

Advice Memorandum

DATE: April 28, 2015

TO: Peter Sung Ohr, Regional Director
Region 13

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Nutritionality, Inc. d/b/a Freshii 177-1650-0100
Cases 13-CA-134294, 13-CA-138293, and
13-CA-142297

The Region submitted this case for advice as to whether Nutritionality, Inc., as a franchisee, is a joint employer with Freshii Development, LLC and/or Freshii's franchise development agent for the Chicagoland area. We conclude that neither Freshii nor its Chicagoland development agent are joint employers with Nutritionality under current Board law or the General Counsel's proposed standard.

FACTS

Freshii Development, LLC ("Freshii") is a fast-casual restaurant chain that focuses on providing fresh and nutritious meal choices. There are over 100 Freshii stores, which are operated as franchises in over a dozen countries. Freshii contracts with "development agents" in different geographic locations to cultivate new franchises and help ensure mandatory brand standards for existing franchises.

Nutritionality, Inc. ("Nutritionality") operates a single Freshii store in Chicago, Illinois. Nutritionality signed a franchise agreement around November 2010, and the store opened around May 2011. The franchise generally employs between five and nine employees. In the summer of 2014, Nutritionality terminated one employee and disciplined and terminated another employee for attempting to unionize the workforce. The Region found merit to unfair labor practice allegations regarding the terminations and discipline but requested advice as to whether Nutritionality is a joint employer with Freshii and/or with the Chicagoland development agent.

The Freshii Franchise Agreement

The Freshii franchise agreement grants a franchisee the right "to own and operate a Freshii Restaurant using [Freshii's] business system, business formats, methods, procedures, designs, layouts, trade dress, standards, specifications and [trademarks], all of which [Freshii] may improve, further develop and otherwise

modify periodically.” Under the agreement, franchisees pay an initial franchisee fee and ongoing royalties (six percent of gross monthly sales) to Freshii.

The agreement also states that Freshii may terminate the franchise agreement for twenty different reasons, including if the franchisee interferes with Freshii’s right to inspect the restaurant, if the franchisee fails to pay Freshii, or if the franchisee “fails to comply with any other provision of this Agreement or the Operations Manual, or any mandatory System Standard, and does not correct the failure within thirty (30) days after [Freshii] delivers written notice of the failure” to the franchisee.

Operations Manual, Tools, and Oversight of the Franchisee

Freshii provides its franchisees with an Operations Manual that “contains mandatory and suggested specifications, standards, operating procedures and rules that Freshii periodically prescribes for operating a Freshii Restaurant,” i.e., “System Standards.” The franchise agreement states that System Standards may regulate any aspect of the operation and maintenance of the restaurant, including, inter alia, sales, marketing, advertising and promotion materials; staffing levels, appearance, service, and job functions for restaurant employees; pricing requirements; ingredients and methods of preparing foods; standards for training managers; use of trademarks; days and hours of operation; payment systems; and any other aspects of operating and maintaining the restaurant that Freshii determines to be useful to preserve or enhance the efficient operation, image, or goodwill of Freshii.¹ On the other hand, the franchise agreement specifies that System Standards do not include “any personnel policies or procedures,” which Freshii may make available for franchisees’ optional use, and that the franchisee alone will “determine to what extent, if any, these policies and procedures might apply” to its restaurant operations. The franchise agreement also states that Freshii “neither dictates nor controls labor or employment matters for franchisees and their employees....”

The Operations Manual also contains guidance on how to conform to the System Standards. In this regard, sections of the manual address menu item preparation, including which employees are in charge of taking an order, preparing the order, and providing samples to potential customers; food safety regulations; instructions on how to use and clean equipment; and guest service basics.

The Operations Manual also contains guidance on human resources matters, such as hiring and scheduling employees. For example, the manual includes a sample

¹ There is evidence that Freshii does not actively enforce the non-food-related requirements. For example, after Freshii updated its logo and tagline, it did not require any franchises to update their materials. The Chicagoland development agent states that he has not known Freshii to ever force franchisees to do anything.

hiring advertisement and sample interview questions to ask potential hires. Additionally, the manual explains how to calculate “labor cost percentage” based on the actual labor used and how to project labor calculations to schedule staff in advance. Freshii does not require franchisees to follow its guidance on these topics, which, as mentioned above, are outside the scope of the mandatory System Standards.

Freshii also provides franchisees with a sample employee handbook that contains personnel policies but does not require franchisees to use the handbook and policies. Although Nutritionality used the handbook provided by Freshii, other franchisees, specifically the stores owned by the Chicagoland development agent, used a different handbook that contained different employment policies.

