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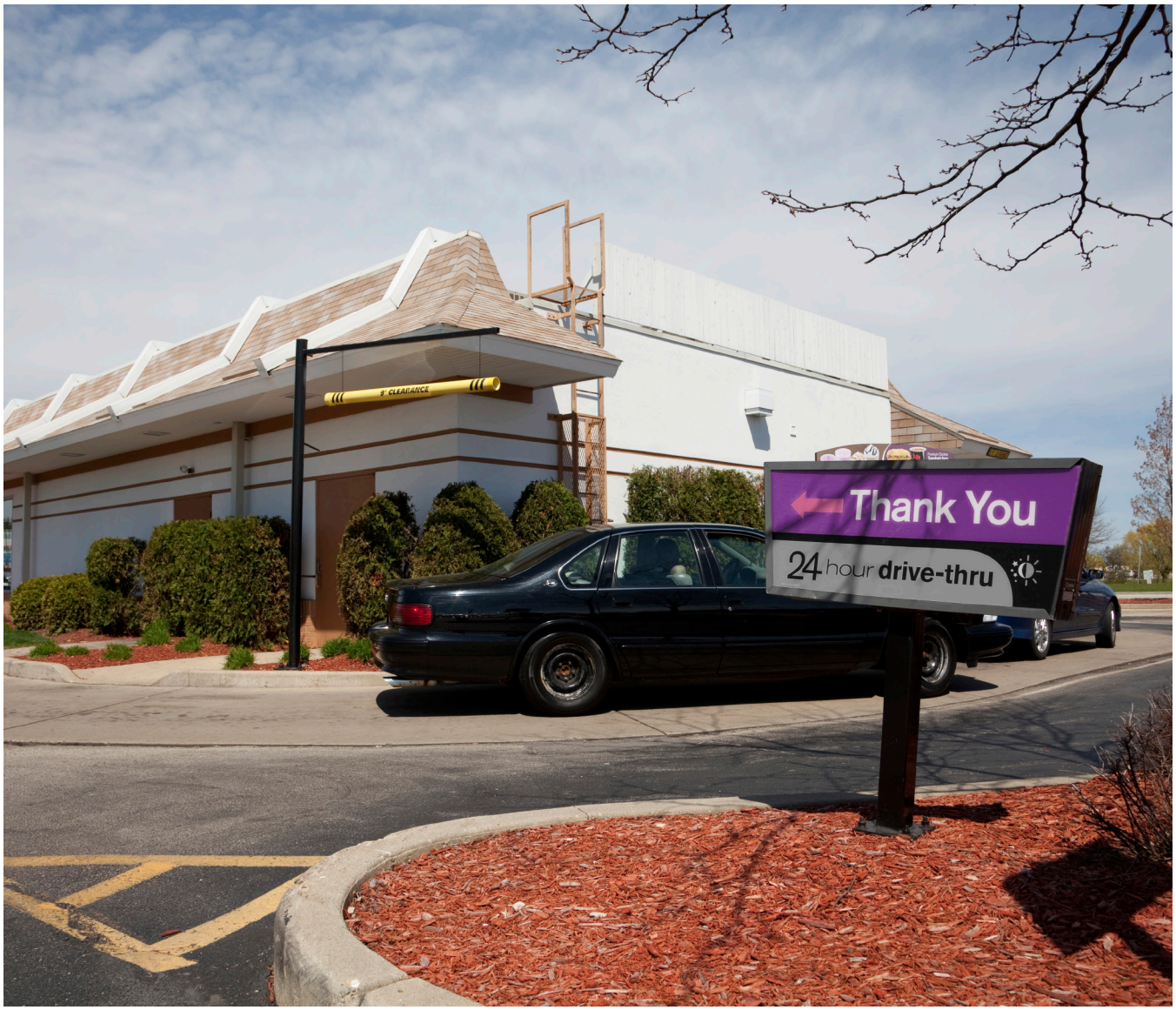
National Labor Relations Board Joint Employer Stipulation Could Change Franchisor Model



The National Labor Relations Board (NLRB) is questioning whether to use a broader definition of the term "joint employer" – a move that could bring sweeping changes to the restaurant and retail/wholesale franchisor model. Whether a large fast food company exhibited more control than it should have over its franchisees was the most recent catalyst for the proposed change, but several earlier cases have challenged the more than 30-year-old standard for determining joint employment.

