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ANTICIPATING PRESIDENT TRUMP'S INFLUENCE IN THE LABOR AND EMPLOYMENT WORLD

COALITION OF PROVIDER ASSOCIATIONS
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IMMIGRATION ACTIONS AND GOALS UNDER OUR NEW PRESIDENTIAL ADMINISTRATION

Four Executive Orders

- Travel Ban Enjoined
  - Appealed to 4th and 9th Circuits
  - 4th Circuit Upheld Injunction
- Border Security
  - The Wall
- Interior Enforcement
  - More individuals at risk for deportation
  - Eliminate Sanctuary Jurisdictions
- Buy American and Hire American
  - Administrative and Legislative Actions

Hire American: Administrative Reforms In the Pipeline

- Increases in H-1B fees (including new DOL fees)
- Changes in wage scale
- Focus on Enforcement
- Adjust lottery to favor Master's degree holders
- 60 Minutes Story: Target Outsourcers
- More FDNS Visits
- Computer Programmers May Not Be Specialty Workers

Legislative Reforms in the Pipeline: Similar Goals

- Eliminate Random H-1B Lottery
- Substitute hierarchy prioritizing those with highest wages and advanced degrees
- Tighten L requirements
- Equalize green card waiting lists
- Raise wages for exemption from H-1B dependence and eliminate master's degree exemption

"Sanctuary City" Executive Order Challenged

- Cities have reaffirmed commitment to sanctuary status
- Attorney General Sessions threatened to end federal funding based upon Executive Order
- 34 Jurisdictions have challenged the Executive Order
- California Judge issued nationwide injunction

The Reform of Health Care Reform – What to Expect

WE ALL KNOW THE ACA BY NOW

- The Patient Protection and Affordable Care Act (ACA) was enacted in 2010 to reform the American health care system.
- The big picture is to provide affordable health insurance to all Americans.
  - Three responsible parties are:
    - Individuals – coverage is (generally) required or a penalty is applied
    - Government – premium credits, Marketplace Exchanges, and Medicaid expansion
    - Employers – taxes and fees, reporting requirements, and coverage mandates

IMPACT ON EMPLOYERS

- The ACA's impact on employer sponsored group health plans is significant:
  - Taxes and Fees (PCORI, TRF, Employer Shared Responsibility, Cadillac Tax)
  - Reporting Requirements (1094 and 1095, W-2)
  - Summary of Benefits Coverage (SBC)

IMPACT ON EMPLOYERS CONT.

- Coverage mandates/requirements
  - Maximum Out-of-Pocket Limits
  - Elimination of Pre-existing Condition Exclusions
  - Coverage of Adult Dependent Children to age 26
  - No Excessive Waiting Periods
  - No Lifetime or Annual Limits
  - Preventive Care Mandate

IMPACT ON EMPLOYERS CONT.

- Coverage mandates/requirements
  - Coverage of approved clinical trials
  - Prohibition on “rescissions” of coverage
  - Appeals process reform and external review
  - Nondiscrimination rules
  - Annual cap on salary reduction contributions to health FSAs
  - Essential Health Benefits

PRESIDENT TRUMP AND GOP PLAN TO “REPEAL” THE ACA

- Repeal and delay
- Repeal and replace

HURDLES TO REPEALING THE ACA

- New Legislation - Outright repeal of the ACA would require a 60 vote majority in Senate to overcome a filibuster.
- Budget Reconciliation - Bills that qualify for "budget reconciliation" only need a simple majority vote to pass.
  - Bills that directly impact taxes and spending (the "Byrd Rule")
  - Can be passed by a simple majority (51 votes) in the Senate
  - Not subject to a filibuster (which requires 60 votes to overcome)
  - Can only be debated for 20 hours in the Senate
  - Scope of floor amendments is very limited
  - Only one such bill can be passed per year

WHICH PARTS OF THE ACA ARE "TAXES AND SPENDING"?

