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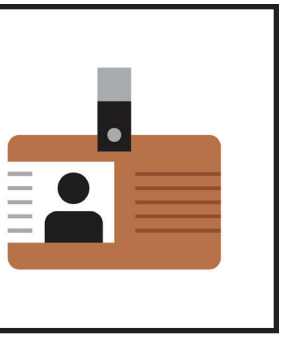
FOR BNHRA MEMBERS
LABOR & EMPLOYMENT
MARCH 2018



NLRB Reinstitutes the Browning-Ferris Joint Employer Standard – For Now

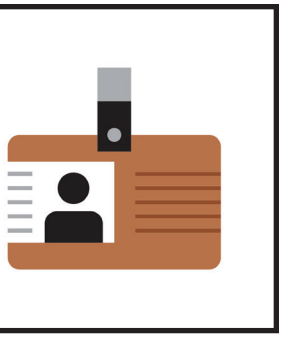
When the National Labor Relations Board ("NLRB") expanded its definition of "joint employer" in 2015 to include companies that share some direct or indirect control over other companies' employees, many businesses were understandably concerned that they could become partly or wholly responsible for individuals previously considered to be other companies' employees. This new joint employer standard, established in the NLRB's decision *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015) ("*Browning-Ferris*"), seemed to be here to stay, as it was cited extensively by the NLRB and adopted by federal district courts.

However, the NLRB reversed course in December 2017. In *Hy-Brand Industrial Contractors, Ltd. & Brandt Construction Co.*, 365 N.L.R.B. 156 (Dec. 14, 2017) ("*Hy-Brand*"), the NLRB overruled its previous decision in *Browning-Ferris* and returned to its previous joint employer standard. Specifically, *Hy-Brand* established that "two or more entities will be deemed joint employers . . . if there is proof that one entity has exercised control over essential employment terms of another entity's employees . . . and has done so *directly and immediately* . . . in a manner that is not limited and routine."[1]

The overruling of *Browning-Ferris* turned out to be short-lived. On February 26, 2018, the NLRB issued a decision and order vacating its previous decision to overrule *Browning-Ferris*. The NLRB based its decision upon a memorandum by the NLRB's Office of Inspector General stating that Member William Emanuel should have been disqualified from participating in the *Hy-Brand* proceeding.[2] The NLRB's Office of Inspector General reasoned that the *Hy-Brand* decision had incorporated *Browning-Ferris* to such an extent that the two proceedings were essentially consolidated into one, and that it was therefore improper for Member Emanuel to participate in rendering a decision in *Hy-Brand*, given his former law firm's representation of a party in *Browning-Ferris*.

Further proceedings in the *Hy-Brand* matter are scheduled to occur, so the NLRB may soon have another opportunity to revert the joint employer standard to its pre-*Browning-Ferris* posture. The NLRB may also choose to undo the *Browning-Ferris* joint employer standard in another matter altogether, thus bypassing the procedural hitches in *Hy-Brand*. Complicating the situation is the fact that the five-member NLRB is currently comprised of two Republican members and two Democratic members, with an additional Republican member awaiting confirmation before the U.S. Senate. Even if the NLRB does not act, other avenues for changing the joint employer standard exist. For example, the U.S. House of Representatives in November 2017 passed the Save Local Business Act (H.R.3441), which would define an entity as a joint employer only if such entity "directly, actually, and immediately . . . exercises significant control over essential terms and conditions of employment."[3] This bill is currently pending before the U.S. Senate.

1 *NLRB Overrules Browning-Ferris Indus. & Reinstates Prior Joint-Employer Standard*, https://www.nlrb.gov/news-outreach/news-story/nlrb-overrules-browning-ferris-industries-and-reinstates-prior-joint (Dec. 14, 2010).
2 Memorandum from the Office of Inspector General, National Labor Relations Board (Feb. 9, 2018).
3 https://www.congress.gov/bill/115th-congress/house-bill/3441/text.



In the meantime, businesses, contractors and employees should take note that the expanded "indirect control" test continues to apply. Under the joint employer standard established in *Browning-Ferris*, "two or more entities are joint employers of a single workforce if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."[4] The Board stated expansively that an entity can be considered a joint employer by exercising direct or indirect control over terms of employment, such as number of workers to be supplied, scheduling, seniority, overtime, assignment of work, and manner or method of work performance.[5] As noted in *Hy-Brand*, the indirect joint employer test has the potential to affect the law as applied to numerous types of business relationships, including between users and suppliers, lessors and lessees, parents and subsidiaries, contractors and subcontractors, franchisors and franchisees, predecessors and successors, and creditors and debtors.[6]

Additional Assistance

Should you have any questions regarding the joint employer standard, please contact any of the attorneys on our Labor & Employment Practice Team. ■

4 *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. No. 186 at 19.
5 *Id.*
6 *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 N.L.R.B. 156 at 5.

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