Employers Beware: McDonald's Memorandum Suggests That the NLRB Intends to Loosen the Standard for When Legally Separate Entities May Be Considered Joint Employers

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In late July, the General Counsel of the National Labor Relations Board (the "NLRB" or "Board") issued a memorandum in a group of cases against operators of several McDonald's franchises. The memorandum is significant because it indicates that the General Counsel is filing unfair labor practice charges not only against the McDonald's franchise operators, but against McDonald's USA, LLC, the franchisor, or what many people think of as "corporate McDonald's." The memorandum has touched off a firestorm of criticism from employers and business groups, because it indicates that the NLRB is pushing for a more lenient standard for when two separate and distinct business entities may be considered to be "joint employers" and held liable for unfair labor practice charges and collective bargaining obligations.

Labor law has long recognized that under certain circumstances, two separate entities, such as a franchisor and franchisee or parent and subsidiary, may both be responsible for employee unfair labor practices and collective bargaining if they are found to be joint employers under the National Labor Relations Act. The key concept in determining whether a franchisor or parent company will be a joint employer is the degree to which it exerts control over the terms and conditions of the employees at issue. Under current Board law, the franchisor must share or codetermine the terms and conditions of employment. In other words, the franchisor must be able to meaningfully affect matters such as hiring, firing, discipline, supervision, and direction of the employees. If the franchisor or parent company exerts such control, it will be jointly liable for any unfair labor practice charges against the franchisee/subsidiary and will be jointly responsible for bargaining with the union.

The General Counsel's decision to file charges against "corporate McDonald's" likely indicates that the General Counsel is asking the NLRB to adopt the less restrictive standard for finding that two entities are joint employers, which the NLRB overturned approximately thirty years ago. Under this less restrictive standard, often called the industrial realities test, an entity may be found to be a joint employer if it exercises direct or indirect control over working conditions, even if that control is not actually exercised, or where the industrial realities make the separate entity essential to meaningful collective bargaining. If the Board ultimately adopts this less restrictive standard and it is upheld by the courts,

many more legally separate entities will be joint employers and could be exposed to liability because of the actions of their franchisees or subsidiaries.

Employers are justifiably concerned over this development because, if upheld, it signifies the NLRB's intent to hold more businesses responsible for the acts of related entities, even though those entities may be legally separate. The joint employer test is applied not only to the franchisor/franchisee relationship, but also to similar relationships where to entities are related but legally separate, such as the parent/subsidiary, and even the employer/staffing agency relationship. Thus, this decision could affect more than just franchisors. Employers are also concerned this decision will make it easier for unions to organize because franchisors will no longer be able to distance themselves from union disputes with a local franchisee. This may allow unions to exert greater pressure on franchisors to accept contract terms or even neutrality agreements.

While the General Counsel's memorandum is concerning, it is important to keep in mind that the NLRB has not yet adopted the more relaxed standard. The McDonald's case and another pending case (Browing-Ferris Industries of California) involving similar issues have not yet been decided. It is also important to note that if the NLRB does agree with the General Counsel and does change its standard for determining when an entity is a joint employer, the issue will likely end up before the United States Supreme Court, given the fact that the NLRB is changing thirty years of prior law on an issue that is of great importance to so many businesses. Thus, the NLRB may not make the final decision on the issue.

At this point, the primary take away from the McDonald's case is that employers should keep an eye on this issue as the McDonald's and Browing-Ferris cases go forward. Employers who have related but legally separate entities or who use independent contractors to provide employees should consider the degree to which they exert influence over the employees of a franchisee, subsidiary, or third-party contractor to assess their exposure to liability as a joint employer. Concerned employers may want to strengthen the language in their contractor agreements to provide evidence of related entity's control over working conditions and to provide indemnity for labor and employment law violations. Employers with joint liability exposure should be more vigilant in monitoring related entities to ensure compliance with labor and employment law. Lastly, employers should keep in mind that other agencies such as the Equal Employment Opportunity Commission and the U.S. Department of Labor have indicated their agreement with the General Counsel's position on broadening the definition of joint employer. Thus, this issue is not going to go away and it is likely that other agencies will join the NLRB in pushing to expand the definition of who is a joint employer in the future.

For more information on how to ensure that your company does not fall into the joint employer category, please contact the authors of this article or any member of Butler Snow's Labor and Employment group.