CLIENT ALERTS & INSIGHTS

House of Representatives Passes Legislation Limiting Joint-Employer Liability and Reversing Browning-Ferris

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On November 7, the House of Representatives voted to pass a bill that would reverse the National Labor Relations Board's ("NLRB") ruling in *Browning-Ferris Industries*, 362 NLRBNo. 186 (2015), that greatly expanded joint employer liability for business. Under *Browning-Ferris*, the NLRB held that a company that has "indirect" or "potential" control over the employees of another company may be considered a joint employer of those employees. That decision is currently on appeal before the D.C. Circuit Court of Appeals.

Notwithstanding the outstanding appeal, the House passed the Save Local Business Act 242-181 with eight Democrats crossing the aisle to vote in favor of the Save Local Business Act. Representative Bradley Byrne introduced the Act in the House to combat the significant changes in the joint employer analysis caused by the broad ruling in *Browning-Ferris*. The bill was co-sponsored by 123 Representatives, including three Democrats. The Save Local Business Act would amend Section 2(2) of the National Labor Relations Act (29 U.S.C. 152(2)) and Section 3(d) of the Fair Labor Standards Act (29 U.S.C. 203(d)) by clarifying when a person or company is a joint employer.

A person would qualify as a joint employer under the Save Local Business Act if the person "directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment." Such terms and conditions explicitly include "hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline."

The Save Local Business Act returns the joint employer analysis to the pre-*Browning-Ferris* standard. Prior to *Browning-Ferris* a company only qualified as a joint employerif it exercised "direct and immediate control" over another company's employees, but *Browning-Ferris* broadened that joint employer standard to determine that any company that possessed "reserved and indirect control" over another company's employees - even if not actually exercised - could qualify as a joint employer. This new standard significantly altered the determination of when a company qualified as a joint employer, particularly in - but not limited to - franchisor-franchisee or contractor-subcontractor relationships. The Save Local Business Act seeks to codify the prior standard that direct and immediate control over essential terms and conditions of employment is necessary to qualify as a joint employer. Under the Save Local Business Act, determining common marketing or operation strategies would not extend employer liability to an independent entity responsible only for these overarching general strategies or policies. For example, a franchisor or parent company directing its franchisees or subsidiaries to follow consistent promotions or uniform

and appearance policies would not qualify as a joint employer under the Save Local Business Act, but arguably would under *Browning-Ferris*. Similarly, a construction company overseeing a project involving multiple contractors and subcontractors would not qualify as a joint employer under the Save Local Business Act simply because it set a general schedule for when certain components of the project should be completed, although such an arrangement may result in exposure to joint employer liability under *Browning-Ferris*.

The Save Local Business Act will now move to the Senate where the support of at least eight Democrats will be needed to avoid a filibuster in that chamber of Congress.

For more information on this topic, please contact a member of Benesch's Labor & Employment Practice Group.

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