Franchisees also must install and use equipment approved by Freshii, including computer hardware and software. While Freshii requires all franchises to use the same point-of-sale system, new franchises use one system while older franchisees use another without having to upgrade. Additionally, one Chicago franchise uses a completely different system that the franchisee uses in his other franchised Sbarro restaurants. Other than passively monitoring sales and costs, there is no evidence that Freshii is actively involved in the point-of-sale systems or any scheduling software that may or may not be incorporated, and there is no evidence that Freshii has any input into scheduling algorithms or methods used in the software.

Development Agents and Training

Freshii contracts with individuals throughout the country to be development agents. Development agents are responsible for cultivating stores in particular geographic locations, including helping potential and future franchisees find appropriate real estate for potential restaurants, architects for the restaurant design, contractors for building the restaurants, and third-party product lines for snacks.² Development agents receive a percentage of the franchise fee and royalties that a franchisee pays to Freshii. There is no contractual relationship between the development agents and the franchisee stores that they oversee. The Chicagoland development agent states that he is not involved in the hiring, firing, or scheduling of employees in any of the franchise stores in his area, other than those he owns and operates.

Additionally, a development agent’s store is used to train new franchisees within the geographic area. All franchisee owners and managers are required to undergo a four-week training period before a new franchise can open. The first three weeks cover the menu, recipes, food preparation and ordering, along with showing owners

² Development agents also operate their own Freshii franchises.

how to schedule and use the point-of-sale system. During the last week of training, the franchisee owner is the manager-on-duty for the development agent's store. When a new franchise is set to open, the development agent will train the entire staff for three days prior to the opening, and will stay for the next five days to ensure that the store is organized and running smoothly. During both owner and employee trainings, development agents use digital documents provided by Freshii that outline the duties of various positions and how to make Freshii products. According to the Chicagoland development agent, other than the initial store opening training, franchisees are responsible for training their staffs without the help of development agents.

After a new store is operational, development agents, with the help of their employees, called area directors, perform monthly store evaluations for all franchisees. According to the Chicagoland development agent, the purpose of these evaluations is to ensure that everyone is wearing Freshii uniforms, the food is being made correctly, the store is clean, and proper promotional material is on the wall. To the development agent's knowledge, there are no employment-related standards. The development agent sends evaluation reports to Freshii only if it shows significant deviation from mandatory brand standards. For example, the Chicagoland development agent recommended to Freshii that action be taken against Nutritionality for failing to meet brand standards. However, there is no evidence that Freshii attempted to end Nutritionality's franchise agreement or otherwise take action against Nutritionality, other than send a few letters.

In addition to the monthly evaluations, development agents visit each franchisee store once or twice a month. The Chicagoland development agent states that he recently visited one franchise and noticed that the store was dirty and that there were four employees working during a slow time. The agent later emailed the franchisee about his concerns (no uniforms, store uncleanliness, too many employees working, etc.), and the franchisee replied by thanking him. Franchisees are not required to take any action based on such findings, and to the Chicagoland development agent's knowledge, no franchisee has ever taken action against an employee because of his feedback.

Franchise Labor Relations

Individual franchisees are exclusively responsible for hiring their staffs. Although the Freshii website allows potential applicants to apply to stores online, there is no evidence that Freshii screens or analyzes the applications in any way. Nutritionality's owner testified that he typically either hires employees through word of mouth or through Craigslist advertisements.

Additionally, individual franchisees are exclusively responsible for setting employee wages and benefits. There is no evidence that franchisees need to consult

with Freshii or a development agent in order to grant wage increases, decreases, or changes to benefits. The owner of Nutritionality has both increased and decreased specific employees' wages unilaterally without seeking approval from Freshii.

Individual franchisees are also exclusively responsible for disciplining and discharging their employees, and Nutritionality has disciplined and discharged employees without consulting Freshii. While the Operations Manual includes sections regarding coaching and counseling policies, as well as employee conduct that may warrant discharge, there is no evidence that franchisees must follow these sections. To the contrary, as stated above, the franchise agreement explicitly states that it is up to the franchisee to decide to what extent, if any, it would follow Freshii's personnel policies. Additionally, as mentioned above, during store reviews and visits, a development agent may raise an issue about an employee, but there is no evidence that any employee has ever been disciplined or discharged because of a development agent's comments.

Freshii's involvement with Nutritionality regarding the alleged unfair labor practices

There is no evidence that Freshii or its development agents are involved in Nutritionality's labor relations or provided guidance about how to deal with a possible union organizing campaign. In one instance, Nutritionality's owner told the Chicagoland development agent that if employees were more than five minutes late, he would require them to clock in and work but would not begin paying them until the next half hour. The development agent told him that if employees clock in, the franchisee has to pay them for every minute. Around the same time, Nutritionality's owner told the development agent that employees had presented Nutritionality with a letter asking it to recognize a union as their collective-bargaining representative. The development agent did not instruct him how to respond; instead, he asked Freshii about the incident and Freshii responded that it had not heard anything about unions organizing employees. Neither Freshii nor the development agent followed up with Nutritionality about the organizing effort.

