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Franchisors as Joint Employers

Strategies for Avoiding the NLRB

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If you've ever been involved with franchising, then you know first-hand that the regulatory landscape for franchise companies can be daunting – particularly for those that aren't familiar with the nuances of state and federal franchise laws. Navigating this already challenging geography became even more complicated for franchisors recently. This is because the National Labor Relations Board ("NLRB") adopted a new "joint employer" test, deciding that McDonald's Corporation should be considered the joint employer of its franchisees' employees.

In December 2014, the NLRB – the agency tasked with protecting employees against unfair labor practices – identified McDonald's (the franchisor) as a joint employer by alleging that it engaged in various unlawful employment practices against its franchisees' employees. The NLRB argued that McDonald's was a co-employer because of the indirect influence it had on those employees by way of the policies, procedures, and rules McDonald's requires all of its franchisees to follow. Many have speculated that this move is a political one stemming from the NLRB's motivation to allow employees of these large franchise systems to unionize so that they can collectively bargain with their employers.

This move caught the franchise community off guard. Historically, franchisors have been found time and again to be shielded from such liability because they lack direct control over their franchisees' employees. Now however, with this change in position and focus by the NLRB and other governmental agencies, many franchise companies are reconsidering the aspects of the franchisor-franchisee relationship and are seeking ways to limit their risks of being found jointly responsible as an employer of their franchisees' employees.

This sea-change has created a series of new challenges for lawyers who advise franchise brands. On one hand, a franchisor's primary responsibility is to protect the brand and integrity of the franchise system as a whole. As a result, it is crucial for the franchise company to have strong rules and policies in place to ensure the uniformed replication of an exceptional customer experience. On the other hand, the position taken by the NLRB and other governmental agencies has made it clear that greater control by a brand owner can be a contributing factor in the joint employer test.

What follows from this tension is the need for balance in the controls exerted by franchise companies over their individual franchisees. For a trademark owner, it is critically important to create uniform standards to protect the use of the brand and quality of the products and services to the end user. When these controls start to seep into matters of the employment relationship, however, the franchisor finds itself deeper within joint employer territory. As a result, experienced franchise attorneys typically seek ways to achieve a happy medium between dictating rules that ensure brand consistency and quality system-wide, while at the same time avoiding a direct or indirect nexus to the relationship between the franchisees and their employees.

Without much in the way of direct guidance from the NLRB or other authorities, finding the right balance between these competing concerns can be elusive. The prevailing wisdom is that a franchisor should draft its legal documents in a way that ties operational rules to brand-protection justifications, and leave it to individual franchisees to determine the way their employees follow those rules. By way of example, franchisors likely won't find themselves to be joint employers if their manual dictates what type and style of uniforms the employees must wear; they may, on the other hand, find themselves deeper in joint employer territory if the manual dictates employees' hours, pay, and/or benefits.

The devil is in the details, and unfortunately there is no silver bullet to protect against these risks. Concerned franchise companies should consult with legal counsel experienced in franchising to best arm themselves in this increasingly perilous environment.

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