The NLRB Recusal Standard: How Will *Hy-Brand*, The Inspector General, and a Federal Regulation Affect Employees and Employers?

By Gary Enis and Sara Hamilton

Despite years of litigation, the joint employer standard and other far-reaching decisions of the National Labor Relations Board ("Board") may be in limbo yet again, but not because of the newfound Republican-majority Board. Though holdings of the five-member Board often shift with the Board's composition, this time a federal ethics regulation is poised to create uncertainty in federal labor law. What is the current controversy and how will it affect employers?

Bench Brief: *Hy-Brand Industrial Contractors, Ltd.*

The current controversy began with *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (2017). In *Hy-Brand*, the Board voted 3-2 to overrule *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), a seminal case in which the Obama-era Board adopted a new joint employer standard. Describing *Browning-Ferris* as a "distortion of common law," the Board in *Hy-Brand* returned to the pre-*Browning-Ferris* joint employer standard, which many argued was more management-friendly. Thus, *Hy-Brand* was considered a favorable case for employers.

However, on February 26, 2018, the Board vacated *Hy-Brand* because it determined that Board Member William Emanuel, a Trump appointee, should have recused himself for having an alleged conflict of interest. With Member Emanuel's vote removed, *Hy-Brand* became a 2-2 tie thus reinstating *Browning-Ferris* as the applicable joint employer standard.

Executive Order 13770: What Does "particular matter involving specific parties" Mean, Exactly?

The Board's decision to vacate *Hy-Brand* was based on a February 9, 2018 Memorandum by the Board's Inspector General, David P. Berry, in which he raised a "serious and flagrant problem" with Member Emanuel's participation in the *Hy-Brand* case. Instead, he found, Member Emanuel should have recused himself pursuant to Executive Order 13770 (Jan. 28, 2017).

Executive Order 13770, intended to be an ethics pledge, contractually forbids Trump appointees in their new roles from participating in "any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients" during the first two years of service. Executive Order 13770, at ¶ 6. Because Member Emanuel's former law firm represented Leadpoint, a party in *Browning-Ferris*, he should have recused himself from *Hy-Brand*, reasoned the Memorandum.

The Inspector General's interpretation of the recusal standard in Executive Order 13770 is notable for legal and political reasons.

First, to reach his conclusion, the Inspector General broadly interpreted the term "particular matter involving specific parties." The Executive Order adopted a definition contained in 5 CFR § 2641.201 for the term "particular matter involving specific parties." Under this regulation, two matters can be considered the same matter based on a review of factors "including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed." 5 CFR § 2641(h)(5).

Though *Browning-Ferris* and *Hy-Brand* both shared a common issue—the joint employer standard—they were decided two years apart, by different Boards having two different members, and involved different parties, facts and confidential information. Despite these differences, the Inspector General found that the two cases could not be separated because the *Browning-Ferris* dissent became the *Hy-Brand* majority decision. Accordingly, *Browning-Ferris* was sufficiently central to *Hy-Brand*'s deliberative process to constitute a "particular matter involving specific parties." And, because the cases were considered the same matter, Member Emanuel should have recused himself from *Hy-Brand* because his former law firm, Littler Mendelson, had represented Leadpoint, a party in the *Browning-Ferris*.

Second, the Inspector General's broad interpretation of the recusal standard had some claiming that he applied a double standard. The application of 5 CFR § 2641.201 to ethically bind political appointees actually originated with President Obama, who first incorporated the regulation in a similar ethics pledge, Executive Order 13490 (Jan. 21, 2009). In 2010, Obama-appointed Board Member Craig Becker refused to recuse himself from a dozen cases involving local chapters of the SEIU, for which he served as associate general counsel prior to his appointment to the Board. With Member Becker, however, Inspector General Berry found no ethical violation.

Two of the Trump-appointed Board Members came from law firms with over 1,000 lawyers, meaning the potential number of cases requiring recusal could be large.

The Board's Recusal Standard: Where Does That Leave The Board?

The Inspector General's broad application of President Trump's Executive Order 13770 means that the Trump-appointed Board Members could be required to recuse themselves simply because their law firms worked on or participated in prior cases before the Board, even if the Member was not personally involved in the particular case. Two of the Trump-appointed Board Members came from law firms with over 1,000 lawyers, meaning the potential number of cases requiring recusal could be large.

Practically speaking, if just one of the three Trump-appointed Members recuses himself, then the Board is unlikely to obtain a

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three-member majority, which is significant because Republican-appointed Members now constitute a 3-2 majority for the first time since 2007. As *Hy-Brand* has demonstrated, the Board has recently begun revisiting Obama-era cases and otherwise issuing new decisions. Parties are attempting to use the recusal standard both to prevent revisions to the Board's jurisprudence and to overturn decisions that it perceives to be unfavorable.

For instance, a challenge was recently lodged against Member Emanuel in *Boeing Company,* 365 NLRB No. 154 (2017), which overturned *Lutheran Heritage Village-Livonia*, 343 NLRB No. 646 (2004), a case relating to employer work rules. Following the Board's decision in the *Boeing Company*, International Union of Painters and Allied Trades filed a motion requesting the Board to vacate its decision. Its basis for doing so? Member Emanuel allegedly should have recused himself because his former law firm previously represented Boeing in unrelated matters. While the Board has yet to decide whether to vacate, the use of the recusal standard to challenge *Boeing Company* highlights the uncertainty that will likely continue in the future.

Finally, the recusal standard, if applied prospectively to undecided cases could also have substantial implications. The Board is set to hear a wide variety cases that could shape federal labor law for the years to come. The docket includes *Velox Express, Inc.*, in which the Board will consider whether misclassification of employees as independent contractors violates the National Labor Relations Act. The docket also includes *Newmark Grubb Knight Frank*, a case challenging the Board's 2014 ruling in *Purple Communications, Inc.*, in which the Board held that employees have the right to use their employer's email system for union organizing purposes.

Conclusion: Time Will Tell

As presently applied, the recusal standard has potentially far-reaching consequences for Trump-appointed Board Members, particularly Members Emanuel and Ring, who came from large law firms. In the short term, some Board decisions will inevitably be challenged based on the recusal standard contained in Executive Order 13770. If successful, the Board may fail to obtain a majority vote, which could create uncertainty as to applicable Board law. Alternatively, the Board Member could simply refuse to recuse himself, or a new Inspector General could reinterpret the recusal standard.

In any case, the uncertainty will not be permanent. The Executive Order only applies to the appointee's first two years of service and hypothetically could be abolished altogether at any time if President Trump withdraws or modifies the Executive Order.

Nevertheless, labor lawyers, employers, and others are well-advised to follow forthcoming developments carefully. ■

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