Board Vacates Hy-Brand – puts Browning-Ferris Joint Employment Standard Back in Play

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The National Labor Relations Board (NLRB) announced yesterday that it was vacating its December 14, 2017, ruling in *Hy-Brand Industrial Contractors, Ltd*, that overturned the Board's 2015 decision in *Browning Ferris*. Employers will remember that under *Browning-Ferris*, entities could be considered "joint employers" for purposes of federal labor law, including collective bargaining and unfair labor practices, based only on "indirect control" of another entity's employees. *Hy-Brand* was the Board's effort to restore the joint employer standard to the pre-*Browning-Ferris* standard of "direct control."

While employers nationwide cheered the *Hy-Brand* decision, in a February 9, 2018, report to the Board, the NLRB Inspector General opined that Board Member William Emanuel, a Trump appointee to the board, "should have been recused from participation in *Hy-Brand*" due to potential conflicts of interest. Emanuel's former law firm had represented one of the entities in *Browning-Ferris*. The Inspector General argued that because the ruling in *Hy-Brand* incorporated elements from the dissent in *Browning-Ferris* "the Board's deliberation in *Hy-Brand*, for all intents and purposes, was a continuation of the Board's deliberative process in *Browning-Ferris*."

The vacation of *Hy-Brand* could result in the *Browning-Ferris* standard controlling for the foreseeable future. The Board is currently split 2-2 between Republican and Democratic appointees. While President Trump has nominated business lawyer John Ring to fill the fifth seat, even if Ring is confirmed by the Senate, Emanuel may face future pressure to recuse himself in any case that could overturn *Browning-Ferris*, which would leave the Board potentially deadlocked.

In the meantime, companies may once again find themselves potentially liable for federal labor law violations or obligations in situations in which the companies had no direct control. Industries particularly susceptible to *Browning-Ferris* claims of joint employer status include franchises, staffing agencies, and employers utilizing temporary employees.

If you have any questions regarding the NLRB's recent decision. please contact Catherine Burgett or any other attorney in Frost Brown Todd's Labor and Employment Practice Group.