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Labor & Employment ADVISORY ■

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National Labor Relations Board Directive on "Joint Employer" Status Attempts to Blur the Lines Between Franchisors and Franchisees

On July 29, 2014, the National Labor Relations Board (NLRB or the "Board") announced that its Office of the General Counsel would be naming McDonald's USA, LLC, as a "joint employer" in at least 43 cases in which complaints have been authorized against McDonald's franchisees. The NLRB's decision to pursue cases against McDonald's USA as a joint employer threatens to upend years of precedent in which franchisors are generally considered separate employers from their franchisees.

The NLRB's decision was issued as a directive from its General Counsel to its regional directors following complaints of unfair labor practices against McDonald's franchisees. Those complaints relate to allegations of unlawful terminations, threats and treatment in response to employees' involvement in a well-publicized campaign organized by the Service Employees International Union (SEIU) in which employees have participated in walkouts and demanded wages of $15 per hour. According to the NLRB, if the parties are unable to reach a settlement, McDonald's USA will be named as a respondent in those cases where the Board has found merit, and the cases will proceed to a hearing before an administrative law judge.

Under current NLRB law, the test for joint-employer status is whether one entity exercises "direct and immediate control over the terms and conditions of employment" of another entity's employees, which would include the hiring, firing, discipline, supervision and direction of those employees. The Board's General Counsel, however, has recently advocated for a test that would consider the "totality of circumstances" in determining joint-employer status, which would take into account whether "one of the entities wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence." The General Counsel's decision to consider McDonald's USA as a joint employer with its franchisees is therefore consistent with the Board's recent attempts to reshape the "joint employer" analysis.

Labor organizers argue that McDonald's USA is a joint employer with its franchisees because the company allegedly controls how franchisee restaurants are run, including what menus, supplies, uniforms and training materials are used. In a statement issued by McDonald's USA, however, the company forcefully argues that while it relies on existing rules to run a successful business based on a franchising model, it does not direct or co-determine the hiring, termination, wages, hours or any other essential terms and conditions of employment of franchisee employees.

While it is important to point out that the General Counsel's directive does not have the same force as a Board ruling, the recent announcement could have wide-reaching effects beyond the restaurant industry. Any employer that relies on a franchise model—including hospitals, hotels and convenience stores—may also be affected. Moreover, a change in the joint-employer analysis could potentially reach non-franchise employers that rely on subcontractors or temporary staffing agencies.

Additionally, the impact of the Board's directive is not limited to liability for unfair labor practices. A reshaping of what constitutes a joint employer could change the way the Board views franchisors and franchisees for purposes of union elections and collective bargaining, thereby opening the door for unions to seek representation of larger groups of employees rather than smaller, segmented units. It is also anticipated that the Equal Employment Opportunity Commission (EEOC) and other federal labor and employment agencies will take steps to support the General Counsel's position, as the EEOC has long advocated for a an expansive joint employer analysis.

Given the early stage of proceedings of the McDonald's cases, it is unclear whether the full Board or the courts would uphold the General Counsel's directive. In light of this uncertainty, employers should continue to consult with counsel regarding what they can do to limit their exposure and avoid being considered a joint employer with franchisees, independent contractors or staffing agencies.

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