- The entire ACA cannot be repealed through budget reconciliation
  - Individual mandate penalty
  - Federal government subsidies for individuals
  - Employer mandate penalty
  - 40% excise tax on so-called Cadillac plans repealed (currently delayed until 2020)
  - Dollar limit for FSAs
  - Federal government payments to states and insurance companies

BUDGET RECONCILIATION ALONE NOT ENOUGH TO UNDO ALL ACA

- Many provisions of the Affordable Care Act are not "taxes and spending" (though no bright line)
  - Coverage of children up to age 26
  - Waiting periods, coverage exclusions, dollar limits
  - Claim review
  - Cost sharing provisions
  - Essential health benefits
  - Guaranteed access and affordability

HOUSE PASSES THE AMERICAN HEALTH CARE ACT

- Passed by the House of Representatives on May 4, 2017.
- American Health Care Act is a budget reconciliation bill.

AMERICAN HEALTH CARE ACT

- Mandates: Reduce the individual and employer shared responsibility penalties to $0 retroactive to January 1, 2016
  - Individuals who fail to maintain coverage pay an increased premium to the issuer (30%) for one year rather than a penalty to the federal government (2018)
- Medicaid: Repeals Medicaid expansion and block-grants traditional Medicaid (2020)
  - Prohibit federal Medicaid funding for Planned Parenthood clinics for one year, effective upon date of enactment.
- Metal Plans: Eliminates the bronze/silver/platinum level plans (2020)
- Taxes: Dismantles many of the ACA tax provisions
- Cadillac tax: Delayed from 2020 to 2026.

AMERICAN HEALTH CARE ACT CONT.

- HSAs: Expands HSA contribution limits and availability. (2018)
- Health FSAs: Repeals employee contribution limits (2017)
- Subsidies: Replace current tax credits based on cost-of-coverage with credits based on age (2020)
- Age rating: Increases the maximum age-based premium-pricing ratio from 3:1 to 5:1 (2018)
- High-risk Pool: It establishes a high-risk pool called the State Patient and State Stability Fund (2018)

AMERICAN HEALTH CARE ACT STATE WAIVERS

- Essential Health Benefits: States may opt-out of providing the ACA's essential health benefits.
- Pre-existing Conditions: States may opt-out of requiring premiums to be the same for all people of the same age, so while individuals with pre-existing conditions must be offered health insurance there is no limit on the cost of that insurance. A new $8 billion fund would help lower premiums for these individuals.
- Age rating: States may opt-out of limiting premium differences based on age.

WHERE DOES THE AHCA STAND NOW?

- The final version of the bill has to be agreed to by both the House and Senate before it can be presented to President Trump for signature.
  - If the Senate decides to amend the bill, it may send its proposal back to the House, and the House may respond with a counterproposal, and so on until both chambers agree to the same bill.
- Senate is expected to start from scratch with a new plan.
- The Senate would vote on the bill and would need 51 votes to pass it. Vote expected this Summer.
- The bill would be expected to be signed by President Trump.

ACTION FOR EMPLOYERS

- Stay the course
  - No changes have been made to the ACA reporting on Forms 1094/1095-B/C
  - Do not change plan provisions
  - Continue to "play or pay"
- Watch for opportunity

Federal Courts

- More than **100 vacancies** in US Federal District Courts and Courts of Appeals
  - Compare to President Obama's **59 vacancies** when he took office
- While not all of the current vacancies were Republican appointments → significant impact, regardless
  - Immigration, anti-discrimination, LGBTQ rights, etc.
  - Few cases make it to the Supreme Court. **Trump's impact on federal courts cannot be understated**.

FEDERAL COURTS (cont.)

