PUBLICATION

NLRB: Joint Liability Inquiry Can Precede Finding on Merits of Underlying Unfair Labor Practice Charge

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In the latest development in the National Labor Relations Board's ongoing efforts to redefine joint employer status, the board has determined that an employer (whether franchisee or franchisor) can be named a joint employer before any finding that an unfair labor practice has been committed. On January 8, 2016, the NLRB approved an administrative law judge's decision allowing evidence of McDonald's Corporation's joint liability with its franchisees, prior to deciding whether any labor law violations had occurred.

The Board ruled 2-1 that the administrative law judge did not abuse her discretion because she "structured the litigation in a manner that she determined would be most efficient and effective for allowing the general counsel and the charging parties to present their cases and for respondents to mount their defenses." The implication of the NLRB's decision is that a franchisor can be included in unfair labor practice proceedings even if the adjudicator has not made any finding on the merits of the underlying unfair labor charges. In this case, where the NLRB has consolidated numerous charges, the allegations comprise 181 violations of the National Labor Relations Act (NLRA) in 30 different restaurant locations. Notably, the charges span six NLRB regions. As a result, the franchisor will be dragged into discovery, which will be expensive and time consuming. That discovery will center around whether a joint employer relationship exists, putting the joint employer issue at the forefront - well before the merits of the charge are reached.

Board member Phil Miscimarra dissented from the NLRB's decision, noting that the proceedings appear to be intended to align with the NLRB general counsel's recent "overarching" joint employment doctrines. Mr. Miscimarra also noted his prior dissent from the NLRB's decision consolidating the numerous unfair labor charges. Believing the parties and claims too numerous and dissimilar to be thrown into a single case, Mr. Miscimarra opined that the structure of this litigation will impose oppressive costs, burdens and delays on the parties, the NLRB, and reviewing courts. To this point, McDonald's estimates that it has already spent more than $1 million on the NLRB litigation, while it will owe no more than $50,000 if it is found to be jointly liable for the unfair labor practices committed at the franchisee establishments.

As this has played out, it has become clear that the NLRB decision has opened the door for wide-ranging discovery on the issue of joint employment status before any determination of the merits of an unfair labor practice has been made. For instance, on January 21, 2016, Chicago-area federal judge Samuel Der-Yeghiayan ordered nine franchisees to comply with NLRB subpoenas requesting documents and records the NLRB said would allow it to determine how the fast food corporation has partnered with its franchisees and has organized its business. Judge Der-Yeghiayan determined that "[g]iven the broad range of relevant factors for a joint employer determination, the NLRB necessarily needs to seek a broad range of information in order to properly address its joint employer allegations." Remarkably, McDonald's claims that it has produced more than 160,000 documents in response to NLRB requests. With the NLRB's January 8 decision, this type of discovery will become more common.

The NLRB's recent decision comes in the wake of its ruling last year that McDonald's headquarters in Oak Brook, Illinois, and local franchises can be held jointly responsible for violating federal labor laws. There, the NLRB determined that McDonald's engaged in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of

labor laws the agency enforces. This is despite McDonald's contention that its franchisees -- which own 90 percent of the company's more than 14,000 U.S. restaurants -- set wages and control working conditions independently within their restaurants.

The alleged unfair labor practices include spying, unlawful promises of increased benefits, discrimination against pro-union workers, threats of termination, threats of closing McDonald's restaurants, unlawful reductions in work hours, and intimidation tactics including failing to post work schedules and pretending to choke an employee to dissuade union representation.

Previously, the NLRB had determined that a franchisor could be considered a joint employer only if it directly employed or controlled the franchisee's workers. Under the NLRB's new interpretation of joint employment, a franchisor can be jointly liable for unfair labor practices committed by a franchisee if the franchisor wields indirect or potential control over the franchisee's workers. Under the new standard, it will be much easier for franchisors to be named joint employers under the NLRA. Not only would this make such employers potentially jointly liable for unfair labor practices, but it would also impact their obligations to engage in collective bargaining.

In a report prepared by for the International Franchise Association, IHS Global Insight recently estimated that approximately 781,794 franchise establishments exist in the United States. The IFA also estimates that the franchise industry provides jobs for more than 8 million workers. The NLRB's continued efforts to enlarge joint liability for franchise relationships may well affect the growth of the franchise economy.