GRiffin and Weil one year later – has a clearer picture of the joint employer conundrum come into focus?

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November 2-4, 2016
Miami Beach, Florida
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I. INTRODUCTION

Last October, the Forum’s plenary session featured a panel discussion with Richard Griffin, General Counsel of the U.S. National Labor Relations Board (the “NLRB”), and Dr. David Weil, U.S. Department of Labor Wage and Hour Administrator (the “WHD”), entitled “Franchising Reconsidered: Will the NLRB Fundamentally Change the Franchise industry?” The attendees hoped Messrs. Griffin and Weil would shed light on the application to the franchise relationship of the joint employer analysis established in Browning-Ferris. Some attendees left the presentation unfulfilled while others left feeling a faint sense of hope. In any event, there seemed to be a general consensus that notwithstanding the best efforts of the moderators there was not a definitive answer to the question posed by the title of the program.

However, in January 2016 the franchise community arguably received an answer with the issuance of the U.S. Department of Labor Wage and Hour Division Administrator’s Interpretation regarding joint employment under the Fair Labor Standards Act (the “FLSA”) and the Migrant and Seasonal Agricultural Worker Protection Act (the “MSPA”) (the “DOL Interpretative Opinion”). The sweeping language of this opinion, combined with the Browning-Ferris opinion, when read against the backdrop of the NLRB’s ongoing joint employer litigation against McDonald’s USA, LLC (“McDonald’s”), arguably signified that the NLRB along with the Department of Labor (the “DOL”) would seek to impose joint employer liability against franchisors if the franchise relationship fell within the broad joint employment analysis laid out in Browning-Ferris and the DOL Interpretative Opinion. Although it is too early to determine whether the joint employer analysis provided in Browning-Ferris will ultimately be the law of the land, as no court has yet ruled on it, franchisors and franchisees have made significant changes to their operating procedures in an effort to avoid joint employer liability.

For example, many franchisors have updated their franchise agreements to make clear that they are not involved in the relationship between a franchisee and its employees. Franchisors have also taken a fresh look at their manuals with an eye toward modifying operating standards that could lead to a joint employment finding. Many franchisors have also made significant changes to their operations, limiting the training and instruction they have traditionally provided to franchisees’ rank and file employees. All of these items and more are discussed in depth in Section III of this paper.

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1 This paper represents the collective work of the authors. However, given the nature of the topic and its treatment, as well as the desire to analyze the topic in a unified paper, any particular views expressed herein do not necessarily represent the individual views of the authors.

2 It is important to understand the different enforcement focuses of the NLRB and the WHD. The NLRB enforces the National Labor Relations Act (NLRA), which was passed in 1935 to, among other things, protect the rights of employees and employers and to encourage collective bargaining. 29 U.S.C. § 151–169 (2015). The WHD is tasked with enforcement of various provisions of the FLSA, including the Federal minimum wage and overtime pay requirements. WHD also enforces the Migrant and Seasonal Agricultural Worker Protection Act, and various other federal employment laws. UNITED STATES DEPARTMENT OF LABOR, https://www.dol.gov/whd/regs/statutes/summary.htm (last visited July 26, 2016).


5 McDonald’s USA, LLC., 02-CA-093893, https://www.nlrb.gov/case/02-CA-093893.
As discussed above, franchisees have not been immune from the joint employer concern. Franchisees have historically relied on their franchisors for guidance on many aspects of the business operations on which franchisors are now taking a hands-off approach. This is requiring franchisees to fend for themselves in certain areas of their business in which they may have previously been given support. Naturally, this is requiring franchisees to “figure it out” or, more aptly, invest in consultants and other business professionals to provide the guidance. In addition to the added cost, franchisees are now pegged with the task of finding good quality professionals to help them. Many franchisees are locating these professionals themselves, while some are relying on their independent franchisee associations for recommendations. Regardless, franchise agreements are changing to address the concerns franchisors have identified, requiring franchisees to be diligent on understanding the impact of those changes. And, perhaps most notably, what is not yet ascertainable is the long-term effect of how the joint employer standard will affect the relationship between franchisor and franchisee moving forward. Franchisees are resilient and they will find their way – however, the murkiness around the future of franchising is cause for concern.

II. THE JOINT EMPLOYER ANALYSIS

August 27, 2015 - Some argue it will be remembered as the day franchising died.6 Although that is debatable, it is clear that day, and more precisely the Browning-Ferris joint employment decision issued on that day, changed the way many practitioners viewed the threat to the franchise model imposed by this new joint employment standard. Prior to that decision, many practitioners viewed the threat as being limited to those franchise systems that had certain unique qualities. After the decision, however, it became apparent that this proposed shift in the joint employer legal analysis could potentially impact a large portion of the franchise community, unless franchisors changed certain practices. To understand the significance of the proposed shift in this area of law, it is important to understand the state of joint employer law prior to August 27, 2015.

A. The Joint Employer Analysis Prior to August 27, 2015

Interestingly, the actual standard for joint employment — whether the parties “share or codetermine those matters governing the essential terms and conditions of employment,” did not change on August 27, 2015. However, the analysis of whether the standard is satisfied changed considerably. From 1984 through the release of the Browning-Ferris decision, the NLRB focused exclusively on a putative employers’ actual exercise of control over the workers, requiring the exercise of that control to be “direct, immediate, and not ‘limited and routine’,” for there to be a finding of joint employment.8 To that end, contractual language providing the user employer with the right to control the direction and supervision of workers without the actual exercise of that control by the user employer was found not to satisfy the standard for joint employment. Further, even when control was found, the control needed to be direct and immediate as to the performance of the work at hand. The control could not be general or indirect or limited or routine. For example, in various cases the Board had held that the joint employment standard had not been met when the control focused on factors other than the


8 Id. This threshold was in stark contrast to the pre-1984 threshold that focused on reserved or indirect control as evidence of joint-employer status.
actual performance of the services, for example, number of workers, where and when to
perform the work, and oversight over the end product or service. Last, the essential terms and
conditions of employment that the NLRB focused on were limited to hiring, firing, discipline,
supervision, and direction.

Franchisors have operated their franchise systems over the last 30 plus years against
the foregoing backdrop. It is arguable that over this time period, franchisors have become more
aggressive when addressing matters between franchisees and their employees. For example,
many franchisors have traditionally provided direct training to rank and file franchisee
employees. It has also been a common practice among franchisors to provide franchisees with
employee scheduling software and other forms of assistance in an effort to minimize franchisee
labor costs. Many franchisors have also provided assistance to franchisees in human resource
matters including hiring, firing and, discipline. This assistance has taken the form of the
provision of employment forms, such as job applications, forms of employment agreements,
forms of termination letters, and the like. Many franchisors have mandated minimum
qualifications for certain franchisee employee positions and others have maintained websites
where potential franchisee employees can apply for jobs. The new joint employer analysis
draws into question whether a franchisor can continue these practices, and others like them,
without fear of joint employer liability. Welcome to life after August 27, 2015.

B. The Joint Employer Analysis after August 27, 2015

As discussed above, the NLRB in Browning-Ferris did not change the standard for a
finding of joint employment, but it did broaden the scope of the analysis it would undertake in
determining if the standard is satisfied.9

First and foremost, the NLRB expanded those matters it would consider when defining
the “essential terms and conditions of employment”. In addition to the traditional factors
discussed above, the NLRB concluded that essential terms include wages and hours, control
over scheduling, seniority and overtime, assigning work and determining the manner and
method of work performance. As important, the NLRB indicated that the right to control, even if
not exercised, would be probative. Additionally, the NLRB indicated that when it comes to the
putative employer’s actual exercise of control, that control need not be direct or immediate but
indirect control would be sufficient, such as through an intermediary. Last, the NLRB made
clear that all facets of the relationship must be analyzed and no one factor will be determinative.

Applying these factors to the facts at hand in Browning-Ferris, the NLRB found BFI to be
a joint employer under the NLRA. In arriving at its conclusion, the NLRB cited various factors,
including the following that are traditionally found in many franchise relationships: (i) BFI
retained the right to require the workers to meet or exceed certain standards required by BFI; (ii)
BFI managers held meetings with employees to address customer concerns and business
objectives and to advise on work practices; and (iii) BFI specified the number of workers
required and dictated the timing of the employee shifts.10

Any discussion of the joint employer legal analysis would be incomplete without a
discussion of three other important events. First, the issuance of what has come to be known

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9 Id. Some would argue that this “change” was not really a change at all but a return to the analysis used by the
NLRB pre-1984.

10 Id.
C. Analysis of the Freshii Advice Memorandum

In April 2015, approximately four months before the *Browning-Ferris* decision was issued, many in the franchise community breathed a sigh of relief when the NLRB’s Associate General Counsel Division of Advice issued an Advice Memorandum finding that Freshii Development, LLC (“Freshii”), the franchisor of the Freshii restaurant chain, was not a joint employer of the employees of Nutritionality, Inc. (“Nutritionality”), a Freshii franchisee located in Chicago. Many thought this Memorandum was the bell weather for franchisors as the General Counsel found that Freshii was not a joint employer under either the then-current joint employer analysis or the then-proposed analysis subsequently laid out in *Browning-Ferris*. Others, however, have argued that Freshii was not a traditional franchisor in that it arguably failed to provide the types of assistance provided by most franchisors and did not enforce its own standards. Accordingly, the decision, especially in light of the subsequent *Browning-Ferris* decision, is of marginal comfort for franchisors. Irrespective of one’s position on this point, there are various lessons franchisors should take away from the Memorandum as it pertains to the joint employer analysis.

