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Congress Approves Resolution to Repeal National Labor Relations Board Joint Employer Regulations

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The U.S. Senate, in a 50-48 vote, approved a resolution to repeal the National Labor Relations Board's (NLRB) joint employer rule (the Rule). The U.S. District Court for the Eastern District of Texas invalidated the NLRB's regulation on March 8, 2024. The Rule, had it been put into effect, could have significantly lowered the bar for a "joint employer" finding and required employers (such as franchisors or companies that use staffing agencies) to bargain with a union. The Rule also could have made it much easier for such employers to be held liable for another company's unfair labor practices. The U.S. House of Representatives approved the resolution in January 2024. President Joe Biden has vowed to veto the resolution. A two-thirds majority is required to overcome a veto. The resolution at issue was introduced under the Congressional Review Act, which permits Congress to repeal agency rules provided there was a majority vote in both houses. While the passage by both Houses of Congress is gratifying, the likelihood of a veto is high and the likelihood of resolution proponents being able to override the veto is low. Absent an appellate court decision to vacate the Rule, it is more likely than not to become effective at some point in time.

Current State of the NLRB's Joint Employer Regulation

This legislative action places yet more uncertainty as to the fate of the Rule. The Rule was set to go into effect nationwide in December 2023. The NLRB postponed the effective date to February 2024 due to challenges to the Rule in federal court in Texas and the District of Columbia. Before the Rule took effect, the federal court in Texas vacated the rule. The NLRB has not yet appealed that ruling to the Fifth Circuit Court of Appeals, but many expect it to do so. The D.C. Circuit Court of Appeals has yet to issue a decision in the case pending before it. If President Biden's veto is successful (which appears likely given how close the vote was in passing the resolution), then the ultimate determination of the Rule will turn back to the federal court system, or to the NLRB to take regulatory steps on its end to rescind the Rule and issue revised rulemaking (a process that would not be able to be undertaken quickly, in any event).

What Should Employers Do in the Meantime?

Although this will no doubt be a welcome development to many employers, companies are best advised to review their franchise or staffing agreements with other employers. While the ultimate fate of the Rule is uncertain, the issue has not been definitively resolved. The Rule may well ultimately take effect. As such, employers may want to use this as an opportunity to consider whether they need to change their operations or business relationships in the event the President successfully vetoes the resolution, or either the Fifth Circuit or D.C. Circuit Courts of Appeal declare that the Rule is valid and should be made effective.

We will continue monitoring these developments and will keep our clients updated. If you have any questions about these recent developments, contact Louis J. Cannon Jr., Cassandra L. Horton, or any member of Baker Donelson's Labor & Employment Team.