

Alert | Labor & Employment





February 2018

NLRB Returns to Browning-Ferris Test for Joint Employment

On Feb. 26, 2018, the National Labor Relations Board (NLRB or Board) issued an order reinstating the *Browning-Ferris* standard for evaluating joint employer status, once again leaving franchisors open to an increased risk of being found to be a joint employer of franchisee's employees and potentially liable for labor law violations.

The Board's 3-0 Order (Member Emmanuel did not participate) vacated its recent decision in *Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.*, 365 NLRB No. 156 (2017), which had overruled *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015). The Board's Order is a direct result of a Feb. 9, 2018, report issued by NLRB Inspector General David Berry finding that Member Emmanuel should have been recused from *Hy-Brand* pursuant to Executive Order 13770, "the President's ethics pledge," which "prohibits an appointee from participating in a 'particular matter involving specific parties' when the appointee's former employer or client is a party or represents a party." According to the Inspector General, *Hy-Brand* was the same "particular matter" as *Browning-Ferris* because "the Board's deliberation in *Hy-Brand*, for all intents and purposes, was a continuation of the Board's deliberative process in *Browning-Ferris*" and "involved and affected the legal rights of the parties of *Browning-Ferris*."

What is the Browning-Ferris standard?

This decision effectively reinstates *Browning-Ferris*, a business qualifies as a joint employer if it exhibits "indirect" control or the ability to exert such control



over employees. This means that where a franchisor merely reserves the authority to control terms and conditions of employment (which can be interpreted very broadly), the franchisor could be liable as a joint employer. The *Browning Ferris* standard was (and now is, again) an Obama-era departure from the Board's long-held "direct control" test, under which a business qualified as a joint employer only if it had "direct and immediate" control over the terms and conditions of workers' employment.

The *Browning-Ferris* "indirect control" test is ambiguous and renders it difficult for businesses to determine their duties under the National Labor Relations Act. Nevertheless, the decision will likely remain in place for the foreseeable future.

What does this mean for franchisors?

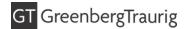
The NLRB's decision in *Hy-Brand* to revert back to the longstanding "direct control" test was a short-lived respite. The NLRB's immediate return—at least for the time being—to *Browning-Ferris's* broad "indirect control" joint employment test increases the risk that a franchisor could be found liable for a franchisee's alleged labor violations and as a joint employer with a franchisee in the context of a union petition for representation before the NLRB. As has been the case since *Browning-Ferris* was decided in 2015, franchisors must be extremely cautious when exercising control over their franchisees and their employees. While it is imperative that franchisors control their brands by implementing and enforcing system standards, they should refrain from exercising control in areas where control is not necessary. Ultimately, franchisors must strike a balance between exercising sufficient operational control to protect the brand while being cautious not to control the terms and conditions of the franchisees' employees' employees and other areas where franchisors interact with their franchisees and their franchisee's employees, and train field personnel to ensure that all interactions are necessary to protect the goodwill associated with the brand.

Authors

This GT Alert was prepared by **Katie Molloy** and **David W. Oppenheim**. Questions about this information can be directed to:

- Katie Molloy | +1 813.318.5710 | molloyk@gtlaw.com
- David W. Oppenheim | +1 973.443.3263 | oppenheimd@gtlaw.com
- Tristan J. Reiniers | +1 813.318.5749 | reinierst@gtlaw.com
- Or your Greenberg Traurig attorney

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.¬ Houston. Las Vegas. London.* Los Angeles. Mexico City.* Miami. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.® Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.® Warsaw. Washington, D.C.. West Palm Beach. Westchester County. This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ¬Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, S.C., an affiliate of Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. »Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig, P.A. and Greenberg Traurig, P.A. a



 $Images \ in this \ advertisement \ do \ not \ depict \ Greenberg \ Traurig \ attorneys, \ clients, \ staff \ or facilities. \ No \ aspect \ of \ this \ advertisement \ has been \ approved \ by the \ Supreme \ Court \ of \ New \ Jersey. \ @2018 \ Greenberg \ Traurig, \ LLP. \ All \ rights \ reserved.$

© 2018 Greenberg Traurig, LLP www.gtlaw.com | 3