1. **Lesson No. 1 – Stay out of the Employment Relationship.** Franchisors should not meddle in the employment relationship between a franchisee and its employees. In finding that Freshii and Nutritionality did not share or codetermine matters governing the essential terms and conditions of employment of the Nutritionality employees, the General Counsel found that Freshii played no role in Nutritionality’s decisions regarding hiring, firing, disciplining or supervising employees. Although Freshii maintained a website where it would accept resumes for employment opportunities at Nutritionality, Freshii would simply pass the resumes along without commenting on their appropriateness. Additionally, Nutritionality without Freshii’s help, set wages and benefits for its employees. Although Freshii provided guidance on labor costs generally, because it did not “directly or through scheduling software” instruct Nutritionality on employee scheduling or hours, this guidance was found to be permissible.

2. **Lesson No. 2 – Recommendations are Acceptable.** The General Counsel concluded that recommendations regarding hiring, scheduling, and disciplinary practices, did not equal a sharing or codetermination of the essential terms and conditions of employment because they were not requirements of the franchisor, only recommendations.

3. **Lesson No. 3 – Be Careful Who you Train.** The General Counsel specifically noted that Freshii had no involvement in training after the initial training and that the initial training was only provided to franchisee owners and managers.

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12 *McDonald’s USA, LLC.*, 02-CA-093893, https://www.nlrb.gov/case/02-CA-093893.

4. **Lesson No. 4** – Standards to Maintain Brand Goodwill are Permissible. Requirements imposed by Freshii that related to maintaining the goodwill of the brand, including those related to ensuring a standardized product and customer experience such as requirements regarding uniforms, store hours, design, decoration and décor of a location, are appropriate and “without more, are not basis for finding a joint employer relationship”.

5. **Lesson No. 5** – Anti-Organizing Advice is Off Limits. The General Counsel highlighted Freshii’s silence when it was asked by Nutritionality for advice on the union organizing efforts of Nutritionality’s employees at a location. Whether this silence was intentional or unintentional, the General Counsel found it as compelling evidence of Freshii’s lack of involvement in Nutritionality’s relationship with its employees.

D. **Analysis of the DOL Interpretative Opinion**

If the franchise community was feeling uneasy after the plenary session and the release of the *Browning-Ferris* decision, the DOL Interpretative Opinion did nothing to allay that concern. Quite to the contrary, for many it heightened the sense of alarm. Although acknowledging that the presence of a franchise relationship does not of itself create joint employment liability, it arguably provided a *broader* joint employment analysis than that found in *Browning-Ferris*.14 As discussed above, the *Browning-Ferris* joint employment analysis focuses predominantly on the control of the putative employer over the workers. The DOL Interpretative Opinion, however, makes clear that the DOL will not only analyze the control present in the relationship, but also the economic realities of the relationship, and specifically the economic dependence of the workers on the putative employer.

To that end, the DOL cited seven factors that it would use in determining the existence of economic dependence.15 The first two factors are similar to those found in the NLRB analysis. The others, however, broaden the analysis to such an extent that various business relationships, including the franchise relationship, are arguably at risk. The factors focus on the following: (1) the level of control or supervision the putative employer directly or indirectly exerts on the workers, with a high degree of control suggesting economic dependence; (2) the putative employer’s ability to hire or fire the workers, or otherwise control the terms of their relationship, including the rate and method of pay; (3) the length of the relationship, with long term, permanent, or full time relationships suggesting economic dependence; (4) the nature of the work, with work that is rote and repetitive suggesting economic dependence; (5) the importance of the work as it relates to the joint employers’ business, with work that is found to be integral to the joint employer’s business suggesting economic dependence; (6) where the work is performed, with work being performed at a location owned or controlled by the putative employer indicating economic dependence; and (7) the putative employer’s performance of administrative functions for the worker such as handling payroll, providing workers compensation insurance, equipment, housing or transportation, tools and materials.

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15 Administrator’s Interpretation No. 2016-1, UNITED STATE DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION, http://www.dol.gov/whd/flsa/Joint_Employment_ai.htm (Jan. 20, 2016). It is noteworthy that the DOL concluded that these factors are only “guides,” various courts may not consider all factors relevant and yet others consider factors other than the seven cited in the DOL Interpretative Opinion.
E. **McDonalds and the NLRB**

Against the backdrop of *Browning-Ferris* and the DOL Interpretative Opinion, McDonald’s and the NLRB continue their battle over whether McDonald’s is a joint employer with its franchisees, responsible for various alleged labor law violations at certain locations. This dispute has raged on since December 2014 when the NLRB’s General Counsel issued hundreds of complaints against McDonald’s and its franchisees. As of October 30th, 2015, McDonald’s is said to have had incurred over $1,000,000 just to comply with the NLRB’s discovery requests. In March 2016, the case went to trial before an administrative law judge in New York. At trial, NLRB counsel argued that the level of control imposed by McDonald’s on its franchisees is such that McDonald’s is a joint employer under *Browning-Ferris*. Counsel cited as evidence of this control among other things, McDonald’s imposition of requirements as they relate to various aspects of a franchisees’ business, including labor scheduling and advising franchisees on interview questions to ask prospective employees. In contrast, McDonald’s counsel argued that its franchisees hire and are solely responsible for setting their employees’ wages, benefits and schedules. This argument has been supported by various McDonald’s franchisees. After a short delay, the trial was scheduled to resume on August 29, 2016 with many predicting that it will continue throughout the remainder of 2016.

Some say the dispute is an attempt by the politically appointed NLRB General Counsel to hold McDonald’s liable as a joint employer, thereby making the unionization of locations easier as the employees of these locations would be considered to be jointly employed for unionization purposes. Others argue that it is an attempt to hold McDonald’s responsible for turning a blind eye to unfair labor practices at its franchised locations. Whatever its underpinnings, the result of the case will go a long way in determining application of *Browning-Ferris* to the franchise relationship. Unfortunately, the ultimate outcome of this case, and the new joint employment analysis, may not be known for many years and will in all likelihood be decided by the United States Supreme Court.

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18 On July 11, 2016, the NLRB issued a decision in a non-franchise case potentially magnifying the effect of Browning-Ferris by potentially making it easier for jointly employed employees to organize. *Miller & Anderson, Inc. & Tradesmen Int’l & Sheet Metal Workers Int’l Ass’n, Local Union No. 19, Aff-Cio, 364 N.L.R.B. No. 39* (July 11, 2016). In *Miller & Anderson*, the NLRB held that “employer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer. Instead, we will apply the traditional community of interest factors to decide if such units are appropriate.” Id. It remains to be seen if, and how, the *Miller & Anderson* decision will apply to any franchisors, or even whether it will remain good law. As discussed above, it remains to be seen whether any franchisors are the joint employees of their franchisees’ employees for purposes of the NLRA, and even if they are, which employees share a sufficient community of interest to form a bargaining unit. In determining whether employees share a community of interest (not necessarily in the joint employer context), the courts and the Board have considered a wide variety of factors, including: (1) similarity in skills, training, or experience; (2) similarity in job functions or job classifications; (3) similarity in wages, wage scale, or method of determining compensation; (4) similarity in fringe benefits; (5) similarity in work hours; (6) similarity in work clothes or uniforms; (7) similarity of job situs or geographical proximity of employees; (8) interchangeability of employees or job assignments; (9) common supervision; (10) centralization of employer’s personnel and labor policies; (11) integration of employer’s production processes or operation; (12) similarity of relationship to employer’s administrative or organizational structures; (13) common history of bargaining with employer; (14) reflection of industry bargaining pattern; (15)
III. METHODS TO POTENTIALLY LIMIT JOINT EMPLOYER EXPOSURE

As discussed earlier, the Browning Ferris decision, along with the DOL Interpretative Opinion have combined to create significant angst in the franchise community. Whether the new joint employer analysis outlined in Browning-Ferris will become the law of the land is yet to be determined. In the meantime, what is a franchisor to do?

Because the DOL Interpretative Opinion is arguably a broader joint employment analysis than that found in Browning-Ferris, counsel is well advised to focus on that analysis when advising their clients, as a failure to meet the joint employment standard under the DOL Interpretative Opinion should equate to an analogous finding under Browning-Ferris. To that end, counsel should recommend certain changes to the Franchise Disclosure Document, including the Franchise Agreement, certain changes to the Brand Standards Manual and last but definitely not least, changes to certain parts of the franchisor’s operations.

A. Potential Changes to the Franchise Disclosure Document

Franchisors should review their Item 11 disclosures related to the initial training program to confirm that the disclosures do not inadvertently contribute to potential joint employer liability. Specifically, franchisors should be on the look-out for disclosures that indicate the franchisor will provide training to the franchisee’s employees other than the franchisee’s owners and managers. Based upon the current joint employer analysis, this type of language or practice is potentially problematic and franchisors should limit training to the franchisee’s owners and managers. Franchisors should also make clear in Item 11 that the franchisee, as the owner of the franchised business, is responsible for providing training to its employees and the time limitations within which this training must be provided.

Franchisors should also disclose the purpose of the initial training program. To that end, Item 11 should be revised to provide specifically that the initial training program is being provided by the franchisor to protect the brand and the franchisor’s trademarks and not to control the day-to-day operation of the franchised business.

Most franchisors disclose the existence of their “operations manuals” or “operating manuals” in Item 11. Reference to these manuals as “operating manuals” is an example of innocuous language that could be cited as evidence of the type of indirect control referenced in Browning Ferris. If the franchisor is providing an operating manual to a franchisee for use in the operation of their business, it is not a far leap for a party unfamiliar with franchising to assume that the franchisor is controlling the franchisee’s business in such a manner that they should be liable as a joint employer. Otherwise, what is the purpose of a manual called an “operating manual”? However, those familiar with franchising understand that these manuals, when written appropriately, are limited to instruction on those segments of the franchisee’s business that if not operated appropriately would negatively impact the franchised brand’s goodwill. Accordingly, it is arguably more appropriate and more accurate to call these manuals “brand standards manuals” as opposed to operating manuals. Although not determinative, this simple change may help the franchisor defend against a claim of joint employment.

expressed desires of employees; and (16) employees' organizational framework or extent of union organization." 90 A.L.R. Fed. 16 (originally published in 1988).

