SEYFARTH SHAW

One Minute Memo®

The Board Initiates The Internal Process To Consider Rulemaking On The Joint-Employer Standard

By Andrew R. Cockroft

***Seyfarth Synopsis**: On Wednesday, May 9, 2018, the Office of Information and Regulatory Affairs announced that the NLRB is considering rulemaking to establish the standard for determining joint-employer status under the National Labor Relations Act.*

NLRB Chairman, John F. Ring, announced on Wednesday, May 9, 2018, that the Board is considering rulemaking to address the standard for joint-employer status under the National Labor Relations Act.

In the announcement, Chairman Ring acknowledged the importance of the Board's joint-employer standard as "one of the most critical issues in labor law today." Chairman Ring went on to address some concerns voiced by employers following the Board's ruling in *Browning-Ferris* and more recently with the Board's decision to vacate *Hy-Brand*, while noting the importance of the rulemaking to cure the push and pull of the Board's recent joint-employment decisions:

> The current uncertainty over the standard to be applied in determining joint-employer status under the Act undermines employers' willingness to create jobs and expand business opportunities. In my view, notice-and-comment rulemaking offers the best vehicle to fully consider all views on what the standard ought to be. I am committed to working with my colleagues to issue a proposed rule as soon as possible, and I look forward to hearing from all interested parties on this important issue that affects millions of Americans in virtually every sector of the economy.

Indeed, as Seyfarth has covered previously, under the existing joint-employer standard the NLRB finds that two or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law; and (2) they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board presently will–among other factors–consider whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so. This approach, first arrived at by the Board in 2015, vastly expands the types and number of entities that can be held responsible for unfair labor practice violations and who may be held to have collective bargaining obligations regarding employees of a totally separate, independent employer.

While the Board rarely has used rulemaking to establish standards under the NLRA, the importance of the joint-employer standard to businesses' ability to function in the modern economy makes the issue a prime candidate for this seldom exercised power.

Any proposed rule requires approval by a majority of the Board, followed by the issuance of a Notice of Proposed Rulemaking. The Chairman's proposal does not reflect the participation of the two Democratic Board Members, Members Pearce and McFerran.

Employers should be aware of this beneficial opportunity to affect potential joint-employment policy and be prepared to offer input on any proposed rule.

If you would like further information, please contact Andrew R. Cockroft at acockroft@seyfarth.com.

www.seyfarth.com