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## BLOGS

Employment

# Browning-Ferris Appeal Reinstated Because of “Extraordinary Circumstances” Surrounding NLRB Joint-Employer Standard

A series of unusual developments has brought the NLRB’s joint-employer standard back in front of the D.C. Circuit, where the federal court will finally weigh in on the 2015 decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015). For many years prior to 2015, when determining when two or more entities would be considered a “jointemployer” under the National Labor Relations Act, the NLRB looked at whether an entity possessed and exercised direct control over employees’ terms and conditions of employment. In *Browning-Ferris*, however, the board announced that even if an entity had never exercised joint control over the terms and conditions of employment, the Board would also consider whether that entity had either exercised indirect control through an intermediary or had reserved the right to do so. Having been found a jointemployer, Browning-Ferris appealed to the D.C. Circuit for review.

While that appeal was pending, a newly recomposed NLRB overruled *Browning-Ferris* in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017). As a result, the D.C. Circuit remanded *Browning-Ferris* back to the agency. But on February 26, 2018, the NLRB vacated *Hy-Brand* after a determination by the NLRB Inspector General that one of the NLRB Board Members should have been disqualified from voting in the case because of his former law firm’s involvement in *Browning-Ferris*. The vacation of *HyBrand* means that *Browning-Ferris* is, for now, the governing joint-employer standard at the NLRB. On April 6, 2018, the D.C. Circuit agreed to reinstate *Browning-Ferris*’ appeal, citing the “extraordinary circumstances” surrounding its procedural history at the NLRB. Meanwhile, Hy-Brand has filed a motion for reconsideration in its case, supported by a brief from the NLRB’s General Counsel’s office.

## Related People

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