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NLRB WILL NOT RECONSIDER VACATED *HY-BRAND* DECISION ON JOINT EMPLOYER STANDARD, WILL SEEK TO CHANGE STANDARD BY REGULATION INSTEAD

On June 6, 2018, the National Labor Relations Board ("NLRB") issued an order denying a motion to reconsider its February 2018 order vacating the Board's decision in *Hy-Brand Industrial Contractors,* 365 NLRB No. 156. The original *Hy-Brand* decision, issued on December 14, 2017, had changed the test applied by the Board to determine whether two business entities are considered joint employers, making it more difficult for workers to prove joint employer status. However, that decision was vacated due to concerns that Board Member William J. Emanuel had violated ethics rules by participating in *Hy-Brand*. Board Chairman John Ring has stated that the NLRB will instead attempt to change the standard through the rulemaking process.

Prior to 2015, two employers would be found to be "joint employers" under the National Labor Relations Act ("NLRA") only when the two companies exerted such "direct and immediate" control over the same group of employees that the two entities shared or co-determined matters related to the essential terms and conditions of employment for those employees. In finding a company to be the joint employer of another company's employees, the Board generally required that the control exercised by the putative employer must be actual, direct, and substantial.

However, on August 27, 2015, the Obama Board adopted a new joint employer standard in the case of *Browning-Ferris Industries*, 362 NLRB No. 186. Under the *Browning-Ferris* standard, "[t]he Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." This determination could be based on the actual or *potential* authority to exercise control, directly or indirectly, over the other entities' employees, regardless of whether the putative joint employer ever actually exercised that authority. Thus, a company which reserved the right to hire, fire, discipline, or otherwise control another companies' employees in a contract – such as a franchise agreement or a staffing contract – could be liable for unfair labor practices by the other company and could be required to participate, to some extent, in collective bargaining with the employees' representative. Labor advocates considered this less demanding standard an important step toward holding employers responsible for their labor policies and practices in a modern economy that involves franchise agreements and other relationships through which one company indirectly controls another company's workers.

Just two years later, in its *Hy-Brand* decision, the Trump Board overruled *Browning-Ferris* and returned to a more demanding test, requiring a showing that the putative joint employer had direct control over the employees, and that the putative employer actually exercised that control in a manner that that was neither indirect nor "limited and routine." Member Emanuel, who was appointed to the Board in September 2017, participated in the *Hy-Brand* decision, despite conflict-of-interest concerns based on his previous law firm Littler Mendelson's representation of one of the employers in *Browning-Ferris*, which *Hy-Brand* overruled. On February 9, 2017, the Board's Inspector General issued a report concluding that Member Emanuel is, and should have been, disqualified from participating in the *Hy-Brand* proceedings. Accordingly, on February 26, 2018, the full Board, without the participation of Member Emanuel, vacated *Hy-Brand*, thereby returning to the *Browning-Ferris* joint employer test.

On June 6, 2018, the Board indicated that it will not reconsider its decision to vacate *Hy-Brand*. Instead, Chairman Ring stated that the Board would seek to return to the more demanding joint employer standard through the regulatory rulemaking process, which would require public notice and a period of comments before a final rule could be adopted. Chairman Ring stated that the Board planned to have a proposed rule published by the end of summer. However, Board Member Mark Gaston Pearce, who was previously the Chairman of the

Obama Board, criticized Chairman Ring's decision to pursue a new joint employer rule. Member Pearce suggested that Chairman Ring has already prejudged what the new rule should be, which entirely undermines the purpose of investigating and comment-gathering before publishing a new rule. Member Pearce argued that the Board's proposed use of rulemaking to change the joint employer standard again – for the fourth time since 2015 – would only create even greater uncertainty for employers and workers.

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