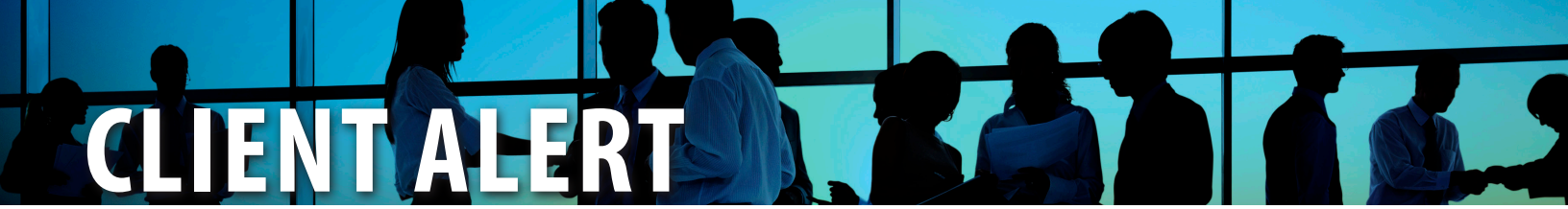

CLIENT ALERT

LABOR & EMPLOYMENT

ONE MINUTE YOU'RE IN, THE NEXT, YOU'RE OUT: NLRB VACATES THE SHORT-LIVED HY-BRAND DECISION AND REINSTATES THE BROWNING-FERRIS' JOINT EMPLOYER STANDARD

by Sara H. Jodka

As we reported just last December, the National Labor Relations Board (NLRB or Board), issued Hy-Brand Industrial Contractors Ltd. and Brandt Construction Co., which overturned the 2015 Browning-Ferris Industries case that vastly expanded the definition of joint employer. Specifically, the Browning-Ferris case held that a company and its contractors or franchisees could be a single-joint employer and liable as such, even if the company had not exerted overt control over the employees' terms and conditions.

For a brief two-month period, employers were happy to have Browning-Ferris' standard vacated. That relief, however, was short-lived because this week the NLRB unanimously vacated Hy-Brand because of a very unusual finding in an inspector general report faulting board member Bill Emanuel for improperly participating in the Hy-Brand decision in violation of ethics standards.

Practically speaking, vacating Hy-Brand means that the Browning-Ferris joint employer standard is back, at least for now. This means that the "joint employer" test is once again the "indirect control" or "ability to exert such control" standard, which ditches the far more employer-friendly "direct and immediate" control standard of Hy-Brand.

Browning-Ferris was an Obama administration decision. So while labor unions and workers will welcome the reinstatement of Browning-Ferris, the enjoyment is likely to be short lived as the decision is unlikely to hold for long. The best case scenario for Browning-Ferris supporters is to delay the NLRB from scrapping the indirect control standard with a new ruling in Hy-Brand or another joint employer-issue case. The Trump administration NLRB is unlikely to let Browning-Ferris stand and will likely use its first opportunity to overturn Browning-Ferris and return to the direct and immediate control standard that Browning-Ferris did away with. This also puts more pressure on Congress to pass the Save Local Business Act, which would amend the National Labor Relations Act to establish a direct control standard for joint employers and take the issue out of the hands of the Board, which tends to sway on the issue depending on the controlling political party.

The decision is a technicality, but the NLRB is used to technicalities and technical rulings still have to play out. Recall the 2014 *National Labor Relations Board v. Noel Canning* case in which the United States Supreme Court unanimously ruled that President Obama's recess appointments of three members to the NLRB were improper and all decisions decided by the NLRB that included those three recess appointees had to be reviewed due to a lack of required quorum.

With the NLRB's move vacating Hy-Brand, the joint employer debate will continue, and it will continue to be a very closely watched issue for unions, workers, and employers, especially those in the staffing and franchise industries and those with worker contract relationships.

So stay tuned because as this case demonstrates things change like the tide. One minute you're in, the next, you're out. Goodbye Hy-Brand, at least for now.

FOR MORE INFORMATION CONTACT:

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