Insights: Alerts

NLRB Reverts to a Broad Test for Determining Joint-Employer Status – At Least, for Now

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In a December 18, 2017 Legal Alert, we reported on the National Labor Relations Board's *Hy-Brand Industrial Contractors, Ltd.* decision. That decision overruled a broad test for determining joint-employer status under the National Labor Relations Act that had been adopted in the Board's 2015 ruling in *Browning-Ferris Industries*. The *Hy-Brand* decision replaced the *Browning-Ferris* test with a more stringent test requiring that an employer actually exert direct and immediate control over "essential" employment terms of another employer's employees to be deemed the joint employer of those employees.

The *Hy-Brand* decision quickly became the subject of controversy, however, because one of the Board members who had voted in favor of overturning *Browning-Ferris*, William Emanuel, had worked for a law firm that was directly involved in the *Browning-Ferris* case before he was appointed to the Board last year. Earlier this month, the Board's Inspector General issued a report concluding that Member Emanuel should not have taken part in the *Hy-Brand* decision. In the wake of that report, the Board announced on February 26, 2018, that it was vacating the *Hy-Brand* decision. This means that the decision no longer has any legal effect. As a result, the *Browning-Ferris* test for joint-employer status, which allows an employer to be found to be the joint employer of another employer's employees if it has "indirect control" or the mere contractual right to exercise control over those employees, is, for the time being at least, the binding standard for determining joint-employer status under the National Labor Relations Act.
By vacating the *Hy-Brand* decision, the Board is not foreclosing the possibility that it will re-adopt the *Hy-Brand* test for determining joint-employer status in a future decision. At the moment, however, the normally five-member Board has only four members, and they are evenly split between Democrat appointees and Republican appointees. Until a fifth member of the Board is confirmed by the Senate and the Board can reconsider the joint-employer issue, the broad test for joint-employer status announced in *Browning-Ferris* is likely to remain controlling under the National Labor Relations Act.

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