

John Duke in Law360: 'NLRB's Joint Employer Move May Foreshadow EEOC Action'

September 15, 2022

PRACTICES Labor and Employment

Haynes Boone Counsel **John Duke** was quoted in a *Law360* Employment Authority article. Below is an excerpt:

The National Labor Relations Board's recent proposal to broaden the agency's test for analyzing when multiple companies qualify as joint employers — who can then be held liable for the same labor law violations — may put pressure on the U.S. Equal Employment Opportunity Commission [EEOC] to push the hot-button issue up on its own agenda, attorneys say.

EEOC May Enter Spotlight

... the EEOC had thrown its support behind the NLRB's Obama-era Browning-Ferris test.

In an amicus brief filed with the D.C. Circuit in September 2016, when the NLRB was arguing to the appeals court that its joint employer test was valid, the EEOC said the framework developed by its fellow executive branch agency was neither vague nor unworkable, and that the NLRB's Browning-Ferris test was "consistent with the EEOC's longstanding joint-employer test."

The EEOC's 2016 amicus brief describes its legal standard as a multifactor test that takes into account a putative joint employer's right to directly or indirectly exert control over workers' terms and conditions of employment. Some of those terms of employment, which are derived from common law, include where and how work is performed, who pays the worker, whether the worker is provided the equipment they need, and whether the worker can be fired, among other things.

Though the composition of the commission is far different today from what it was at the time the brief was filed, John Duke, counsel at Haynes Boone who advises employers, said he believes the EEOC's 2016 amicus brief may be a good indicator to gauge what direction the EEOC might go if the commission should opt to address its joint employer standard under Title VII and other anti-discrimination laws.

While Duke noted that the commission's changing composition could sway the agency's stance and what it decides to do regarding joint employment, a sharp departure from the position the EEOC stated in its 2016 brief could hurt the agency in court.

"I think the problem that'll happen if they take a different position and litigation, someone's going to point to that brief that they filed in the [Browning-Ferris appeal] case and say they're just flip-flopping all over the place," Duke said.

Excerpted from *Law360*. To read the full article, click [here](#).