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Do Over? NLRB May Have To Revisit Its Stance On Joint-Employers Due To Alleged Conflict

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On Dec. 14, 2017, the National Labor Relations Board (NLRB) made headlines and pacified many concerned members of the business community when it overruled its infamous 2015 *Browning-Ferris* decision – a decision that made it significantly easier for two or more companies to be found "joint-employers" under the National Labor Relations Act. The board did so in a case involving the company Hy-Brand Industrial Contractors Ltd. That victory for employers may be short lived, at least if the NLRB's Inspector General gets his way.

Both *Law360* and *Bloomberg BNA* are reporting that the agency's Inspector General has just issued a report finding that current NLRB member William Emanuel should have recused himself from the *Hy-Brand* case on grounds that his former law firm (not him personally) was involved with the *Browning-Ferris* case – a wholly separate matter. The report is interesting in light of the fact that former NLRB member Craig Becker (an appointee of President Obama) routinely adjudicated cases involving the SEIU union – a union for whom he was general counsel immediately before joining the board. The report also follows a filing last month by the Teamsters in federal court related to the *Browning-Ferris* case that raised similar arguments.

To the extent the *Hy-Brand* ruling is rolled back, it would be a huge loss for employers. 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. It gave rise to much concern in the business community because a finding of joint-employment can have significant consequences, such as joint liability for another company's unfair labor practices. The *Hy-Brand* case reinstated the requirement of direct control as a precondition to imposing joint-employment. Based on the reports, the NLRB is evaluating the issue further. Stay tuned to see how this one plays out.

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