

## The NLRB General Counsel's Decision To Name McDonald's As A Joint Employer Threatens To Change The Franchise Model – And More

In a press release issued on Tuesday, July 29, the National Labor Relations Board Office of the General Counsel vowed to name franchisor McDonald's, USA, LLC as a joint employer respondent in complaints alleging unfair labor practices against their franchised restaurants. The General Counsel's decision could potentially hold the franchisor corporation responsible for employment actions taken at thousands of McDonald's franchises throughout the United States, and may have far-reaching effects that could be litigated up to the Supreme Court.

Any employer which operates a franchise, or which operates a business where joint employer liability is a possibility (such as a business where the workforce is managed with the assistance of a staffing or temp agency) should be aware of the implications of the position being advocated by the NLRB's General Counsel.

### General Counsel Seeks To Expand Standard For "Joint Employers"

The timing of the General Counsel's press release is not coincidental. The press release comes at a time when the NLRB is reviewing its standard for determining when businesses should be considered joint employers under the National Labor Relations Act for bargaining and unionization purposes.

As articulated in decisions such as *TLI, Inc.*, 271 NLRB 798, 798 (1984) and *Laerco Transportation*, 269 NLRB 324 (1984), the Board currently finds joint employment "where two separate entities share or codetermine those matters governing the essential terms and conditions of employment." In particular, an employer must "meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction to be found to be a joint employer." Other Board decisions, including *Airborne Freight Co.*, 338 NLRB 597 (2002), have articulated the requirement that the putative joint employer exert "direct and immediate control" over employment matters.

Under the current standard, franchisors in the fast food industry are not considered to be joint employers. They may provide franchisees with resources related to food quality and restaurant management, but major employment decisions such as hiring



by Gilbert J. Tsai & Kurt A. Franklin



and promotions, pay rates, discipline, and termination largely remain under the control of the franchisee. In other words, franchisors under normal circumstances do not exercise "direct and immediate control" over employment matters and thus, are not considered joint employers with the franchisees.

In *Browning-Ferris Industries*, Case No. 32-RC-109684, currently pending review before the Board, however, the NLRB solicited *amicus* briefs to address whether or not the Board should adhere to its existing joint employer standard or, adopt a new standard. The NLRB's General Counsel is pressing for a new, more inclusive standard. The General Counsel presents this new standard as a "totality of circumstances" standard whereby joint employer status is established if an employer wields enough influence over another entity's employees' working conditions such that meaningful bargaining couldn't happen without the first employer's presence. The General Counsel argued in its brief that "The Board should abandon its existing joint employer standard because it undermines the fundamental policy of the National Labor Relations Act to encourage stable and meaningful collective bargaining."

The Board has yet to rule on the *Browning-Ferris Industries* case, which involves a staffing company subcontractor, not a franchisee or franchisor.

### **What Are The Next Steps For The McDonald's Cases?**

In Tuesday's press release, the General Counsel stated that 181 cases involving McDonald's have been filed since November 2012. Of those cases, the General Counsel found 68 to have no merit, and 43 to have merit. 64 cases are currently pending investigation. In the 43 cases where a complaint has been authorized, the General Counsel intends to name McDonald's, USA, LLC as a respondent/joint employer if parties are unable to reach a settlement.

If joint employer complaints are issued, NLRB Administrative Law Judges will determine if McDonald's, USA, LLC is a joint employer and liable for alleged unfair labor practices. McDonald's, USA, LLC has already announced its position that the General Counsel's position on the joint employer issue is contrary to well established precedent and contrary to the purposes of the NLRA. If an ALJ applies the standard proposed by the General Counsel, McDonald's, USA, LLC likely will appeal the findings to the full five-member labor board in Washington. If the full Board adopts the new standard, the case may ultimately be decided by the United States Supreme Court.

### **The Takeaway**

In the context of the General Counsel's position in the *Browning-Ferris* matter, Tuesday's press release emphasizes the General Counsel's apparent commitment to expanding the standard for finding joint employer status, and to utilize its proposed standard to find that corporate franchisors are joint employers of their franchisees' employees under the National Labor Relations Act.

The General Counsel's decision to name franchisors such as McDonald's as joint employer will affect not only the fast-food and restaurant industry but also all other franchised businesses such as car dealerships, delivery services, hotel/motels, dry cleaners, and numerous others. Further, in an era in which companies increasingly use staffing, HR, and temp agencies to assist them with employment-related functions, the adoption of the General Counsel's standard would require all businesses involved in the franchisee/franchisor industry, or that utilize temporary staff or HR service companies, to take a closer look at how they manage their employment relationships.

For more information, please contact:

**Gilbert J. Tsai**, Partner  
415-995-5874  
gtsai@hansonbridgett.com

**Kurt A. Franklin**, Partner  
415-995-5086  
kfranklin@hansonbridgett.com