

Insights, News & Events

BACK TO SQUARE ONE: NLRB REVERTS TO UNWORKABLE JOINT-EMPLOYER TEST – FOR NOW

Insights
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In what employers are sure to hope is just a temporary—but stinging—setback, the National Labor Relations Board today vacated its December ruling that had freed employers from having to deal with an unworkable and expansive legal test for determining whether an entity was considered a joint employers. Because of allegations that one of the three-member majority was ethically compromised due to his former law firm's involvement in a related case, the Board decided that it would pull the new legal test and instead revert to the troubling and controversial standard that had been in place since August 2015. What do employers need to know about this development?

QUICK RECAP: WHERE WERE WE?

For 30 years, the National Labor Relations Board (NLRB) had held that two companies would only be considered joint employers if they share or codetermine those matters governing the essential terms and conditions of employment. Under this standard, an employer would only be held to be jointly employing workers if they *actually exercised* the right to control. Moreover, under this standard, the exercise of such control must have been direct, immediate, and not limited and routine.

However, the Board renounced this joint-employer test in [a controversial August 2015 ruling](#) against Browning-Ferris Industries, eliminating the requirement that the employer actually exercise control. Instead, the NLRB decided that businesses need only retain the contractual right to control

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to be considered a joint employer—even if it has never exercised it. Further, the Board rejected the direct, immediate, and not limited and routine criteria, holding instead that indirect control (e.g., control through an intermediary) would be sufficient to find joint employment.

WHAT HAPPENED?

In December 2017, the Board effectively overturned *Browning-Ferris* in [the *Hy-Brand Industrial Contractors, Ltd.* case](#), reverting to the old standard. One of the new Board members that decided that case was William Emanuel, who was confirmed by the Senate and formally assumed a role on the NLRB in September 2017. Prior to joining the Board, Emanuel worked for an employer-side private law firm that happened to have represented one of the companies in the pivotal *Browning-Ferris* case from 2015.

Once his prior law firm's involvement became apparent, a group of Congressional Democrats sought clarification from Emanuel about the situation. He said that he did not believe he had needed to recuse himself from the case because the connection between his former law firm and the case at issue was too remote. However, this did not stop Senate Democrats from putting pressure on the Board to take action and wipe the *Hy-Brand* decision from the books.

Late today, the NLRB bowed to that pressure. It issued a simple order vacating the decision “in light of the determination by the Board’s Designated Agency Ethics Official that Member Emanuel is, and should have been, disqualified from participating in this proceeding.” It concluded that the legal standard re-adopted by the *Hy-Brand* case was now without force or effect, meaning that the *Browning-Ferris* standard is once again law of the land.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Today’s order means we’re once again living in a world where the *Browning-Ferris* standard controls. Employers need not actually exercise control over third-party employees in order to be deemed their joint employer. Instead, the business need only retain the contractual right to control, even if it never exercises it. Further, even indirect control (e.g., control through an intermediary) is now sufficient for such a finding. Moreover, the resurrected standard includes control over any term or condition of

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employment and is not limited to an exclusive list of factors.

Given that the Board breathed new life into the *Browning-Ferris* standard, any employer that retains the right to impose even indirect control over the working conditions of temporarily placed employees runs a serious risk of being deemed their joint employer—not only for bargaining purposes, but potentially for unfair labor practice liability as well. We'd expect unions to consider targeting temporary employees with promises of "regular" status and all the perceived perks that come with it in an effort to secure their signatures, and ultimately their votes, for organizing benefits.

How long with this last? It is hard to say. The NLRB should probably once again regain a five-member panel in the very near future, as the Senate is currently scheduled to vote on the Trump nominee John Ring on March 7. Assuming Ring is confirmed, the Board will once again have a three-member majority appointed by President Trump and will be free to continue its efforts of restoring balance to the nation's labor law. The Board may very well attempt to identify a joint employment case that is not tainted by Emanuel's prior law firm relationship that will serve as the vehicle by which to once again scrap the unworkable standard.

It is also possible that Emanuel's name will be cleared by the pending investigation into his role in the case, or that a federal appeals court will take matters into its own hands and overturn the *Browning-Ferris* case. If either occurs, the *Hy-Brand* standard will be effectively restored.

WHAT NOW?

Unfortunately, as a result of today's order, employers and temporary service providers alike need to once again scrutinize the parameters within their written service agreements and their underlying practices for reference to right to control. This includes an analysis of pre-employment qualification and hiring standards, assignment and retention of individual temporary employees, shift schedules, workload and pace of work, and wages and benefits.

No doubt that the complete elimination of many of these factors may be impractical in many cases. But to the extent that their presence can be minimized, the parties can at

least develop and preserve viable arguments against imposition of joint employer status.

We will continue to monitor the situation and provide updates as the long-running saga unfolds.

For more information, contact any member of our [Labor Relations Practice Group](#) or your regular Fisher & Phillips attorney.

This Legal Alert provides an overview of a specific federal NLRB order. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.