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NLRB's McDonald's Ruling Has Local General Counsel Concerned

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Of the Legal Staff

A one-line email last week from the National Labor Relations Board's general counsel to McDonald's has brought to the fore an issue that local GCs and labor lawyers say has been bubbling up for nearly a year.

And the ruling has management-side lawyers and corporate GCs warning of the dire effects the decision could have not just for franchisors but for any company that uses independent contractors.

The NLRB Office of the General Counsel informed McDonald's July 29 that the office was authorizing complaints against McDonald's franchise owners and that it has determined parent company McDonald's USA LLC is a joint employer for purposes of those suits. The employee complaints relate to alleged retaliation for protesting the company's policies.

According to a statement from the NLRB, McDonald's USA will be named as a joint employer in the suits if they move forward with the NLRB. Of the 181 cases involving McDonald's that have been filed with the NLRB since November 2012, 68 were found to have no merit, 64 are pending investigation and 43 cases were found to have merit, the NLRB said.

Several GCs have told The Legal they are concerned with how all of this will impact the franchise model and beyond.

Attorney Richard L. Kolman has a bit of experience in this area. He is currently vice president, law and general counsel, of American Driveline Systems Inc., the parent company of Horsham, Pa.-based franchisor AAMCO Transmissions Inc. Before that, he served in legal roles for various companies, including as a franchise lawyer for UPS and as a corporate attorney for McDonald's.

"The NLRB general counsel's choice to move forward with some of the claims against McDonald's reflects a fundamentally flawed understanding of how franchising works as a business model," said Kolman, who noted he was speaking only for himself and not on behalf of his current or former employers. "The control a franchisor exercises in its franchise agreement and policies normally relates to issues involving brands standards, product quality, and the good will associated with the franchisor's trademarks. A franchisor normally has no need to direct or control employment decisions or conditions of employment, and normally does not do so."

Kolman said he had no reason to believe McDonald's operated any differently from that typical franchisor-franchisee model. He said he was sure McDonald's would fight "this erroneous decision," and he expected the franchise community to support the fast-food chain.

"While there are some issues on which franchisors, franchisees and their respective attorneys often disagree, this is one area where most franchisors, franchisees and their attorneys should agree," Kolman said.

One in-house attorney of a New Jersey-based company with company-owned and franchised locations globally, who did not want to be named, said the McDonald's decision is another example of increased federal and state review of contractual business relationships.

"This particular ruling, in expanding the definition of employee to include franchisees in a union context, is especially troubling," the attorney said. "Our business model includes not only use of independent contractors for the delivery of services, but also the use of franchisees. The franchisor-franchisee relationship is

intended to benefit both parties while allowing the franchisee discretion and substantial control over employee relations, discipline and compensation.

"The franchisee can best consider and defend against the risks of violation of employment and labor laws and regulations due to the franchisee's investment of capital and 'sweat equity' in the local operation, not to mention day-to-day operation and interaction with its employees."

Dean Fournaris, a Wiggin and Dana shareholder whose practice focuses on franchising, said the ruling "threatens the franchise model" and hurts small-business owners. He described the franchise model as a three-tiered cake of the franchisor, franchisees and the employees and said this decision "collapses the first and second tier of the cake."

Fournaris said most fast-food chains cannot afford the types of concessions—such as raising the minimum wage—that workers are seeking. He said forcing that increase would result in widespread unemployment because it would make the investment in technology that replaces human workers look more economical than paying increased labor costs.

Fournaris said it isn't just franchise companies that are under scrutiny.

"We've seen it for six or 12 months where people have been very interested in everything from franchising to the independent contractor model and sensing that something could change," Fournaris said.

For those who are in favor of consolidating what has been described as the fractured franchise industry, Fournaris said, one way to do it would be to declare the franchisor as the employer of the franchisee's employees.

"Everybody recognizes there is a conflict between the franchise model and the advocates of unionization," Fournaris said. "And there is undoubtedly some level of political interplay between two very different desires."

But for union-side labor lawyer Bruce Ludwig of Willig, Williams & Davidson, the ruling isn't as dramatic as some might suggest.

"I understand the labor board is looking into all industries and the joint-employer standard," Ludwig said. "But it has had the joint-employer standard for some time, and I think they are just applying it here to this case."

Ludwig noted it is new for the test to be applied to this industry. But he said the NLRB GC seems to have determined that McDonald's has some substantial control of the working conditions of its franchisees' employees. Ludwig said that is how the test should be applied.

"I don't think it threatens the model," Ludwig said. "I think it reflects an economic reality in that, in some areas, the parent company, the franchisor, has some control. They can still pursue their model, but they can't ignore the reality that exists out there that if they exert some control they" could be considered a joint employer.

But if the board does ultimately find McDonald's is a joint employer—a decision that could be appealed to the federal courts—the impact could be significant, Ludwig said.

"In the long run, this view that McDonald's is a joint employer, if that is upheld by the labor board, it will really be a boon for the effort of unions to organize fast-food workers and try to obtain for them a living wage," Ludwig said.

Several industries are watching the NLRB's application of the joint-employer status beyond just the McDonald's cases. Fournaris said that, before the board gets to any decisions in the McDonald's cases, it might first reach a ruling in the Browning-Ferris Industries of California Inc. case. That case involves a staffing agency and the recycling company that hires from the staffing agency. The question is whether the recycling company is a joint employer that has to be a party to the collective bargaining agreements between union members and the staffing agency. It is currently being briefed before the NLRB.

Fournaris said he has been working on this issue on behalf of franchisors for 10 years because there have been, from time to time, "aberrational decisions" that have deemed a franchisor a joint employer. But this has become "a particularly fertile area" in the last year, causing Fournaris to undertake large projects for large franchisor clients in anticipation of where the NLRB was headed.

"We thought it was wrong then and we think it was wrong now," Fournaris said of attempts to deem franchisors joint employers.

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