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Labor Board Moves Anew to Limit Employers' Workplace Liability

By Noam Scheiber

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After it was forced to retreat from an effort to make challenging labor practices harder in many workplaces, the National Labor Relations Board is moving to achieve the goal through other means.

The board announced on Thursday that it was set to publish a proposed rule redefining a company's responsibility under labor law for workers engaged at arm's length, such as those hired by contractors or franchisees.

The proposal, reversing an action taken during the Obama administration, would make it less likely that a company in such a situation would be deemed a joint employer liable for labor abuses like firing workers seeking to unionize.

In February, a majority on the board voted to vacate its earlier attempt to change the policy, in a decision involving a company called Hy-Brand, after the agency's inspector general concluded that one of the board members had a conflict of interest and should have recused himself.

But the board has authority to change policy both by deciding cases and by putting forth rules. Having been stymied in its initial approach, it has decided to rely on another.

Philip A. Miscimarra, who was chairman of the board when it issued the Hy-Brand decision, said that rulemaking was justified and that the task was urgent because the current policy had created uncertainty among employers, workers and unions. "The agency has to fix it," Mr. Miscimarra, who was elevated to chairman by President Trump, said in an interview this year. Mr. Miscimarra left the board when his term expired at the end of 2017.

Critics accused the agency of seeking to bring about an essentially illegitimate policy.

"After getting caught violating ethics rules the first time, Republicans on the board are now ignoring these rules and barreling towards reaching the same anti-worker outcome another way," Senator Elizabeth Warren, Democrat of Massachusetts, said in a statement.

Ms. Warren and a fellow Democrat, Senator Patty Murray of Washington, played a crucial role in drawing attention to the conflict of interest that undermined the board's first attempt to revise its joint employer standard.

Before 2015, the law typically required a company to exert direct and immediate control over workers at a franchise or subcontractor to be considered a joint employer.

But in a ruling that year, when the labor board had a Democratic majority, it altered the standard so that even employers that controlled other companies' workers indirectly — say, through software that locked franchisees into certain scheduling policies — could be considered joint

employers. The board also said that a company could be considered a joint employer if it had a right to control working conditions at a franchisee's place of business, even if it didn't exercise that right.

This more liberal standard, in addition to potentially exposing more companies to legal liability, made it easier for workers to unionize at fast-food restaurants and hotel chains. It may be illegal for a parent company to terminate a franchise agreement in response to a union campaign by employees of a franchisee if the parent company is considered a joint employer.

Last December, the Trump board under Mr. Miscimarra reversed the Obama-era ruling, reverting to the earlier, stricter standard. The ruling was vacated over conflict-of-interest questions involving William J. Emanuel, a board member whose former law firm had played a role in a related case.

The proposed rule could be even stricter than the pre-2015 standard because, according to the board's announcement, it adds the word "substantial" to the words "direct and immediate" in listing the criteria for whether a company exercises enough control to be considered a joint employer.

Once the proposed rule is published on Friday, the public will have 60 days to submit comments, which the agency is supposed to consider in formulating its final rule.

The rule could be challenged in court on procedural grounds, an outcome that Wilma B. Liebman, a Democratic former board member who served as chairwoman under Mr. Obama, said was likely.

Ms. Liebman said groups representing workers would probably argue that the conflict-of-interest problems that undid the earlier attempt to change the joint-employer standard also doom the rule-making approach in light of Mr. Emanuel's significant role.

Board custom holds that changing the law requires the support of three members, though this is not a formal requirement. Mr. Emanuel was one of three members to propose the new rule. (The board ordinarily has five members; there is currently one vacancy.)

Depending on how the process plays out, the rule could also be vulnerable to arguments that the board did not sufficiently consider public views.

Plaintiffs might argue that "the board majority went into it with their minds made up," Ms. Liebman said. "You have to invite public comment and seriously consider it, give reasons why you might reject certain ideas."

If the board does not go out of its way to do so, she said, a court might view the process skeptically, given the events that led up to the rulemaking.

Perhaps anticipating this critique, the board's chairman, John F. Ring, said in the announcement that he looked forward "to receiving the public's comments."

Business groups were enthusiastic about the board's latest proposal.

"The N.L.R.B.'s announcement is good news for franchises and franchise employees across the country," Robert Cresanti, president and chief executive of the International Franchise Association, said in a statement.

“Franchise owners have been confused about the vague and uncertain legal minefield created by the N.L.R.B. joint-employer standard since it was expanded in 2015.”

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