

PUBLICATION

Fifth Circuit Protects Franchisors, For Now

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In the wake of the National Labor Relations Board General Counsel's announcement that he intends to pursue unfair labor practice charges against a franchisor, franchisors are on high alert. With the NLRB considering an upheaval of its current joint-employer standard, it is yet to be seen whether the NLRB's focus in this area will become the focus of other agencies tasked with enforcing employment laws. In the meantime, the Fifth Circuit applied the longstanding economic reality text under the Fair Labor Standards Act, to relieve a Texas franchisor from wage and hour liability.

Benjamin Orozco worked as a cook at a Texas restaurant franchise, Craig O's. After several years in the kitchen, Orozco quit, alleging that his employer violated the FLSA by failing to pay him minimum wage and overtime. Initially, he filed suit against only the franchisee and its owner, but subsequently added the franchisor/owner of Craig O's as an additional defendant in the suit. The District Court tried the case and found that the franchisor was Orozco's employer and was thus liable for FLSA violations.¹

The Fifth Circuit recently reversed the judgment² by applying the economic reality test. In evaluating the economic reality, the Court examined whether the franchisor; (1) had the power to hire/fire, (2) supervised and controlled the work schedules and conditions of employment, (3) determined the rate and method of payment, and (4) maintained employee records. The test is flexible, however, and not all elements need to be met for a party to be found to be an employer. If the franchisor has real "operating control" over an employee, then it could be liable for FLSA violations, in addition to the franchisee.

The Fifth Circuit found that a meeting between the franchise owner and the franchisor about improving the profitability of the franchise store by reducing labor costs was legally insufficient to establish liability under the FLSA. The franchisor, therefore, was not liable as the Plaintiff's employer under the FLSA.

For now, the Fifth Circuit's application of the economic reality test offers wage and hour protection for franchisors in Mississippi, Louisiana, and Texas. Franchisors should remain cautious though, as the NLRB, and possibly other agencies, begin to scrutinize the franchise business model.

¹ Orozco v. Plackis, 2013 WL 3306844 (W.D. Tex. Jun 13, 2013)

² Orozco v. Plackis, 2014 WL 3037943, No. 13-50632 (5th Cir. July 3, 2014)