

Congress of the United States
House of Representatives
Washington, DC 20515-0552

May 8, 2017

Barry J. Kearney
Associate General Counsel, Division of Advice
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

Dear Mr. Kearney,

We are writing regarding an advice memorandum issued by your office on April 28, 2015. In that memorandum, the National Labor Relations Board's Division of Advice concluded that restaurant franchisor, Freshii Development LLC, and one of its franchise development agents were not joint employers with Freshii Nutritionality Inc., a franchised Freshii® business operating a store in Chicago.

We have heard from constituents and other stakeholders concerned about whether, and to what extent, they can rely on the Freshii memorandum as a blueprint for clear guidance on the joint employer issue in the franchisor-franchisee relationship. Uncertainty remains as to whether businesses may rely on the Freshii guidance because the memorandum appears fact-specific to Freshii's circumstances and the NLRB's new joint employer test outlined in *Browning-Ferris* created a new standard for all businesses including franchised businesses.

The Freshii memorandum concluded that the franchisor and franchisee were not joint employers under either the then-existing "old" joint employer standard or under the General Counsel's proposed new joint employer standard, which the NLRB essentially later adopted in *Browning Ferris*. However, only three non-specific paragraphs of the ten-page memorandum evaluated the Freshii-franchisee relationship under the proposed new standard; the remaining pages evaluated joint employer under the lens of the former standard. This discrepancy exacerbates the uncertainty in franchising in assessing potential liability under the joint employer concept.

Understandably, the franchisors are seeking clarity with respect to their potential exposure for franchisee misconduct, as the Freshii franchisor-franchisee relationship differs significantly from many franchise arrangements. For example, while the Freshii franchisee did not use the franchisor's sample employment policy handbook, it is common in other franchise relationships for franchisees to utilize franchisor-recommended policies and procedures to enhance their prospects for success.

Franchisees, most of which are small businesses, likewise seek clarity on the memorandum's meaning and impact. They are concerned that some franchisors, fearful of the

uncertain landscape, may turn away from offering new franchisee opportunities, opting instead for corporate growth and related vertical integration, until a clear, bright line test exists for franchised businesses. Unlike the Freshii fact guidance, since first-time entrepreneurs have never owned a business before and are attracted to the franchise business model under which they will benefit from the guidance of an established experienced enterprise.

Much as the General Counsel did in his March 18, 2015, "Report Concerning Employer Rules Cases" (NLRB Office of the General Counsel Memorandum GC 15-04), we ask that your office offer guidance on this evolving area of law. Given the Board's post-Freshii decision in *Browning Ferris*, we ask that you clarify the following issues regarding the Freshii Advice memorandum:

1. May the April 28th memorandum be used as a blueprint for all franchise systems notwithstanding the joint employer standard established in late August 2015, and
2. How much flexibility will franchisors have to implement, articulate, and enforce brand standards before they are deemed to cross the line into the forbidden areas of "indirect," "unexercised," or "potential" control for joint employer purposes?

Thank you for your attention to this matter. We look forward to your response.

Sincerely,



Scott H. Peters

Member of Congress



Kurt Schrader

Member of Congress



Kyrsten Sinema

Member of Congress



Ami Bera

Member of Congress



Collin C. Peterson

Member of Congress



Vincente Gonzalez

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Jim Costa

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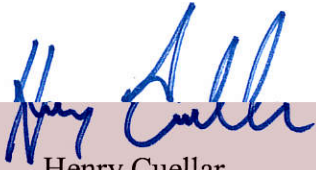
Daniel W. Lipinski

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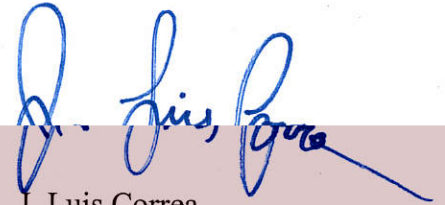
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