



With New Prez, Hotels Hope For Browning-Ferris Reversal

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For the past 18 months, hotels have been adjusting to a landmark decision by the National Labor Relations Board that put the future of the hotel franchise model in jeopardy, but with a Republican president now in the White House, the industry is trying to remain compliant while holding out high hopes for a reversal of the decision.

At issue is the Browning-Ferris decision from August 2015, which said that even indirect control, which exists in franchise agreements, could trigger joint-employer liability. Franchise agreements for decades have been built on the premise that the franchiser could have some control over the franchisee and generally not be liable when it comes to employment disputes, but the NLRB decision has created additional liability.

However, the hotel industry remains hopeful that the decision will be reversed under President Donald Trump's watch.

"Prior to the decision from the NLRB, you had a situation where joint employment would really only be triggered when there was direct oversight or a direct connection between the hotel and an outsourced component of a hotel operation, such as valet, housekeeping or security," said Dana A. Kravetz of Michelman & Robinson LLP. "Normally, you have two employers, one for the hotel company and one for the valet."

Hotels following the decision had been bracing for a long-term impact, but now that Trump is in office, they are walking a delicate line between making sure they comply with the new rules and taking a long view, which holds that Trump's two upcoming appointments to the NLRB will help reverse the ruling.

The NLRB now leans 2-1 in favor of Democrats, but assuming Trump appoints two right-leaning members, the board could ultimately lean 3-2 in favor of Republicans. Also, Trump's pick for Labor Secretary, Andrew Puzder, who is CEO of the parent company of Carl's Jr. and Hardee's, has used the franchise model for most of his career, which could further favor the hotels.

In the meantime, the decision still continues to cause major potential liability for the hotel franchise industry. The NLRB rules make franchisers subject to a broad spectrum of employment lawsuits from franchisees while also allowing union voices at franchisees to be heard by the franchiser.

"It blew up the 30 years of rulemaking on this," said Travis Gemoets of Jeffer Mangels Butler & Mitchell LLP. "Even if you're not the employer but if you exercise control or if you could potentially exercise control, then you are subject to unionization, to a joint-employer analysis."

To that point, lawyers say it's crucial that franchisers have a clear understanding of how union rules apply.

"Make sure that your rules are defined. Your positions are defined," said Christina O. Alabi at Gould & Ratner LLP. "There's a new class of people that have been added to the bargaining unit and can vote for the union. The workforce can now become a unionized workforce."

Kravetz said he is telling his clients to, in essence, exercise caution since the NLRB ruling is out there at the moment and could still cause problems for franchisers. But that's rarely an easy task.

"The rub is how do you not exercise control and yet still maintain the standard of the hotel that you want? How can I simply as a franchiser spot-check, see that they're not greeting the guests appropriately, the coffee's cold, the area around the milk and sugar is dirty?" Kravetz said.

"Most of the larger franchisers, the deep-pocket franchisers, they're taking the position, by and large, 'Look, we're not going to change our model. This ruling is going to be reversed. We will just play the long game,'" Gemoets said.

In that scenario, franchisers would fight unfair labor challenges, buying some time with appeals, and hope that a reversal of the 2015 decision would come in time to render the challenge without merit, he explained.

But some franchisers who don't have such deep pockets or are more concerned about risk are deciding to cede all control of the franchise to minimize liability amid the current environment, Gemoets added. In that case, he is advising clients to use an asset manager to at least manage the assets of the franchisee.

The new rules could also mean labor problems at one hotel could now ripple across various hotels. Since there's now a link between the franchisee and the franchiser, disputes at one of the franchiser's properties may lead to liability at other properties the franchiser owns.

"You're going to be held responsible for wage-and-hour, sexual harassment — any labor and employment issue you're going to be on the hook for," said Karl R. Lindegren of Fisher Phillips.

For her part, Sheri A. Affrunti of Reed Smith LLP said she's advising clients to carefully examine their franchise agreements, as well as additional operating agreements and manuals, to ensure compliance with the current rules.

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The key question is: "How much control, even now indirect control, over labor relations does the franchiser have over the franchisee?" said James R. Hays of [Sheppard Mullin Richter & Hampton LLP](#).

The NLRB can't reverse the exact 2015 decision, but it will likely in the near term hear cases with similar issues and could render a new decision that would override Browning-Ferris. Browning-Ferris is currently on appeal in the D.C. Circuit, but even if it reversed the decision, the NLRB wouldn't have to follow the appellate ruling, lawyers say.

Additionally, it may not be for a long while that Trump gets two more NLRB members appointed and the board hears another similar case, which means hotels will likely still have the NLRB decision to live by in the short term.

"He could nominate them for tomorrow. He's got a lot on his plate," Gemoets said. "I don't think it's going to be until the summer. It may be the end of the summer until those two positions get filled."

[The White House](#) and the NLRB couldn't be immediately reached for comment.

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Karl R. Lindegren
Partner
949.851.2424
[Email](#)

