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NLRB Vacates Pro-Corporation Ruling in Joint Employer Case

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A Trump-appointee's conflict of interest has resulted in a blow to U.S. corporations, including franchisors.

As we previously posted on our Franchise Lawyer blog, the National Labor Relations' Board narrowed the definition of a joint employer, in a 3-2 decision, in the *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.* case. In *Hy-Brand*, the NLRB held that two or more entities will be deemed joint employers if one party exercises control over essential employment terms of another entity's employees. The decision overruled the Obama-era 2015 *Browning Ferris Industries* case, which had expanded the definition of a 'joint employer' and left corporations subject to increased liabilities.

The *Hy-Brand* decision was celebrated by Franchisors, as it limited their liability for the actions of their franchisees.

Now, the NLRB has thrown out the *Hy-Brand* decision, following an internal agency report that found a potential conflict of interest had tainted the vote. Trump-appointed William Emanuel, whose former law firm had represented a corporation in the *Browning Ferris* case, voted in the *Hy-Brand* decision to overturn *Browning Ferris*. Accordingly, the NLRB has thrown out what has been widely regarded as its "most important ruling of 2017."

It is unclear what the implications of the ruling will be in the long run for Franchisors, but for now, there appears to be a return to the *Browning Ferris* standard, meaning an increased risk of joint employer liability. Those representing corporate interests are now urging the Senate to take up the Save Local Business Act, which also narrowed the definition of a 'joint employer.' As we previously noted in our blog, the Save Local Business Act was passed by the U.S. House of Representatives in November 2017.