Connecticut Law Tribune
October 27, 2014 Vol. 40, No. 43 ctlawtribune.com An ALM Publication

EMPLOYMENT & IMMIGRATION LAW

A Supersized Announcement by the NLRB

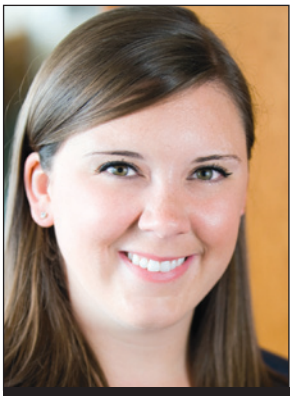
McDonald's case could dramatically alter franchisor-franchisee relationships

By ARMEL JACOBS and CAROLINE PARK

Franchisors be warned: the National Labor Relations Board is poised to expand its long-established joint employer standard, a change that would make it easier for unions to successfully argue that a joint employer relationship exists between a franchisee and franchisor, or between a staffing agency and the companies for which it provides employees.

On May 12, the NLRB expressed its willingness to revisit the joint employer standard by requesting briefing from interested parties in a case involving Browning-Ferris Industries. In that case, the International Brotherhood of Teamsters asked the NLRB to find that Browning-Ferris Industries of California and Leadpoint Business Services, a Phoenix-based staffing firm providing temporary workers to Browning-Ferris, were joint employers of a group of those workers for collective bargaining purposes. In its request for briefs, the NLRB asked amici to weigh in on whether Leadpoint is the sole employer under the current joint employer standard, whether a new standard should be adopted and, if so, the definition of that standard.


Armel Jacobs


Caroline Park

Not long after that invitation, the NLRB Office of the General Counsel made an announcement regarding pending cases involving McDonald's Corp. restaurants. After investigating 181 cases of allegedly unlawful labor practices at franchise restaurants since 2012, the board found sufficient merit in at least 43 cases. In those cases, the general counsel's office said that parent company McDonald's USA LLC would be named as a joint employer respondent.

To be clear, the general counsel's notice is not a decision or a ruling, and the NLRB has yet to rule either on the specifics of McDonald's relationship with its franchisees or the joint employer test in general. However, issuing the Browning-Ferris invitation and permitting the McDonald's complaints to proceed against the franchisor as well as the franchisees are indications that the NLRB is reevaluating its decades-old standard for deciding when an entity is a "joint employer" of individuals employed by another entity.

Under the board's current standard, a joint employer relationship exists where two separate employer entities

Armel Jacobs is an associate in Wiggin and Dana's litigation department and focuses her practice on franchise and distribution, as well as class actions. She has assisted in the defense of various franchisors in disputes regarding consumer protection, franchise termination and franchise transfer. Caroline Park is an associate in the firm's labor, employment and benefits group. Her practice includes representing employers in federal and state litigation.

actually share or meaningfully affect terms and conditions of employment. This includes joint involvement in such tasks as hiring, firing, discipline, supervision and direction.

However, in its amicus, the NLRB's general counsel advocates for a standard that would not require "meaningful control," but rather would assess whether "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." Moreover, potential control would be sufficient to find joint employer status, so even the unexercised ability to control working conditions may be adequate. In practical terms, a broader standard would increase the number of employers subject to collective bargaining and liability for unfair labor practices.

Altering the Landscape

The franchise model has long depended on a symbiotic, but separate, legal relationship between franchisee and franchisor: the franchisee gets the benefit of brand power, but bears the burden of day-to-day operations, including any legal repercussions stemming from those operations. A broader approach to the joint employer standard by the NLRB would significantly alter that landscape, and the fallout could disadvantage both franchisors and franchisees.

Some franchisors, seeking to avoid joint employer status, might withdraw some of the support now given to franchisees that could be considered to influence working conditions. Franchisees that now benefit both from the brand license, as well as from operational support, which may manifest in the form of employee manuals, billing and payroll software, employee training materials or standard job applications, may find themselves more or less on their own in certain areas, exactly what they sought to avoid by entering into a franchise relationship in the first place.

Under the NLRB's current standard, a joint employer relationship exists where two separate employer entities actually share or meaningfully affect terms and conditions of employment. This includes joint involvement in such tasks as hiring, firing, discipline, supervision and direction.

The reverse is also possible. Those franchisees that enjoy a high level of autonomy may find themselves under the aggressive control of a franchisor seeking to ensure legal compliance. A franchisee testifying before a congressional committee recently explained this view, saying "the real impact of a new standard that considers my franchisor the joint employer of my workers is that I will have less independence and less control over the business that I worked so hard to build." (Testimony of Clint Ehlers, before the U.S. House of Representatives Education and Workforce Committee, Sept. 9.) Franchisors may tighten the grip on all franchisees to compensate for the few with frequent violations, punishing the "good actors" with the bad. This scenario does not sit well with those franchisees who, as Ehlers put it, "bought a franchise so that I could run my own business, not so that I could be a part of someone else's."

Franchising is not the only business model that would be affected by a shift in the joint employer standard. Browning-Ferris amici also debate the effect a broader standard may have for staffing firms, subcontracting and outsourcing relationships. Leadpoint and amici generally argue that bargaining would be impeded by requiring the participation of parties who lack direct or immediate control over working conditions.

Much like those who fear that a broader joint employer standard will result in a "hands-off" approach by franchisors, they speculate that companies will be discouraged from holding their contractors to codes of conduct requiring minimum labor standards, safe working conditions and environmentally friendly practices for fear of giving the impression of influence.

Employers should stay tuned for further developments in the Browning-Ferris and McDonald's cases, as entities who may not be joint employers for other purposes may soon find themselves under the NLRB's purview. ■