THE "JOINT EMPLOYER" STANDARD IN EMPLOYMENT LAW:
THE ROLL BACK BEGINS

We have discussed in past updates that the U.S. Department of Labor during the Obama administration was extremely proactive in the areas of organized labor and employee rights. New regulations and legal interpretations dramatically eroded employers' rights to implement policies and procedures to manage workplaces and workforces. With Trump's election, most employment attorneys expected a retreat from these expansive regulations and interpretations. The question was whether the roll-back would be led by the Administration via executive order, the Congress via legislation, or the Department of Labor via regulations and decisions. Over the last month, the answer has proven to be the Department of Labor.

Over the next few weeks, we will chronicle the Department of Labor's efforts to roll back the clock to interpretations of employment law before the dramatic changes of recent years. We begin with what we view to be the most significant issue – the **"joint employer" doctrine.**

The importance of the "joint employer" doctrine cannot be understated. It impacts the following relationships:

- independent contractor relationships
  - regulation of the contractor's access to the property and hours of work
  - control of manner and methods of performance of contractors
  - monitoring of quality and quantity of work performed
  - "costs plus" pricing arrangements

- use of temporary staffing or referral companies

- franchise relationships

- insurance companies that require employers to take certain actions with their employees in order to comply with policy requirements for safety, security, health, etc.

- banks or other lenders whose financing terms may require certain performance measurements

Courts and federal agencies have applied the National Labor Relations Board's (NLRB) interpretation of "joint employer" in interpreting every federal discrimination statute – Title VII (race, national origin, sex, and religion), 42 U.S.C. § 1981 (race and ethnic origin), the Age Discrimination in Employment Act, and The Americans with Disabilities Act. Under the "joint employer" doctrine, an employer with too few employees to be subject to Title VII by itself could suddenly face liability if aggregated with another employer.

It has long been the case that two or more separate and distinct businesses can be the "joint employer" of a single worker, or a group of workers, if the businesses share control and co-determine the essential terms and conditions of employment. Essential terms and conditions of employment include hiring, firing, pay and benefits, discipline, supervision and direction. As "joint employers," both entities are subject to the obligations and liabilities imposed by federal employment statutes and regulations.

In the 35 years prior to August 2015, Board and court decisions required a finding of actual and direct shared control to support a finding of a joint employer relationship. In August 2015, the NLRB[1] reversed 35 years of established legal interpretation and issued a decision that dramatically expanded the traditional "joint employer" doctrine:

> In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board will – among other factors – consider whether an employer has exercised control over the terms and conditions of employment[2] **indirectly** through an intermediary, or whether it has **reserved** the authority to do so.

While in the past evidence of indirect control could supplemental evidence of direct control in the analysis, in plain language of the new 2015 interpretation, an employer could be held liable based entirely on the conduct *by another entity* which the employer did not control, in which the employer did not participate, or of which the employer was unaware. The NLRB used its new interpretation to allow employees of a staffing company to vote in a union election with the direct employees of the contracting company, Browning-Ferris Industries. The Equal Employment Opportunity Commission immediately launched a discrimination lawsuit against franchisor McDonald's, Inc., arguing that it was a joint employer with an individual franchisee that directly employed and managed the employees.

Following his election, President Trump had the opportunity to appoint new members to seats on the NLRB vacated as the terms of the current members expired. On Dec. 14, 2017, the newly reconstituted NLRB rolled-back the clock and returned to the legal interpretation of the "joint employer" doctrine that it recognized and applied, and that had been accepted by the courts, for the 35 years prior to August 2015.

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[1] The NLRB administers the National Labor Relations Act (NLRA), which protects employees' right to engage in "concerted activity," including unionization. The NLRA applies to unionized employers AND non-unionized employers. With extremely narrow exceptions, the NLRA applies to companies with over $50,000 in annual gross revenues. Board decisions have almost universal application to most U.S. employers.

[2] Essential terms and conditions of employment include hiring, discipline, termination, compensation and benefits, dictating the number of employees to be employed, controlling scheduling and overtime, assigning work, and determining the manner and method of work performance.

The Board's decision is lengthy, goes to great length to explain its rationale, and is highly critical of the August 2015 decision, but we will not discuss these aspects here. Suffice it to say that, once again, ***a "joint employer" relationship requires the actual***, ***direct***, ***immediate joint control over essential employment terms*** *(hiring, firing, discipline, supervision, establishing wages and benefits),* and ***indirect control*** (e.g., through the economic terms of a contract or other leverage), ***or merely reserving, but not exercising, the right of control is alone insufficient to establish a joint employer relationship.***

Should you have any questions regarding the NLRB's recent decision, and its implications for your business, please call.

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