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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* as the law of the land. Under *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' employment. In order to minimize the risks, franchisors may wish to review all agreements, manuals, procedures 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.

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