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Employment Practices Liability

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NLRB Reverses Joint Employer Standard

By Frederick L. Warren, Partner; and Henry F. Warnock, Counsel; FordHarrison

Executive Summary: The National Labor Relations Board ("NLRB" or "Board") has reversed the controversial joint employer standard created by the Obama Board in the *Browning-Ferris Industries of California, Inc.* ("*BFI*") decision, restoring the traditional joint employer test that was in place for decades prior to *BFI*. On December 14, 2017, the NLRB issued its decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017) ("*Hy-Brand*") in which a 3-2 majority overturned the controversial *BFI* decision.

BFI

On August 27, 2015, the Board issued its decision in *BFI*. In that decision, the Board set forth a new standard to determine whether a joint-employment relationship existed. Under that standard, a joint-employer relationship will be found if the alleged joint-employers possess, exercise or **simply retain** the right, directly or **indirectly**, to control essential terms and conditions of employment, even if that control is not exercised.

Hy-Brand

In *Hy-Brand*, the Board reversed its decision in *BFI* and restored the joint-employment standard used by the Board for determining joint-employment for decades prior to *BFI*. Under the *Hy-Brand* standard, an entity is a joint employer only where it has actually exercised "**direct** and **immediate**" control over the essential terms and conditions of employment of the other entity's employees, such as hiring, discipline, termination, suspension and direction. A critical difference between the *BFI* and *Hy-Brand* standards is "the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."

The Board criticized *BFI* as a "distortion of common law," "ill-advised as a matter of policy," and stated that its application prevents "stability in labor-management relations." By restoring the "direct and immediate" control standard in place prior to *BFI,* the Board noted that "we return today to a standard that has served labor law and collective bargaining well, a standard that is understandable and rooted in the real world. It recognizes joint-employer status in circumstances that make sense and would foster stable bargaining relationships."

Effect on Employers

Overturning *BFI* is welcome news for employers. The *BFI* decision had created uncertainty in all sorts of standard business agreements between independent companies, including, "user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships" under the NLRA. Specifically, under the *BFI* standard, companies had to scrutinize their contracts with third parties (often drafted well before the *BFI* decision) to determine whether the terms provided that a company **retained** the right to control terms and conditions of employment – even if the company had never exercised that right in any way. If so, that entity could be a "joint employer" and, therefore, subjected to all of the responsibilities bestowed upon employers (such as an obligation to bargain, provide restitution for unfair labor practices caused by a "joint employer," etc.).

Hy-Brand is particularly important for the franchisor-franchisee relationship. As the Board noted, there are 750,000 franchise establishments and those businesses account for approximately 3.4 percent of America's gross domestic product. The Board stated that "in many if not most instances, franchisor operational control has nothing to do with labor policy but rather compliance with federal statutory requirements to maintain trademark protections." Further, "even though franchise law requires some degree of oversight or control by the franchisor over the franchisees, it was never the intent of Congress to make franchisors joint employers of their franchisees' employees." Under *Hy-Brand*, it is significantly less likely that the typical franchisor-franchisee relationship will result in such entities being considered joint employers.

Bottom Line: Most labor law experts anticipated that the Trump Board would overturn *BFI* eventually but not so quickly. NLRB Chairman Miscimarra's term will end on December 16, 2017, after which time it could take months for the Trump administration to appoint another member. In the meantime, the Board will have two Democrats and two Republicans. It appears that the Board took advantage of the brief time that there was a 3-2 Republican majority to overturn the *BFI* test, which was a major concern to the business community.

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cirmahotline@fordharrison.com
