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Another Joint Employment Development, And Still More Uncertainty

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For the last several years, "joint employment" (whatever that now means legally) has been anything but the gift that keeps on giving for employers. First, joint employment became a tool that the previous Administration locked onto in seeking to expand wage and hour liabilities and to open up potential union organizing opportunities and labor relations obligations. After those actions sent tremors through franchise-based businesses and companies that have significant subcontractor relationships, the new Administration took relatively swift action seeking to unwind the previous joint employment expansion. And even where the federal appellate courts have weighed in on the joint employment changes, to this point they have provided little helpful guidance about what joint employment means (and what the derivative legal obligations will become) for the long term.

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Labor and Employment Law Perspectives

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If we have learned anything from these recent machinations, it is that joint employment has become as much a political tool as a legal concept. And with politics being what it is these days, employers could be forgiven for wondering if the rules will change with every national election cycle.

But perhaps there is hope on the horizon. Perhaps.

On November 7, 2017, the House passed H.R. 3441, dubbed the "Save Local Business Act," a short bill with a clear purpose: a legislative solution to the suddenly uncertain joint employment landscape. The bill seeks to define joint employer status for purposes of the National Labor Relations Act and Fair Labor Standards Act, such that a joint employment relationship only is created where the "higher up the chain" entity "directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as 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."

In other words, according to H.R. 3441, while it is still a legitimate possibility in professional employer organization relationships and some others, joint employment will be the rare exception, not the rule, for franchises and most other typical vertical business relationships under federal law. For many employers, passage of the bill would be a significant source of relief, perhaps as much for the certainty of the legal standard as for the narrow view of joint employment and the effect on derivative obligations and potential liabilities.

The Save Local Business Act hit the Senate on November 8, 2017, where it has seen no further action. And it is uncertain whether the bill will advance in the Senate or can overcome a filibuster, given that only five House Democrats voted in its favor (even though two Democrats co-sponsored the bill and supporters hoped for broader bipartisan appeal when introducing the bill in July). And of course, even if it passes, it is always possible that a differently constituted Congress could change the law through further legislative maneuvering, even though achieving change in Congress remains a far more difficult prospect than changing federal agency policy with the changing political winds.

While we continue to wait for certainty in the joint employment arena as these developments continue, franchise companies and businesses that subcontract with other employers would remain wise to seek counsel on joint

employment risks and risk mitigation strategies. Not only does the future of joint employment at the federal level remain uncertain, but states have the power to create their own joint employment rules with respect to their own wage and hour requirements, meaning a clear federal law will not necessarily create clear nationwide risks and rules.