National Labour Relations Board vacates joint employer ruling and reverts to *Browning-Ferris* standard

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Case overview

On February 26 2018 the National Labour Relations Board (NLRB) changed its joint-employer standard for the second time in the past three months, returning to the standard set in its 2015 decision in *Browning-Ferris Industries*.(1) After the NLRB voted three-to-two in December 2017 along party lines to overturn *Browning-Ferris* in *Hy-Brand Industrial Contractors Ltd*,(2) the NLRB vacated *Hy-Brand* after the its inspector general determined that board member William Emanuel should have recused himself from the decision. *Hy-Brand* had resurrected a longstanding narrower standard for joint-employer liability under which only those employers that exercised "direct and immediate" control over essential employment terms would be considered joint employers. By reinstating *Browning-Ferris*, the current NLRB standard is that a joint-employer relationship exists whenever "two or more entities... share or codetermine those matters governing the essential terms and conditions of employment". That is, an employer is a joint employer if it can control the terms and conditions of employment (or has any input in those decisions), regardless of actual control.

Impact

The NLRB's reinstatement of a controversial Obama-era standard of broader joint-employer liability, which many saw as a setback to the franchisor/franchisee business model, has caused concern among the many companies that use staffing services or outsourcing arrangements. Given the NLRB's recent action, employers should once again look closely at the National Labour Relations Act and union implications of any franchisor, staffing agency or outsourcing agreements that they are considering entering into and continue to closely monitor further developments in the joint-employer area, both at the NLRB and under other employment laws.

Continued monitoring

Employers should also continue to monitor these cases. When *Hy-Brand* was decided, *Browning-Ferris* was on appeal to the DC Circuit. Following *Hy-Brand*, the DC Circuit remanded *Browning-Ferris* to the NLRB for further proceedings under the new standard. However, after *Hy-Brand* was vacated, the NLRB asked the DC Circuit to restore the appeal, which had been fully briefed and argued, to the court's docket. The motion to restore the appeal is currently pending. If the DC Circuit does restore the *Browning-Ferris* appeal, there may be further development in this dynamic area.

For further information on this topic please contact Ruth Zadikany or Grant T Miller at Mayer Brown LLP's Los Angeles office by telephone (+1 213 229 9500) or email (rzadikany@mayerbrown.com or gtmiller@mayerbrown.com). Alternatively, contact Richard E Nowak at Mayer Brown LLP's Chicago office by telephone (+1 312 782 0600) or email (rnowak@mayerbrown.com). The Mayer Brown LLP website can be accessed at www.mayerbrown.com.

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Endnotes

(1) 362 NLRB 186 (2015).

(2) 365 NLRB 156 (2017).