19 *Infra* note 3.
B. Potential Changes to the Franchise Agreement

There are various changes a franchisor should make to its franchise agreement in an attempt to limit potential joint employment liability. Some of these changes are to eliminate potentially problematic language whereas others are to add clarifying language intended to align with the Browning-Ferris decision as well as the joint employer analysis in the DOL Interpretative Opinion. These changes generally revolve around three topics addressed in the Franchise Agreement: employment matters; control/manuals; and identification as an independent contractor. Each of these topics is discussed below.

1. Employment Matters

Franchisors should review their franchise agreement for language indicating, directly or indirectly, that the franchisor has control over the employment relations between a franchisee and its employees. This language should be deleted from the agreement and replaced with language clearly providing that the franchisee alone is responsible for the employment relationship with its employees. Additionally, language should be added clearly providing that training is provided only to the franchisee’s owners and managers who are ultimately responsible for training the franchisee’s employees. Any language giving the franchisor the right to require the franchisee to terminate or remove an employee who does not meet the franchisor’s qualifications is potentially problematic and should also be removed from the franchise agreement. If the franchisee has hired an employee who is not performing appropriately leading to a breach of a brand standard, the franchisor’s remedy is to default the franchisee under its franchise agreement for failure to comply with brand standards; not to mandate termination of the employee by the franchisee, thereby inserting itself into the employment relationship between the franchisee and its employee. Examples of language clarifying that the franchisee is responsible for the acts of its employees and controls the employment relationship is provided below:

(a) Staffing – The people you retain to work in your Franchised Business will be your agents and employees. They are not our agents or employees and we are not a joint employer of those persons. You must determine who to hire, how many people to retain, how you compensate these people, terms of their employment, working conditions, and when and how to discipline and terminate them. You must comply with all applicable employment laws. We will not operate your Franchised Business, direct your employees, or oversee your employment policies or practices.

(b) Staffing – You are solely responsibility for the day to day operation of your Franchised Business and its employees. You will be solely responsible for recruiting and hiring the persons you employ to operate the Franchised Business. You are responsible for their training, wages, taxes, benefits, safety, schedules, work condition, assignments, discipline, and termination. At no time will you or your employees be deemed to be employees of ABC Franchise System.

The foregoing language makes clear that the franchisee is responsible for the day to day operation of the franchised business and for all employment related matters. Many franchise agreements were silent on these matters before Browning-Ferris. However, after Browning-Ferris this type of language is imperative to provide clearly that the franchisee is the employer of
the employees of the franchised business and is solely responsible for the terms and conditions of their employment.

To rebut any assertion by the franchisee’s employees that they thought they were really the employee of the franchisor, counsel should consider adding language to the franchise agreement requiring the franchisee to obtain verifications from each employee acknowledging that the employee is an employee of the franchisee or at the very least requiring the franchisee to place a notice at the franchised business indicating that the employees are employees of the franchisee and not the franchisor. Examples of this type of language are provided below:

(a) **Employer Acknowledgment** – Franchisee shall obtain from each of its personnel an acknowledgment signed by such personnel providing that such individual understands, acknowledges, and agrees that he or she is an employee of Franchisee and not Franchisor and that such individual shall look solely to Franchisee for his or her compensation and for all other matters related to their relationship with Franchisee.

(b) **Employment Notices** – Franchisee shall post a notice on the employee bulletin board clearly visible to employees at the Restaurant, notifying all employees of their employer and clearly stating that neither Franchisor nor its affiliates are the employer of the employees.

Last, and in an effort to address the seven factor joint employer analysis provided in the DOL Interpretative Opinion, franchisors should consider adding the following language to their franchise agreement:

(a) **Employment Matters** – Franchisee’s employees are not Franchisor’s agents or employees and Franchisor is not a joint employer of these individuals. Franchisee is solely responsible for performing all administrative functions at the Franchised Center, including payroll and providing workers’ compensation insurance. Franchisee acknowledges that it is not economically dependent on Franchisor, and that Franchisor does not provide facilities, equipment or house or transport Franchisee’s employees or provide to Franchisee’s employees tools or materials required for Franchisee’s employees to perform services for Franchisee.

2. **Control/Manuals**

As discussed above, counsel should make certain that references to the Operating Manual are recast as Brand Standards Manual references to better describe the contents and purpose of the manual. Like the language discussed above to be added to Item 11 of the Franchise Disclosure Document, franchise agreement language should be modified to clarify that the manuals contain standards that are designed only to protect the trademarks and goodwill of the system. The franchise agreement should also clarify that the franchisee is required to comply only with those mandatory standards to ensure that recommendations in the manual are not construed to be requirements imparting a level of control on the franchisor that could be used to argue joint employment. An example of this language is provided below:

(a) **Compliance with Specifications and Procedures** – Franchisee acknowledges that the Confidential Manual(s) are designed to protect Franchisor’s standards and systems, and the Trademarks, and not to control the day-to-day operation of the business. Franchisee shall comply
with all rules, regulations, and directives specified by Franchisor, as well as all mandatory standards, specifications and procedures contained in the Confidential Manual(s), as amended from time to time.

Counsel should also confirm that the franchise agreement clearly provides that the franchisee is responsible for the operation of the business and that the franchisor’s ability to approve certain matters does not imply that the franchisor has control over all matters at the franchised location. An example of language addressing this issue is provided below:

(b) Franchisee Control – Franchisee acknowledges that it is responsible for the day-to-day operation of its Hotel, including hiring, setting the conditions of employment, supervising, discipline and termination of all personnel, purchases (or leases) and maintenance of equipment and supplies, preparing Franchisee’s own marketing plans and funding and implementing those marketing plans, maintenance of employment records, and daily maintenance, safety, security and the achievement of compliance with the System of Operation. Franchisor’s ability to approve certain matters, to inspect the Hotel and its operations and to enforce its rights, exists only to the extent necessary to protect its interest in the System of Operation and the Trademarks. Neither the retention nor the exercise of these rights is for the purpose of establishing any control, or the duty to take control, over those matters that are clearly reserved to Franchisee.

3. Identification as an Independent Contractor

Counsel should also review the franchise agreement to identify whether the agreement contains language requiring the franchisee to identify itself as an independent contractor and the franchised business as independently owned and operated. This language was prevalent in franchise agreements 20 years ago and should once again take a prominent place in the franchise agreement. Although not directly related to the joint employer issue, it is another opportunity for the franchisor to educate the public on the separateness between its operations and those of its franchisees. An example of this language is provided below:

(a) Evidence of Relationship – Franchisee shall hold itself out to the public as an independent contractor by, without limitation: (i) clearly identifying itself in all dealings with third parties as a franchised, independently owned and operated entity, including on all public records, checks, stationery, contracts, receipts, marketing materials, envelopes, letterhead, business cards, employment applications, and other employment documents, invoices and other communications, electronic or otherwise; and (ii) displaying a sign in the reception area of the Franchised Center so as to be clearly visible to the general public indicating that the Franchised Center is independently owned and operated as a franchised business.

Last, counsel should revisit the indemnification language in the franchise agreement to confirm that it is drafted broadly enough to require the franchisee to indemnify the franchisor for employment related liabilities arising from the franchised business. Although counsel can include language requiring indemnification by the franchisee for joint employer liability, the enforceability of such language is questionable.
C. **Potential Changes to the Franchisor's Manuals**

Counsel should review the franchisor’s manuals for language or practices that may be problematic under the *Browning-Ferris* and DOL Interpretative Opinion analyses. At the very least, counsel should add a disclaimer to the introductory portion of the manual advising the franchisee on responsibility for operation of the outlet, including employment matters. An example of the language is provided below:

> These Brand Standards are designed to protect the System and the trademarks associated with the System, and not to control the day-to-day operation of the outlet. Franchisee at all times will remain responsible for the operation of the outlet, and all activities occurring at the outlet. Franchisee must hire, train, discipline, and otherwise be solely responsible for the outlet's employees. Franchisor is not responsible for, and does not direct or control the conduct of, any outlet employee.

In reviewing the manuals, counsel should confirm that each requirement in the manual is necessary to maintain the goodwill of the franchised system. If it is not, counsel should consider removing the requirement or making compliance optional or recommended, as opposed to mandatory.

Counsel should also consider removing operating standards that address the employment relationship between the franchisee and its employees. For example, mandatory standards that address franchisee hiring practices, the conditions of franchisees’ employees' employment, or that address supervision, discipline or termination of these employees should be deleted or at the very least modified to clarify that they are not mandatory but are met only as recommendations. Language should also be added to this section of the manual indicating that the franchisee should check with its counsel or a human resources professional for additional guidance and that these policies or procedures are not a part of the franchisor’s mandatory standards.20 Any employment related forms provided by a franchisor in the manual or otherwise should include a legend printed on their face indicating that they are only examples of forms. If the franchisor is providing these items outside of a manual it should, as a condition to providing them, require the franchisee to sign an acknowledgment indicating that the forms are meant only as examples and may not comply with applicable law. The acknowledgment should also direct the franchisee to check with its counsel or a human resources professional as to their appropriateness.

D. **Potential Operational Changes**

Certain franchisors are pulling back from the assistance they provide franchisees in various areas of operation due to the potential joint employer threat. Whether this is a good idea is debatable. In the short term it may be successful, as it arguably limits potential joint employment liability, but in the long term it may ultimately hurt the franchisor’s brand because many franchisees, as opposed to seeking the assistance elsewhere, are making their own decisions without input from appropriate professionals, potentially opening themselves up to liability. Left with this Hobson’s choice, what is a franchisor to do?

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1. Handling Employment Issues

As discussed earlier, many franchisors have historically provided counsel to franchisees on employment issues ranging from hiring to termination and everything in between. Specifically, many franchisors provided employment manuals, others employment law advice, and still others employment help lines. In the current climate, many franchisors have stopped these practices. Notwithstanding the current climate, franchisors still have options when it comes to these types of issues. One option is for franchisors to compile a list of human resource professionals that franchisees can consult. A franchisor may also consider underwriting the cost of human resources professionals for franchisees to consult with on employment related matters, as opposed to providing the advice themselves.

