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Recent NLRB Guidance: Franchisor and Franchisee Not Joint Employers

Recently, the National Labor Relations Board's Office of the General Counsel concluded that a franchisor and its franchisee were not joint employers of the franchisee's employees under either the Board's current legal standard or the broader standard proposed by the General Counsel in the last year.

The advice memo was issued in a case that arose from the termination by a Freshii's franchisee of two employees who were attempting to unionize the franchisee's workforce. The Office of the General Counsel looked at several factors and concluded that no joint employment relationship existed because:

- While the franchisor provided guidance on human resource matters (even providing a sample employee handbook in its Operations Manual), the franchisee had the power to decide whether to adopt the franchisor's personnel policies, and the franchisee had, in fact, created its own employee handbook with its own personnel policies.
- The franchisor had no involvement in hiring, firing, disciplining, or supervising the franchisee's employees, their compensation, or their work schedules

(including through the point-of-sale systems or scheduling software).

- The franchisor’s pre-opening training programs dealt primarily with restaurant operations, not employment matters.
- The monthly field reviews were limited to inspecting the franchisee’s adherence to the franchisor’s mandatory brand standards.
- Despite the franchisee’s request for advice on its employees’ organizing efforts, the franchisor remained silent and did not instruct the franchisee on how to respond.

In concluding that no joint employment relationship existed, it was noted that the franchisor’s controls were “limited to ensuring a standardized product and customer experience,” did not extend to “sharing or codetermining matters governing essential terms and conditions of employment” and, therefore, did not interfere with any “meaningful collective bargaining” regarding the franchisee’s employees.

While this development does not signal a shift in the General Counsel’s position on what the joint employer standard should be, it does illustrate the possibility of an appropriate outcome for a careful franchisor. This issue continues to evolve, so stay tuned for more on these developments as they occur.

For questions or more information regarding this Alert, please contact us.

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