Labor & Employment Issues
In Focus
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REPUBLICAN ONLY NLRB FINAL JOINT EMPLOYER RULE TIGHTENS STANDARD, ELIMINATES OBAMA-ERA PRECEDENT

On Tuesday, February 25, 2020 the National Labor Relations Board ("NLRB" or "Board") unveiled the final version of its rule tightening the legal test it uses for analyzing whether workers are jointly employed by affiliated businesses. Final Rule available at https://www.federalregister.gov/documents/2020/02/26/2020-03373/joint-employer-status-under-the-national-labor-relations-act. The NLRB had issued a proposed version of its rule in late 2018 that ultimately received nearly 30,000 public comments.

The final rule, published in the federal register on February 26 and effective on April 27, deals the finishing blow to the more expansive Obama-era standard adopted in the 2015 Browning-Ferris Industries decision ("Browning-Ferris"). The final rule reinstates a pre-Browning-Ferris test that provided that a business is only a joint employer if it has "substantial direct and immediate control" over another company's workers. According to the text of the final rule, in order to qualify as a joint employer, business's must have "substantial direct control" of at least one key term or condition of another business's workers job such that the business "meaningfully affects matters" pertaining to the employment relationship. The final rule lists eight (8) key terms and conditions, stating that the list is an "exclusive, closed list": hiring, firing, discipline, supervision, direction, wages, benefits and hours of work. It also defines "substantial direct control" as actions that have "a regular or continuous consequential effect" on one of the eight key terms, while noting that any direct control that is "sporadic, isolated or de minimis" won't be enough to warrant a finding of joint employment. In contrast, in 2015, the standard established in Browning Ferris made it possible for a business to be deemed a joint employer if it exhibits "indirect control" over a contractor or franchisee or reserves the ability to exert such control.

The final rule makes clear that examples of a business indirectly controlling or maintaining an unexercised contractual ability to control those terms of employment — which, on its own, could have led to a joint employer finding under the Browning-Ferris standard — can be considered as part of the board's joint employer analysis only to lend support to evidence of direct control, but cannot lead to a finding of joint employment without evidence that substantial direct control exists. Further, the final rule states that various common elements of third-party contracts will not be enough to convert businesses into joint employers, such as a business "setting minimal standards for hiring, performance, or conduct" for a contractor, requiring that a contractor maintain workplace safety or sexual-harassment policies, or a franchiser taking steps to protect its trademark.

NLRB Chairman John Ring, along with NLRB members William Emanuel and Marvin Kaplan, each voted in favor of issuing the final rule. All three members were appointed by President Donald Trump. The five-member Board currently has two vacant seats, both Democratic.

The NLRB, which typically issues decisions based on live cases and controversies brought before it, acknowledged its break from the norm in issuing a final rule on the controversial topic. In support of such action, it cited helpful public feedback and a desire to provide the public with a stable rule going forward as its logic for departure from the norm.

APPEALS COURT UPHOLDS BAN ON WAGE INQUIRY AND RELIANCE

On February 6, 2020, the U.S. Court of Appeals for the Third Circuit issued its decision in *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, No. 18-2175 (3rd Cir. Feb. 6, 2020). The Court upheld a Philadelphia ordinance prohibiting employers from inquiring into a prospective employee's wage history ("inquiry provision") or relying on wage history ("reliance provision") when setting or negotiating wages. This decision may have important implications for similar legislation across the country, including New York.

The City of Philadelphia enacted its ordinance in 2017, intending to address the pay gap suffered by women and minorities ("Ordinance"). The Philadelphia Chamber of Commerce ("Chamber") conceded that the pay gap exists and that Philadelphia has a substantial governmental interest in addressing it. Nevertheless, the Chamber argued that the Ordinance could not survive a First Amendment challenge due to an allegedly insufficient legislative record to offset the corresponding burden on employer speech. Upon review, the district court concluded that the reliance provision did not implicate the First Amendment at all as it targeted conduct rather than speech. But the court held that the inquiry provision implicated speech and could not survive because the City failed to present substantial evidence to support the conclusion that it would help close the wage gap.

