

One Minute Memo[®]



Senate Holds Hearing on NLRB's Proposed Joint-Employer Standard

By *Marshall B. Babson and Gena B. Usenheimer*

On February 5, 2015, the U.S. Senate Health, Education, Labor and Pension (“HELP”) Committee held a *hearing* on the National Labor Relation Board’s (“NLRB”) proposed new standard for determining joint-employer status under the National Labor Relations Act (“NLRA” or the “Act”). A joint-employer is a separate entity that exercises control over the terms and conditions of another employer’s employees. The current standard—which has been in place for more than thirty years—requires that before an entity may be an employer, or a joint-employer, it first must exercise “direct and immediate” control over the working conditions of the employees in question. The NLRB is currently considering a greatly expanded standard, the ramifications of which are significant: increased potential liability for unfair labor practices not of the putative joint-employer’s making, back-pay, bargaining obligations with a union representing employees not directly employed, as well as unlimited exposure to secondary boycotts and other economic action against primary employers.

The new, proposed standard, as formulated by the NLRB’s General Counsel, seeks to eliminate the “direct and immediate” standard and would capture entities which have indirect or even unexercised potential control over working conditions, or where “industrial realities” otherwise make the entity “essential” to “meaningful collective bargaining”. Marshall B. Babson of Seyfarth Shaw LLP *presented testimony* at the February 5th hearing that despite representations to the contrary, the proposed test is not a return to a more traditional means of measuring joint-employer status, but rather a greatly expanded standard that is unbounded by the common law definition of who is an employer and therefore plainly inconsistent with the intent of Congress and Supreme Court precedent. Babson also testified that the proposed standard’s consideration of “industrial realities” would inevitably lead to “economic analysis” by the NLRB which specifically was prohibited by the Taft-Hartley Congress in 1947 in Section 4(a) of the Act.

The positions of the Senators on the Committee fell along party lines. The Republicans expressed great concern that the proposed new standard would adversely impact business arrangements and contractual relationships, particularly franchise agreements, and thus would interfere with opportunities for economic growth. In turn, the Democrats focused on the potential for alleviating what they believe to be abuses by certain employers by including an ever-widening group of companies liable for damages or required to sit at the bargaining table.

Although no new rule has been adopted by the NLRB, the General Counsel’s proposed standard is an integral part of his enforcement policy and likely will ensnare potentially hundreds of unrelated employers into labor disputes that are not of their making.

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