What this Means for Employers

- The United States Supreme Court – little impact on employment law matters. Employment cases make up a very small percentage of SC docket.
- The leanings/decisions of the lower courts will shape the employment law universe within your particular jurisdiction
- Legal developments will happen in a **piecemeal fashion** → if your company operates in several jurisdictions, the **laws may differ**

Title VII, Gender Identity and Sexual Orientation – In the Courts

- Second Circuit has held that Title VII does not cover discrimination on the basis of sexual orientation
  - Sexual stereotyping is covered
  - Likely headed to the Supreme Court (split with other federal circuits)
- So, why do we care about this?
  - Sexual Orientation protected under State HRL and NYCHRL but gender identity is County specific
  - Change will allow access to Federal courts and Federal remedies – Title VII allows punitive damages

Government Agencies – In General

- Shift from **aggressive enforcement → compliance**
- Education v. penalties
- Ongoing court challenges to some rules may change a landscape

Department of Labor

- Expected to be more **business-friendly**
  - Shift in focus to achieving compliance rather than aggressive enforcement
  - Acting Solicitor of Labor, Nicholas Geale – "I think you'll see in the new administration that we will do a lot more outreach and attempt to assist, particularly, small employers who may not have the ability to have excellent counsel."
- Expected to permit employers greater flexibility in using independent contractors
- Anticipate more relaxed approach to joint employer analysis

Office of Federal Contract Compliance Programs "OFCCP"

- Recent criticism of controversial OFCCP enforcement methods, including relying solely on statistical "red flags" without any anecdotal evidence to support claims of discrimination
- Under Trump-appointed DOL and OFCCP leadership, will likely return to enforcing traditional theories of discrimination, as opposed to advancing the law.
- Change in leadership is not likely immediate – currently **"business as usual"**
- ***But* – recent proposal to merge OFCCP and EEOC**

Equal Employment Opportunity Commission

- President Trump appointed Acting EEOC Commissioner, **Victoria Lipnic**, Republican
  - Unlikely to support the initiatives of the previous administration
  - Voted against July 2015 decision that sexual orientation is gender discrimination
  - Noted that emphasis of Trump Administration may be slightly altered to emphasize job growth and to collaborate with employers

EEOC (cont.) – Ms. Lipnic's Views

- "I am committed to the mission of the agency . . . But it is a new day [under the Trump administration] and to the extent where we can help foster employment opportunities and economic growth, that is something we should be focused on."
- "Individual cases matter . . . I'm not of the view that it should be all systemic all the time."

EEOC Will Still Likely Pursue . . .

- Age Discrimination
- Religious Accommodation
- Gender equity in pay and benefits
- ADA Accommodation (especially if the employer did not engage in interactive process)
- Large and small disparate treatment cases where statistical and anecdotal evidence support finding of discrimination

EEO-1 Pay Data Reporting

- Commissioner Lipnic - Revised EEO-1 Report - Revised EEO-1 is an example of a regulation that "would fall squarely under" the Trump Administration's new approach to rethink existing regulations.
- Final rules issued on September 29, 2016 revised the EEO-1 report to include **W-2 earnings and work hours** for some employers and aggregate hours worked.
- These rules, which are scheduled to **take effect in March 2018**, are intended to assist the EEOC in investigating compliance with equal pay laws.
- Employer groups raised serious concerns about the burdens associated the new reporting.
  - Senator Lamar Alexander, R-Tenn. and Senator Pat Roberts, R-Kan., penned a letter to the White House OMB against the EEO-1 revisions: "These revisions will place significant paperwork, reporting burdens and new costs on American businesses, and will result in fewer jobs created and higher prices for American consumers."
- The new administration may rescind the changes before first reporting is due in 2018, or may revise the reporting requirements to ease the burden on employers.

THE NATIONAL LABOR RELATIONS BOARD

What? A new Board?

A surge in pro-business positions? Not so fast.

- By all accounts, many union members voted for Trump, especially in key states. Some talk about "empowerment".
- Three days into the new Administration, Trump invited labor leaders to the White House.
- "It was a good substantial meeting about good middle class jobs." Terry O'Sullivan, Laborers Union
- "He's the first president to (address NAFTA) and I'm going to give him KUDOS for that." Dennis Williams, UAW.
- Trump has worked fairly well with unions, mostly in the construction industry, for most of his career.