If the new definition, which was proposed by the NLRB's General Counsel Richard Griffin, is adopted, franchisors could see significantly expanded wage and hour and other employment practices liabilities as well as operational challenges. Franchisors could now be responsible for alleged discrimination, harassment, wage, labor practices, and other allegations that previously may have been directed at franchisees only. Franchisees, in turn, could see a reduction in control or end up out of business altogether. The proposed expansion of "joint employer" could become final as early as 2016, and the change could have implications far beyond the restaurant and retail industries to all companies that subcontract or outsource.

PROPOSED JOINT EMPLOYER CHANGE

A "joint employer" is currently defined as two separate employer entities having direct and immediate control over the essential terms and conditions of employment. Under this definition, a franchisor is typically not jointly responsible for any liability relating to franchisees' labor relations policies. The general counsel of the NLRB is urging a broader definition that replaces "direct and immediate" control with "direct, indirect, or potential" control over employment practices. If the NLRB adopts the general counsel's proposed definition, there will be more joint employers and thus more franchisors and franchisees could be liable for each other's unfair or discriminatory labor practices.

The NLRB held hearings in March 2015 over whether a fast food company exerted control that was "beyond protection of the brand," making it a "joint employer" with its franchisees. With that label, it would be jointly liable for alleged discriminatory labor practices that were cited in December 2014 against the firm and its franchisees, and those that date back further to 2012.

Under the fast food case in question, 310 unfair labor practice charges were filed against the franchisor, which included allegations of discriminatory discipline, reductions in hours, discharges, and other coercive conduct directed at employees in response to union and other protected concerted activities. Some of the allegations purportedly involved the use of threats, surveillance, interrogations, promises of benefit, and overbroad restrictions on communicating with union representatives or with other employees about unions and the employees' terms

and conditions of employment. The NLRB found that the franchisor, by its use of tools, resources, and technology, engaged in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, thereby sharing liability for violations of the National Labor Relations Act (NLRA). The NLRB will host a series of hearings with a final decision to come on the case in 2016.

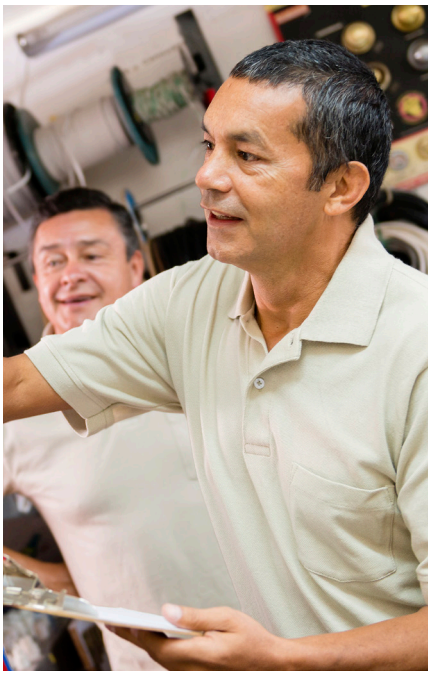
KEY LABOR/EMPLOYER PROTECTION IMPLICATIONS

Employers that have non-traditional employment arrangements exemplified by the use of franchises and temporary workers have made it increasingly difficult for unions to organize workers who are affected by these arrangements. The NLRB's general counsel may be seeking a change in the definition of joint employer partly to address this trend. The underlying premise of the general counsel seems to be that the current joint employer definition has allowed sophisticated employers to evade bargaining obligations via various business arrangements.

The potential implication of a joint employer redefinition could impact NLRB representation, unfair labor practice, and secondary boycott proceedings. Expanding the NLRB's joint employer standard seemingly would make it easier for unions to join multiple employers in labor disputes and organizing campaigns.

The proposed change forces employers to address each of the following conditions of employment under both standards: the broader pre-1984 standard ("indirect or potential control") and the current, more stringent standard ("direct and immediate") governing the sufficiency/degree of control. These conditions include: (1) wages; (2) employee personnel issues; (3) the number of employees needed to perform a job or task; (4) establishing employee work hours, schedules, work week length, and shift hours; (5) employee grievances, including administration of a collective-bargaining agreement; (6) authorizing overtime; (7) safety rules and standards; (8) production standards; (9) break and/or lunch periods; (10) assignment of work and determination of job duties; (11) work instructions relating to the means and manner to accomplish a job or task; (12) training employees or establishing employee training requirements; (13) vacation and holiday leave and pay policies; (14) discipline; (15) discharge; and (16) hiring.

Moreover, if the NLRB were to redefine who is "the employer" such that it includes a company that can indirectly affect certain terms of employment of another company's workers, the implication is that there would be no meaningful limit on who could be deemed a joint employer of another's workers.



