

AUGUST 04, 2014

## NLRB GENERAL COUNSEL SEEKS EXPANDED DEFINITION OF “JOINT EMPLOYER”

And so it continues. In an advice memo dated July 29, 2014, the General Counsel of the NLRB has given authorization to include a franchisor (McDonald's) as a named party in unfair labor practice charges arising out of the treatment of franchisee employees. Some believe that this move is just part of the increasing pressure brought upon the fast food industry to increase pay for their workers. Others see it as a continuation of the trend of the NLRB to exert increasing control over employment and labor relations in this country. The NLRB's announcement of this decision explained in part:

"The National Labor Relations Board Office of the General Counsel has had 181 cases involving McDonald's filed since November 2012. Of those cases, 68 were found to have no merit. 64 cases are currently pending investigation and 43 cases have been found to have merit. In the 43 cases where complaint has been authorized, McDonald's franchisees and/or McDonald's, USA, LLC will be named as a respondent if parties are unable to reach settlement. "

While this statement gives us little insight into the General Counsel's rationale for seemingly ignoring 30 years of precedent, a review of the General Counsel's views in an amicus brief in another matter sheds some light on where the General Counsel and the NLRB may be heading. In *Browning-Ferris*, the General Counsel filed an amicus brief, in which his position was summarized as follows:

"The Board should abandon its existing joint-employer standard because it undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining. The Board's current standard is significantly narrower than the traditional standard, under which *an entity could be a joint employer if it exercised direct or indirect control over working conditions, had the unexercised potential to control working conditions, or where "industrial realities" otherwise made it essential to meaningful bargaining.*

The General Counsel urges the Board to adopt a new standard that takes account of the totality of the circumstances, including how the putative joint employers structured their commercial dealings with each other. Under this test, if 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, joint-employer status would be established."

### WHAT DOES THIS MEAN?

The General Counsel's proposed legal analysis is not limited to the franchisor/franchisee relationship. Rather, it advocates for a completely revised definition of "joint employer," which would be applicable in all industries and corporate structures (e.g., parent corporations, members, etc.). Fortunately, the General Counsel's advice memo is not yet law. We expect complaints to be issued against the franchisors and franchisees in the McDonald's matters, followed by one or more administrative law judge trials. The case(s) would then proceed to the National Labor Relations Board for decision and possibly to a federal circuit court of appeals from there. This entire process could take several years.

In the meantime, employers are cautioned to closely examine corporate structures with an eye toward who actually has control, directly or indirectly, over the terms and conditions of employment. Employers who are considered separate entities today may in the future be considered joint employers liable for the other's unfair labor practices or even collective bargaining obligations.

*Browning-Ferris* illuminates the underlying rationale. In that brief, the General Counsel asserts that "the Board should abandon its existing joint-employer standard because it undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining."

The General Counsel advocates a return to the pre-1984 "traditional" approach, whereby an "entity was a joint employer where it exercised direct or indirect control over significant terms and conditions of employment of another entity's employees, where it possessed the unexercised potential to control such terms and conditions of employment, or where 'industrial realities' otherwise made it an essential party to meaningful collective bargaining."

The National Labor Relations Board Office of the General Counsel has investigated charges alleging McDonald's franchisees and their franchisor, McDonald's, USA, LLC, violated the rights of employees as a result of activities surrounding employee protests. The Office of the General Counsel found merit in some of the charges and no merit in others. The Office of the General Counsel has authorized complaints on

alleged violations of the National Labor Relations Act. If the parties cannot reach settlement in these cases, complaints will issue and McDonald's, USA, LLC will be named as a joint employer respondent.

As you consider these issues, please do not hesitate to contact Bruce Bagdady at [bbagdady@hallrender.com](mailto:bbagdady@hallrender.com) or your regular Hall Render attorney.