



New Year, New Rules

As 2017 draws to a close, we wanted to update you regarding three areas expected to affect your business next year.

SBA Directory

Beginning January 1, 2018, a franchisee will be able to obtain SBA-guaranteed financing only if its franchisor is listed on the SBA's new franchise directory ("Directory"). As part of the listing process, franchisors are required to select either the SBA's standard addendum (as was handed down by the SBA in 2017), for which the SBA will conduct an "eligibility only" review, or a negotiated version, for which the SBA will conduct a more extensive and time-consuming "eligibility plus affiliation" review. Once the franchisor is on the Directory, lenders will be able to search it, immediately know whether the franchise is SBA-eligible, and determine the form of addendum required to support the SBA guarantee. For most franchise systems, the standard addendum is familiar and will be satisfactory, but for certain types of systems, a negotiated form will be more appropriate. We recommend that you check and verify the Directory [here](#) for your brand's current status and, if not listed, apply now.

Joint Employer Liability

Last week, the National Labor Relations Board ("NLRB") overruled its controversial 2015 *Browning-Ferris* decision that expanded joint employer liability under the National Labor Relations Act ("NLRA"). In *Browning-Ferris*, the NLRB broke decades of precedent by holding that two or more entities could be joint employers of an employee even if they each merely "reserved" control or exercised "indirect" or "limited" control over the worker's "essential terms and conditions of employment." In last week's decision, the NLRB returned to the "direct and immediate" control standard. While the NLRB's decision was limited to the standard under the NLRA, legislative efforts are still underway to address other state and federal laws. To date, 18 states have passed some form of "joint employer"

legislation, and the U.S. House of Representatives recently passed the Save Local Business Act which, if enacted, will amend the definition of “employer” in the NLRA and Fair Labor Standards Act so that a person may be considered a joint employer only if it “directly, actually, and immediately ... exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline.” We will continue to watch how that bill progresses through Congress.

FASB Revenue Recognition Standards

The Financial Accounting Standards Board (“FASB”) recently clarified (but did not formally amend) how its new standards for revenue recognition will affect initial franchise fees. The new standards were initially set with the goal of developing a global standard concerning revenue recognition. In franchising, their implementation meant that franchisors would likely need to recognize revenue from an initial franchise fee over the term of the franchise agreement. This was problematic for franchisors, in particular for new and emerging brands that fund operations through franchise fees and perform significant services at the start of the franchise relationship. A few weeks ago, FASB clarified that separate performance obligations were appropriate for things like site selection, equipment, and training. So some revenue from franchise fees can be recognized at the time these services are provided. Thus, franchisors are well advised to identify the separate performance obligations that are a part of their initial franchise fees and assign a (supportable) value to each.

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Barring a significant development, this will be our last Alert for the year. From all of us here at Cheng Cohen, we wish you and your family a happy and healthy holiday season. We look forward to working with you in the year ahead!

December 2017

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