Labor Board Will Soon Issue New Rule To Solve Joint Employment Dilemma

Insights
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In a rare procedural move that caught many by surprise, the National Labor Relations Board announced on Wednesday that it will soon start the rulemaking process to clarify the current joint employment standard. Perhaps frustrated by uncertainty resulting from the recent reversal of a Board decision on the topic and the seemingly stalled litigation sitting at the D.C. Circuit, Chairman John Ring said that he hopes NLRB rulemaking would bring resolution to this matter "as soon as possible."

[**Ed. Note:** In a June 5 letter responding to several U.S. Senators who had questions about this development, Chairman Ring indicated that a majority of the Board is "committed to engage in rulemaking" and that the NLRB will issue a Notice of Proposed Rulemaking (NPRM) on the joint employment issue "certainly by this summer." He noted that internal preparations are already underway and that the Board is working toward issuing the proposed rule "as soon as possible." Chairman Ring expressed hope that the final rule would "bring far greater certainty and stability to this key area of labor law."]

Background: Employers Left Wondering How To Manage Business Relationships
The joint employment dilemma has taken many twists and turns in the past several years. To briefly recap, the National Labor Relations Board (NLRB) had held for 30 years that two companies would only be considered joint employers if they shared or codetermined those matters governing the essential terms and conditions of employment, and *actually exercised* the right to control.

However, in 2015, the Board renounced this joint-employer test in the controversial *Browning-Ferris* decision, eliminating the requirement that the employer actually exercise control. Instead, the NLRB decided that businesses need only retain the contractual right to control to be considered a joint employer—even if it has never exercised it. Further, the Board held that indirect control (e.g., control through an intermediary) would be sufficient to find joint employment.

In December 2017, the Board effectively overturned *Browning-Ferris* in the *Hy-Brand Industrial Contractors, Ltd.* case, reverting to the old standard. But in February, the Board was forced to vacate that decision due to allegations that one of the Board members involved had an unacceptable conflict of interest. As of today, employers are still subject to the *Browning-Ferris* standard.

Current Board Reveals Possible Light At The End Of The Tunnel

Once Chairman Ring was installed as the fifth member of the Board in April to provide a Republican majority for all consequential actions, the wheels were set in motion to restore much-needed balance on a number of matters. With the May 9 announcement, the Board majority indicated that high on its agenda was the concept of joint employment.

"Whether one business is the joint employer of another business's employees is one of the most critical issues in labor law today," said NLRB Chairman Ring in a statement that accompanied the release. "The current uncertainty over the standard to be applied in determining joint-employer status under the Act undermines employers' willingness to create jobs and expand business opportunities."

The official Board action is short and sweet. In an agency filing included in the Unified Agenda of Federal Regulatory and Deregulatory Actions, the Board majority stated: "The National Labor Relations Board is considering engaging in rulemaking to establish the standard for determining joint-employer status under the National Labor Relations Act." The agenda notes that this is a "long-term action" and no target date is included in the release.

However, in a press release published soon thereafter, the Board indicated it has already begun the internal process necessary to consider rulemaking on the joint employer standard. Chairman Ring stated he is "committed to working with my colleagues to issue a proposed rule as soon as possible." As of now, two of the Board members—the two Democratic appointees—do not seem inclined to participate. The release specifically noted that the inclusion of this proposal on the Board's regulatory agenda does not reflect the participation of Board Members Mark Gaston Pearce and Lauren McFerran.

In fact, a bit of Twitter tit-for-tat flared up later in the day, as Member McFerran tweeted: "The regulatory agenda is a Chairman initiative, not formal NLRB action. I'll approach any proposal w/an open mind, but urge the majority to deliberate carefully, allow public input, and abandon the 'decide first, ask questions later' approach from [former-Chair] Miscimarra's end-of-term."

Ring responded on Twitter six minutes later: "How could anyone argue against notice and comment rulemaking? It's the most fair process and best way to get everyone's views on the joint employer standard. The Board majority will work to issue a proposed rule ASAP, and we will consider the views of all interested parties."

Next Steps

The next step in this process would be the issuance of a Notice of Proposed Rulemaking. Once that occurs, the Board would engage in a formal process which includes receiving and considering comments from interested parties and members of the public before officially establishing any new rule. It could take months for any such rule to be finalized, and no doubt critics of the rule would seek to block or delay it through the courts. Still, this may be an easier fix than awaiting Congressional action. The Save Local Business Act, which would narrow the definition of "joint

Congressional action. The Save Local Business Act, which would narrow the definition of "joint employment" to eliminate many employer headaches, has been stalled in Congress due to opposition from Senate Democrats.

It is also possible for the Board to resolve the conflict-of-interest issues that led to the abandonment of the *Hy-Brand* decision, or to simply accept another case involving similar issues and release a new standard through such an alternate channel. Whichever direction the NLRB takes in the coming weeks and months, we will monitor progress and provide updates as appropriate.

If you have any questions about this development and how it may affect your business, please contact any member of the Staffing and Contingent Workers Practice Group or your Fisher Phillips attorney.

This Legal Alert provides an overview of proposed rulemaking. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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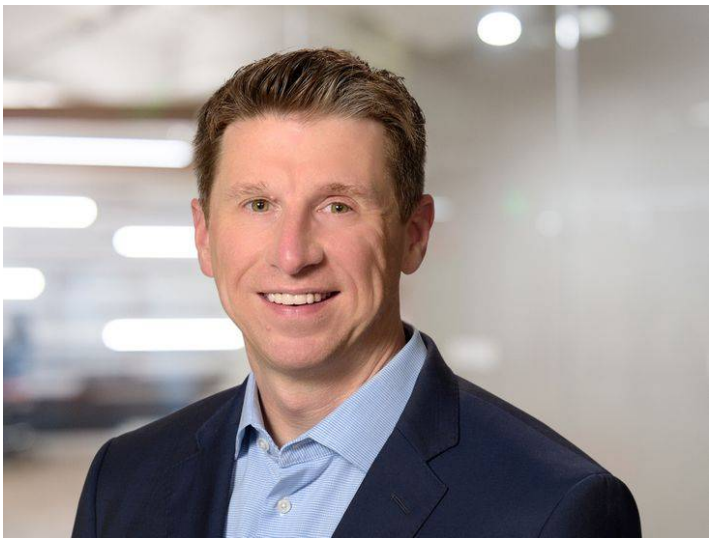

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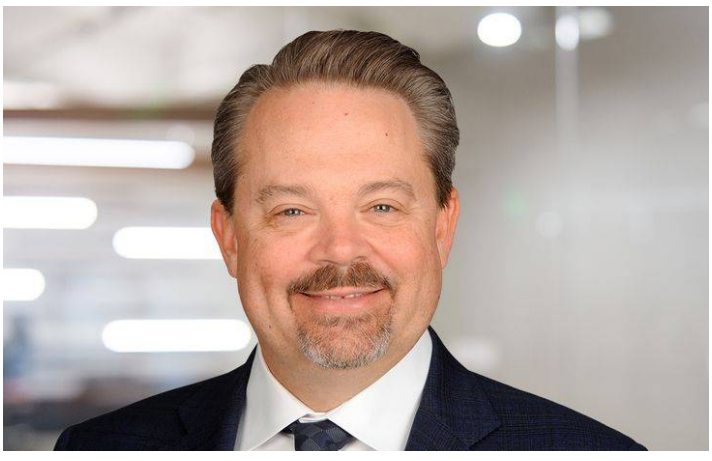

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