Some have argued that franchisors should not provide examples of employment manuals to franchisees. However, as long as those manuals are marked as examples only and clearly direct the franchisee to consult its own counsel to provide it with employment manuals, the risk to the franchisor is arguably negligible. In any event, in lieu of actually providing a manual, a franchisor could again provide a list of human resource professionals with whom franchisees can work to create their own manuals. Additionally, in franchise systems with franchisee advisory councils or independent franchisee associations, franchisors can empower the council or the association to work with the appropriate professionals to create an example of a manual franchisees can then obtain from the franchise advisory council.

2. Handling Training Issues

Franchisors have traditionally provided initial training to franchisee owners and managers and in some cases, their franchisees’ lower level employees. Over the years, this training has evolved and broadened in scope as many franchised businesses have become very complicated to operate. In light of the current climate, franchisors should limit this training to a franchisee’s owners and managers. Further, franchisors should limit the training to those items designed to maintain the goodwill of the brand. For example, training should arguably be limited to ensuring a standardized product or service and customer experience and should focus on those items that a customer can touch and see. Training that goes beyond these parameters is potentially problematic. Further, as opposed to providing training directly to a franchisee’s lower level employees, the franchisor could institute a “train the trainer program” and require the franchisee’s owners or managers to provide the initial training to the franchisee’s lower level employees and certify to the franchisor that the training has been provided. This same type of approach could be used in those situations where the franchisor as historically required a franchisee’s lower level employees to undergo the franchisor’s computerized training. In an effort to limit potential exposure, the franchisor could license the computer modules to the franchisee and require the franchisee to certify that it has provided the computerized training to its employees.

Traditionally, franchisor field personnel have provided advice and in some cases training to franchisee rank and file employees when the field personnel have observed quality service issues at the operation of a franchised center. In the current climate, many franchisors are hesitant to continue this practice. One alternative is to train field personnel to interact only with


22 For example, franchisors could provide financial assistance to help pay for the creation of these manuals.
the franchisees’ managers and then require the managers to train the employees and provide a certification that the employees have been retrained on the quality service issues. If the issues remain unresolved, the franchisor should not insert itself into the relationship between the franchisee and its employees. Instead, the franchisor should issue a notice of default based on quality service issues and require the franchisee to cure by providing appropriate training. If the issues remain unresolved, the franchisor’s ultimate recourse is to terminate the franchisee.

3. Point of Sale Systems

Franchisors use system wide information not only for their own benefit, but for the benefit of their franchisees. It has become commonplace for franchisors to require franchisees to use certain point of sale systems or other software to manage this information. This software commonly contains a labor scheduling component. The NLRB has cited this type of software as a factor in finding a joint employment relationship. One way for a franchisor to mitigate this risk is for the franchisor to direct the provider to disable this component but provide the franchisee with the option to work directly with the provider to enable this component. Additionally, as long as the franchisor does not require the use of the scheduling software, it would also be permissible for the franchisor to create the software itself as long as it is being voluntarily used by the franchisee.

4. Practice Vigilance

In an effort to convey a “one brand” image, many franchisors have, when advertising the brand, intentionally or inadvertently blurred the lines between brand owner and brand licensee. This approach has arguably contributed to a mistaken public perception that franchised locations are owned either wholly by “corporate” or jointly with the brand licensee, leading to a belief that the brand owner should be liable, or at the very least jointly liable, for acts at these locations. In light of the current climate, franchisors that continue this practice without modification continue it at their own peril.

There are ways, however, that a franchisor can continue to promote a one brand image while putting the public on notice of the separation between franchisee and franchisor. For example, franchisors should ensure that employee paychecks are issued in the name of the franchisee entity, not the brand, and do not contain the logo or trademark of the franchisor. Customer receipts should disclose the name of the franchised entity. All contracts should be signed by the franchisee in its legal name. Franchisee advertising, including websites, should make clear that the locations are independently owned and operated. All employment forms should be carefully reviewed by the franchisor to confirm that they do not inadvertently refer to the brand as the employer and specifically refer to the franchisee entity. Franchisee employee business cards should indicate that the individual identified on the card is an employee of the franchisee. A sign should be prominently posted at the franchised location indicating that the location is independently owned and operated. Last, franchisors should encourage franchisees to take pride in local ownership and promote that fact in advertising and otherwise. To that end,


24 Evidence of this belief was found in a poll discussed at the 2016 IFA Legal Symposium. Sixty-four percent of those polled believed that the franchisee and the national brand should be jointly liable for injuries sustained by an employee at a local franchise. Even more interesting, or frightening for franchisors, 7% of those polled thought the national brand alone should be liable with 23% believing that the local franchisee should be liable.
franchisee advertising, including websites, should make clear that the location is independently owned and operated. 25

Any analysis of the current legal climate as it relates to joint employment would be incomplete without a discussion of 2015/2016 federal and state legislation attempting to limit joint employment liability as well as recent employment litigation, including joint employment litigation, asserted against various franchisors.

IV. 2015/2016 LEGISLATIVE ACTION

A. Attempts at Federal Legislation Addressing Franchisor Employment Liability

In response to increased joint employment enforcement efforts by the NLRB and the DOL, members of Congress have made multiple attempts to limit joint employment liability. As of the publication date of this paper, no federal legislation has passed.

In 2015, House Representative Tom Cole (R-Oklahoma) and Senator Thad Cochran (R-Mississippi) introduced H.3020/S.2132, which sought to add to the annual appropriations bill for the NLRB the following provision:

> Sec. 408. None of the funds made available by this Act may be used to investigate, issue, enforce or litigate any administrative directive, regulation, representation issue or unfair labor practice proceeding or any other administrative complaint, charge, claim or proceeding that would change the interpretation or application of a standard to determine whether entities are ‘joint employers’ in effect as of January 1, 2014. 26

This amendment did not pass. Instead, Congress passed an appropriations bill that did not contain Section 408 or similar limiting language. 27 Members of Congress may try a similar approach with the FY 2017 appropriations bill to limit the scope of joint employment liability.

In addition to efforts with the appropriations bill, members of Congress have tried standalone legislation targeting the joint employer issue. For example, on September 9, 2015, Senator Lamar Alexander (R-Tennessee) and House Representative John Kline (R-Minnesota) introduced the Protecting Local Business Opportunity Act (S.2015/H.3459), which sought to limit the definition of “employer” under the NLRA:

> 29 U.S.C. 152(2) is amended by adding at the end the following: “Notwithstanding any other provision of this Act, two or more employers

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25 For more ideas see Barry Kurtz, et al., Reducing the Risk of Joint Employer Liability, Lewitt Hackman Newsletter (May 2016).

26 2016 Labor, Health and Human Services, Education, and Related Agencies Appropriations bill (H.R. 3020), https://www.congress.gov/bill/114th-congress/house-bill/3020?q=%7B%22search%22%3A%5B%22hr%22%5D%7D&resultIndex=1. See also An Act Making Appropriations to Stop Regulatory Excess and for Other Purposes, 2016 (S. 2132), https://www.congress.gov/bill/114th-congress/senate-bill/2132?q=%7B%22search%22%3A%5B%22s%5D%22%22%5D%7D&resultIndex=1.

27 See the Consolidated Appropriations Act, 2016, H.R. 2029, Public Law 114-113, which became law on December 18, 2015, https://www.congress.gov/bill/114th-congress/house-bill/2029?q=%7B%22search%22%3A%5B%22public%22%22%5D%7D&resultIndex=1.
may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct and immediate."\textsuperscript{28}

No action has been taken on the legislation since December 1, 2015, when the House Bill was placed on the Union Calendar for the House of Representatives. Neither the Senate nor the House has voted on it.\textsuperscript{29}

In a more sweeping effort, on September 28, 2015, Senator Mike Lee (R-Utah) introduced The Protecting American Jobs Act (S. 2084), which sought to remove the NLRB’s authority to prosecute complaints for unfair labor practices and to prohibit the NLRB from promulgating rules or regulations that affect employer or employee rights. Instead, under the bill, aggrieved persons could bring civil actions in federal district courts. No action has been taken on S. 2084 since it was referred to committee on September 28, 2015.\textsuperscript{30}

\section*{B. State Legislation Addressing Franchisor Employment Liability}

\subsection*{1. Summary of State Legislation Addressing Franchisor Employment Liability}

In contrast to the unsuccessful efforts at federal legislation, as of July 19, 2016, nine states (Georgia, Indiana, Louisiana, Michigan, Oklahoma, Tennessee, Texas, Utah and Wisconsin) have passed legislation limiting the situations in which franchisors will be deemed to be joint employers of their franchisees’ employees or employers of their franchisees for purposes of state law (such as state laws on workers compensation, wage and hour issues, unemployment insurance, employment discrimination, occupational safety and health, and other employment issues).\textsuperscript{31}

The specific approach taken by each state legislature varies. Some states, like Tennessee and Oklahoma, establish a bright line rule that a franchisor is not an employer of the franchisee or the franchisee’s employees.\textsuperscript{32} Georgia’s new law creates a blanket change across all state employment laws except workers compensation.\textsuperscript{33} Other states have specifically amended particular underlying state employment laws. For example, Wisconsin amends workers compensation, minimum wage, unemployment insurance, wage payment/claims/collection, and employment discrimination laws.\textsuperscript{34} Indiana has amended its


\textsuperscript{29} Id.


\textsuperscript{31} Michigan’s new laws facially appear to only address the question of when franchisors will be deemed joint employers of their franchisees’ employees. The new laws in the other eight states each limit both (1) when franchisors will be deemed joint employers of their franchisees’ employees, and (2) when franchisors will be deemed employers of their franchisees.

\textsuperscript{32} TENN. CODE ANN. § 50-1-208 (2016); OKL. ST. ANN. tit. 59 § 6005 (2016).

