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Hospitality Update

NLRB Sets Its Sights on McDonald's and Other Franchisors

By Ronald J. Kramer, Esq.

On December 19, 2014, the NLRB General Counsel's Office issued thirteen consolidated complaints against the purported unfair labor practices of numerous McDonald's franchisees nationwide, with franchisor McDonald's USA LLC being named as a co-defendant on a joint employer theory. According to the NLRB's press release, *click here*, the defendants allegedly violated the rights of employees by, among other things, making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, including participating in nationwide fast food worker protests about their terms and conditions of employment during the past two years.

This action unfortunately comes as no surprise: General Counsel Richard F. Griffin, Jr. announced back in July that he had authorized the issuance of complaints against McDonald's USA LLC as a joint employer. Moreover, in the highly anticipated *Browning-Ferris* joint employer litigation, the General Counsel argued for the adoption of a broad interpretation of employment status. There the General Counsel argued for a test that would include looking at the way in which the parties have structured their commercial relationship, and whether 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. As the General Counsel asserted, his interpretation "would make no distinction between direct, indirect, and potential control over working conditions and would find joint employer status where 'industrial realities' make an entity essential for meaningful bargaining."

The General Counsel's position—and given the timing of the complaint right before the issuance of *Browning-Ferris*, likely a majority of the Obama Board's position—would reverse over thirty years of precedent applying a common law agency test to determine employment status. Under that test, joint employer status turns on the "direct and immediate" control over the particular employees at issue: The extent to which the purported employer determines matters governing essential terms and conditions of employment, including the right to hire and fire, set work hours, determine start and end times of shifts, directions, compensation, day to day supervision, record keeping, and to approve the contractor's employees assigned and devise rules under which those employees were to operate. There is no possible way these complaints would have issued under the existing joint employer test.

Franchisor-franchisee relationships are ubiquitous throughout all sorts of businesses, from fast food and other restaurants, to hotels, convenience stores, gas stations, car dealers, movie theatres, hardware stores, professional sports teams, and even private schools. As our colleague, former NLRB Member Marshall Babson, stated to Bloomberg's *Daily Labor Report*: "Upending traditional franchise arrangements and finding employment relationships where none exist is a threat to commerce and contrary to the purposes of the NLRA." Should the Board find a joint employment relationship exists between franchisors and franchisees, this issue will be litigated through the courts for years to come.

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