NLRB'S General Counsel's announcement that McDonald's and its Franchisees are Joint Employers – A Super-Sized Headache for McDonalds

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On July 29, 2014, the NLRB's General Counsel, Richard Griffin, announced that he has authorized issuance of Unfair Labor Practice Complaints against 43 McDonald's franchisees and their franchisor, McDonald's USA, alleging that they are *both* jointly liable for violating the rights of employees because of activities surrounding employee protests regarding wages and working conditions on the theory that McDonald's is a *"joint employer".*

This announcement by the General Counsel of allegations that his office will pursue in litigation before an administrative law judge has been widely mischaracterized as a "ruling" or a "decision" of the NLRB itself. While no Advice Memorandum has yet been publically issued, and we are still years away from a decision by the full 5 member National Labor Relations Board, the General Counsel's announcement sets forth his legal position on the "*joint employer"* issue.

This radical departure from decades of settled NLRB precedent was recently foreshadowed in the recent *Browning-Ferris Industries of California, Inc.,* Case 32-RC-109684, a non-franchise case involving the use of a staffing agency's employees. The Teamsters Union argued that the employer closely directed the use of the staffing agency's employees, and, therefore, was a joint employer.

In that case, in May 2014, General Counsel Griffin signaled his intent to ask the NLRB to re-examine its standards for determining joint employer status, by inviting interested parties to submit *amicus* briefs in *Browning-Ferris* concerning the following questions:

- Should the NLRB adhere to its existing joint-employer standard or adopt a new standard?
- What considerations should influence the NLRB's decision ?
- And if the Board adopts a new standard for determining joint-employer status, what should that standard be?
- If it involves the application of a multifactor test, what factors should be examined?
- What should be the basis or rationale for such a standard?

Thereafter, the General Counsel filed an *amicus* brief in *Browning-Ferris* urging the NLRB to adopt a new joint-employer standard, arguing that the Board "should abandon its existing joint employer standard" that finds joint liability when an employer exercises direct or indirect control over significant terms and conditions of another entities employees, such as wages, hours and working conditions, and instead examine the economic realities and "adopt a new standard that takes into account the totality of the circumstances, including how

the putative joint employers structured their commercial dealings with each other." This "economic realities" test is similar to the one utilized by the Department of Labor in enforcing the FLSA.

The current joint employer doctrine well settled for years extends the common law doctrine of employment, which asks whether the putative joint employer, such as McDonald's, can exercise common law control of the employee's wages, hours and working conditions. It would include the ability to hire or fire employees, and the ability to direct the means and methods by which they perform their work.

What is different in the McDonald's cases is that the franchisees' employees do not perform services for the benefit of McDonald's, nor does McDonald's pay for the employee's services. Rather, here the General Counsel is stretching the joint employer doctrine to include factors such as: branding requirements established by McDonald's and how they exert control over the working conditions of the franchisees' employees, such as: uniforms, use of common computer software that measure various things including labor costs, manuals, and inspections by the franchisor, McDonald's.

If McDonald's is found to be a joint employer, then it would be liable if one of its franchisees violates the law by not paying its employees minimum wages and overtime or if it illegally fired employees for engaging in pro-union activities. It would also be more vulnerable to unionization efforts.

McDonald's has stated that it will fight the NLRB's allegations that it is a joint employer of its franchisees, which amount to 13,000 of its restaurants, which is over 90% of all of its restaurants. The next step will be for various NLRB Regional Directors to issue complaints against McDonald's, per the General Counsel's directive. These complaints will be tried individually before administrative law judges. Their decisions will likely be appealed to the full 5 member National Labor Relations Board, which will probably find that McDonald's is a joint employer. Thereafter, the decision will be appealed to Federal Appellate Courts, where the results are uncertain. Ultimately, the US Supreme Court will make the final decision.

In the meantime, franchisees and franchisors in numerous industries, including restaurants, hospitality, automobile sales and services will be closely examining their practices. Some will take a more hands on approach to directly police their franchisee's employment relations, to avoid liability. Others may seek to distance themselves further from their franchisees to avoid any finding of joint employer status.

Beyond the franchisee industry, the issue of joint employer liability will be critical for any company to understand that uses temporary agencies, subcontractors, independent contractors, leased employees or operates any

business model in which services or work is performed by entities or employee other than its own direct employees.

California is still using the common law test set forth in the Wage Order defining Employer as: "any person …who directly or indirectly, or though an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." It was recently affirmed by the State Supreme Court in *Martinez v. Combs* (2010) 49 Cal.4th 35. However, in *Guerrero v. Superior Court* (2013) 213 Cal. App. 4th 912, the Court of Appeals provided a more expansive interpretation of the joint employer issue.

The joint employer issue is evolving rapidly and is sure to be vigorously litigated Employers and their attorneys must monitor this issue closely.