The Daily Dish

The Joint-employer Pendulum Swings Back

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"Joint employment" describes a situation in which two or more distinct entities share responsibility in the terms and conditions of employment including hiring, disciplinary action, and supervision of employees. Prior to the Obama-era National Labor Relations Board's (NLRB) Browning-Ferris decision, joint-employer status required that the firm must "possess and exercise substantial direct and immediate control" over at least one essential aspect of employment of another entity's employees, thus having a meaningful impact on the workers. After the Browning-Ferris decision, the NLRB proposed a joint-employer rule that embodied the ruling's more flexible "indirect" control standard.

The indirect control standard made firms responsible for the labor violations, unionization, and other employee matters of anyone with whom they contract – their franchisees, contractors, suppliers, and so forth. It is a broad enough standard that it endangers, for example, the franchise business model. The Trump Administration rolled back the Obama-era NLRB rule and replaced it with the traditional "direct" standard. Unsurprisingly, among the first pieces of business for the Biden NLRB was a rulemaking to restore the Obama-era indirect control standard. Needless to say, the business community, especially the franchisers, felt whipsawed.

Implementing the rule involved a two-step process. First, one decides whether a business is an employer under the standards of common law. Then, one assesses whether a business has control over one or more "essential terms and conditions" of a worker's job, even if that authority is indirect or not actually exercised.

This past Friday, the pendulum swung back again, when federal Judge John Campbell Barker tossed out the NLRB rule because it violates common-law principles. In particular, he noted that it "would treat virtually every entity that contracts for labor as a joint employer because virtually every contract for third-party labor has terms that impact, at least indirectly, at least one of the specified 'essential terms and conditions of employment.'"

For the moment, enforcement of the rule is suspended and policy is in the right place. One way to make this permanent is for Congress to revoke the rule using the Congressional Review Act (CRA). The House has already done so. If the Senate were to join it, and the president sign, the rule would be rescinded and no similar rule would be permitted in the future. Or, Congress may fail under the CRA and employers will simply await the next swing of the pendulum.