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ALERT

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NLRB General Counsel Announces Broad Interpretation of Joint Employer Status

In a press release last week, the Office of the General Counsel of the National Labor Relations Board (NLRB) announced its position that McDonald's, USA, LLC is a joint employer of the employees of its franchisees. This signals a dramatic reversal in the position of the NLRB that franchisors and franchisees are not joint employers, single employers or alter egos.

The press release noted that 181 cases involving McDonald's have been filed since November 2012: 68 of which were found to have no merit, 64 of which are currently pending investigation and 43 of which have been found to have merit. According to the General Counsel, "McDonald's franchisees and/or McDonald's, USA, LLC" will be named as a respondent in the complaints issued by the NLRB in the 43 cases if the parties are unable to reach a settlement. This announcement comes at a time when the NLRB is considering revising the standard it uses to evaluate alleged joint employer relationships. The General Counsel has asked the NLRB to expand the contours of the joint employment test. *See Browning-Ferris Industries* (Case 32-RC-109684).

The General Counsel's announcement represents yet another effort by the current administration to curry favor with the AFL-CIO by making it easier for unions to organize worksites. Thus, we can expect similar initiatives from other federal agencies, such as the Equal Employment Opportunity Commission and the Department of Labor reaching the same conclusion (e.g., under the Fair Labor Standards Act and Executive Order 11246, to name a few). However, because the definition of "employer" or "joint employer" differs from statute to statute, the decision as to each will necessarily turn on the applicable statutory language.

Presently, the weight of authority under federal anti-discrimination statutes, such as Title VII, rejects joint employer status for franchisors such as McDonald's. *See, e.g. Evans v. McDonald's Corp.*, 936 F.2d 1087 (10th Cir. 1991) (considering NLRB factors and holding McDonald's was not an employer of its franchisee's employees under Title VII); *Alberter v. McDonald's Corp.*, 70 F.Supp.2d 1138 (D. Nev. 1999)

(same); *Gray v. McDonald's USA, LLC*, 874 F.Supp.2d 743 (E.D. Tenn. 2012) (holding McDonald's was not an employer of its franchisee's employee under 42 U.S.C. § 1981 and the state anti-discrimination statute). However, with the federal government and agencies focusing on this issue, that may change. Commonly franchised industries, such as food service and hospitality, will no doubt be watching these developments very closely, as a shift in the law could have significant impact on the entire franchise business model.

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