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Committee Passes Bill to Veto NLRB's New Joint-Employer Standard

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Recently, the House Education and the Workforce Committee approved the Protecting Local Business Opportunities Act (the "Bill") with a 21-15 vote. This Bill was introduced as a response to the National Labor Relations Board's ("NLRB") recent decision that adopted a new test for determining joint-employer status.

More specifically, in August 2015, the NLRB issued a new test for determining the joint-employers status of companies. The test looks at whether a company has a direct or potential ability to exercise control over wages and working conditions. The fact that a company does not exercise its ability to control does not matter. A potential ability to control can be determined based on, among other factors, a company's economic power in the relationship. If a company is found to have the potential ability to exercise control, then the company may be pulled in as a joint-employer.

By way of brief background, in the NLRB case, Browning-Ferris Industries ("BFI") owned and operated a recycling facility. BFI employed approximately 60 employees of its own and hired workers through contractor companies, such as Leadpoint in this case. Leadpoint supplied approximately 240 temporary workers to BFI to carry out various tasks in BFI's facilities. The agreement between BFI and Leadpoint stated that "Leadpoint is the sole employer of the personnel it supplies, and that nothing in the Agreement shall be construed as creating an employment relationship between BFI and the personnel that Leadpoint supplies." BFI relied on Leadpoint to make hiring, disciplinary, and firing decisions, but the agreement granted BFI the authority to "discontinue the use of any person for any or no reason." The NLRB decided, in a 3-2 split, that BFI was a joint-employer because BFI had a role in "sharing and codetermining the terms and conditions of employment."

In issuing the new joint-employer standard, the NLRB emphasized that, because 2.87 million workers in the U.S. were employed through temporary agencies in August 2014, the joint-employer standard should be updated to address the growing number of such temporary workers.

Joint-employer status matters because a company that decides to outsource certain tasks may still have the liability of an employer for the outsourced tasks if the company is found to have the ability to control employment conditions. For example, employees of a cleaning company retained by a building owner may be able to organize and bargain with the building owner if the owner has a potential ability to control the contracted workers' employment conditions.

The Bill, recently introduced in the House Education and the Workforce Committee, seeks to restore the joint-employer standard that applied before the NLRB's decision in August. The previous standard essentially looked at whether a company had actual, direct and immediate control over essential terms and conditions of employment. The previous standard would not consider most franchisors and franchisees, or contractors and subcontractors as joint-employers.

Until the Bill becomes enacted, the NLRB's expansive joint-employer standard will apply. However, companies are advised to pay close attention to the Protecting Local Business Opportunities Act, as it has the ability to have significant practical as well as legal consequences on companies.

If you have any questions or concerns regarding employment or education-related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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