\textsuperscript{33} GA. CODE ANN. § 34-1-9 (2017).

\textsuperscript{34} WIS. STAT. ANN §§ 102.04; 104.015; 108.065; 109.015; 111.3205 (West 2016).
franchise act, rather than its employment statutes. Michigan has amended both its franchise and employment laws.

Many states carve out narrow situations where a franchisor could be deemed to be a joint employer (or an employer of its franchisees), and provide that the franchisor is not a joint employer or employer in any other situation. The situations under the new state laws where a franchisor could be deemed an employer or joint employer include:

- If the franchisor agrees to assume the role of an employer, specifically:
  - if the franchisor agrees, in writing, to assume the role of an employer or co-employer of the franchisee or the employee of a franchisee (Indiana);
  - as specifically provided in the franchise agreement (Michigan);
  - if the franchisor has agreed in writing to assume that role (Wisconsin); and
  - if the franchisor exercises a certain level of control, specifically:
    - if the franchisor and franchisee share or co-determine those matters “governing the essential terms and conditions of employment” and “directly and immediately” control matters related to the employment relationship such as hiring, firing, discipline, supervision, and direction (Louisiana);
    - if both of the following apply: “(a) The franchisee and franchisor share in the determination of or codetermine the matters governing the essential terms and conditions of the employee’s employment. (b) The franchisee and franchisor both directly and immediately control matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction.” (Michigan, workers compensation only);
    - if the franchisor has exercised “a type or degree of control over the franchisee or the franchisee’s employees not customarily exercised by a franchisor for the purpose of protecting the franchisor’s trademarks and brand” (Texas, Utah, and Wisconsin).

36 MICH. COMP. LAWS ANN. §§ 408.1005; 408.471; 408.412; 421.41; 445.1504b; 418.120 (West 2016).
37 IND. CODE § 23-2-2.5-0.5 (2016).
38 MICH. COMP. LAWS ANN. §§ 408.1005; 408.471; 408.412; 421.41; 445.1504b (West 2016).
39 WIS. STAT. ANN §§ 102.04; 104.015; 108.065; 109.015; 111.3205 (West 2016).
41 MICH. COMP. LAWS ANN. §418.120 (West 2016).
42 TEX. LABOR CODE ANN. §§ 21.0022; 61.0031; 62.0006; 91.0013; 201.021; 401.014; 411.005 (West 2015).
43 UTAH CODE ANN. §§ 31A-40-102; 31A-40-212; 34-20-2; 34-20-14; 34-28-2; 34-40-102; 34A-2-103; 34A-5-102; 34A-6-103; 35A-4-203 (West 2016).
44 WIS. STAT. ANN §§ 102.04; 104.015; 108.065; 109.015; 111.3205 (West 2016).
The following chart identifies the nine state laws:

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<th>State</th>
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<th>Where Codified</th>
<th>Status</th>
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<td>Indiana</td>
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<td>IND. CODE § 23-2-2.5-0.5</td>
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<td>Texas</td>
<td>Acts 2015, 84th Leg. R.S., Ch. 1156 (Senate Bill 652)</td>
<td>TEX. LAB. CODE §§ 21.0022; 61.0031; 62.0006; 91.0013; 201.021; 401.014; 411.005</td>
<td>Effective September 1, 2015 (signed by governor on June 19, 2015)</td>
<td><a href="http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=84R&amp;Bill=SB652">http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=84R&amp;Bill=SB652</a></td>
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<td>Utah</td>
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<td>UTAH CODE ANN. §§ 31A-40-102; 31A-40-212; 34-20-2; 34-20-14; 34-28-2; 34-40-102; 34A-2-103; 34A-5-102; 34A-6-103; 35A-4-203</td>
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2. **What do the State Franchisor Employment Liability Laws Accomplish?**

The laws have practical and strategic effects. On the practical front, they modify other state laws, which themselves create independent sources of liability with independent remedies. In one concrete example, under Tennessee state law, employers are required to provide meal breaks under certain circumstances, and if they do not, are subject to civil penalties.45 Federal law does not require such meal breaks.46 By eliminating joint employer liability, Tennessee’s law seeks to clarify that a franchisor will not be liable as a joint employer for this Tennessee meal break violation. Similarly, workers compensation programs are largely governed by state laws.


46 See https://www.dol.gov/general/topic/workhours/breaks.
law (with exceptions for federal workers and a few select specific employee groups). Thus, state joint employer statutes can have significant impact in the workers compensation realm.

Critically on the practical front, state legislation neutralizes state regulators who might otherwise pursue enforcement actions or issue regulatory guidance addressing state law claims. For example, the general counsel of a cleaning services franchisor has reportedly stated that in New York, the company is facing an ongoing and lengthy joint employer case involving an unemployment insurance claim, which has already cost the franchisee and franchisor hundreds of thousands of dollars. In Texas, however, the same franchisor was quickly released from a joint employer style audit of a franchisee by the state workforce commission. Similarly, if New York had passed legislation providing that franchisors were not the joint employers of their franchisees’ employees, the Attorney General of the State of New York likely would not have been able to pursue Domino’s Pizza Franchising LLC, as he currently is, in a recently filed action alleging that the Domino’s franchisor is a joint employer responsible for alleged violations of New York’s Labor Law by certain Domino’s franchisees.

On the strategic front, state legislation can build momentum for federal legislation or other federal action. State legislation educates the state’s representatives in Washington D.C. about the interests of their constituents and encourages the federal legislators to follow these interests. Efforts on the state legislation front can also serve as a grassroots organizing tool to motivate franchisors and franchisees.

3. **What Can’t the Laws Accomplish?**

There are limits to what state laws can accomplish. Of course, state laws cannot amend federal laws, such as the NLRA and the FLSA. Thus, for example, state laws cannot impact joint employer liability for minimum wage and overtime issues based on the FLSA.

4. **Do the State Laws Address Voluntary Agreements with the Department of Labor?**

In some situations, franchisors have entered into voluntary agreements with the Department of Labor. For example, since 2012, the franchisor for Subway and the WHD have collaborated to educate Subway franchisees about their responsibilities under the FLSA. Subway’s franchisor has invited DOL staff to present at annual meetings, published articles authored by WHD in its weekly electronic newsletter, and facilitated DOL’s efforts to provide FLSA posters to all new franchise owners. On July 26, 2016, the DOL and Subway’s franchisor entered into a voluntary agreement to build on the existing collaboration by, among

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49 Id.

50 Supreme Court of the State of New York for New York County, Index No. 450627/2016. As of the date of the drafting of this paper on August 17, 2016, Domino’s Pizza Franchising LLC had not yet filed its response to the Petition. DLA Piper LLP (US) represents Domino’s Pizza Franchising LLC in this action.


52 Id.
other things (a) providing training (and compliance assistance) materials to franchisees, (b) developing compliance support for franchisees through data-sharing and technology, (c) committing to regular meetings to share information, evaluate compliance trends, and solve problems, (d) communicating about responsibilities to comply with the investigative process, and (e) emphasizing consequences for FLSA noncompliance. Under this agreement, DOL retains its prosecutorial discretion to investigate and seek remedies for any violation of the FLSA or other relevant laws.

In an entry on the DOL’s blog, David Weil states: “the agreement builds upon the division’s ongoing work to provide technical assistance and training to Subway’s franchisees. It also provides an avenue for information-sharing where we will provide data about our concluded investigations with Subway, and they will share their own data with us, generating creative problem solving and sparking new ideas to promote compliance. When circumstances warrant, the franchisor will remind franchisees of the Wage and Hour Division’s authority to investigate their establishments and to examine records. It also specifies that Subway may exercise its business judgment in dealing with a franchisee’s status within the brand, based upon any history of Fair Labor Standards Act violations. The agreement provides a model for exacting compliance, at scale, in an industry that has experienced problems.”

Some states, including Georgia, Louisiana, and Tennessee, attempt to provide franchisors with certainty that such voluntary agreements will not have unintended consequences. Thus, Louisiana’s law states, “A voluntary agreement entered into between the United States Department of Labor and an employer shall not be used by a state department or agency as evidence or for any other purpose in an investigation or judicial or administrative determination, including whether an employee of a franchisee is also considered to be an employee of the franchisor.” Similarly, the Tennessee law states: “Notwithstanding any voluntary agreement entered into between the United States Department of Labor and a franchisee, neither a franchisee nor a franchisee’s employee shall be deemed to be an employee of the franchisor for any purpose.” In the same way, Georgia’s law states: “Notwithstanding any order issued by the federal government or any agreement entered into with the federal government by a franchisor or a franchisee, neither a franchisee nor a franchisee’s employee shall be deemed to be an employee of the franchisor for any purpose.”

5. **Is this a Partisan Issue?**

This is not a purely partisan issue. For example, in Indiana, a Democratic legislator co-sponsored the legislation. Similarly, Louisiana’s Democratic governor signed its joint employer legislation.

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53 *Id.*

54 *Id.*


Still, the states enacting the new franchisor joint employment liability laws have tended to be states where both the state legislature and the governor’s mansion are controlled by Republicans. By contrast, the states where such laws have received more opposition tend to lean more Democratic. For example, in Virginia, the Republican-controlled Legislature passed legislation (HB 18), but it was vetoed by the Democrat governor, who commented, “House Bill 18 would relieve [] dominant franchisors/employers of the obligations and responsibilities an employer owes to its employees. As a result, it would fall to the dominated franchisees—usually small, Virginia-based businesses—to shoulder the burdens more appropriately placed on the dominant franchisor.”

