WINSTON & STRAWN LLP

CLIENT ALERT

From the Ashes: NLRB Vacates Hy-Brand Decision and Reinstates Browning-Ferris Standard for Determining Joint Employment

FEBRUARY 27, 2018

On February 26, 2018, the National Labor Relations Board (NLRB or Board) vacated its December 14, 2017 decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017) (see Winston's briefing). In *Hy-Brand*, the Board had overturned the Obama-era expanded test for determining joint employment status, as established in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015). Now, as a result of the vacatur, the *Browning-Ferris* standard is reinstated at the Board.

In a much-discussed (and oft-maligned) 2015 decision, the Board in *Browning-Ferris* held that two or more entities could be deemed joint employers of a particular workforce under the NLRA regardless of whether they ever actually exercised control over the workers' terms and conditions of employment. That is, to find joint-employer status, *Browning-Ferris* required only a finding that: (i) two or more separate employers were both "employers" in the common law sense, and (ii) they shared or co-determined matters governing the essential terms and conditions of employment. Critically, it was not necessary to find that the employers actually exercised direct and immediate control over working conditions—the mere right to control, even if unexercised, was enough.

Then, in December of last year, a 3-2 Board majority decided *Hy-Brand*, which overturned *Browning-Ferris* and returned to the pre-*Browning-Ferris* standard. So, once again under *Hy-Brand*, joint employment would be found only where two or more "entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'"

Following the Board's decision in *Hy-Brand*, the charging parties in that case filed a motion for reconsideration, recusal, or to strike, arguing that Board Member William J. Emanuel should have been disqualified from participating in the decision because his former law firm represented a party in *Browning-Ferris*. The Board's Designated Agency Ethics Official agreed, opining that Member Emanuel is, and should have been, disqualified from participating in the *Hy-Brand* proceeding.

Today, a three-member panel of the Board (including the two dissenters in *Hy-Brand*) issued an order vacating the Board's earlier decision in *Hy-Brand*. As a result, the Board panel explained that its prior overruling of *Browning-Ferris* "is of no force or effect."

The *Browning-Ferris* decision had been appealed to the U.S. Court of Appeals for the District of Columbia Circuit, but the Court remanded it to the Board without making a decision in light of *Hy-Brand*. It is unclear what effect today's decision will have on the *Browning-Ferris* appeal or efforts in Congress to enact legislation to define the joint employment standard.

2 Min Read

Related Locations

Charlotte | Chicago | Dallas | Houston | Los Angeles | New York | San Francisco | Silicon Valley | Washington, DC

Related Topics

NLRB | National Labor Relations Board

Related Capabilities

Labor & Employment

Related Regions

North America

Related Professionals

Derek G. Barella

Shane Blackstone

Joan Fife

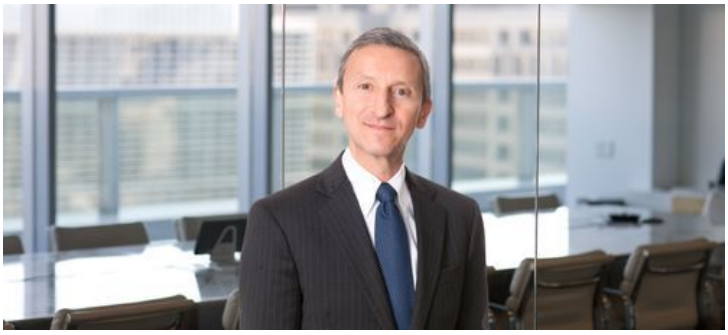
Aviva Grumet-Morris

Deborah S.K. Jagoda

Scott Landau

Laura Petroff

Michael Roche



Stephen Sheinfeld

Cardelle Spangler

William Sunkel

Emilie Woodhead