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It's Back: NLRB Reverts to Browning-Ferris Joint Employer Standard for Now

In 2015, a sharply divided NLRB replaced its decades-old standard for determining joint employer status with a far more expansive one in *Browning-Ferris Industries of California*. In December 2017, the board overruled that decision in *Hy-Brand Industrial Contractors* but subsequently reversed course. At least for now, businesses that use temporary or contingent worker, franchising and outsourcing arrangements remain at risk of being deemed joint employers for collective bargaining and other purposes, even when they have never exercised direct control over the workers involved.

Background

From 1984 until 2015, the National Labor Relations Board (NLRB) applied a standard that required a business to exercise direct and significant control over another entity's workers in order to be deemed a joint employer. In its 2015 *Browning-Ferris Industries of California, Inc.* decision, the Obama board adopted a new, expansive standard for determining whether two employers are joint employers for purposes of the National Labor Relations Act (NLRA), including in representation cases and unfair labor practice cases. Under the *Browning-Ferris* standard, employers that have only indirect control (or the ability to exercise such control) over the essential terms and conditions of another entity's employees are joint employers, with joint bargaining obligations, potential joint liability for unfair labor practices and breaches of collective bargaining agreements, and increased exposure to strikes and picketing. (See our September 25, 2015 *For Your Information*.) Browning-Ferris appealed the decision to the D.C. Circuit.

NLRB Overturns *Browning-Ferris* Standard

On December 14, 2017, the board overturned *Browning-Ferris* in its *Hy-Brand Industrial Contractors* decision. Post-*Hy-Brand*, joint employment status once again rested on one entity's exercise of actual, direct, and immediate control over one or more essential employment terms and conditions of another entity's employees. Shortly after the *Hy-Brand* decision, the NLRB asked the D.C. Circuit to remand the *Browning-Ferris* appeal so it could take

appropriate action in light of its new precedent. On December 22, the court remanded the appeal to the agency "for further consideration in light of *Hy-Brand,*" and subsequently denied a motion for reconsideration.

The *Hy-Brand* decision faced immediate challenge, as the charging parties moved the board to reconsider, recuse and strike that decision. Among other things, the motion argued that NLRB Member William Emanuel — a member of the majority in the 3-2 *Hy-Brand* decision — had an obligation to recuse himself from participating in the case because his former law firm represented Leadpoint, a party in *Browning-Ferris*.

On February 9, while the motion was pending, the NLRB inspector general issued a report finding that "the Board's deliberation in *Hy-Brand,* for all intents and purposes, was a continuation of the Board's deliberative process in *Browning-Ferris.*" The report concluded that Emanuel should have recused himself from participating in the *Hy-Brand* deliberations given his former law firm's representation of a party in the *Browning-Ferris* case. Finally, it recommended that the board consult with the designated agency ethics official to determine what action to take in light of the report's findings.

And Then Reverses Itself

Citing the inspector general's determination that Member Emanuel should have been disqualified from participating in the *Hy-Brand* decision, a three-member panel of the board vacated the decision on February 26. It also made clear that "the overruling of the *Browning-Ferris* decision is of no force or effect." Member Emanuel did not participate in the decision to vacate. Hy-Brand has since moved to have that ruling reversed, arguing that Member Emanuel was improperly excluded from participation, and the NLRB's inspector general erred in concluding that Member Emanuel should have recused himself from participating in the *Hy-Brand* deliberations.

Meanwhile Back at the D.C. Circuit

After the board vacated the *Hy-Brand* decision, it asked the D.C. Circuit to reinstate the *Browning-Ferris* appeal and continue processing the case. Citing "extraordinary circumstances," a split panel of the appeals court agreed on April 6 to recall the remand mandate and reinstate the appeal to its docket. However, the court decided to hold the *Browning-Ferris* appeal "in abeyance pending prompt disposition by the Board of the pending motion for reconsideration in *Hy-Brand*." The court also ordered the NLRB to update the court every 21 days on the case status.

As the Board Looks to Rulemaking

While the new Republican majority board was expected to revisit *Browning-Ferris*, it was unclear when and through what vehicle that would happen. On May 9, the NLRB announced that it is considering rulemaking to address the standard for determining joint-employer status under the NLRA, and has included the proposal in the agency's regulatory agenda. The move underscores Chairman Ring's view of the critical need to remove uncertainty over the joint-employer standard and to work toward a proposed rule as soon as possible.

NLRB Returns to Full Strength

Last month, the NLRB returned to full strength as management-side attorney John Ring was sworn in as chairman. Ring's addition to the board ended the 2-2 Republican-Democrat split that had been in place since December 2017.

With a Republican majority restored, the board is expected to look for opportunities to revisit the issue of joint employment. Notably, in his confirmation hearing, Chairman Ring testified that it's "very important for the integrity of the Board to have some finality and clarity on the joint employment issue as soon as possible." Stay tuned. (See our **April 20, 2018** *Legislate*.)

In Closing

While the issues surrounding *Hy-Brand* remain unresolved, the Obama board's *Browning-Ferris* joint employer standard remains board law. The more business-friendly Trump board is expected to change that, and use notice-and-comment rulemaking to consider views on what the joint employer standard should be. In the meantime, a business may still be deemed a joint employer, regardless of whether it actually exercises direct control over essential employment terms of another entity's employees.

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