ACTION

We conclude that Nutritionality and Freshii are not joint employers under the Board's current standard or under the traditional joint employer standard being urged by the General Counsel because there is no evidence that Nutritionality shares or codetermines with Freshii matters governing the essential terms and conditions of employment of Nutritionality's employees.³

³ The instant ULP charges allege that Nutritionality is a joint employer with the Chicagoland development agent, who operates an independent company that is

A. Freshii and Nutritionality are not Joint Employers under the Board's Current Standard.

The Board will find that two separate entities are joint employers of a single workforce if they “share or codetermine those matters governing the essential terms and conditions of employment.”⁴ To establish such status, a business entity must meaningfully affect matters relating to the employment relationship “such as hiring, firing, discipline, supervision, and direction.”⁵ As recently noted by the Board in *CNN*, the Board and the courts have also considered other factors in making a joint employer determination, including an employer’s involvement in decisions relating to wages and compensation, the number of job vacancies to be filled, work hours, the assignment of work and equipment, employment tenure, and an employer’s involvement in the collective bargaining process.⁶

Here, applying the current standard, the evidence does not establish that Freshii meaningfully affects any matters pertaining to the employment relationship between Nutritionality and its employees. Freshii has played no role in Nutritionality’s decisions regarding hiring, firing, disciplining or supervising employees. While potential applicants are able to submit resumes through Freshii’s website for employment at franchise locations, there is no evidence that Freshii screens the resumes or does anything other than forward them on to individual franchises. Further, there is no evidence that anyone other than Nutritionality is responsible for determining wages, raises, or benefits of its employees. Indeed, Nutritionality’s owner regularly increased and decreased employees’ wages without Freshii’s involvement. And Nutritionality uses a different employee handbook with different

involved in numerous business enterprises, including several Freshii franchises and other restaurant franchises. In his role as Freshii’s Chicagoland development agent, he helps Freshii prepare new franchises to begin operations and monitors brand standards at existing franchises. Aside from these activities, which fall strictly within the development agent’s agreement with Freshii, the investigation clearly revealed that the development agent was not a joint employer with Nutritionality. Thus, the following analysis only addresses whether Freshii and Nutritionality are joint employers.

⁴ *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3 (Sept. 15, 2014) (citing *TLI, Inc.*, 271 NLRB 798, 798 (1984), citing *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117, 1123-24 (3d Cir. 1982)).

⁵ *Id.* (citing *Laerco Transportation*, 269 NLRB 324, 325 (1984)).

⁶ *CNN*, 361 NLRB No. 47, slip op. at 3 n.7 & 7.

personnel policies than the Chicagoland development agent uses for his Freshii franchises. All of this evidence is consistent with the clear language of the franchise agreement, which gives the franchisee the power to determine whether to use Freshii's personnel policies or procedures and states that Freshii "neither dictates nor controls labor or employment matters for franchisees and their employees...."

Additionally, Freshii is not involved in Nutritionality's scheduling and setting work hours of its employees. While Freshii provides guidance on how to calculate labor costs to ensure that restaurants are not over- or understaffed, there is no evidence that Freshii, directly or through scheduling software or the development agent, ever instructed Nutritionality to reduce an employee's hours or send an employee home because labor costs at a particular time were too high.⁷ Nor is there evidence that Freshii has any input into scheduling algorithms or methods used in any scheduling software. Further, since Freshii does not enforce its requirement that every franchise use the same system, there are at least three different point-of-sale systems being used by Chicago-area franchises, all of which may contain their own scheduling software.

Also, the required trainings that owners and managers must attend prior to opening a franchise deal primarily with operating a restaurant. While the trainings may also offer recommendations and guidance similar to what is outlined in Freshii's Operations Manual and handbook regarding employee personnel policies, such as hiring, scheduling, and disciplinary practices, Freshii does not require franchisees to follow those recommendations. Additionally, after the initial training, Freshii and its development agents have no involvement in any future trainings, highlighting a lack of impact on franchise employees' terms and conditions of employment.

At most, Freshii's control over Nutritionality's operations are limited to ensuring a standardized product and customer experience, factors that clearly do not evince sharing or codetermining matters governing essential terms and conditions of employment. This case is therefore similar to *Love's Barbeque Restaurant*, where the ALJ, in a decision adopted by the Board, found that materials prescribing the recipes for food preparation and the sizes and portions of the menu items offered ultimately did not tend to establish joint employer status, as they "relate[d] to the image, the historical image of the [franchisor's] chain," as opposed to labor relations.⁸ And, as in

⁷ Indeed, the Chicagoland development agent states that he communicated his concerns about staffing levels at a different store to that store's franchisee but that the franchisee's only response was to thank him.

