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Oh No! It's Back: NLRB's Browning-Ferris Decision Reinstated

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In a huge development, on Feb. 26, 2018, the National Labor Relations Board (NLRB) announced that it is reinstating its infamous 2015 *Browning-Ferris* decision regarding "joint-employers" under the National Labor Relations Act (NLRA).

The NLRB made headlines at the end of last year when it overruled *Browning-Ferris* – a decision that made it significantly easier for two or more companies to be found "joint-employers." The board did so in a case involving the company Hy-Brand Industrial Contractors Ltd.

Earlier this month, however, the NLRB's Inspector General has 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 was involved with the *Browning-Ferris* case – a wholly separate matter but involving the same legal issues and potentially impacting the *Browning-Ferris* case that was on appeal in federal court. The agency's press release states: "The National Labor Relations Board (3-0, Member Emanuel did not participate) today issued an Order vacating the Board's decision in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017), in light of the determination by the Board's Designated Agency Ethics Official that Member Emanuel is, and should have been, disqualified from participating in this proceeding.

Because the Board's Decision and Order in *Hy-Brand* has been vacated, the

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overruling of the Board's decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), set forth therein is of no force or effect." Accordingly, the *Browning-Ferris standard is back*.

In *Browning-Ferris*, the NLRB held that it no longer requires 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 is sufficient. That standard has potentially wide-reaching effects on many businesses, including those using staffing companies and franchisor-franchisee models. When found to be joint-employers, two or more companies may be forced to share in unfair labor practice liability and suffer other consequences under the NLRA. It is possible the NLRB may revisit this issue yet again in the future. Stay tuned.