Employment Law Alert: NLRB Overrules Browning-Ferris Industries' Joint Employer Standard

Dec. 21, 2017

On Dec. 14, 2017, the National Labor Relations Board (NLRB or the Board) decided *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), expressly overruling the controversial joint employer standard espoused two years earlier in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015).

Under *Browning-Ferris*, two entities could be found to be joint employers based on mere *potential* control of terms and conditions of employment. In *Hy-Brand*, the Board jettisoned this broad standard, reinstating the joint-employer standard that had been in place before *Browning-Ferris*.

The Board held that, from now on, joint employer status before the NLRB will depend on whether:

- There is proof that one entity has exercised control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control);
- The control was exercised in a manner that was direct and immediate (rather than indirect); and
- The control was exercised in a manner that was not limited and routine.

The Board reasoned that it overstepped its statutory authority in *Browning-Ferris* by re-defining common law agency principles and creating a vague and ill-defined legal standard that harmed both employers and employees due to its lack of predictability. Members Pearce and McFarren dissented, arguing that the majority overstepped its authority by using the *Hy-Brand* case as an opportunity to overrule *Browning-Ferris* even though such a decision was not requested by either party. The dissent also argued that this rush to judgment by the Board prevented public debate on the topic.

While this decision should be welcome news for employers, it certainly does not eliminate the possibility that two entities will be found to be joint employers and thus jointly liable for labor relations and collective bargaining matters. The NLRB can still rule that two entities bear that kind of responsibility jointly, and employers who routinely contract, or whose operations are intertwined, with other entities (such as staffing companies and franchisors) should pay careful attention to make sure they operate in a way that protects them from being found a joint employer with another entity.

Please contact Gray Plant Mooty if you have questions regarding this ruling.