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July 31, 2014

NLRB General Counsel Announcement on Joint Employer Status for Franchisors Could Have Significant Implications

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In a move that could have a dramatic impact on numerous businesses across the country, National Labor Relations Board General Counsel Richard Griffin announced on July 29, 2014, that his office intends to name a parent franchisor as a respondent in cases involving alleged unfair labor practices committed by franchisees, if the parties are unable to reach a settlement. According to the General Counsel, the agency is investigating the various charges, and may name the franchisor company as a joint employer if a complaint is issued.

This decision comes as the Board is reviewing amicus briefs filed in a separate matter, *Browning-Ferris*, in which the Board is reconsidering its long-established joint employer test. *Browning Ferris* involves a Teamsters union's appeal of a NLRB Regional Director's determination that only independent staffing company employees are eligible to vote in a representation election at a recycling plant in Milpitas, California, not regular plant employees too, because the staffing company is a sole employer. The Board solicited briefs from interested parties addressing whether to retain its current test or adopt a new joint-employer standard.

The current legal standard, endorsed by Congress and the courts, has existed for 30 years. Generally, under the current standard, only legally separate entities that exert a significant and direct degree of control over employees and the employees' essential terms and conditions of employment are considered joint employers under the National Labor Relations Act. The "essential terms and conditions of employment" are those involving such matters as hiring, firing, discipline, supervision and direction of employment.[1]

During a recent House subcommittee hearing to address this issue, one witness opined that the joint employer model should not apply to franchisors and their franchisees, as the franchisor-franchisee relationship is built on a division of roles and responsibilities, with individual franchises independently running their businesses. While franchisors set standards to protect their trademark and maintain product consistency, franchisees are in charge of hiring, firing, and managing nearly all other aspects of the workplace. If found to be joint employers with their franchisees, franchisors would be liable for the decisions and employment practices of the individual franchisees. That exposure, in turn, would put the franchisors in the position of having to exert control over day-to-day operations and workplace decisions to limit their own potential liability. Such a change could result in a complete overhaul of the

1 *TLI, Inc.* 271 NLRB 798 (1984); *Laerco Transportation,* 269 NLRB 324 (1984).

franchise model. In fact, any change in the joint employer test could significantly alter the face of American business and impact every level of the supply chain, as multiple businesses have contractual relationships based on this decades-old standard.

The NLRB has yet to release any memorandum or decision outlining its new approach. However, a look at the General Counsel's amicus brief in *Browning-Ferris* illuminates the underlying rationale. In that brief, the General Counsel asserts that "the Board should abandon its existing joint-employer standard because it undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining." The General Counsel advocates a return to the pre-1984 "traditional" approach, whereby an "entity was a joint employer where it exercised direct *or* indirect control over significant terms and conditions of employment of another entity's employees, where it possessed the unexercised potential to control such terms and conditions of employment, or where 'industrial realities' otherwise made it an essential party to meaningful collective bargaining."

The General Counsel suggests in his *Browning-Ferris* brief that the Board adopt former member Liebman's "industrial realities" test, articulated in her concurrence in *Airborne Express* (which was specifically rejected by the overall Board in that case). The current test focuses on whether one company's control over employment matters of the other company is direct and immediate. Former member Liebman's proposed test requires an assessment of the degree of "economic dependence" between the companies. The focus is not whether the company exercises control through direct "hiring, firing, discipline, supervision and direction" of the other companies' employees, but whether the company imposes its own, highly standardized operational requirements and monitors and retains effective control over those operations. The General Counsel asserts in the brief that companies may effectively control wages by controlling every other variable in the business. According to the General Counsel, indicia of control include: tracking data on sales; inventory and labor costs; calculating labor needs; setting and policing employee work schedules; tracking wage reviews; tracking time needed for employees to fill customer orders; acceptance of employment applications through company systems; reimbursement of wages; retention of right to approve employees; requiring the company and its employees to follow safety rules; and making recommendations during the collective bargaining process or retaining the right to provide such input. This expanded test would create many new joint employment relationships on a local and national level.

The NLRB is not the only agency to have taken an interest in the franchise industry. David Weil, the new Wage and Hour Division Administrator at the Department of Labor, was the principal investigator on a report for the DOL: *Improving Workplace Conditions through Strategic Enforcement: Report to the Wage and Hour Division Strategic Enforcement*. In this paper, Weil claims that the "fissuring" of the employment relationship, particularly via franchises, contributes to wage and hour law noncompliance. During a Senate committee hearing to consider his nomination last year, Weil clarified that his concern is not with the franchise model *per se*, but rather with employers using franchising improperly as a means of subverting the law.

The General Counsel's proposed approach is not limited to franchise operations – it would have far reaching impact across industries and many business models. The General Counsel specifically identifies temporary service workers, outsourced and subcontracted services, and franchising as target areas for the expanded joint employer concept. While the franchisor has not yet been named in an official complaint, the readiness of the NLRB General Counsel to consider it a joint employer should give employers pause.

Anticipated next steps include the issuance of a complaint against the franchisor and its franchisees in the NLRB Regions where cases are pending, followed by a trial or trials before an administrative law judge. The case will then move to the Board for a decision, which will likely be appealed to one of the federal circuit courts of appeal. This process could take several years. During that period of time, there will be considerable uncertainty as to how business is to conduct itself under the Board's anticipated "new" joint employer standard.

When the actual complaint against the franchisor is issued, and when the *Browning-Ferris* decision is released, we will provide a more detailed explanation of the General Counsel's theory of joint employment and advise accordingly. Of course, these NLRB developments must be considered as part of the Board's unprecedented initiatives involving quickie elections, micro bargaining units, what constitutes concerted activity, permissible employer policies, and employee use of company email and other access rights to company property. The General Counsel's announcement is another potential pro-labor reversal of long-standing precedent to encourage organizing at the expense of companies' rights to make business decisions regarding organizational structure.

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