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NLRB Invalidates *Hy-Brand* and Complicates Joint Employer Issues for the Hospitality Industry

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A recent decision by the National Labor Relations Board (NLRB) may complicate joint employer issues for the hospitality industry. The Board issued an Order on February 26, 2018 vacating its opinion in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.* (*Hy-Brand*) citing ethical concerns regarding the participation of board member William Emanuel in that decision. The *Hy-Brand* case overturned the controversial joint employer test set out in *Browning-Ferris Industries* (*Browning-Ferris*). By rejecting the *Hy-Brand* decision, the Board returned to the *Browning-Ferris* standard, an older, more lenient version of the joint employer test.

In the *Browning-Ferris* opinion, released on August 27, 2015, the NLRB reestablished the old joint employer test. Under the *Browning-Ferris* standard, two or more entities are joint employers if: (1) they are both employers within the meaning of the common law, and (2) they share or co-determine those matters governing the essential terms and conditions of employment. In assessing whether an employer retains sufficient control over employees to qualify as a joint employer under *Browning-Ferris*, the NLRB focused on whether an employer exercised control over terms and conditions of employment *indirectly* or through an intermediary, or whether the employer reserved the authority to do so. Interestingly, this older standard was also articulated by the Third Circuit Court of Appeals in another case involving Browning-Ferris, *NLRB v. Browning-Ferris Industries*.

In 2017, however, the NLRB's *Hy-Brand* decision overturned *Browning-Ferris* and reinstituted a more employer-friendly standard. Under *Hy-Brand*, a finding of joint-employer status requires proof that putative joint employer entities have **actually exercised joint control** over essential employment terms, as opposed to merely having reserved the right to exercise control. This control must be *direct* and immediate, and joint employer status will not result from control that is "limited and routine."

The decision to vacate *Hy-Brand* was based in part on a ruling by the NLRB's Designated Agency Ethics Official with the Office of the Inspector General that board member Emanuel should be disqualified from participating in the *Hy-Brand* proceedings because he would have been ethically prohibited from participating in the *Browning-Ferris* case due to the involvement of his former law firm. It is important to note that although Emanuel's former firm was involved in *Browning-Ferris*, the firm did not represent Browning-Ferris, but rather another entity involved in the case.

In vacating *Hy-Brand*, the Board effectively resurrected the *Browning-Ferris* standard as the appropriate test for identifying joint employers. However, a challenge to the *Browning-Ferris* decision remains pending and will now proceed back to the U.S. Court of Appeals for the District of Columbia Circuit.

Emanuel remains an active member of the Board but is completely barred from all proceedings involving the *Browning-Ferris* decision, and as a result, *Hy-Brand* is no longer controlling precedent. In the meantime, the NLRB is also waiting for Congress to confirm John Ring to fill the vacant position on the Board formerly held by Philip A. Miscimarra, whose term ended December 16, 2017. Thus, the Board is currently comprised of only three members who can rule on the *Hy-Brand* issue – Mark Gaston Pearce (Democrat), Lauren McFerran

(Democrat), and Marvin E. Kaplan (Republican). Members Pearce and McFerran dissented in the original *Hy-Brand* decision in December 2017, and they have not indicated that their positions will change. Accordingly, a vote by the current board would likely uphold the *Browning-Ferris* standard for joint employers. Furthermore, even if Mr. Ring is confirmed as a member of the Board, his vote would presumably be in favor of overturning *Browning-Ferris*, resulting in a 2-2 split because of Emanuel's recusal from future decisions on this issue.

The next vacancy on the Board will occur when Pearce's term expires on August 27, 2018. If prior practice is continued, the vacancy will be filled by a Democrat, who would likely support *Browning-Ferris*. Consequently, *Browning-Ferris* will likely remain the prevailing standard on joint employers, absent legislative action on this issue.

What this decision means for the hospitality industry is very simple. If your company hires any employees through a third party, the risk of being considered a joint employer is extreme. After all, indirect control, even if not exercised, puts any company at risk. Even more so, if there is direct control, even under existing law as interpreted by United States Courts of Appeals, the facility could be considered a joint employer.

Recently, McDonald's U.S.A., LLC and the general counsel of the NLRB asked Administrative Law Judge Lauren Esposito to approve a proposed global settlement. Attorneys representing the Fight for $15 Campaign and the Service Employees International Union (SEIU) objected to the deal. The general counsel of the NLRB clarified that the NLRB's withdrawal of *Hy-Brand* had no impact on its decision to pursue a settlement with McDonald's. An attorney representing the charging parties in the case claimed that a settlement "allows McDonald's to bury the entirety of the violations." McDonald's also agreed to the establishment of a $250,000 settlement fund, an amount provided by the franchisees, with a condition that any unused funds be distributed back to the franchisees. Whether Judge Esposito will affirm the settlement is still unclear. However, she has taken the proposed settlement under consideration.

For more information about how this issue may affect your business or related matters, please contact the author, Shayna Giles.