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Franchising

Franchisors as 'Joint Employers': An Update

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As many of you will recall, the National Labor Relations Board (NLRB) in late 2014 commenced its effort to have franchisors declared the "joint employers" of their franchisees' employees. By doing so, the NLRB and its supporters hope to make large franchisors the economic "bargaining unit" with which unions may negotiate the salaries and benefits to be accorded to their franchisees' employees.

This governmental attack on the franchise model began with the [NLRB issuing complaints](#) against McDonald's Corporation (McDonald's) and certain McDonald's franchisees which alleged that those franchisees engaged in improper discipline, coercive conduct and employee discharges in response to unionization activity—and that McDonald's, as the putative "joint employer" of those franchisees' employees, was jointly liable for such alleged violations of the National Labor Relations Act of 1935, 29 U.S.C.A. §§151-169 (2000).

NLRB general counsel Richard Griffin Jr., seemingly unconcerned that the NLRB thrust against franchisors contravened virtually all judicial precedent on the subject, 30 years of NLRB precedent, the Lanham Trademark Act (15 U.S.C.A. §§1051-1172), every federal and state franchise law definition of the term "franchise" and the business realities of franchising, nevertheless had his way in a 2015 proceeding unrelated to franchising, *Browning-Ferris Industries of California*, 362 NLRB 186 (August 2015), in which the NLRB held that two or more entities would be deemed joint employers of the same employee if they "share or co-determine those matters governing the essential terms and conditions of employment." Rejecting 30 years of precedent, the NLRB in *Browning-Ferris* went on to declare that the reserved authority to control terms and conditions of employment, even if not exercised, was sufficient for a "joint employer" finding.

The *Browning-Ferris* decision was certainly not a good harbinger for McDonald's—especially since, just the week before it was decided, the NLRB denied McDonald's motion for a description of precisely why the NLRB general counsel was contending that McDonald's controls its franchisees' employees, the NLRB instead only declaring that its general counsel's simple "control" allegation was sufficient.

The NLRB cases against McDonald's, which were consolidated before a hearing panel in New York City, have yet to be decided. And if the NLRB follows *Browning-Ferris* and rules against McDonald's, an immediate appeal to the U.S. Court of Appeals for the D.C. Circuit will almost certainly be forthcoming.

But before then the political upheaval which has taken place in the United States over the past year—with the Democratic party no longer in control of the presidency, Senate, House of Representatives or a majority of governorships—will either imminently, or perhaps over the longer term, negate the NLRB "joint employer" thrust and restore 30 years of NLRB precedent which prevailed prior to *Browning-Ferris*.

To begin with, the NLRB's sole Republican during the Obama years—and a strong dissenter in *Browning-Ferris*—was appointed acting chairman of the NLRB by President Donald Trump in late January 2017. A second Republican NLRB board member, Marvin Kaplan, was nominated and confirmed by the U.S. Senate earlier this month. And another Trump appointee, William Emanuel, awaits Senate confirmation. If that transpires, then the Trump-appointed NLRB board members will possess a 3-2 advantage over their fellow Democratic board members, certainly a harbinger favorable to franchisors fighting "joint employer" allegations.

Further, in June 2017, the U.S. Department of Labor announced the withdrawal of its 2016 informal guidance on joint employment (Administrator's Interpretation No. 2016-1), which largely tracked *Browning-Ferris*.

Then, in late July, a U.S. House of Representatives committee introduced legislation (the Save Local Business Act, H.R. 3441) defining what it means to be a "joint employer" and directly rebuking the NLRB's *Browning-Ferris* decision. In this age of political polarization, it is notable that this bill is bipartisan in nature, sponsored by three Republicans and two Democrats. It is not yet clear what chance this bill has of being enacted into law.

On the state level, a number of jurisdictions—including Arizona, Mississippi, New Hampshire and Wyoming—enacted legislation clarifying that a franchisor is not the employer of its franchisees or the joint employer of its franchisees' employees under those states' employment laws.

The judiciary, as well, has issued rulings seemingly most favorable to eradicating the NLRB's "joint employer" thrust and, in particular, assisting McDonald's in resisting that allegation.

Earlier this year, in *Salazar et al. v. McDonald's*, 2017 WL 950986 (N.D. Cal. 2017), U.S. District Judge Richard Seeborg granted summary judgment to McDonald's for a second time, holding that the franchisor could not be held liable for workplace violations because it didn't meet the definition of "employer" under the California Labor Code. An appeal of this decision is currently pending before the Ninth Circuit.

And in a direct rebuke to the NLRB, earlier this month the D.C. Circuit overruled an NLRB decision holding that cable news company CNN was a "joint employer" with a company that it subcontracted with. In *National Labor Relations Board v. CNN America*, 2017 WL 3318834 (D.C. Cir. Aug. 4, 2017), the court held that the NLRB's determination that CNN and its subcontractor were "joint employers" could not stand, since the NLRB failed "to come to grips with conflicting precedent, which constituted ... an inexcusable departure from the essential requirement of reasoned decision making."

It thus appears that, across the board, the "progressive" attempt to characterize franchisors as the joint employers of their franchisees' employees is suffering a decisive retreat at the hands of federal and state legislatures and the judiciary, and may be doomed altogether once Trump-appointed NLRB board members come to constitute a majority.

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