

NLRB Advice Memo Provides Additional Guidance On Joint Employer Standard

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As [we covered](#) this time last year, the NLRB [invited briefs](#) in a recent RC case, *Browning-Ferris Industries*, on the issue of joint employer status under the NLRA, signaling that that Board is considering jettisoning its 30-year precedent. However, the Board has yet to issue a decision in that case, leaving continued uncertainty on this issue going forward. This week, the NLRB Division of Advice provided some additional guidance when it released an [Advice Memo](#) addressing the joint employer status of Freshii Development LLC, which franchises Freshii restaurants, and a Freshii franchisee in Chicago. The Division of Advice found that the franchisor **was not** a joint employer under both the Board's current precedent and a new test proposed by NLRB General Counsel in the *Browning-Ferris Industries* case. Under the current test, companies will be considered joint employers if they "share or codetermine those matters governing the essential terms and conditions of employment." According to the Advice Memo, the NLRB General Counsel has argued that the test should be whether "the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence." The Division of Advice found that the Freshii franchisor did not meet either test, because it did not control, directly or indirectly, the terms and conditions of employment of the franchisee's employees. The Advice Memo noted that while the franchisor provided a sample employee handbook and store manual that contained personnel policies, there was no evidence the franchisee was required to implement or follow the policies. While the Division of Advice found that the franchisor exercised some control to ensure "a standardized product and customer experience," this was not enough to meet either joint employer standard because such control did not significantly influence the working conditions of the franchisee's employees. While employers wait on a final decision from the NLRB on this issue in the *Browning-Ferris Industries* case, this Advice Memo may provide some comfort for franchisors in that the NLRB at least appears willing to find that not all franchisors are joint employers, even under the new test proposed by General Counsel. Stay tuned as this issue develops.

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