"Study the past if you would define the future"

Confucius, circa, 530BC

Proverb #1: Change is never is as easy as it seems.

In spite of great fanfare, many major initiatives did not come to fruition in the Obama administration:

- The Employee Free Choice Act;
- Changes in solicitation rules to allow union visitation;
- Enhanced penalties for violations, including enhanced use of 10(j) injunctions;
- Nationwide posting for all employers;
- Changes to the LMRDA: "The Persuader Rule".

Proverb #2: Change is like watching paint dry.

Change at the NLRB and in the labor movement traditionally occurs very slowly:

- By most accounts, there were not wholesale changes in the leadership of most major unions, as was expected.
- Corporate campaign tactics, which exploded prior to 2008, remained fairly unchanged.
- "Change to Win" coalition failed to fulfill promises or expectations for labor.
- No changes in the law…or even in regulations until fairly recently,

Proverb #3: Change doesn't always meet expectations

Many of the changes heralded in by the labor movement have failed to have a significant affect on union win rate or union density, such as:

- The Expedited or "Ambush" Election Rules.
- The "micro-unit" under *Specialty Healthcare.*
- Joint Employer/Temporary employee status.
- The much touted electronic authorization card.

Proverb #4: Change is not always measured in numbers alone.

- In spite of election rule changes, and a reported upsurge in organizing, union membership has hardly changed.
- Overall down, from 2015-2016: Union membership went from 11.2% to 10.7%.
- But private sector was very slightly up, from 7.3% to 7.4%.
- U.S. employees represented by collective bargaining agreement is at all time low: 12%.
- Highest density: NY at 23.6%, Lowest density: SC at 1.6%. From 2015 to 2016, Texas dropped, from 5.6% to 5.3%.
- Highest density in utilities, transportation and warehousing, and telecom; lowest in finance, agriculture, food services.
- Importantly, millennials still left out: union membership rates remain highest among workers 45-64.

What to expect? The Labor Secretary

- Alexander Acosta is expected to be more of a traditional, business oriented pick.
  - Conventional pick.
  - Dean of Florida International University Law School.
  - Previous member of the NLRB.
  - Son of Cuban immigrants, first Hispanic on Trump's cabinet.
  - Wrote 125 decisions while at the Board.
  - Understands Board practice and procedure.
  - Good reputation at the agency level.

What to expect? The National Labor Relations Board

- The NLRB as an agency is on Trump's radar.
- Trump's businesses historically have been subject to NLRB litigation on both the representative side and the unfair labor practice side.
- The NLRB recently issued a ruling against the Trump International Hotel in Las Vegas, requiring it to recognize and bargain with a newly-elected union.
- Many business groups also want to see quick appointments to the NLRB because of recent anti-business initiatives and expansion of workers' rights.

What to expect?
The National Labor Relations Board (cont.)

- The NLRB is a five-member board. The members are appointed by the President for five-year terms and are confirmed by the Senate. The Chairman of the NLRB is selected by the President and is from the same political party.
- Under President Obama, the NLRB drastically changed existing policies and legal precedents for both unionized and non-union employers.
- There are two open seats on the Board right now, with a third scheduled to open next year.
- These open seats will be filled by Trump appointees, resulting instantly in a more business-oriented NLRB.

