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Major Changes Possible for Franchisors in Light of National Labor Relations Board General Counsel's Position in *McDonald's* and *Browning Ferris* Matters

At the end of July the General Counsel of the National Labor Relations Board (NLRB) announced his intention to name the McDonald's Corporation, as a parent franchisor, as a respondent joint employer in cases involving unfair labor practices allegedly committed by franchisees.

That decision raised considerable concern among franchisors and franchisees who addressed the issue at a Congressional hearing in September. There the business community argued that the franchisor-franchisee relationship is, by design and definition, built upon a clear and substantial division of responsibilities with franchisees operating as independent businesses in all aspects of the workplace – to include hiring and firing – not covered by the franchise agreement. To find franchisors joint employers, the testimony continued, would result in a complete change to the franchise model and require franchisors to exert control over operations of franchisees.

Some indication of the General Counsel's thinking can be found in the recent amicus brief he submitted in another matter before the NLRB, *Browning Ferris* (Case 32-RG-109684). The current legal standard for joint employment is that only separate entities that exert a significant and direct degree of control over employees and their terms and conditions of employment can be considered joint employers for purposes of the National Labor Relations Act. The General Counsel brief suggests abandoning that test in favor of an "economic dependence" test which goes beyond hiring, firing supervision and direction of employees to look at other formalized operational requirements put in place by the franchisor and over which it retains control. According to the General Counsel's brief, franchisor control is also evidenced by things like tracking data on sales, inventory, and labor costs, calculating labor needs; setting employee work schedules; accepting job applications through company wide application systems; making recommendations during any collective bargaining process.

The resolution of this issue is likely to be lengthy since there will be administrative decisions which will almost certainly be followed by appeals in federal court.

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