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NLRB's Proposed New Joint Employer Rule: What to do now to manage the risk

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On September 7, 2022, the National Labor Relations Board (NLRB) issued a Notice of Proposed Rulemaking (NPRM) that would, if adopted, make it much easier for the NLRB to find a company to be a "joint employer" of persons directly employed by its contractors, vendors, suppliers and franchisees. The consequences of a joint employer finding are significant and can lead to: liability for unfair practices committed by the direct employer; a duty to bargain with a union representing the direct employer's employees; exposure to liability for one's own conduct that fails to take into account the indirect employer relationship and spread of a union from the direct employer's employees to the indirect employer.

Joint-employer theory creates far more risk for employers than related doctrines such as single employer or alter ego because, unlike those theories, joint employer status does not require any common ownership or corporate control. Two companies operating entirely at arm's length can be found joint employers.

The major proposed change relates to the degree of influence that an indirect employer must have to justify a finding of single employer status. Under the current NLRB standard, the indirect employer must actually exercise "immediate and direct" control over key terms of employment, normally limited to wages, benefits, hours and termination.

The proposed rule relaxes that standard in three key ways. First, it eliminates the actually exercise requirement and states that possession of even unused authority can be sufficient.

Second, it does away with the immediate and direct requirement so that influence exercised by the indirect employer through the direct employer can be used to support a finding.

Third, it expands, beyond the list enumerated in the current rule, the types of employment terms control of which will justify a finding of joint employer status. The Obama Board had adopted the currently proposed standard by an NLRB decision, *Browning-Ferris Inds.* 362 NLRB No. 186 (2015). However, that decision was overturned by the Trump Board's adoption of the current rule, 85 FR 11184, codified at 29 CFR 103.40, (Feb. 26, 2020). The proposed rule seeks to reinstate *Browning-Ferris* as the governing law.

Because *Browning-Ferris* and the NPRM endorse pre-1984 NLRB decisions regarding joint employer status, those decisions provide guidance for how the new rule may be enforced. The NLRB and courts frequently relied on what authority was given to the alleged indirect employer in its agreement with the contractor or vendor. Clauses that required or allowed the indirect employer to approve hirings, terminations or wage adjustments to contractor employees usually resulted in finding joint employer status. In addition, cost-plus arrangements, particularly those that were terminable on short notice were often found to support a joint employer finding. Finally, clauses allowing the indirect employer to set work schedules, production rates, or requiring contractor employees to abide by the indirect employer's work rules and other policies governing conduct also were found supportive of joint employer status.

The proposed rule is still subject to comment and revision, but it is likely to be adopted without significant change. The comment and review period, which closes on November 21, 2022, provides a window in which savvy employers can assess the risks to their organization when the Rule goes into effect. A key step is to examine existing contractual relationships with vendors to identify and modify those terms that may potentially support joint employer status, or, if

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modification is untenable, to manage the risk through indemnity agreements with the vendor.

Please contact your Miller Canfield attorneys if you would like to learn more about how the NLRB's NPRM may impact your organization.