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The Saga Continues: NLRB's Browning-Ferris Decision On Joint Employment Still Drawing Attention – This Time From Congress

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Since the National Labor Relations Board (NLRB) issued its now infamous *Browning-Ferris* decision in August 2015 that significantly altered its standard for evaluating "joint employment," businesses – particularly those utilizing franchise models – have been concerned and confused about how broadly that standard is to be applied. In *Browning-Ferris*, the NLRB stated that it will no longer require 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. While *Browning-Ferris* does not explicitly deal with franchisor-franchisee relationships, many in the business community have feared that the new standard will be utilized by the NLRB in that setting to find joint employment. Prior to the NRLB rendering its decision in *Browning-Ferris*, the agency's General Counsel issued an advice memorandum on April 28, 2015, evaluating whether restaurant-franchisee Freshii Nutritionality, Inc. was a joint employer with franchisor Freshii Development LLC. The NLRB General Counsel's office determined that the two entities were not joint employers because of a lack of evidence that the franchisor and franchisee co-determined the terms and conditions of employment of the franchisee's employees. The advice memo went on to indicate that the result would be the same under the new standard that was being proposed – but not yet adopted – in *Browning-Ferris*. Advice memos issued by the NLRB's General Counsel are not binding precedent, however, so many business owners worry that *Browning-Ferris* will nevertheless be applied in the franchise context. In an attempt to bring clarity to the situation, 13 members of Congress sent a letter to the Associate General Counsel for the NLRB on May 8, 2017. In that letter, the Congress members express the concerns they've heard from the business community and ask the NLRB to answer the following two questions:

1. May the April 28th [2015] memorandum [dealing with Freshii] be used as a blueprint for all franchise systems notwithstanding the joint employer standard established in late August 2015 [by *Browning-Ferris*]?
2. How much flexibility will franchisors have to implement, articulate, and enforce brand standards before they are deemed to cross the line into the forbidden areas of "indirect," "unexercised," or "potential" control for joint employer purposes?

The NLRB has yet to issue a public response to the letter. We will update the

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blog with any developments resulting from this. In addition, as previously reported, President Trump reportedly is set to nominate two Republican appointees to the NLRB in the near future, which, if confirmed, would give Republicans a majority at the agency for the first time in nearly a decade. It is possible that a Republican-led NLRB could abandon *Browning-Ferris* completely – regardless of any response that may be issued to the May 8th letter. A copy of the May 8th letter can be found here.