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PERSPECTIVE

McDonald's is not lovin' a recent NLRB ruling

By Michael J. Lotito

In a move with potential sweeping impact on numerous businesses across the country, National Labor Relations Board General Counsel Richard Griffin, an Obama appointee and former union lawyer, announced that his office will name a parent franchisor as a respondent in cases involving alleged unfair labor practices committed by franchisees. According to the general counsel's office, the agency is currently investigating the various charges, and may name the franchisor company — here, McDonald's — as a joint employer should a complaint be issued.

This decision comes as the board is reviewing amicus briefs filed in a separate matter, *Browning-Ferris*, involving a Teamsters' union appeal of an NLRB regional director's determination that an independent staffing company was the sole employer and only its employees should be included in an NLRB election at a Browning-Ferris recycling plant in Milpitas, Calif. The director excluded all Browning-Ferris employees from the election. The board solicited briefs from interested parties addressing whether the board should retain its current rule or adopt a new joint-employer standard.

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The current legal standard, endorsed by Congress and the courts, has existed for 30 years. Under the current standard, only legally separate entities that exert a significant and direct degree of control over employees and their essential terms and conditions of employment are considered joint employers under the National Labor Relations Act. The "essential terms and conditions of employment" are those involving such matters as hiring, firing, discipline, supervision and direction of employment. See *TLI Inc.*, 271 NLRB 798 (1984), enf. 772 F.2d 894 (3d Cir. 1985); *Laerco Transportation*, 269 NLRB 324 (1987).

The general counsel's latest move has disregarded established laws regarding the franchise model. The franchisor-franchisee relationship is built on a division of roles and responsibilities, with the individual franchises independently running their businesses. Franchisors set standards to protect their trademark and maintain product consistency, but franchisees are in charge of hiring, firing and managing other aspects of the workplace. If found to be joint employers, franchisors would be liable for individual franchisees' employment practices, forcing them to exert more control over day-to-day operations and workplace decisions. Such a rule change could completely overhaul of the franchise model. In fact, any change in the joint employer rule could significantly change the face of American business and impact every level of the supply chain. Multiple businesses and contractual relationships are based on this decades- old standard.

The NLRB has yet to release any memorandum or decisions outlining its new approach. However, a look at the general counsel's amicus brief in *Browning-Ferris* illuminates the underlying rationale. In that brief, the Griffin 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." He suggests that the board adopt former member Wilma Liebman's "industrial realities" test outlined in *Airbourne Express* (which was specifically rejected by the overall board in that case). 338 NLRB 597 (2002).

The current test focuses on whether the employer's control over employment matters of the other company is direct and immediate. Liebman's test requires an assessment of the degree of "economic dependence" between the companies. The focus is not on whether the company exercises control through direct "hiring, firing, discipline, supervision and direction" of the other companies' employees, but whether the company imposes its own standardized operational requirements and monitors and retains effective control over those operations. Liebman maintained that this test should apply to employees in the transportation, manufacturing, shipbuilding, janitorial, building trades and mining industries.

Griffin's proposed test focuses on overall business organization. According to him, indicia of joint control includes: tracking data on sales, inventory and labor costs; calculating labor needs; setting and policing employee work schedules; tracking wage reviews; tracking time needed for employees to fill customer orders; accepting employment applications through company systems; reimbursing wages; retaining the right to approve employees; requiring the company and its employees to follow safety rules; and making recommendations during the collective bargaining process or retaining the right to provide such input. This expanded test would magnify the joint employment relationship on a local and national level.


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This approach will have far-reaching impacts beyond franchise operations and into many industries and business organizations. Griffin specifically identifies temporary service workers, outsourced and subcontracted services, and franchising as target areas for the expanded joint employer concept. While McDonald's has not yet been named in an official complaint, the readiness of the NLRB to consider it a joint employer should give many employers pause. The announcement is another potential pro-labor reversal of long-standing NLRB precedent to encourage organizing at the expense of companies' rights to make legitimate business decisions regarding organizational structure. The board's process for determining "new" joint employment standards could take several years. During this time, there will be considerable uncertainty about the form and conduct of business under these changing standards.

This line of cases will continue to draw attention to the NLRB's agenda. Here, Griffin's actions are aimed at numerous industries. The impacts of an expansion of the NLRB's joint employer rule will be felt far beyond the franchising sector.

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