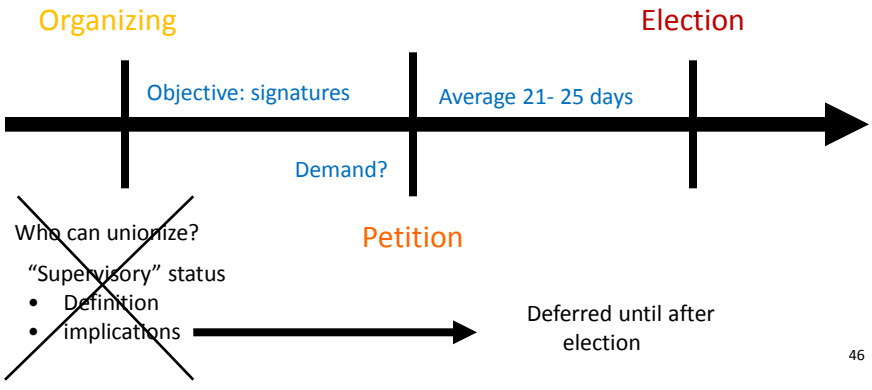
What to expect?
Board changes and possible reversals

- The new Board is not likely to make additional changes the current Board would make, such as:
  - Extending Weingarten rights to non-union workplaces, and
  - Making misclassification of employees as independent contractors a separate violation of the National Labor Relations Act.
- Reversing Board decisions:
  - It will take time for cases to filter through the appeals process and be heard by the more conservative Trump board
  - Trump also may work with Congress to pass legislation to reverse several NLRB decisions from recent years to expedite changes in the law, such as joint employment.

Will the new Board revisit or reverse Obama initiatives?

- The new Board with a Republican majority may revisit numerous recent NLRB rules and decisions, especially those covering:
  - The quickie election rule;
  - Class action waivers;
  - Protected Concerted Activity / Social Media Protections
  - Specialty Healthcare and the "micro-unit" concept.
  - Joint employers.

The Quickie Election Rule



Legal and Practical Ramifications

- "Quickie elections" predicted to help unions organize more employees.
- Fewer hearings creates uncertainty.
  - Ambiguity over inclusions in voting group.
  - Lack of definitive clarity about whether all of the individuals it considers supervisors meet the definition of supervisor under the NLRA.
- As noted earlier, lawful, honest employer education of voters typically reduces union support once employees hear both sides. Cutting the "campaign" period reduces opportunity for employee education.
- A great deal of immediate work demanded of employers—distracts from employee education (and running the business).
- Release of additional items of employee personal information (personal email addresses, home and cellphone numbers) to facilitate personal, phone, and electronic campaigning by union.

Class Actions Waivers

- Petitions for writ of certiorari have been filed with the U.S. Supreme Court urging the Court to consider the ongoing dispute over employment agreements and policies containing mandatory class-action or collective-action waivers.
- The petitions have been filed from decisions rendered by the Second, Fifth, Seventh, and Ninth Circuits.
- In addition, on November 18, Murphy Oil USA Inc. filed a brief with the Court urging it to grant the Board's request to review the Fifth Circuit's decision in *Murphy Oil,* 808 F. 3d 1013 (5th Cir. 2015), upholding the legality of such mandatory class-action or collective-action waivers (Murphy Oil filed the brief urging that the issue needs to be resolved, even though it won its underlying case before the Fifth Circuit).
- In its brief, Murphy Oil noted "a deep circuit split" exists on the issue.

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Class Actions Waivers

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- Indeed, Circuit Courts remain split on the legality of mandatory class-action or collective-action waivers under the Act.
- Three circuits (the Second, Fifth, and Eighth Circuits) that have considered the issue have concluded such waivers do not violate the Act.
- Meanwhile, the Seventh and Ninth Circuits have held Employers violate the Act when they require class-action and collective-action waivers as a condition of hire or continued employment.

Protected Concerted Activity

- Again, Section 7 of the NLRA gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."
- Even if a rule does not explicitly prohibit such activity, it still will be found unlawful if: (1) employees would reasonably construe the rules language to prohibit Section 7 activity; (2) the rule was promulgated in response to union or other Section 7 activity; or (3) the rule was actually applied to restrict the exercise of Section 7 rights.
- *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004): "the mere maintenance of a work rule" may violate the NLRA [Section 8(a)(1)] if the rule "has a chilling effect on employees' Section 7 activity."