V. FRANCHISOR EMPLOYMENT LITIGATION DECISIONS IN 2016

Plaintiffs’ lawyers have noted the NLRB’s and DOL’s focus on joint employment issues and have increasingly brought their own private lawsuits alleging that franchisors are joint employers of their franchisees’ employees, or that franchisors are employers of their franchisees. The cases have become increasingly difficult to defeat at the motion to dismiss stage, but there is no indication of a trend of finding on the merits that franchisors are liable as employers or joint employers. In addition to private litigation, franchisors face enforcement actions, such as a recently initiated action by the Attorney General of the State of New York against Domino’s Pizza Franchising LLC alleging that the Domino’s franchisor is a joint employer responsible for alleged violations of New York’s Labor Law by certain Domino’s franchisees. Below are some recent decisions.

A. Ochoa v. McDonald’s

In Ochoa v. McDonald’s, a federal district court in California held that the issue of whether McDonalds may be liable for its franchisee’s labor violations on an ostensible agency basis could be adjudicated on a class-wide basis with respect to claims for miscalculated wages, overtime, and maintenance-of-uniform. Pursuant to Federal Rule of Civil Procedure 23(f), McDonald’s has filed a petition in the Court of Appeals for the Ninth Circuit, seeking interlocutory review of the class certification order. If an appeal is unsuccessful, in future cases franchisors will likely attempt to distinguish Ochoa on the grounds that in that case McDonald’s failed to submit any evidence indicating that any named plaintiff or putative class member did not believe that McDonald’s was their employer or that they were unjustified or unreasonable in relying on their belief that McDonald’s was their employer. In future cases, franchisors will likely introduce evidence that named plaintiffs or other class members did not believe that the franchisor was their employer or were unjustified or unreasonable in relying on any belief that the franchisor was their employer.

63 Supreme Court of the State of New York for New York County, Index No. 450627/2016. As of the date of the drafting of this paper on August 17, 2016, Domino’s Pizza Franchising LLC has not yet filed its response to the Petition.
65 Ninth Circuit Case No. 16-80096.
The *Ochoa* court had previously held that McDonald's was not directly liable as a joint employer with its franchisee, but that fact disputes precluded summary judgment on the issue of whether McDonald's might be liable because its franchisee was its ostensible agent. Under California law, ostensible agency can only exist where (1) the person dealing with the agent does so with reasonable belief in the agent's authority; (2) that belief is “generated by some act or neglect of the principal sought to be charged,” and (3) the relying party is not negligent.\(^{66}\)

In ruling on the class certification issue, the *Ochoa* court reasoned that, “Plaintiffs have tendered substantial and largely undisputed evidence that the putative class was exposed to conduct in common that would make proof of ostensible agency practical and fair on a class basis. For example, plaintiffs have submitted declarations showing that they were required to wear McDonald's uniforms, packaged food in McDonald's boxes, received paystubs, orientation materials, shift schedules and time punch reports all marked with McDonald's name and logo, and in most cases applied for a job through a McDonald's website. [internal citations omitted]. The fact that each employee spent every work day in a restaurant heavily branded with McDonald's trademarks and name is also informative. These facts are shared in common across the proposed class and make class-wide adjudication of ostensible agency against McDonald's a suitable and appropriate procedure.”\(^{67}\)

The *Ochoa* court further observed, “whether or not ostensible agency exists ‘may be implied from circumstances.’ (internal citation omitted) As shown here, plaintiffs have already identified a common course of conduct on the part of McDonald's which makes possible the implication that class members reasonably believed that the [franchisees] were McDonald's ostensible agents. On top of that the named plaintiffs have submitted declarations stating that they in fact held the personal belief that McDonald's was their employer. Significantly, on the other side of the ledger, McDonald's has submitted no evidence at all indicating that any named plaintiff or putative class member did not believe that McDonald's was their employer or that they were unjustified or unreasonable in relying on that belief.”\(^{68}\)

Thus, on the record before it, the *Ochoa* court found that plaintiffs had done enough to show that the ostensible agency issue could be litigated on a class-wide basis. Still, this was not a decision on the merits. The court carefully stated, “[w]hether plaintiffs will ultimately prevail or fail in their proof of agency is for the trier of fact to decide and not for the Court to resolve in determining certification. It may well be that the proposed class has the ‘fatal similarity’ of a failure of proof on ostensible agency.”\(^{69}\)

**B. Dep't of Labor & Indus. of State v. Lyons Enterprises Inc.**\(^{70}\)

In *Dep't of Labor & Indus. of State v. Lyons Enterprises Inc.*, the Washington Supreme Court held that janitorial franchisees who did not actually employ subordinates were covered “workers” of their regional franchisor for purposes of Washington’s workers’ compensation law (the Industrial Insurance Act, “IIA”). Whether the franchisees were actually employees of their


\(^{68}\) *Id.*

\(^{69}\) *Id.* at *4.*

\(^{70}\) 185 Wash. 2d 721, 374 P.3d 1097 (2016).
regional franchisor was not at issue in the case because the IIA also covers certain independent contractors where the essence of the independent contract is the independent contractor's personal labor. The Washington Supreme Court held that on the facts before it, the essence of the franchise agreements was the franchisee's personal labor required to clean customers' buildings, except in instances where the franchisee actually employed others to do all or part of the work.

Although the case decided a narrow issue under the Washington statute in a factual situation that is not typical for most franchise systems, plaintiffs' lawyers may seek to use some of the reasoning in other contexts that consider whether franchisors and franchisees are engaged in independently established businesses. In Lyons, the Washington Supreme Court ruled that the franchisees' businesses did not exist separate and apart from the relationship with the franchisor. The facts were somewhat unique, including the following findings by the Court:

- Most of the franchisees were not in the commercial cleaning business prior to the purchase of their franchise, nor had they previously owned businesses.
- The franchisees relied on the franchisor to solicit business and to complete billing, and the franchisor owned all of the cleaning contracts.
- The franchisees' businesses relied on the franchisor for creation and operation of the franchise and ceased to have any legitimate value at the close of the franchise agreement.
- If a franchise was terminated early, franchisees were precluded from operating their businesses for the entire duration of the ten-year franchise agreement and for a one-year period after the end of the franchise agreement pursuant to the mandatory non-compete clause. 71

The Lyons Court described the non-compete clause as the “antithesis of independence.”72

C. Uninsured Employers' Fund v. Crowder 73

In Uninsured Employers' Fund v. Crowder, the Kentucky Supreme Court affirmed an Administrative Law Judge's decision that the franchisor for Quiznos ("QFA") did not have up-the-ladder liability for workers compensation benefits for a franchisee's assistant manager.

Unlike the Lyons case described above, the factual situation in Crowder is more typical of franchise systems, and franchisors' lawyers will likely seek to use some of Crowder's reasoning in other contexts. The Kentucky Supreme Court held the ALJ's determination that QFA did not have up-the-ladder liability was supported by substantial evidence. To have up-the-ladder liability, the franchisee's work would have had to have been a "regular or recurrent part of the work" of the franchisor.74 The franchisee's work was making and selling sandwiches to customers; QFA was not in the business of making and selling sandwiches to customers. Instead, QFA was in the business of granting and overseeing franchise agreements. QFA did not actually operate any Quiznos restaurant. Although the franchise agreement and operating manual provided detailed instructions on how to manage the restaurants on a day-to-day basis,

71 Id. at 743.
72 Id.
74 Id. at *3.
these guidelines were instituted to protect the brand which QFA sold. Keeping the brand strong is a critical part of QFA's purpose because it derives its revenue from franchise fees and royalties. Additionally, although the success of individual franchises benefited QFA, its primary focus was making Quiznos franchises attractive to investors.

D. Reed v. Friendly's Ice Cream, LLC

Reed v. Friendly's Ice Cream, LLC illustrates the difficulty of prevailing at the motion to dismiss stage when an action involves joint employment claims directed against the franchisor. In Reed, a Pennsylvania federal court denied a motion to dismiss plaintiffs’ claims in an FLSA and state labor and wage class action that the franchisor and franchisees for Friendly's restaurants jointly employed the franchisees' employees. Plaintiffs alleged that the franchisor required servers at Friendly's restaurants to perform work tasks “off-the-clock,” both during unpaid meal breaks and after clocking out at the end of shifts, and that servers were not paid overtime and minimum wages.

Plaintiffs further alleged that the franchisor oversaw the day-to-day operations of all Friendly's restaurants, created and enforced all policies related to employees' wages and work tasks, and in fact operated as a joint employer and integrated enterprise with its franchisees due to its level of oversight of and involvement with each restaurant. In support of their joint employment assertion, plaintiffs alleged, among other things:

- “Throughout the relevant period, Friendly's has been actively engaged in the day-to-day operation and management of business operations at all of its Company-owned and Franchisee-owned restaurants.”

- “All Friendly's restaurants receive active, ongoing support from Friendly’s, including: quality assurance visits, marketing and advertising services, menu development, point-of-sale materials, signage and banners, public relations announcements.”

- “Friendly's website describes its extensive 'on-going operations support' in Franchisee-owned restaurants as including: 'an assigned Franchise Business Consultant, quality assurance visits, marketing and advertising services and many others.'”

- “All Company-owned and Franchisee-owned Friendly's restaurants use the same computerized ordering, timekeeping and payroll systems developed and overseen by Friendly's.”

- “Friendly's is a joint employer of the Servers in all Company-owned and Franchisee-owned Friendly's restaurants because it has the right to: hire and fire them, set their wages, control their work, direct the manner in which they perform their work, inspect

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76 Dkt. 25 at ¶¶ 16-20, 33.
77 Dkt. 25 at ¶ 19.
78 Dkt. 25 at ¶ 20.
79 Dkt. 25 at ¶ 22.
80 Dkt. 25 at ¶ 26.
and supervise their work, promulgate policies and procedures governing their employment (including the work, time, compensation and overtime policies and procedures at issue here), enforce these policies and procedures, calculate the compensation they receive, and pay that compensation.”

- “Servers in all Company-owned and Franchisee-owned Friendly’s restaurants are required to follow common policies, systems, procedures, and requirements, including policies relating to hiring, training, hours of work, overtime, timekeeping and compensation developed and promulgated by Friendly’s.”