⁸ *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 120 (1978), enforced in rel. part, 640 F.2d 1094 (9th Cir. 1981).

Love's Barbeque, Freshii's requirements regarding the "design, decoration and décor" of its franchisees' restaurants is hardly a matter that affects labor relations.⁹ Similarly, other than the recipes and décor elements, there is evidence that other parts of the Operations Manual are recommendations rather than mandatory requirements.¹⁰ Lastly, Freshii's requirements regarding uniforms, initial training of employees, and store hours, without more, are not a basis for finding a joint employer relationship.¹¹ Thus, Freshii's requirements regarding food preparation, recipes, menu, uniforms, décor, store hours, and initial employee training prior to a franchise opening are not evidence of control over Nutritionality's labor relations but rather establish Freshii's legitimate interest in protecting the quality of its product and brand.

Similarly, the monthly reviews by development agents are limited to inspecting franchisees' adherence to Freshii's mandatory brand standards described above, primarily the menu and food products, and are not used to examine any employment-related policies. Thus, franchisees are not reviewed on their hiring, discipline, scheduling, or wage policies. Freshii only obtains a report of the review if a development agent finds a significant deviation from the brand standards. And even after Freshii receives the reports, Freshii is under no obligation to follow a development agent's recommendations. There is no evidence that a review ever affected an employee's terms and conditions of employment either through discipline or discharge. In addition to the reviews, development agents try to visit each franchise once or twice a month and often email notes and suggestions to owners afterwards. But franchisees, including Nutritionality, are not required to make any changes that a development agent suggests after store visits.

Freshii additionally does not meaningfully affect Nutritionality's employees' terms and conditions through its contractual right to terminate the franchise agreement. The record evidence demonstrates that a franchise agreement could be

⁹ *Id.* at 119.

¹⁰ *Id.* at 120 (finding that descriptions of employee duties in operating manual were recommendations and not required to be followed).

¹¹ See e.g., *S. G. Tilden, Inc.*, 172 NLRB 752, 753 (1968) (requirement that franchisees' employees wear prescribed uniforms "amounts to nothing more than an implementation of [the franchisor's] advertising policy"; "offer to train prospective employees" was "not the exercise of any authority over [franchisees'] hiring policies"; and requirement that franchisees' shops be open certain hours and days of the week "in no way prescribes the hours that a particular employee must work" and was designed to "eliminate unfair competition among franchisees").

terminated for failure to maintain brand standards. Indeed, the Chicagoland development agent recommended to Freshii that Nutritionality's franchise agreement be terminated because it continually failed to meet brand standards; the recommendation was not based on labor relations, working conditions, or employee scheduling or compensation. However, Freshii has not followed the development agent's recommendation and has not attempted to terminate Nutritionality's franchise. There is no evidence that any franchise has been terminated for non-brand related reasons.

Lastly, the events that precipitated the instant ULP charges stemming from Nutritionality's employees' organizing efforts further demonstrate Freshii's lack of involvement in Nutritionality's dealings with its employees. Even after Nutritionality's owner asked Freshii, via the development agent, for advice on the situation, Freshii remained silent and did not interfere or instruct Nutritionality's owner as to how to respond to the employees' organizing efforts.¹²

B. Freshii and Nutritionality are not Joint Employers under the General Counsel's Proposed Standard.

Recently, the General Counsel has urged the Board to return to its traditional joint employer standard.¹³ Under that standard, the Board finds joint employer status where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence. This approach makes no distinction between direct, indirect and potential control over working conditions and results in a joint employer finding where "industrial realities" make an entity essential for meaningful bargaining.

Applying the General Counsel's proposed standard, we conclude that Freshii and Nutritionality are not joint employers of Nutritionality's employees. As discussed above, Freshii does not significantly influence the working conditions of Nutritionality's employees. For example, it has no involvement in hiring, firing, discipline, supervision, or setting wages. Thus, because Freshii does not directly or indirectly control or otherwise restrict the employees' core terms and conditions of employment, meaningful collective bargaining between Nutritionality and any

¹² See e.g., *Love's Barbeque*, 245 NLRB at 120 (ALJ, in decision adopted by the Board, found it significant that franchisor had not become involved in how the franchisee should handle its labor dispute with the union).

¹³ See Amicus Brief of the General Counsel at 2, 16-17, *Browning-Ferris Industries of California d/b/a BFI Newby Island Recyclery*, Case 32-RC-109684 (June 26, 2014).

potential collective-bargaining representative of the employees could occur in Freshii's absence.

Based on the above, we conclude that Freshii and Nutritionality are not joint employers, under both the Board's current joint employer standard as espoused in *CNN*, and the standard recently proposed by the General Counsel.

/s/
B.J.K.