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KEY LABOR/EMPLOYER PROTECTION IMPLICATIONS

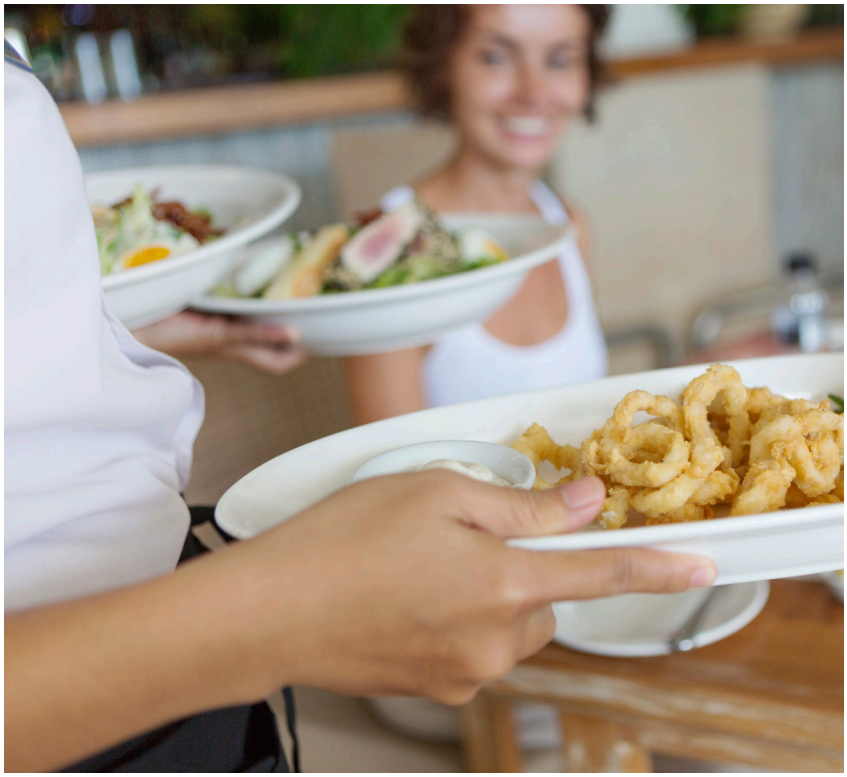
WAGE AND HOUR AND EPL RISK CONSIDERATIONS

Companies in retail/wholesale and food and beverage industries already have one of the greatest risks for wage and hour and employment practices liability (EPL) claims, and the proposed definition for joint employers could tip the scales further. The change could result in franchisors facing broader liability and could also create uncertainty for franchisees and their business relationships.

FRANCHISORS

Just as misclassifying independent contractors has led to a flood of charges from the US Department of Labor, if the proposed definition impacts liability for misclassification to the extent entities are held as joint employer, it could lead to increased claims against franchisors for discriminatory labor practices and wrongful labeling of their franchisees. Full- and part-time distinctions could be crucial for salary, tax, and other compensation issues under any proposed change in the joint employer definition.

With the proposed change, EPL and wage and hour underwriters could become more rigorous in assessing how much control franchisors exercise over franchisees' operations. And EPL and wage and hour insurance rates may rise if company losses increase in both frequency and severity related to the proposed joint employer stipulation.



FRANCHISEES

According to the International Franchise Association (IFA), a broadened definition of joint employer would ultimately lead to consolidation among franchisors and force franchisee business owners into a role similar to a store manager or even put them out of business. With franchisors legally responsible, they may no longer want to leave critical business decisions, especially around labor practices, in the hands of franchisees. This could potentially cause local business owners to lose their jobs and communities to lose vital sources of economic activity. The IFA's arguments, along with those from other groups, include:

International Franchise Association – The pending recommendation by the NLRB's general counsel would upend the 780,000 locally owned businesses across the US and jeopardize the 8.9 million jobs they directly support , according to the IFA. It maintains that if the proposed joint employment definition becomes accepted law, many organizations would be forced to reassess their current way of doing business with one another, which could hurt franchisees.

Coalition to Save Local Businesses – The impact from the NLRB's general counsel would be unprecedented and significant; almost any economic or contractual relationship could trigger a finding of joint employer status under the new proposed standard, it notes. Local franchise business owners currently have direct control over their own hiring practices, working conditions, wages, and hours of operations.

US Chamber of Commerce Workforce Freedom Institute – Should this campaign succeed, brand-name companies and contractors, it believes, could find themselves liable for employment practices governing workers that they do not, in fact, employ.

