

NLRB RETURNS TO MORE DEMANDING JOINT EMPLOYER STANDARD

In yet another blow to workers' rights, on December 14, 2017 the National Labor Relations Board ("NLRB") issued its 3-2 decision in *Hy-Brand Industrial Contractors*, in which the Board overturned the joint employer standard created in the 2015 case of *Browning-Ferris Industries* and reverted to a more demanding test to determine whether two business entities jointly employ workers.

Under the *Browning-Ferris* joint employer standard, two companies could be held to be joint employers even where one company had not directly exercised control over the essential terms of employment for employees of a second company, as long as the first company had reserved the *right* to exercise that control, through a franchise contract or other agreement. The *Browning-Ferris* decision opened the door to finding joint employer status in new situations, such as franchisor-franchisee relationships, where the national franchisor may have set general guidelines for the business of its franchisees but did not directly control day-to-day employment decisions. This was important because it allowed the NLRB to hold parent corporations responsible for the unlawful actions of their subsidiaries or franchisees, and it created the potential for requiring these parent companies to bargain with unions over the terms of employment over which they had control.

The Board's decision in *Hy-Brand* returned to the previous, more demanding joint employer standard. Now, in order to establish joint employer status, there must be proof that one company has exercised control over the essential terms of another company's employees, rather than simply reserving the right to exercise that control. Additionally, there must be evidence that the company has exercised control over the other company's employees directly, rather than indirectly, in a manner that is not limited and routine.

The NLRB's decision was joined by Board Chairman Philip A. Miscimarra and Members Marvin E. Kaplan and William J. Emanuel, both Trump appointees. Members Mark Gaston Pearce and Lauren McFerran, both Obama appointees, dissented from the majority's opinion. This decision is yet another attack on the expansion of workers' rights that had taken place under the Obama Board. However, it should be noted that a Board case currently pending against fast food giant McDonald's was not ended by the decision in *Hy-Brand*. In the *McDonald's* litigation, the previous General Counsel had argued that McDonald's should be held liable as a joint employer for labor law violations against employees at franchised restaurants under both the *Browning-Ferris* standard and under the more demanding standard now embraced by the Board. Thus, that case will move forward applying the *Hy-Brand* joint employer standard.

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Dated: December 20, 2017

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