BLOGS
Employment

NLRB Vacates *Hy-brand*, Returns to *Browning-Ferris* Joint Employer Standard

On February 26, 2018, the National Labor Relations Board issued an order that vacates its December 14, 2017, joint employer decision in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.* As we reported in Issue 225 of *The GPMemorandum, Hy-Brand* had expressly overruled the expansive joint-employer standard set forth in the Obama-era *Browning-Ferris Industries*, 362 N.L.R.B. No. 186 (2015). In its recent order, the NLRB accepted its ethics official's determination that NLRB Member William Emanuel is, and should have been, disqualified from participating in the decision in *Hy-Brand* because of a conflict of interest. Emanuel's former law firm represented one of the companies in the *Browning-Ferris* case.

The order at least temporarily returns the NLRB to the controversial standard set forth in *Browning-Ferris*. *Browning-Ferris* substantially broadened the circumstances under which entities might be held responsible for collective bargaining and unfair labor practices, and vulnerable to union organizing, picketing, and work stoppages even when the entity is not directly signing employees' checks, such as in a relationship between a franchisor and franchisee or a site employer and a staffing agency. Under *Browning-Ferris*, the mere existence of "reserved" control, "indirect" control, or control that is "limited and routine" over terms and conditions of employment can result in a finding that two organizations are joint employers. This analysis to which the NLRB has now returned looks at an entity's *potential* to control essential terms and conditions of employment, such as its involvement in hiring, firing, discipline, supervision, and direction, as well as in "dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance." The *Browning-Ferris* standard means companies may find themselves liable for labor violations, or responsible for collective bargaining matters, at the workplaces of their franchisees, subcontractors, or vendors. It is unclear when the NLRB might again be in position to relax this standard.

On March 1, 2018, the NLRB took the unusual step of asking the United States Court of Appeals for the D.C. Circuit to revisit the *Browing-Ferris* case itself, an appeal that had been mooted in late 2017 by the original decision in *Hy-Brand*.

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