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Franchisor Is Not “Lovin’ It”



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Litigation

Last week, McDonald’s and the National Labor Relations Board (NLRB) faced off in an administrative court to determine whether the fast-food chain is liable for the actions of its franchisees as a joint employer. The case arose out of hundreds of complaints filed by fast food workers alleging they were illegally threatened, disciplined, or fired after protesting for collective bargaining and a \$15 minimum wage. The NLRB backs these workers and charges that the McDonald’s corporation should be held equally liable for any violations a franchisee commits against its employees. If the NLRB prevails, the ruling will overturn decades of precedent, disrupting the expectations of thousands of businesses. Significantly, it would allow workers to unionize and bargain directly with corporate headquarters, and would expose franchisors to a great deal of liability in labor matters.

The NLRB argues McDonald’s is a joint employer based on the nature of the relationship it has with workers employed by its franchises. Specifically, the NLRB believes McDonald’s is ultimately responsible for workers because it possesses and exercises control over the labor policies of franchisees through its franchise agreements and through its use of a comprehensive computer system, which tracks labor usage, costs and the schedules of employees. Traditionally, a parent company could only be found to be a joint employer where it exerted sufficient control over conditions of employment, such as determinations on wages, hiring, and firing. However, in a recent August 2015 ruling, the NLRB broadened the test for joint employer status. Here, the court concluded that joint employer status exists where unrelated employers of the same employees share or codetermine the matters governing the essential terms and conditions of employment. Thus, under the new standard, a company need only have indirect control over the terms and conditions of employment to be found to be a joint employer.

Details of the relationship between McDonald’s and its franchisees will be essential to the court’s determination. The NLRB sees a system in which McDonald’s controls and monitors the majority of what goes on in its franchised locations. It points to McDonald’s operating agreement that specifies the size of crews, their job descriptions, and the amount of time to be spent on individual tasks. McDonald’s also specifies certain requirements that must be met during the hiring process, and it provides its franchisees assistance in helping them schedule shifts according to periods of high demand.

In contrast, McDonald’s fiercely opposes the joint employer designation and argues that it is unfair to hold a franchisor accountable for the actions of its franchisees. Attorneys for the company argue McDonald’s in no way exerts control over workers employment terms and conditions. Instead, they maintain that franchisees, not McDonald’s corporate headquarters, are the ones who set wages and manage the conditions in their restaurants. McDonald’s may set expectations and provides guidance as to how to meet those expectations, the company maintains, but implementation is optional and ultimately in the hands of individual franchisees. Attorneys for McDonald’s explain that everything McDonald’s does to improve franchisee performance is done to promote and maintain the brand. Of course, the whole franchise business model is rooted in this very notion: entrepreneurs buy into franchises in order to take advantage of the established brand.

If McDonald’s loses, the ruling would significantly impact the franchise model. Joint employment would expose the franchisor to the full panoply of employment laws and regulations. This is the beginning of what is sure to be a long process, and while not directly related, seems to fall within the larger trend we’re seeing of challenges to employer/employee classifications, à la the well-publicized Uber litigation, so stay tuned!