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A Hail Mary? Union Fights To Keep NLRB Joint-Employer Case In Federal Court

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On Jan. 4, the Teamsters union filed a motion with the U.S. Court of Appeals for the D.C. Circuit in the infamous *Browning-Ferris* case requesting that the court reconsider its Dec. 22 order that remanded the case back to the NLRB. The reason? The Teamsters argue that one of the new NLRB members' law firms was involved in the related *Browning-Ferris* case. The case was on appeal to the court from the NLRB. In its August 2015 *Browning-Ferris* decision, the NLRB stated that it would no longer require that a company actually exercise control over a workforce's terms and conditions of employment in order to be deemed a "joint employer"; rather, "reserved" or "indirect" (i.e., potential) control was sufficient. The decision had huge implications for companies with contingent workforces and also those using franchise business models, and gave rise to much concern in the business community. On Dec. 14, however, the NLRB overruled the *Browning-Ferris* decision and announced in its *Hy-brand Industrial Contractors* case that the agency again would require actual control before imposing joint-employment status on two or more companies. After the NLRB issued its decision in *Hy-brand Industrial Contractors,* the D.C. Circuit issued the order remanding the *Browning-Ferris* case back to the agency. The Teamsters argue that one of the new NLRB members who rendered the *Hy-brand Industrial Contractors* decision – William Emanuel – should have recused himself from presiding over the case because his former law firm represented one of the parties in *Browning-Ferris*. Seems like a potential Hail Mary, given there is no allegation of any actual or apparent conflict in the *Hy-brand Industrial Contractors* case – the case over which Emanuel actually did preside with his fellow members. We'll see what the court decides to do with the motion.

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