Employment Law Alert: NLRB Vacates Hy-Brand; Returns to Browning-Ferris Joint Employer Standard

February 27, 2018

On Feb. 26, 2018, the National Labor Relations Board issued an Order that vacates the Board's decision in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017) ("*Hy-Brand*"), which expressly overruled the expansive joint-employer standard set forth in the Obama-era *Browning-Ferris Industries*, 362 NLRB No. 186 (2015). In the NLRB's recent Order, the Board accepted its Ethics Official's determination that Member William Emanuel is, and should have been, disqualified from participating in the case because of a conflict of interest: Emanuel's former law firm represented one of the companies in the *Browning-Ferris* case.

Today's Order returns the NLRB to the controversial joint-employer standard set forth in *Browning-Ferris*. The *Browning-Ferris* standard substantially broadened the circumstances under which entities might be held responsible for collective bargaining, unfair labor practices, and vulnerable to union organizing, picketing, or work stoppages even when the entity isn't directly signing employees' checks, such as in the case of a franchisor or a site employer using 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 may result in a finding that two organizations are joint employers and thus jointly liable for labor and employment matters affecting the employees at issue. Under *Browning-Ferris*, the analysis 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 "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 NLRB's return to the *Browning-Ferris* standard today means companies may find themselves liable for labor violations, or responsible for collective bargaining matters, at the workplaces of their franchisees, subcontractors, or vendors.

The situation does not look promising for a change to the *Browning-Ferris* standard any time soon. Member Emmanuel will apparently be blocked indefinitely from participating in any case that would potentially overturn *Browning-Ferris*; so even when a fifth member of the Board is confirmed by the Senate, there will presumably be an ongoing 2-2 tie vote in any case raising the joint employer issue. Thus, there is now no clear path to breaking up that logjam and getting back to the more moderate standard that had been expressed in the *Hy-Brand* decision.

Please contact Gray Plant Mooty if you have questions regarding this order or its potential affect on your business.