

NLRB Changes the Joint Employer Standard: What Do Franchise Businesses Do Now?

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About Littler

Littler is the largest management side labor, employment, and benefits law firm in the world with over 1,000 attorneys devoted exclusively to representing the interests of management relating to the workplace. Michael Lotito and Maury Baskin serve as counsel to the IFA. Littler's Workplace Policy Institute™ represents trade associations and employers on matters involving workplace policy.

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Browning-Ferris “Joint Employer” Case

- Arose from a 2013 Teamsters’ election; NOT a franchise case
- Teamsters sought to represent staffing agency employees at BFI’s recycling facility and wanted BFI to be included as joint employer of suppliers’ employees.
- In a 2015 brief, the NLRB General Counsel lobbied to replace previous direct control over day-to-day labor relations test with indirect operational control test.
- Board Ruling means that the staffing agency and BFI are found to be joint employers; so if the Union wins it will be entitled to bargain with both BFI and its staffing agency jointly, and any ULPs will apply to both.

Why Did the NLRB Change the Joint Employer Rule?

- **David Weil’s “Fissured Workplace”**
- **New test takes into account “economic realities.”**
- **Bring more employers into the collective bargaining relationship and to the bargaining table.**
- **Increases unions’ market share.**

Old and New Joint Employer Standards

BEFORE- PREDICTABLE TEST	AFTER-AMBIGUOUS TEST
<p>Pre-BFI Joint Employer Standard</p>	<p>Post-BFI Joint Employer Standard</p>
<ul style="list-style-type: none"> • Businesses are joint employers only when they share “direct and immediate” control over matters governing the essential terms and conditions of employment. • Focus is on terms and conditions of employment including hiring, firing, discipline, supervision and direction. 	<p>Two part test that looks at direct, indirect, and potential control</p> <ul style="list-style-type: none"> • The initial inquiry is whether there is a common law employment relationship with the employees in question. • If this relationship exists, then the question is whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining. • Fact based test that must be decided on case-by-case basis.

What Does It Mean For Franchising?

- Dissenting opinion says the BFI decision “fundamentally alters” the law applicable to all business-to-business relationships, including franchising specifically.
- Majority opinion says that franchising “is not before us today,” but then says all of its new “control factors” will have to be examined on a “case by case” basis.

Other Cases Involving Franchising

- **McDonald's – NLRB complaints were filed under the old joint employer standard; case remains pending**
- **Freshii/Nutritionality – NLRB GC 2015 Advice Memo found no joint employer status under the old standard, and even if the standard were to change**
- **Ongoing wage/hour/overtime lawsuits involving franchising**

So What Has Changed?

- Not only does the BFI case speak of “indirect” control, but also “ultimate” control and “potential” authority reserved by contract, even where never exercised
- Such a standard is potentially unlimited in its scope
- Increased chance of joint liability for ULPs, joint collective bargaining, and joint responsibility for labor relations generally
- Bad news for both franchisors and franchisees

How Might *Browning Ferris* Impact Franchise Labor Relations?

- ✓ **Neutrality Agreements – extend to suppliers?**
- ✓ **Unions will routinely file joint employer petitions to test concept**
- ✓ **Who decides the response message?**
- ✓ **Union corporate campaigns given new strength**
- ✓ **Joint bargaining with unions will be messy**
- ✓ **The secondary boycott issue**

What Can Franchise Businesses Do?

- ✓ Educate yourself on the NLRB's new joint employer standard and monitor latest directives provided by the agency.
- ✓ Audit current relationships with third parties, franchisors or franchisees to eliminate factors showing potential or indirect control.
- ✓ Review Agreements – Can the appearance of “ultimate control” be avoided, without breaking the franchise model?
- ✓ Review downstream outsourcing contracts also.
- ✓ Limit exposure of each entity's employees to other entities' managers.
- ✓ Review EPLI and other insurance policies with broker to reduce risk and include joint liability coverage.
- ✓ Join the Coalition (www.savelocalbusinesses.com) Franchise Action Network (www.franchiseactionnetwork.com) and support the case for changing the joint employer standard in Congress and through *Amicus* briefs at the NLRB and courts.

How Best To Guard Against Applying BFI to Franchising?

- **Take the Board at its word: Keep your operations as different from BFI as possible.**
- **Franchising is different from temporary staffing – keep it that way.**
- **No guarantees of success but worth making common sense changes where possible.**
- **Meanwhile, the only safe harbor is if IFA and the Coalition succeed in pushing back against the unlimited NLRB standard.**

A Closer Look at Factors Cited in *BFI* “Potential Control” – “Reserved Contractual Authority”

- **Hiring** – BFI played no role in actual hiring but its contract set basic qualifications, required drug screening, disqualified workers that were ineligible for rehire by BFI, and limited employment term to six months.
- **Discipline, Evaluation, and Termination** – BFI played no direct role but its contract reserved BFI’s right to reject employees for any reason.
- **Wages** - Although staffing agency determined rate of pay and paid all benefits, BFI’s contract put limits on.
- **Training** – Staffing agency was responsible, but BFI contract required them to comply with safety policies, procedures, and training requirements.

Specific Factors of Control Cited in Browning-Ferris – “Ultimate Control”

- Work performed on BFI’s premises, supporting BFI’s regular business.
- BFI set productivity standards, assigned specific tasks to be completed, prioritized employee work tasks.
- BFI specified number of employees, dictated timing of three employee shifts and determined when overtime is necessary.
- BFI effectively controlled breaks and overtime through controlling production runs.
- BFI managers communicated work directions to staffing agent’s employees, held meetings with them to address consumer complaints, and explained preferred work practices.

Freshii & Nutritionality – Joint Employer Status Avoided

- Other than recipes and décor elements, the operations manual stated policies were “recommendations,” not mandatory.
- The franchise agreement specified that the operational standards did not include any mandatory personnel policies or procedures
- Franchisor Inspections were limited to ensuring compliance with Freshii’s mandatory brand standards and not any employment-related policies
- Freshii did not meaningfully affect the terms and conditions of the franchisee’s employees through its contractual right to terminate the franchise agreement

How can we fight back?

- **Litigation – Only Republic or Leadpoint can challenge the BFI ruling, and only following a union election and several other circumstances**
- **Legislation – Congressional leaders poised to introduce and push bills to define “joint employer” and stop the NLRB’s activism**
- **FOIA requests – IFA submitted a FOIA request to the Department of Labor following evidence of OSHA investigating franchise businesses to determine joint employer relationships**

How can you fight back?



COALITION TO SAVE LOCAL BUSINESSES

- Join the Coalition at www.SaveLocalBusinesses.com
- Become a Co-chair or Member and participate in a roundtable with your local U.S. Representative or Senator
- Coalition-supported provision approved by both the U.S. House and Senate Appropriations committees

How can you fight back?

Franchise **Action** Network

A Strategic Initiative of the International Franchise Association

- Join at www.FranchiseActionNetwork.com
- Write letters to your elected leaders or testify before Congress
- FANs Steve Carey of Alabama and Fred Weir of Georgia testified before congressional field hearings on joint employer last week

How can you fight back?

- Support the Franchise Preservation Fund
- Fund will allow the IFA to combat the increasing attacks on the franchise model in federal, state and local governments

Contribute by visiting

www.franchise.org/franchisepreservationfund

Franchise **Action** Network

ANNUAL MEETING

IFA'S WASHINGTON, D.C. FLY-IN
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COME TO WASHINGTON TO STOP RUNAWAY REGULATORS WHO WANT TO REWRITE THE FRANCHISE MODEL

To register or for more information, visit
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Questions?



THANK YOU

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