KEY TAKEAWAYS FROM THE NLRB'S FLIP-FLOP ON JOINT EMPLOYMENT STANDARDS

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The National Labor Relation Board's ("NLRB's" or "Board's") standards for determining joint employment are in flux. In *Browning-Ferris Industries*, [1] the Obama-era Board overturned three decades of precedent that limited joint employment for labor law purposes to the relatively rare situation where employers mutually exercised active and direct control over employees. Instead, *Browning-Ferris* held that a joint employment relationship could exist if a company merely **reserved** the right to control workers, regardless of whether it **actually** exercised that right. After changing its composition under President Trump, the Board overturned this controversial decision in *Hy-Brand Industrial Contractors, Ltd*. To the dismay of many in the business community, however, the Board recently vacated *Hy-Brand*, leaving *Browning-Ferris* as the law of the land once again.

This alert explains the events leading to where we are today, offers some predictions about future NLRB joint employment standards, and provides suggestions for how employers might respond while these standards remain in limbo.

THE *BROWNING-FERRIS* AND *HY-BRAND DECISIONS*

Prior to *Browning-Ferris Industries*, the Board relied on decades of precedent to determine when two separate legal entities are deemed to be joint employers. As articulated in two 1984 cases, *TLI, Inc*. [2] and *Laerco Transportation* [3] the Board recognized joint employer status where an entity "meaningfully affects" essential terms of employments, e.g., hiring, firing, discipline, supervision, and direction. In other words, the entity needed to exercise **actual, direct** control over another entity's employees to be deemed a joint employer. Even where an entity had actual control over another entity's employees, it would not be deemed a joint employer if its control was limited and routine. For example, if an entity defined the duties of another entity's employees but failed to specify how those duties should be carried out, the entity would not be deemed a joint employer.

In 2015, the Obama-era Board issued its opinion in *Browning-Ferris Industries*, a controversial opinion that effectively broadened the scope of entities deemed joint employers under the National Labor Relations Act. Under the *Browning-Ferris* standard, even if two entities never exercised joint control over the essential terms and conditions of employment, and any joint control was not direct and immediate, they could still be joint employers based on: (1) the existence of **reserved** joint control, (2) **indirect** control, or (3) control that was limited and routine.

However, fewer than two years later, the newly appointed Trump Board took the first opportunity it was given to overrule *Browning-Ferris* and reinstate the prior standard. In *Hy-Brand Industrial Contractors, Ltd.*, [4] the Board concluded that an entity is a joint employer only if 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) and has done so **directly** and **immediately** (rather than indirectly) in a manner that is not limited and routine. That is, the Board restored the pre-*Browning-Ferris* standard. The Board majority concluded that the reinstated standard adheres to the common law and is supported by the National Labor Relations Act policy of promoting stability and predictability in bargaining relationships.

RECENT DEVELOPMENTS SINCE *HY-BRAND*

The NLRB Inspector General issued a memo on February 9, 2018, to the Board, advising that Board Member William Emanuel should have recused himself from the *Hy-Brand* decision because his prior law firm represented a party in *Browning-Ferris*. The Inspector General found that Emanuel's participation in *Hy-Brand* raised a potential conflict of interest because it was a continuation of the deliberations in *Browning-Ferris*. He concluded that *Hy-Brand* was in effect a "do over" for the *Browning-Ferris* parties. In response, on February 26, 2018, the three other Board members vacated *Hy-Brand* and reinstated *Browning-Ferris*. On March 9, 2018, Hy-Brand filed a motion requesting the Board reconsider its order vacating the decision. Hy-Brand argued that Emanuel should have participated in both *Hy-Brand* and the decision to vacate it. The Board has not yet ruled on that motion.

POTENTIAL CHALLENGES TO *BROWNING-FERRIS*

It appears likely that *Browning-Ferris* will be challenged again in the near future. The NLRB recently asked the D.C. Circuit Court of Appeals to consider whether *Browning-Ferris* should stand. The D.C. Circuit Court had remanded *Browning-Ferris* to the District Court after the NLRB issued its decision in *Hy-Brand*. The NLRB has now asked the D.C. Circuit Court to consider *Browning-Ferris* in light of the NLRB's order vacating *Hy-Brand.* It is unclear whether the D.C. Circuit Court will do so, since it already remanded the case. The NLRB argues that the order vacating *Hy-Brand* provides sufficiently exceptional circumstances warranting the D.C. Circuit Court to once again consider the case.

The Board is also likely to revisit the issue once it has a full complement of five members. The Board currently has two Republican-nominated members (Emanuel and Marvin E. Kaplan) and two Democrat-nominated members (Lauren McFerran and Mark Gaston Pearce). President Trump's nominee for the fifth Board seat, John Ring, is awaiting congressional confirmation. Floor consideration of his nomination is scheduled to take place in the Senate on April 9, 2018. Ring is expected to be confirmed by the Republican-majority Senate. His confirmation would result in a 3-to-2 Republican majority on the Board. However, the Board will need to consider whether Emanuel must be recused from future cases challenging *Browning-Ferris*.