Plaintiffs also alleged that the employment policies as well as the publicly-stated goals for customer experience and satisfaction at all Friendly’s restaurants are identical among restaurants owned by the franchisor and restaurants owned by franchisees.

At the pleading stage, the court was satisfied that plaintiffs had sufficiently alleged facts to support a joint employment relationship between the franchisor and its franchisees. This was not a decision on the merits.

E. Wright v. Mountain View Lawn Care, LLC

In Wright v. Mountain View Lawn Care, LLC, a West Virginia federal court granted summary judgment in favor of a franchisor, concluding that the franchisor was not the joint employer of the franchisee’s employee for purposes of Title VII liability. The court further held that the franchisor could not be held liable under the single, integrated employer theory of liability or an apparent agency theory.

In concluding that the franchisor and franchisee were not the franchisee’s employee’s joint employers for purposes of Title VII liability, the court noted:

- there was no evidence to suggest that the franchisor had the authority to hire and fire the franchisee’s employee;
- the franchisor did not provide any human resources management services to the franchisee during the relevant period;
- the franchisee, not the franchisor, supervised and disciplined the franchisee’s employee;
- the franchisor did not furnish the equipment used or the place of work;
- the franchisor did not possess any of the employee’s personnel records;
- the franchisor did not provide any training to the franchisee’s employee;

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81 Dkt. 25 at ¶ 32.
82 Dkt. 25 at ¶ 28.
83 Dkt. 25 at ¶¶ 34-37.
• the franchisee’s employee’s duties were different than the duties of the franchisor’s employees (which were to act as franchise advisors or work at the corporate office); and

• forms stated that the franchisee was an independently owned and operated enterprise and was a separate and distinct entity from the franchisor.85

The Wright court was not swayed by other facts such as the employee wearing a uniform bearing the franchisor’s name and using trucks and trailers bearing the franchisor’s logo. Similarly, the court disregarded the amount of control the franchisor maintained over its franchisee, instead noting that the relevant inquiry was the franchisor’s control over the individual employee.

On the apparent agency issue, critically the employee presented no evidence that she accepted this job because she believed she was working for the franchisor. In addition, there was evidence that should have made the employee aware that the company that employed her was an independently owned franchise. Her personnel records either expressly listed “Mountain View Lawn Care, LLC dba U.S. Lawns of Roanoke” as the employer or stated at the bottom: “This U.S. Lawns ‘Franchise’ is an independently owned and operated enterprise and is a separate and distinct entity from the U.S. Lawns ‘Franchisor’.”86

F. Other Joint Employment Litigation Against Franchisors in 2016

Other franchisors, including both large franchisors (such as Domino’s, 7-Eleven, Jack-in-the-Box, and Jimmy John’s) and small franchisors (such as Mexican Restaurants, Inc.), have similarly recently faced allegations of joint employment.87 The franchise community will continue to track these cases with interest.

VI. EFFECT ON FRANCHISEES

The “joint employer” standard announced by the NLRB is an uncharted precedent for the franchise industry. If not carefully analyzed, successfully challenged, limited or clarified, the NLRB standard has the potential to cause a significant shakeup in the franchise business model that millions of Americans have counted on for years for job creation and economic growth. The effect that this standard could have on franchisees and franchisors alike is staggering. This

85 Id. at *4-*6.
86 Id. at *11.
87 See In re: Jimmy John’s Overtime Litig., No. 14 C 5509, 2016 WL 3647650 (N.D. Ill. June 27, 2016) (noting that FLSA collective action had been conditionally certified in action alleging violations of the FLSA and Illinois state wage and hour laws by franchisor Jimmy John’s and certain of its franchisees; action involved joint employment allegations); Abrar v. 7-Eleven, Inc., No. 14CV6315ADSAKT, 2016 WL 1465360 (E.D.N.Y. Apr. 14, 2016) (approving a $5,000 single plaintiff settlement with the franchisor in an FLSA overtime case where a franchisee’s employee alleged that the franchisor was his joint employer; employee could continue to pursue franchisee for additional relief; court noted that the issue of whether the franchisor was a joint-employer subject to liability under the FLSA was hotly contested between the parties, and litigating that issue would have required extensive discovery, including depositions and dispositive motion practice, which would have been costly and presented risks for both parties); White v. Turner, No. CV H-15-1485, 2016 WL 1090107 (S.D. Tex. Mar. 21, 2016) (noting previous ruling on summary judgment, without stating reasoning, that franchisor Mexican Restaurants, Inc. and its franchisee were not joint employers of those working only at the franchisee’s restaurants); Gessele v. Jack in the Box, Inc., No. 3:14-CV-1092-BR, 2016 WL 1056976 (D. Or. Mar. 10, 2016) (noting that Court had previously denied as premature a motion for summary judgment relating to defendant's status as a joint employer); Salazar v. McDonald's Corp., No. 14-CV-02096-RS (MEJ), 2016 WL 736213 (N.D. Cal. Feb. 25, 2016) (noting that McDonald’s planned to move for summary judgment on the issue of whether the franchisor and franchisee were joint employers of the franchisee’s employees).
section of the paper touches on some of these effects on franchisees and how the franchise ownership experience as we know it might be changed forever.

A. **End of Franchising?**

One of the fundamental elements embodying the franchise relationship is some form of independence on the part of the franchisee. Ideally, franchisors provide services in the form of training and other operational support, but will not directly control the day to day operations of a franchisee. This is especially so in the context of employee related issues like hiring and firing, disciplining employees and setting the wages and working conditions of the franchisee’s employees. However, as set forth in greater detail throughout this paper, the new “joint employer” analysis requires a very close look at how arm's length franchisors actually conduct business when it comes to providing guidance or assistance (or mandating) on other “ordinary”, “common” or routine issues that arise in the course of the franchisee running its business. Because of the notion that the new “joint employer” standard will require franchisors to be more involved in the decisions franchisees make in the operation of their business, academics and other pundits have advanced the idea that “joint employer” status may be the end of franchising altogether.

Of course, these opinions are at one end of the extreme, however, one can imagine a complete dissolution of the franchising relationship if there is an elimination of any independence on the part of a franchisee. This alone could result in individuals and companies steering their investments clear of a franchised business and, more likely, companies may choose not to franchise (or even de-franchise). Rather than dealing with the increased risks of being deemed a joint employer, franchisors may choose to open up corporate locations instead of selling franchises to the public, with such corporate locations run by existing members of the corporate hierarchy. Such a decision would not only cut off one of the public’s primary sources of access to small business ownership, but it could discourage entrepreneurship and halt economic development. The trickledown effect would result in the job market inevitably suffering, as the number of jobs previously provided by franchisees to the hard-working members of their communities would decline considerably. Although it is unlikely that “joint employer” will be the end of franchising, it is most certain that if adopted, the new “joint employer” standard would be the end of franchising as we have come to know it over the last several decades in the United States.

B. **Changes to Operational Control**

As this paper has explored, franchisors have some difficult choices to make regarding the direction of their systems and the degree of control that they intend to exercise over their franchisees. The new law changes—or at least questions—the very reason driving companies to franchise and individuals to become franchisees. That is, getting the benefits of the history and experience of the franchisor (in the form of training, support and goodwill); while maintaining the ability to make independent decisions in the day to day operation of the business. In light of the recent changes to the NLRB standard, some franchisors may determine that their best option is to limit the freedom awarded to franchisees and exercise absolute control over the franchisees of their system. However, although this approach may offer franchisors some additional comfort that their franchised locations are being run according to system standards, franchisees that are micromanaged as such might feel less inclined to participate fully in the business and weigh in on the day to day decisions from which they could derive some economic benefit. For franchisees, the ability to hire or fire who they wish, for example, is critical to the sanctity of the franchise relationship. The idea of being in business “for yourself” and not “by yourself” is appealing to franchisees that desire the ideal mix of
independence and guidance. If franchisors are going to be legally responsible at the end of the day for operational issues in which franchisors were not historically involved in, then it behooves the franchisor to take a more active role in that decision making process, regardless of contractual indemnification provisions.

Alternatively, some franchisors may decide to become completely hands off and abstain from any sort of governing or oversight role. Franchisors will be forced to distance themselves from their franchisees. Traditionally speaking, franchising provides those with little to no business experience the chance to piggy back off of a franchisor’s goodwill and brand development, and essentially become an entrepreneur overnight. Most franchise systems help franchisees get on the fast-track to entrepreneurship by providing their franchisees with ample training programs and detailed operations manuals. Out of fear for being deemed a joint employer under the new NLRB standard and being held liable for employment law violations by their franchisees, some franchisors might decide to limit the extent of training opportunities and supervision that they typically would offer to their franchisees. Among other things, they may stop offering helpful training programs, enforcing operational standards, providing standardized manuals, coaching on best employment practices, etc. By removing or paring down the operational tools and support that the franchise model is known to provide, the average individual will be less likely to invest in a franchised concept.

C. Increased Costs

For existing franchisees, material changes to the franchisor’s form of franchise agreement—changes which are even more franchisor-friendly—should be expected during any renewal terms. As it is, most franchise agreements contain extremely franchisor-friendly indemnification provisions. Pursuant to the average indemnification provision, franchisees are responsible for covering any and all legal costs incurred by the franchisor in any actions relating to the franchised operation. On account of the new “joint employer” standard, actions against franchisors will inevitably increase, as franchisors will be commonly roped into lawsuits that were traditionally only brought against the franchisee. Consequently, franchisees should be prepared to bear the financial burden of these lawsuits—both in terms of their own legal costs, as well as those of the franchisor.

Along similar lines, franchisees should accept that their insurance costs will notably increase. As an initial matter, franchisees are typically required to name the franchisor as an additional insured on all insurance policies. With the advent of the new NLRB standard, adding franchisors as additional insureds takes on a whole new meaning, as the risk facing insurance providers is now much higher than it used to be. The likelihood of the franchisor being swept into a claim is greater, so insurance providers are becoming increasingly cautious about adding the franchisor as an additional insured. As such, franchisees should expect to see elevated insurance premiums over the next few years as the joint employer standard evolves.

