Despite joint employer uncertainty, Senate has yet to take up the Save Local Business Act

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It has been almost a year since members of the United States House of Representatives introduced the Save Local Business Act (H.R. 3441) with the purpose of amending 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)). The bill provides that a person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment. The legislation was proposed to counteract the National Labor Relations Board's Browning-Ferris Industries ruling in 2015 that broadened the definition of what establishes a joint employer relationship to include "indirect" or "potential" control over workers' terms and conditions of employment. On Nov. 7, the House passed the Save Local Business Act by a 242-181 vote (including some bipartisan support from Democrats).

After the vote by the House, there appeared to be some traction at the National Labor Relations Board (NLRB) to return to the prior joint employer standard when, on Dec. 14, the NLRB decreed "In all future and pending cases, two or more entities will be deemed joint employers under the National Labor Relations Act (NLRA) if there is proof that one entity has exercised control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so directly and immediately (rather than indirectly) in a manner that is not limited and routine."

While this decree appeared to buoy a more predictable joint employer standard of direct and immediate control, in a surprising order dated Feb. 26, 2018, the NLRB vacated its December decision due to questions and ethical concerns raised by the inspector general regarding the participation of the NLRB's members in the December decision. As a result, Browning-Ferris once again became the NLRB's standard for a joint employer. In the meantime, a pending legal challenge to the Browning-Ferris decision will now go back to the U.S. Court of Appeals for the District of Columbia Circuit; although the judicial process moves relatively slowly. The NLRB also recently said it may try to take up the joint employer issue and resolve it by means of an administrative rulemaking process.

While proponents of the NLRB's rulemaking fix to the joint employer standard welcome that development, such groups also view any bureaucratic action to be only temporary as future administrations can simply rewrite the rules to fit their ideology on joint employer issue. Therefore, many franchise organizations, small business owners and lobbying groups are continuing to urge Congress to codify the definition of joint employer into law by passing the Save Local Business Act. Businesses and trade groups are lobbying hard for the Senate to take up the bill, but it could be threatened by a potential Senate filibuster or lack the requisite 60-vote threshold because of this crazy mid-term election year.

It will be worth watching to see if the Senate takes up the Save Local Business Act prior to its summer recess in August.

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