Given this uncertainty, many in the business community support congressional efforts to reinstate the direct-control joint employment test. The Save Local Business Act (H.R. 3441), currently pending in Congress, is intended to limit the scope of joint employment under the National Labor Relations Act and the Fair Labor Standards Act. The bill would define a joint employer as one who exercises (i) direct, immediate, and actual control over workers, rather than control in a limited and routine manner, and (ii) significant control over essential terms and conditions including hiring, discipline, firing, compensation, benefits, supervision, work schedules, and tasks. Although the bill has passed the House and is supported by many in the business community, it may have difficulties advancing in the Senate due to the strong opposition to the bill from labor organizations.

THE IMPACT OF *BROWNING-FERRIS* AND *HY-BRAND*

For now, the Board's broader joint employer test applies. Under that standard, an entity's reservation of rights to exercise control over employees may be sufficient to create joint employer liability, even if the entity does not exercise actual control. Indirect, limited, and routine control may also be sufficient.

If two separate entities are considered joint employers, both entities may be jointly liable for each other's unfair labor practices and breaches of collective bargaining agreements and both may be required to participate in unfair labor practice proceedings before the NLRB. The NLRB may also require both entities to bargain with any union representing their joint employees. A joint employer may also be subject to unwanted union organizing, campaigning, and economic protest activities.

Potential joint employer liability most commonly impacts contractors and subcontractors, companies retaining temporary or leased employees from a labor contractor or staffing agency, joint venturers, parents and subsidiaries, lessors and lessees, and franchisors and franchisees. As noted by the Board in *Hy-Brand*, under the broad *Browning-Ferris* standard, other entities could be considered joint employers in less obvious circumstances including, for example:

- insurance companies that require employers to take certain actions with their employees in order to comply with policy requirements for safety, security, and health;
- banks or other lenders whose financing terms may require certain performance measurements;
- any company that negotiates specific quality or product requirements;
- any company that is concerned about the quality of contracted services;
- any company that grants access to its facilities for a contractor to perform services there and then regulates the contractor's access to the property for the duration of the contract;
- any company that is concerned about the quality of contracted services; or
- consumers or small businesses who dictate times, manner, and some methods of performance of contractors.

RECOMMENDATIONS

Companies should evaluate their contractual relationships, agreements, and policies to confirm whether they raise any concerns regarding unintended joint employment. Since *Browning-Ferris* remains in effect for now, companies would be well-advised to consider its broader joint employer standard when conducting this evaluation. Companies who amended their contracts in light of *Hy-Brand* should consider whether further amendment is appropriate in light of the NLRB's recent flip-flop on this issue.

1. *Review Contracts for Provisions Suggesting Control*

Companies looking to avoid joint employer liability should consider reviewing their contracts to eliminate or reduce provisions that reserve the right to exercise control over workers. When conducting this review, look for provisions providing that a company:

- is responsible for deciding or will help decide key employment terms such as wages, benefits, or hours;

- provides detailed pre-hiring qualifications and standards;
- will decide or reserves the right to decide work loads and how work will be performed;
- is responsible for or will participate in hiring, training, disciplining, supervising, directing, and terminating employees;
- will dictate how many workers will be supplied to perform the work;
- is responsible for supervising and directing employees;
- will evaluate workers' performance; and
- requires workers to comply with the company's personnel policies and procedures.

In some circumstances, it may not be practical to eliminate such provisions entirely. But efforts to minimize such provisions in written agreements will help bolster arguments that a company is not a joint employer.

2. *Consider Adding Contractual Provisions That Will Help Mitigate the Risk of Joint Employment*

Companies should also consider incorporating additional provisions in their agreements that allocate risks among the parties. For example, robust contractual representations and warranties, particularly coupled with a broad indemnity provision, can be helpful in mitigating risk of exposure to claims by another party's employees. Representations and warranties can require another party to avoid committing unfair labor practices and otherwise comply with applicable labor and employment laws, implement policies to ensure compliance with applicable law, preserve required personnel records, and maintain licenses and insurance. In addition, an indemnity clause can require another contracting party to pay for any loss or claim attributable to its own acts or omissions, including unfair labor practices, and to provide or pay for the cost of a defense for any such claims.

Companies might also consider including an audit provision in contracts to preserve the right to access personnel and other documents to ensure another party's compliance with an agreement's requirements and applicable law. Some contracting parties also include a cooperation clause that requires parties to inform each other of any litigation or claims related to their workers and to cooperate with each other to resolve any such claims.

3. *Evaluate the Relationship*

Companies should evaluate their relationships, and their policies and procedures, to confirm whether they are exercising actual control over workers and whether reasonable measures can be implemented to reduce or delegate this control. It's not enough to have a well-written contract. Companies must ensure that they follow through with what their contracts say.

When conducting this review, companies should keep in mind that different joint employer tests apply depending on who is examining this issue and for what purposes. For example, variations of the test apply with respect to wage and hour, third-party personal injury, leave of absence, and equal employment opportunity claims.

K&L Gates will continue to monitor and report on this issue as new developments unfold. In the meantime, we recommend that companies with the types of contractual relationships described above consult with counsel to evaluate the structure of their contractual relationships and determine whether amendments to their agreements are necessary to reduce the risk of potential joint employer liability.

[1] 362 NLRB No. 186 (2015).

[2] 271 NLRB 798 (1984).

[3] 269 NLRB 324 (1984).

[4] 365 NLRB No. 156 (2017).

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