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NLRB and House of Representatives Overrule Browning-Ferris and Reinstate Prior Joint-Employer Standard

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By Mackenzie L. Dimitri
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The last month has brought about significant developments with respect to the definition of a "joint employer." These developments are critically important, and are good news for Franchisors and Franchisees, alike. As we recently recounted on our Franchise Lawyer blog, on November 7, 2017, the U.S. House of Representatives passed the Save Local Business Act, which redefined "joint employer" under the National Labor Relations Act and the Fair Labor Standards Act, to provide that a person may be considered a joint employer in relation to an employee only if such person "directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment such as hiring employees, discharging employees, determining individual employee rate of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions and tasks, or administering employee discipline."

The bill is intended to reverse the National Labor Relations' Board's 2015 decision in *Browning Ferris Industries*, 362 NLRB No. 186 (2015), which held companies liable for labor law violations committed by their subcontractors by expanding the definition of a 'joint employer.' The bill has not been taken up by the Senate at this time, but has bipartisan support.

On Thursday, the NLRB followed suit with the new House bill, overruling *Browning Ferris* in a 3-2 decision in the *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.* case. In the *Hy-Brand* case, the NLRB held that, in all future and pending cases, two or more entities will be deemed joint employers if one party exercises control over essential employment terms of another entity's employees. Reserving the right to exercise control is not sufficient to establish a joint employer relationship. The board further held that the entity exercising control must have done so directly, immediately, and in a manner that is not limited or routine.

The *Hy-Brand* decision and the Save Local Business Act remove any doubt as to whether a franchisor can be considered a joint employer of a franchisee, meaning any labor disputes between employees of the franchisee and the franchisee will not implicate the franchisor. Franchisors may be reassured by the bill's impact on their potential liabilities. Franchisees, on the other hand, may have concerns where the Franchisor's system and standards may cause them to run afoul of labor laws. All parties should discuss the bill's implications with their advisors.