With respect to the reliance provision, the Third Circuit agreed with its district court, holding that the provision did not regulate speech. The Court explained that the reliance provision does not restrain any expressive message, noting that an employer could still discuss an applicant's value and negotiate wages. Rather, the provision is triggered by an employer's act of relying on wage history, which either does not involve speech or merely has an incidental effect on speech.

The Court recognized that the inquiry provision clearly regulates speech because it prevents employers from asking applicants specific questions. Thus, the Court first needed to address the level of rigor with which it would examine the provision. The Court ultimately concluded that the speech at issue was commercial speech, or speech related solely to the economic interests of the speaker and its audience. Commercial speech is accorded lesser protection than other constitutionally guaranteed speech. A commercial speech regulation is permissible if, among other things, the governmental interest is substantial, the regulation directly advances the governmental interest asserted, and the regulation is no more extensive than necessary to serve the government's interest. Thus, a regulation only needs to be a "reasonable fit between the legislature's ends and the means to accomplish those ends," rather than the "least restrictive means" of achieving those ends.

The Third Circuit easily concluded that the City had a substantial interest in closing the wage gap, determining that no discussion was even required. But unlike the district court, the Third Circuit found that the inquiry provision directly advanced the government's interest. The Court explained that substantial evidence of the possibility that the speech restriction could

favorably impact a concern is all that is required, and the district court imposed too high a burden. In reviewing the substantial record, the Court identified testimony demonstrating that wage history can perpetuate gender and race discrimination and multiple studies isolating skill and qualification causes for the wage gap. Based on the considerable record, the Court concluded that Philadelphia reasonably drew an inference that the inquiry provision would address the wage gap. Finally, the Court found that the inquiry provision was narrowly tailored because it left employers free to ask a wide range of other questions about an applicant, permitted employers to obtain market salary information from other sources, and allowed applicants to volunteer their salary history if they feel it is in their best interest.

With jurisdictions across the country considering and enacting similar salary history bans, the Third Circuit's decision should provide a measure of comfort. A Supreme Court petition, however, may be looming.

NYC COMMISSION ON HUMAN RIGHTS SETTLES WITH PRADA OVER RACIST IMAGERY AND IMPOSES FIRST OF ITS KIND RESTORATIVE JUSTICE MEASURES

In December, 2018, Chinyere Ezie, a civil rights attorney at the Center for Constitutional Rights, brought some unwanted national attention to the luxury retailer, Prada USA Corps, by posting on Twitter a display of "Pradamalia" keychains found in the Prada shop in New York City. The keychains contained a monkey figurine that had a disturbing resemblance to Sambo, a fictional character and a term used to mock persons of Indian and African origin. Ezie's post went viral on social media despite Prada issuing an apology, claiming a commitment to diversity and immediately agreeing to pull the product line. That was not enough for the New York City Commission on Human Rights. The Commission immediately issued a cease and desist order to Prada and began an investigation.

On February 5, 2020, the Commission announced a settlement with Prada, which confirmed that the "display of such racist iconography, [which] manifests as discrimination on the basis of race, [and] suggests that Black people are unwelcome" will not be tolerated. Some highlights of the agreement include:

- Putting all New York store employees and Milan executives through sensitivity and racial equity training;
- Providing the Commission within 90 days, resumes of candidates for the Commission to appoint an executive level diversity and inclusion officer, whose responsibility it will be to review Prada's product designs before they are sold, advertised, or promoted in the U.S., and to review and monitor Prada's anti-discrimination policies;
- Developing a scholarship program to create and increase opportunities for people who have been historically underrepresented within the fashion industry;
- Consulting with Fashion Institute of Technology President Dr. Joyce Brown, who sits on Prada's Diversity and Inclusion Council, which the company also agreed to maintain for at least 6 years;
- Bi-annual reporting to the Commission on the demographic makeup of their staff at every level, all current and future activities aimed at closing the inclusion gap in

the fashion industry as well as the fashion company's progress in achieving the settlement's goals.

