

FRANCHISE & DISTRIBUTION

NLRB'S 'JOINT EMPLOYER' DECISION COULD LEAD TO LABOR LAW HEADACHES FOR FRANCHISORS

by Paul R. Fransway

Franchisee employees may be considered "joint employees" of the franchisor for purposes of collective bargaining and other employment issues under the National Labor Relations Board's recent decision in *Browning Ferris Industries of California, Inc. (BFI)*, a decision that could expose franchisors to labor law liability for conducting common franchisor activities.

In *BFI*, the NLRB abandoned its "direct control" standard for establishing an "employer" for labor law purposes, which focused on the hiring, firing, and control over the day-to-day management of employees, and adopted an "indirect control" standard. Under the "indirect control" standard, many matters that franchisors would consider typical in a franchise system may now be considered evidence of control, and make the franchisor a "joint employer." These include monitoring operational procedures, wearing specified uniforms, meetings with suppliers, direction of minimum safety rules and requiring certain equipment to be used.

More troubling for franchisors, perhaps, is the fact that the Board not only adopted the indirect control standard, but said that "potential" control, such as the reservation of a right-to-control, was evidence of control even if this control had never been exercised. While the Board said that it was not deciding whether this standard applied to franchising, anyone that has ever reviewed a franchise agreement can see the potential danger.

So, what to do? While the law is obviously in an unsettled state at this time, certain proactive steps can be taken now:

- Review your form franchise agreement. Franchisors often reserve rights in their franchise agreements that may no longer be important or are now even unnecessary. If possible, consider removing any unnecessary reservation of rights.
- Review your operational procedures, particularly those involving visits to franchise locations and interactions with franchisee employees. Best practice suggests that franchisor representatives should interact only with the franchisee or their supervisory personnel and should refrain from issuing directives to franchisee employees.
- Review documents that establish minimum or mandatory standards. Wherever possible, these should be described as recommendations rather than mandatory requirements. Where the determination has been made that the establishment of a minimum standard is necessary, describe the standard as necessary to assure uniformity or product quality focusing on the brand aspects of the standard rather than how the standard is to be met.

- Consider disclaimers of control over franchisee employees in documents and communications. Most franchisors do not determine employment policies for their franchisees. Disclaimers of these rights wherever possible, particularly in communications to franchisees, may assist in avoiding joint employer liability.

Keep an eye on further developments. The final resolution of these questions may be some years away, but monitoring further developments will assist you in restructuring your agreements and system to be in the best position to avoid joint employer liability.

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