Moreover, for franchisees that do not already purchase employment practices liability insurance or other management liability coverage, they should expect that their franchisors will soon mandate it. However, because these types of insurance coverages are usually based on the number of employees that an employer has, it is likely that insurance companies will require the single franchisee to factor in the entire number of employees in the franchise system when reporting its total number of employees. Such a requirement may result in a number of unintended consequences, namely that the single franchise owner’s insurance premiums for these policies skyrocket or—in the worst case scenario—becomes unaffordable to purchase.
In addition to the foregoing, franchisees will now also need to be more diligent in finding third party companies to work with to ensure that they are implementing best practices in the operation of their business. This is especially so for areas of support that a franchisor no longer provides. For example, many franchisors have handled various parts of franchisee employee training. In light of the new joint employer analysis, franchisors may cease this type of support – yet continue to require that these employees undergo training meeting the franchisor’s standards. This means that franchisees will be required to create their own training programs and implement their own oversight controls but still pay the fees required by the franchise agreement even though they are receiving less support than has traditionally been provided by franchisors in these areas.

D. **Likelihood of Unionization**

Finally, one of the possible effects of the new NLRB standard in the franchise industry is the increased likelihood of unionization among franchisees. Franchisees will face increased pressure to unionize, which process—whether such franchisees are interested in unionizing or not—will result in increased legal costs for franchisees. Although unionization may result in better work conditions and higher pay for a franchisee’s employees (which arguably could decrease employee turnover and potentially attract better employees for franchisees), it will likely result in increased costs for the franchisees (or require the franchisees to pass on such costs to their customers). Additionally, part of the allure of the franchise model is being able to take inexperienced low-skilled workers and—using the franchisor’s proven tools—turn them into skilled employees. Unionization would reduce this particular benefit, and, again, question the need for the franchising relationship in the first place.

VII. **INCREASING USE OF FRANCHISEE GROUPS**

It is common in the industry to have formed within a franchise system one or more organizational bodies to represent the franchisee community collectively, such as franchisee advisory councils, independent franchisee associations, ad hoc committees or task forces, and cooperatives. The use of these groups, while not a new concept in the industry, may soon become a more widely utilized one as a result of the recent changes in the NLRB “joint employer” standard. As franchisors and franchisees alike look for a cooperative way to forge ahead, despite the challenges faced on account of the changing law, we may begin to see the use of these collective franchisee bodies as a predominant means of communication within the system and as a way for the parties to transmit ideas and share operational initiatives with one another.

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88 Richard L. Kolman & Harris J. Chernow, *Franchisee Associations and Franchise Advisory Councils: A Review of the Fundamentals and Annotated Bibliography of Helpful Resources*, Int'l Franchise Ass’n 40th Annual Legal Symposium, at 2 (2007) (noting that the role of these bodies is vitally important to both franchisors and franchisees).

89 Lawrence, B., & Kaufmann, P. J. (2010). Identity in franchise systems: The role of franchisee associations [Electronic version]. Retrieved August 18, 2016, from Cornell University, School of Hospitality Administration site: http://scholarship.sha.cornell.edu/articles/289. (“These organizations can be arrayed along a continuum from entities that are totally franchisor funded and supported ... to franchisee created and supported structures ... to ad hoc groups created for the simple purpose of litigation.”).

90 Erik B. Wulf, *Advisory Councils: Effective Two-Way Communications for Franchise Systems*, Franchise Relations Committee, Int'l Franchise Ass’n, 3 (2005) (describing the common goal of franchisee groups as fostering constructive two-way communications between a franchisor and the franchisees of its system).
E. Predominant Types of Franchisee Groups

A franchisee advisory council ("FAC") is a committee comprised of franchisees that meets regularly with their franchisor's management team to discuss matters relevant to the system and to receive guidance from the franchisor on various issues. FACs are designed to function as a forum for the open exchange of ideas/concerns – a place in which franchisees can voice their concerns about system-wide issues and franchisors can discuss and test the workability of new initiatives. The success of a FAC is directly attributable to the amount of recognition and attention that it receives from the franchisor. A FAC with an active franchisor can be a real valuable asset to franchisees, as it provides an avenue for important conversations relating to marketing, operations, system technology, market trends, equipment selection, employee management issues, product and service developments, and, generally, system-wide best practices.

Independent franchisee associations ("IFA"), in contrast to FACs, function independent of the franchisor and do not require the same degree of involvement from the franchisor and its management team. Additionally, unless invited, franchisors do not regularly attend meetings of an IFA. Moreover, although IFAs are typically formed and run by the franchisees alone, FACs are developed and run by the franchisor. Not only does the franchisor absorb most of the costs of running the FAC, it also prepares the bylaws and other governing documents for the FAC, which documents set forth the powers of the FAC and the selection process for its members. This is unlike IFAs, which are funded independently by franchisees and almost always democratically operated and run by their members.

Although IFAs are certainly a helpful tool to push franchisee concerns up the ladder, they are often formed as the result of some widespread issue or problem with the particular franchise system and are more traditionally recognized for the various support services that they provide to their franchisee members. To the contrary, FACs are formed with the intent of

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95 Quinland & Salkowski, *supra* note 91, at 5-6.


97 Id. at 8; Quinland & Salkowski, *supra* note 91, at 5.


99 Quinland & Salkowski, *supra* note 91, at 4; Edward (Ned) Levitt, *A Seat at the Table: The Case for Franchisee Advisory Councils*, 45 Franchising World 22, 22 (2013) (explaining that, historically, independent associations were viewed "as an obstacle, if not a threat, to the franchisor’s goals and ambitions"); Blum, Selden & Stove, *supra* note 98, at 9 (explaining that, historically, franchisors have perceived franchisee associations and advisory councils "more as a threat or source of contention than a resource, especially if the association was formed by franchisees during a time of conflict or controversy between the franchisor and franchisees.").
creating a synergistic environment that supports meaningful dialogue and generates operational and strategic improvements for the system, with an equal benefit to the franchisor.

F. Use of Franchisee Groups Moving Forward

As this paper has highlighted, because of the changing “joint employer” analysis, franchisors are at a crossroads with respect to the degree of operational guidance and support that they will offer to franchisees going forward. In the coming years, it is arguable that FACs and IFAs will take on a whole new meaning and role in the industry.

As the new “joint employer” standard takes shape and franchisors continue to reign in the level of indirect and direct control over their franchisees, franchisors may more actively count on FACs to communicate their operational messages to their franchisees. The open discussions that ensue in the FAC meetings regarding the various challenges and issues affecting the system, and the rising use of FACs as the appropriate forum to have such conversations, might work to blur the lines a bit between the franchisor and franchisee and perhaps allow the franchisor to use the FAC’s franchisees to communicate its operational messages to other franchisees. It has been said that a FAC can have the “therapeutic effect of offsetting a franchisor’s tendency to ‘control’ everything that occurs in the system.” 100 As such, when faced with the issue of control in a joint employer context, a franchisor’s participation in a FAC might actually help strengthen its argument.

Moreover, it is likely that the industry will begin to see IFAs assume many of the roles traditionally reserved to franchisors. We should expect to see IFAs working with key industry vendors and suppliers – including insurance companies – to secure group deals for the franchisees and to provide franchisees with access to certain business services that they would not otherwise have had as a single unit franchisee. In addition, as a result of the recent changes to the NLRB’s joint employer standard, we should see more and more franchisors collaborating with their IFA to retain high-performing franchisees or third-party providers to deliver the training and operational support to the franchisee members that was typically provided by the franchisor.

As a recent study pointed out, one national franchisor has already accepted a proposal from its IFA to “pay substantially the entire cost of retaining a prominent national employment and labor relations law firm to provide seminars to franchisees, articles in the franchisee association’ publications and FAQs that can be published to the franchisee association’s website, all in an effort to elevate compliance and avoid costly litigation and damaging public relations.” 101 This is a trend the franchise community can expect to see on a more regular basis, especially in the wake of the changing “joint employer” analysis. Although it provides an additional risk to the IFA, the upside of this strategy is that it will also provide an independent outlet for quality guidance for franchisees that have joined a franchise system, in many instances, precisely for that type of guidance and support. If, as a result of a fear of joint employer liability, franchisors will no longer provide certain information or guidance on business matters, having the IFA as a centralized resource is critical. In fact, if the franchisor has a strong working relationship with the IFA, it may create an avenue for the franchisor to deliver information to franchisees without exerting control over the decision making process. It will be important for the IFAs to recognize and balance the new role they will have in working with franchisors, against crossing over any lines. For example, guidance on legal and accounting

100 Blum, Selden & Stove, supra note 98, at 36.

101 Hein, Karp, & Miller, supra note 94, at 14.
matters should be delegated to qualified professionals that the IFAs have sought out and vetted – it should not be provided by an IFA itself. In any event, it is an important time for franchisors to work with the IFAs within their respective systems to help replace some of the services that franchisors may choose not to continue to provide based upon concerns of potential joint employer liability. This should help ease the sting from a franchisor’s new “hands off” approach and also create a stronger system where franchisors and franchisees continue to communicate about critical issues at a high level, yet steer clear of potential joint employer liability.

VIII. CONCLUSION

Businesses hate uncertainty. The Browning Ferris decision combined with the lack of answers at last October’s plenary session along with the issuance of the DOL Interpretative Opinion have left the franchise community with many questions as it relates to potential joint employment liability. Unfortunately, those questions continue to persist today without many answers. This uncertainty has many franchisors pulling back from certain types of assistance they have traditionally provided to franchisees. In the long term, this is not good for franchisors or franchisees. It is imperative that as advisors to the franchise community we look for creative alternatives that allow franchisors and franchisees alike to continue to benefit from the franchise relationship while limiting potential joint employer exposure.
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