The settlement also requires Prada to have all of its NYC employees retrained in the HRL "by a licensed attorney with substantial knowledge of anti-*discrimination* training." By requiring re-training by an attorney, when it could have instead sought traditional remedies such as civil fines, the Commission essentially took control of the company's human resources department and provided it with a "voluntary" checklist for compliance. Currently, and by contrast, employers in New York City must ensure their employees complete annual anti-*sexual harassment* training, which can be satisfied by watching a 45 minute video on the Commission's website. One conclusion that can likely be drawn is that the Commission will not be shy to tell employers how to comply with the HRL in future "voluntarily" restorative agreements. Given this likelihood, New York employers may wish to review their anti-harassment and discrimination training programs with counsel.

DEMS PRO LABOR BILL WARRANTS UNION SUPPORT, CAUTION, AND SELF-RELIANCE

The Federal Bureau of Labor Statistics recently reported that labor unions suffered another year of membership loss, now down to 10.3% nationally (6% private sector) and 21% in New York. Following President Franklin D. Roosevelt's New Deal, decades of regressive legislation, court decisions, and administrative actions have undoubtedly taken their toll on union membership rates. Seeking to remedy the same, on February 6, 2020, the Democratic-led U.S. House of Representatives passed the Protecting the Right to Organize ("PRO") Act, arguably the most pro-labor piece of federal legislation since the New Deal Wagner Act.

As fully explained by former NLRB Chairman Mark Gaston Pearce in his May 8, 2019, testimony before the House Committee on Education and Labor, the National Labor Relations Act ("NLRA" or "Act") needs to be updated to reflect today's workplace. (https://edlabor.house.gov/imo/media/doc/Pearce%20testimony%20final-%205.3.19%20(002).pdf) (Act contains inadequate remedies, imposes procedural obstacles, and lacks sufficient protections for the bargaining process). The PRO Act addresses these concerns with substantial reforms, including:

- Codifying more expansive definitions of employer and employee while penalizing misclassification;
- Eliminating prohibitions on secondary activity and recognitional picketing;
- Protecting strikers and intermittent strikes
- Prohibiting captive audience meetings;
- Creating a streamlined process for negotiation of initial CBAs
- Enshrining a streamlined union election process in which employers have no standing
- Expanding remedies, including authorization of liquidated damages and civil penalties
- Invalidating state "right to work" laws

The House passed the PRO Act generally along party lines (224-194), with 7 Democrats voting against the legislation and 5 Republicans voting in favor. With the current Republican majority in the Senate, the PRO Act will likely not see a vote.

Those skeptical of the Democrats' commitment to labor reform can find ample support in the party's decades of pro-business, anti-union legislation. In addition to their failure to pass the Employee Free Choice Act in 2009 despite holding the presidency and both houses of Congress, the Democrats joined Republicans to sponsor much of the legislation that has plagued unions in recent years. Democrats helped override President Truman's veto of the Taft-Hartley Act and held majorities in both chambers of Congress for passage of the Landrum-Griffin Act. Further, Presidents Carter and Clinton, with a Democratic Congress, presided over massive deregulation of the airline, trucking, railroad, and telecom industries. President Clinton also finalized and signed NAFTA in 1993.

In any event, the anti-labor attacks of this administration, the rising approval of unions, near a fifty-year high according to Gallup, and a few progressive 2020 presidential candidates pushing aggressively pro-union agendas, may provide reason to believe that Democrats will now prioritize unions going forward. With full knowledge of the Democrats' history, however, labor must organize to ensure that the House's passage of the PRO Act will serve as an inflection point, regardless of the bill's inevitable fate this year.

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