Confidentiality RULES

- Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees (or non-employees).
- An employer's confidentiality policy may protect proprietary information from competitors, but must be narrowly tailored so as not to restrict employees from discussing their terms and conditions of employment.
- Confidentiality rules that broadly encompass "employee" or "personnel" information, without further clarification, will reasonably be construed to restrict Section 7 protected communications.

Confidentiality: Examples of Unlawful RULES

- Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."
- You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of the law or lawful Company Policy).
- Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone outside of your immediate work group is strictly prohibited.

Confidentiality: Examples of Lawful RULES

- No unauthorized disclosure of “business ‘secrets’ or other confidential information.”
- Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.

Employee Conduct / Behavior RULES

- Employees have a Section 7 right to criticize or protest an employer’s policies or treatment of employees.
  - Rules that prohibit protected concerted criticism of the employer will be found unlawfully overbroad.
  - Rules that prohibit employees from engaging in disrespectful, negative, inappropriate, or rude behavior toward employees or management, absent sufficient clarification or context, will be found unlawful.
- Rules that prohibit insubordinate conduct will not be construed as limiting protected activities.

Employee Conduct/Behavior: Examples of Unlawful RULES

- Do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors.
- No defamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management.
- Do not make statements that damage the company or the company's reputation or that disrupt or damage the company's business relationships.
- Policies barring "negative comments," "gossip" and that required employees to act in a "positive and professional manner" found unlawful.

Employee Conduct/Behavior: Examples of Lawful RULES

- No rudeness or unprofessional behavior toward a customer, or anyone in contact with the company.
- Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of company business.
- Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors.

Protected Concerted Activity

- *In Mercedes-Benz U.S. Int'l, Inc. v. NLRB*, 838 F.3d 1128 (11th Cir. Oct. 3, 2016), the U.S. Court of Appeals for the Eleventh Circuit enforced in part and remanded in part a Board decision regarding the Employer's restrictions on distributing union-related materials on its premises. The Employer's policy prohibited "solicitation and/or distribution of non-work-related materials by employees during work time or in work areas."
- An ALJ found the policy violated the Act, and the Board affirmed.
- The Employer appealed to the Eleventh Circuit, which upheld the Board's finding that the Employer's distribution policy was unlawfully overbroad, since it could reasonably be read to prohibit lawful solicitation in work areas by employees during non-work time.

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Protected Concerted Activity

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- The Eleventh Circuit also held that the distribution of union-related materials in the atrium of the Employer's facility was protected concerted activity, since the atrium was a mixed-use area.
- However, the Eleventh Circuit remanded to the Board the question of whether distribution and solicitation could take place in the Employer's Team Centers.
- The Eleventh Circuit asked the Board to consider whether the Team Centers are "converted mixed-use areas," where restrictions are sometimes permitted, or whether they are "permanent mixed-use areas," where an employer may never prohibit distribution of union materials.

Protected Concerted Activity

- In *Kroger Mid-Atlantic LP*, 05-CA-155160 (Sept. 9, 2016), an ALJ held the Employer violated the Act by banning non-employee union representatives from its parking lot, where the representatives were distributing petitions notifying customers about a dispute between the Employer and the Union and asking customers to shop elsewhere.
- The Employer relied on a non-solicitation/distribution provision in its lease.
- Evidence showed the Employer had permitted various charitable/nonprofit organizations to set up tables, solicit for monetary donations, sell goods, and distribute literature on the sidewalk in front of the store on numerous occasions in the past.
- The ALJ held the discriminatory enforcement of the non-solicitation/distribution rule violated the Act, since union representatives have a statutorily protected right to engage in peaceful hand-billing (such as communicating with customers about disputes with the employer, consumer boycotting, or secondary hand-billing).

