BIG MAC ATTACK:
IS THE FRANCHISOR A JOINT EMPLOYER?

By Joel M. Grossman

On July 29, 2014, the National Labor Relations Board ("NLRB") issued a brief statement that could turn labor law in the world of franchising upside down. The NLRB's General Counsel stated that it plans to go forward with a number of complaints that allege unfair labor practice claims against a McDonald's franchisee as well as the franchisor, McDonald's USA, LLC. The NLRB's position appears to be that the franchisor and franchisee may be "joint employers" of the burger flippers and other employees of a franchisee due to the control that a franchisor imposes on its franchisees.

Under past precedent, the franchisor generally has not been held liable for labor or employment practices of its franchisee unless it maintains the right to control the operations of the franchisee, a test analogous to determining whether a worker is deemed an employee or an independent contractor. Past case law has generally held that in a traditional franchisor-franchisee relationship, the franchisor will not be deemed a joint employer and is not responsible for wage and hour violations or other alleged labor and employment violations committed by the franchisee. See, *e.g., Singh v. 7-Eleven Inc.*, in which a federal district court held that 7-Eleven corporate franchisor did not share employment responsibility with its franchisees. Similarly, in a Title VII discrimination case, another district court held that the franchisor was not a joint employer for Title VII purposes because the franchisee "exclusively possessed the rights and responsibilities regarding all employment matters and the day-to-day operations in his store, and his relationship with the plaintiff as his employee."

The cases turn on the degree of control of day-to-day operations exercised by the franchisor. Sometimes the franchise agreement itself is important evidence of how much control the franchisor will maintain over labor matters, and sometimes it will be the factual evidence of how much control is actually exercised. While a franchisor often wishes to exert a degree of control to be certain that its name brand is used properly, the franchisor, not unlike an investor in a corporation, seeks to avoid liability for actions of the franchisee, such as failing to pay over-time wages or failing to protect its employees from sexual harassment. In short, the franchisor walks something of a fine line in retaining enough control to protect the brand name, but not enough control to be liable for the franchisee's misdeeds.

As noted, the case law generally has not sought to hold the franchisor liable for employment law violations by its franchisees, but that may be changing. Two weeks before the NLRB statement that created a great deal of controversy, a federal district court in Cordova v. SCCF, Inc. denied a motion by a franchisor to dismiss an action against it that alleged that it was the joint employer of its franchisees. The court noted plaintiff's allegations that the franchisor created and imposed on its franchisees "management and operation policies and practices by providing materials for use in training store managers and employees and monitoring employee performance." In addition, plaintiff alleged that the franchisor required franchisees to use certain record-keeping systems, including systems for tracking employee hours. While the matter was before the court only at the pleading stage, it is noteworthy that the court thought that these and other allegations were sufficient evidence of joint employment to deny the franchisor's motion to dismiss.

Two weeks after this decision, the NLRB made headlines by announcing that it would proceed with complaints alleging McDonald's USA, a franchisor, was a joint employer of at least some of its franchisees and could be liable for labor violations by the franchisees. This announcement, and the developing case law, holds lessons for both franchisors and the plaintiffs who seek to hold them accountable for their franchisees' actions. It is essential for franchisors to review their agreements and interactions with franchisees to make sure that the level of control exerted over franchisees does not cross the line leading to a finding of joint employment. At the same time, plaintiffs' lawyers clearly have a new opportunity to attempt to hold deep-pocketed franchisors liable for acts of their empty-pocketed franchisees.

One further thought for both plaintiffs and defense counsel: The best way to avoid a potentially damaging judicial precedent is through mediation or arbitration. Through ADR, the matter can be resolved without either side needing to worry that a judge will issue a legal ruling that will be a binding precedent going forward. ■

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