

BLOGS

Employment

## NLRB Overrules *Browning Ferris* Joint Employer Standard

As we brought to your attention last month in a special Franchise Law Alert, the National Labor Relations Board decided in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017), to overrule expressly the controversial joint employer standard espoused two years ago in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015). Under the ruling in *Browning-Ferris*, two entities could be found to be joint employers based on the mere right to control the terms and conditions of employment, regardless of whether that right was actually exercised. The *Hy-Brand* Board held that the *Browning-Ferris* standard "is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act [and] it is ill-advised as a matter of policy . . . ." It reasoned that the NLRB in *Browning-Ferris* overstepped its statutory authority by redefining common-law agency principles and creating a vague and ill-defined legal standard that harmed employers and employees due to its lack of predictability. Thus, the *Hy-Brand* Board jettisoned this flawed standard and reinstated the joint-employer standard that had been in place for decades before *Browning-Ferris*. Specifically, a finding of joint employment status before the NLRB will now require: (1) proof that one entity actually exercised control over the essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control); (2) the control exercised was direct and immediate (rather than indirect); and (3) the control exercised was beyond a limited and routine manner.

Returning to the pre *Browning-Ferris* standard does not eliminate the possibility that a franchisor and its franchisees could be found joint employers. Indeed, given the appropriate facts, the NLRB could find joint employment in a franchise relationship.

### Related People

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