OTHER MATERIAL IMPACT FROM PROPOSED CHANGE

Casting a wider employer net is likely to result in more compliance obligations for the franchisor and ultimately greater exposure for noncompliance for unfair labor practice charges under the NLRA; discriminatory practices under Equal Employment Opportunity (EEO) laws such as Title VII, Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA); and wage and hour violations under the Fair Labor Standards Act (FLSA) and related state laws. Whether the NLRB's focus on the issue causes other administrative agencies like the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) to take a closer look at the joint employer relationship also bears watching, as does the potential for enforcement coordination between federal agencies which could result in higher compliance costs.

To mitigate their risk, franchisors may seek to take over the franchised or subcontracted operations or cease granting more franchises. Either response may weaken and possibly eliminate the franchise business model as it is currently known.

If franchisors seek to take more control, they could cement their status as joint employers. Labor and operational costs may increase as franchisors assume responsibility for operations and administration of functions. Franchisors may pass on these increased costs to consumers. Alternatively, some franchisors may find that taking more control is a route to faster growth and higher profitability and potentially better customer experiences.

A decision to adopt a broader definition of "joint employer" is consistent with the DOL's Wage and Hour Division's current efforts to address the "fissured" workplace (shedding functions), which Administrator David Weil believes allows "top of the pyramid" companies to delegate to the secondary market to provide lower wages, fewer benefits, and less safe workplace protections. This secondary market consists of relatively new organizational structures and relationships such as subcontracting, franchising, outsourcing, employee leasing, contingent and temporary workers, and independent contracting.

JOINT EMPLOYER ISSUES FROM OTHER STATUTES

Employers may be held liable under Title VII of the Civil Rights Act of 1964 ("Title VII") and other anti-discrimination statutes (for example, the ADEA and ADA) pursuant to a "joint employer" theory of liability or a related concept known as a "single employer" theory of liability. Similarly, the broad definition of "employer" under the FLSA has allowed courts to hold individuals and multiple employers liable under the Family and Medical Leave Act (FMLA) and FLSA. In this regard, two or more employers may be considered "joint employers," a "single employer," or a "single enterprise" if both entities control the terms and conditions of the employee's employment.

Courts have fashioned a variety of tests by which a defendant who does not directly employ a plaintiff may still be the plaintiff's "employer" under various employment statutes. Generally, courts examine whether one or both alleged employers exercise control in the capacity of an employer over the working conditions of a particular group of workers. To determine whether a joint employment relationship exists, courts generally apply an "economic reality test," which considers all factors relevant to the employee's particular situation, such as whether the alleged joint employer (1) supervised the employee, (2) had the power to hire and fire the employee, (3) had the power to discipline the employee, (4) supervised, monitored and/or controlled employee work schedules or conditions of payment, (5) determined the rate and method of payment, and (6) maintained employment records.

In one case involving a franchise program that involved more than 470 restaurants, a federal court in Arizona recently agreed with the franchisor that it was not a joint employer and granted its motion for summary judgment, explaining that the franchisor could not be a joint employer unless it had significant control over the employment relationship. Although the franchisor supervised the restaurant's compliance with its guidelines regarding plant maintenance, products and operations, liability insurance, indemnification, periodic inspection, and use of the franchisor's logo, the court found that that franchisor's supervision of the restaurant was insufficient to establish a joint employment relationship, as the franchisor's supervision largely did not involve employment matters.

In a case in New York involving a restaurant driver, the court analyzed both joint employer liability and single employer liability under the FMLA. The court concluded there were disputes of material fact as to whether some combination of two or more of the four restaurants at issue, which had the same owner, operated as a single employer.

While these and other cases have applied the traditional tests applicable to a joint employer analysis, this area of law may be in a state of flux, as the United States Court of Appeals for the Fourth Circuit adopted a new test on July 15, 2015, to determine whether two or more entities constitutes a joint employer under Title VII. This new "hybrid" test is based on "existing precedent and joint employment cases in other circuits" and is likely to be applied in other contexts.

PREPARATORY STEPS

Though the outcome of the proposed change in the fast-food case may not be known until 2016, or even later if the issue ever reaches the Supreme Court, employers should take steps now to understand how a definition change could impact their individual businesses, their industry, and their insurance coverage. Knowing the exact coverages a firm has in place and where potential gaps may occur is critical to understand in the face of potentially expanded EPL and wage and hour liability.

Steps to take include:

- A thorough review of the employer's wage and hour and EPL insurance policies.
- An analysis of a firm's human resource policies to understand what constitutes full- and part-time employment.
- A review of an employer's benefits, including health plans, 401K, and other retirement plans.
- Consideration of what third-party and vendor relationships franchisors have in place that could be impacted by such a change in joint employer.
- An evaluation of what union organization is in place now and how that could change.

Contributors

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