The NLRB's McDonald's Decision: Supersizing the Joint Employer Doctrine to Hold Franchisors Liable

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On July 29, 2014, the General Counsel of the National Labor Relations Board ("NLRB") announced that McDonald's, USA, LLC ("McDonald's") was a "joint employer," along with its various franchisees, with respect to a series of pending labor complaints brought by employees of its franchisees. While the "joint employer" doctrine is not new, the NLRB's extension of doctrine to the franchisor-franchisee relationship is significant well beyond whether the price of a Happy Meal may rise in the near future. Based on its underlying filings in the McDonald's cases, the NLRB seeks to expand the joint employer doctrine by relying on the kinds of overall control that a franchisor (*e.g.*, McDonald's) exercises over its franchisees, as opposed the franchisor's particular control over the day-to-day employment decisions at issue. This expansion of the joint employer doctrine is what should make all franchisors (and all parent corporations) grimace.

As context, the NLRB's Office of the General Counsel investigated charges alleging that McDonald's franchisees violated the rights of employees as a result of activities surrounding certain employee protests over low paying wages (some of which likely was coordinated by the Service Employees International Union ("SEIU")). Since November 2012, the NLRB has considered 181 cases involving McDonald's, 43 of which were found to have merit and 64 of which still are in investigation. In the 43 cases where the NLRB found merit in the underlying complaints, the NLRB authorized McDonald's to be named as a jointly liable respondent. In doing so, the NLRB has given all franchisee employees the "green light" to bring claims naming McDonald's directly for employment practices and working conditions maintained by each of the franchisee employers (clearly a smaller entity with more shallow pockets).

From the briefing preceding the announcement of its decision, the NLRB was candid in its motivation to expand the joint employer standard. As the General Counsel explained in his brief, issues like the "duty to bargain" should be determined by the "totality of circumstances" surrounding the parties' commercial relationship and whether they may impact working conditions. The General Counsel went so far as to argue that *indirect* control or *potential* control over one or more working conditions made the franchisor essential in the bargaining context. Thus, attenuated "macro-level" facts are enough, according to the General Counsel, without any specific tie to the employment decisions or even broader employment practices at issue.

While a formal opinion on the General Counsel's finding has yet to be issued, joint employer status very likely was premised on overall control by McDonald's of the economics of its franchisees, *e.g.*, the fact that McDonald's buys the land and builds the store for each of its franchised restaurants. Consider, the statement from National Employment Law Project's Executive Director, Christine Owens:

> This is what McDonald's control looks like. For instance, the corporate giant charges high rents and royalty fees and imposes take-it-or-leave-it franchise agreements that require, among other things, that franchisees install company-supplied software to track sales, inventory, and labor costs. These tight controls and oversight make it difficult for franchisees to operate profitably.

In Ms. Owen's view, a company that intervenes to this extent in a franchise operation should be "held accountable."

In response to this broad extension of the joint employer doctrine, McDonald's has announced that it will continue to fight to return the standard to the more traditional "day-to-day employment decisions" focus of most joint employer doctrine cases. Towards this end, McDonald's Senior Vice President of Human Resources announced, "this decision to allow unfair labor practice complaints to allege that McDonald's is a joint employer with its franchisees is wrong. McDonald's will contest this allegation in the appropriate forum. McDonald's also believes that this decision changes the rules of thousands of small businesses, and goes against decades of established law regarding the franchise model in the United States."

The practical effects of the NLRB's decision are far-reaching for all franchisors and, by extension, active parent corporations. Now, mere elements of control typically found in franchise agreements and in typical franchisor-franchisee communications (such as periodic reports and reviews) can result in franchisors being vulnerable to organizing campaigns, particularly in industries dominated by lower paying wages, and liability for decisions of which the franchisors were not even aware, much less directed. The decision, if it stands in the courts, represents a boon for unions such as the SEIU because the corporate veil will no longer provide a shield against unionization activity and/or related employment liability. Given that the McDonald's fight is by no means over, franchisors may want to get involved by filing amicus briefs as the case proceeds from the agency to the courts. Moreover, franchisors and parent corporations should consider doing an analysis of the issue of control, and the potential threats of organizing activity, to develop a proactivity strategy to address the significant risks presented by the NLRB's most recent labor force-friendly ruling.

For additional information and guidance on these issues, please contact the members of AGG's Employment and Franchising Teams.

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