NLRB vacates opinion requiring joint employers to have a relationship of direct control

Maria G. Carr | Friday, March 2, 2018

In a dramatic reversal, this week the National Labor Relations Board (NLRB) vacated its Dec. 14, 2017 decision in *Hy-Brand Industrial Contractors, Inc.* because of a conflict of interest.

As we previously reported, the NLRB overruled its own "joint employer" standard in *Browning-Ferris Industries* in December 2017. *Browning-Ferris Industries of California*, 362 NLRB No. 186 (2015), a 2015 opinion, originally held that two entities could found to be joint employers if one entity merely reserved the right to exercise control over another company's employees, or indirectly exercised such control. This decision led to much debate and confusion in the franchise community, among other industries. For example, different types of related businesses, such as a franchisee and a franchisor, could be held to be joint employers if a franchisor simply reserved the right to direct the actions of a franchisee's employees (even if a franchisor never actually did so, or if the businesses operated independently in all other respects). If two businesses were found to be joint employers, both businesses could face responsibility for the acts of the employees of the other business, including labor violations. As the NLRB noted, the *Browning-Ferris* decision was "hugely disruptive" in the franchise community.

The NLRB's December 2017 decision in *Hy-Brand* overruled *Browning-Ferris*, and found that a joint employer qualification actually required a relationship of direct control between businesses. The NLRB noted that the *Browning-Ferris* decision exceeded the NLRB's statutory authority, took away certainty as

to what is defined as an “employer” or an “agent,” and caused confusion, among other reasons.

NLRB's conflict of interest

After the NLRB issued the *Hy-Brand* decision, however, a motion to reconsider the decision was filed. The motion requested that the NLRB reconsider and vacate the *Hy-Brand* decision based on a conflict of interest of William Emanuel, one of the NLRB board members.

One of the parties in the *Browning-Ferris* decision was represented by Emanuel’s former law firm, and federal ethics rules prohibit federal appointees from being involved with “similar matters” in their roles as private citizens and as governmental appointees. On Feb. 9, 2018, the NLRB inspector general issued a memorandum detailing this conflict of interest, and noted that the decisions in *Browning-Ferris* and *Hy-Brand* were “similar matters” because of the subject matter and the great resemblance between the dissent in *Browning-Ferris* and the majority opinion in *Hy-Brand* (both opinons advocated for a less broad definition of a joint employer).

As a result, the NLRB inspector general found that Emanuel should have recused himself from the deliberation process involved in the *Hy-Brand* decision, and the NLRB’s designated ethics official also found that Emanuel should have been disqualified from participating in the proceeding.

As a result of this conflict of interest, the NLRB issued a short opinion on Feb. 26, 2018, vacating the *Hy-Brand* decision, and noted that “the overruling of the *Browning-Ferris* decision is of no force or effect.” Consequently, the *Browning-Ferris* broad definition of joint employer is once again the NLRB’s current standard.

Proceed with caution

While it is possible that further proceedings in the *Hy-Brand* case may eventually result in the NLRB eventually deciding to re-define the joint employer standard, franchisees, franchisors, and many other businesses which regularly interact with other related entities must proceed carefully to avoid facing an unintended designation as a joint employer – and potential increased liability – until that time.

Maria G. Carr
Team member bio