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ALERTS

Joint Employment Moves: What's Next For Franchising And Why It's Not Over

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Within the last month, there have been moves on several fronts to address the lack of clarity surrounding when two or more businesses may be deemed joint employers. While these moves signal a step in the right direction, a bright-line rule should not be expected anytime soon, especially for franchisors and franchisees.

Current Developments

Recently, the National Labor Relations Board (NLRB) released a proposed rule that would roll back its controversial 2015 *Browning-Ferris* decision, which expanded joint employer liability for labor law infractions under the National Labor Relations Act (NLRA). For decades, the NLRB measured joint employer liability by focusing on whether the putative employers each exercised "direct and immediate" control over the employees' "essential terms and conditions of employment." *Browning-Ferris* abandoned that test and instead held that two or more entities could be joint employers if they merely "reserved" control or exercised "indirect" or "limited" control over the employees' working conditions.

Browning-Ferris has affected businesses across virtually every industry. Although the decision applies only to federal labor law matters, it impacts both unionized and non-unionized businesses. It creates uncertainty with respect to what constitutes reserved, indirect or limited control, and leaves businesses vulnerable to liability for employees that are not theirs. The impact of this standard is that any control related to matters such as hiring, firing, discipline, supervision, direction and training wages, hours and benefits, staffing, scheduling, and work assignments – even if

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arguably only tangential – can now be viewed as evidence of joint employment.

The franchising industry is among those affected. Franchisors have been targeted in litigation and regulatory actions as joint employers of their franchisees' employees, including, most notably, the NLRB's cases against McDonald's. The argument is that because franchisors impose certain controls in their contracts with franchisees, they are somehow controlling working conditions at franchised locations, even though those locations are independently owned and operated by franchisees. This expansive interpretation is problematic because some of the "controls" under attack are, in fact, focused on protecting the franchisor's trademarks through brand standards – brand standards that promote uniformity across the franchised system and enhance the customer's experience.

The NLRB has not been alone in its efforts to expand joint employment liability. The Obama Administration's Department of Labor (DOL) also adopted, through administrative guidance, new and broad standards for determining joint employment under the Fair Labor Standards Act (FLSA), which were rescinded last year.

Despite the DOL and NLRB's promising actions, uncertainty remains in the joint employment landscape. The NLRB's proposed rule is far from settled. It must undergo a 60-day comment period, and it could change based on the comments received. Even if the rule is adopted, it concerns only federal labor law and the joint employment question remains unclear in other areas, including the FLSA and at the state level. Secretary of Labor Alexander Acosta announced earlier this month that the DOL is also considering rulemaking to clarify the issue under the federal wage and hour law. Meanwhile, the *Browning-Ferris* case is making its way through the appeals process, even with varying attempts by the NLRB to overturn the decision.

A more permanent solution could come by way of a legislative solution. Legislative efforts are underway to address the joint employment question at the federal and state levels. Last year, the U.S. House of Representatives passed the Save Local Business Act, which seeks to amend both the NLRA and the FLSA's definitions of "employer" so that joint employment liability is imposed only when there is direct, actual, and immediate significant control over the employees' essential terms and conditions of employment. Although the bill passed the House with bipartisan support, it has stalled in the Senate.

On Aug. 31, 2018, the U.S. House of Representatives also introduced the Trademark Licensing Protection Act. If enacted, the bill would amend the federal trademark statute so that a franchisor or licensor's controls to preserve its trademarks through brand controls – which ensure uniformity to the consuming public – cannot be proof of joint employment (or principal-agent) liability. Various states have enacted or are proposing enacting some form of "joint employer" legislation to exempt franchise relationships from joint employment liability for purposes of state employment claims, but their scopes vary significantly and do not apply to claims under federal law.

Takeaways

While these recent moves indicate a favorable shift in the joint

employment legal landscape, this area is still far from resolved. It could take until 2019 before the federal rule(s) are enacted or legislation passes, if at all.

In the meantime, franchised businesses must continue to be mindful of possible "controls" concerning franchisees' employment matters and take precautions to reduce their business exposure. At a minimum, the following should be carefully reviewed and addressed to assess controls, whether imposed or reserved, that extend beyond protecting the brand and trademarks:

- franchise agreements and operations manuals
- training materials and training of field and operations personnel on joint employment issues
- any sample employment materials provided to franchisees (including employee handbooks and policies, job descriptions, applications, etc.)
- contracts with third-party vendors who assist franchisees with human resources matters
- technology systems requirements that involve labor components

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work, or Marlén Cortez Morris at 312-214-8808 or mcortez@btlaw.com, William McErlean at 312-214-8820 or wmcerlean@btlaw.com, or Rebekah Prince at 310-284-3831 or rebekah.prince@btlaw.com.