Specialty Healthcare

- Section 9(b) of the National Labor Relations Act grants to the Board the power to determine "the unit appropriate for the purposes of collective bargaining."
- Old standard for determining appropriate unit - "community of interest".
- *Specialty Healthcare* new standard – as long as a union's petitioned-for unit consists of a clearly identifiable group of employees who share a community of interest, the Board will presume the unit is appropriate. If an employer argues that the unit should include additional employees, the employer must demonstrate that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit.

Specialty Healthcare

- The Board held that two groups share an overwhelming community of interest when their community of interest factors "overlap almost completely."
- *Specialty Healthcare* – Unit of only CNA's requested and granted.
  - Readily identifiable as a group.
  - Shared community of interest.
  - No overwhelming community of interest justifying larger unit
    - Rare interaction.
    - No interchange.
    - No overlapping job duties.
    - No transfers into CNA classification from the others and vice-versa.

Joint Employer: The Basic Concept

- Not mentioned by Congress in the NLRA; however, traditionally defined by the NLRB (in different ways), for at least fifty years.
- Created by the NLRB to reach companies that are separate and legally distinct.

Joint Employer: The Basic Concept Cont.

- Former joint employer standard has existed since the mid-1960's (*Greyhound Corp.*, 153 NLRB 1488 (1965).
- The joint employer standard was refined in *TLI Inc*. 271 NLRB 798 (1984), *Laerco Transportation*, 269 NLRB 324 (1984) and *Airborne Express*, 338 NLRB 597 (2002).
- The joint employer standard has remained relatively unchanged for the past 30(+) years.

The Board's Former Joint Employer Standard

- Joint employment exists "where two separate entities share or codetermine those matters governing the essential terms and conditions of employment."
- The joint employer's control over employment matters must be "direct and immediate" as to things like hiring, firing, discipline, supervision, and direction.

Browning-Ferris Industries of Calif., Inc.
NLRB Case No. 32-RC-109684

- Browning-Ferris (BFI) operates a waste recycling facility.
- BFI subcontracts employees from Leadpoint to sort recyclable items inside the facility and to perform basic housekeeping functions.
- Teamsters (Union) filed a petition to represent approximately 240 employees, which were comprised of sorters, housekeepers, and screen cleaners.
- The Union already represented approximately 60 direct BFI employees who worked on the exterior of the facility.

Browning-Ferris Industries of Calif., Inc.
NLRB Case No. 32-RC-109684 Cont.

- The Regional Director found BFI was not a joint employer (under the former standard) because it did not **share or co-determine those matters governing the essential terms of employment.**
- While BFI did control the production line and set work schedules, it did not directly control pay rates, hiring, or the supervision of Leadpoint employees.

The Board's New Joint Employer Standard

- By a 3-2 majority (split among labor / management lines), the NLRB overruled the determination of the Regional Director.
- The Board found BFI was a joint employer because, even if it had insulated itself from meaningful direct interaction with the Leadpoint workers, it still had enormous influence over their terms and conditions of employment.

The Board's New Joint Employer Standard Cont.

- Overruling 30(+) years of its own case law, the Board's new joint employer standard evaluates whether two entities "**share or codetermine those matters governing the essential terms and conditions of employment**;" however, the new standard requires the following two step analysis:
  1) Does a common-law employment relationship exist?; and
  2) Does the potential joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining?"

The Board's New Joint Employer Standard Cont.

- A franchisor controlling the terms and conditions of a franchisees workers….**is probably a joint employer**.
- A distributor telling its dealers what hours they can work…**is probably a joint employer**.
- A company telling a staffing agency who it needs, when it needs them, and what speed the workers should be able to work…..**is probably a joint employer**.
- A passive shareholder or the client of a professional service that is only interested in results…..**is probably not a joint employer**.

The Board's New Joint Employer Standard Cont.

Control under the new standard can be established **directly or indirectly**, such as through an intermediary or through contractual provisions which **preserve the right to control**, whether or not that right is even or ever exercised.

THANK YOU

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