NLRB Issues Significant Ruling on "Joint Employer" Issue

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In December 2014, we reported that the General Counsel of the National Labor Relations Board (NLRB) had issued 13 complaints naming McDonald's as a "joint employer" of the employees at its franchisees. The complaints alleged that McDonalds and certain franchisees had violated employee rights by "making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, including participating in nationwide fast food worker protests about their terms and conditions of employment during the past two years."

The complaints were noteworthy, because if found to be a "joint employer" by the courts, McDonald's could be responsible along with its franchisees for wage, hour and other labor violations, and may be required to negotiate with unions. Given the significance of the General Counsel's position, significant concern arose within the business and franchisor communities, with some critics claiming that the NLRB's position undermined decades of settled franchisor-franchisee law and relationships.

At the same time as the McDonald's complaints, the NLRB had a separate proceeding before it, which was expected by many to deal directly with the "joint employer" concept.

Last month, that decision was issued. In a 3-2 decision, the NLRB ruled that Browning-Ferris Industries of California was a "joint employer" with a contract staffing firm, and in so doing restated the "joint employer" standard.[1] In a public statement, the NLRB explained that:

In [its] decision, the Board applies long-established principles to find that two or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law; and (2) they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board will — among other factors — consider whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so. [2]

In the decision itself, the NLRB explained — unpersuasively, to many critics — that it was "re-affirming" a prior, historic judicially-based standard of "joint employer" while rejecting later additional limitations on the definition imposed by the Board "without foundation in the statute or common law." [3]

In so doing, the Board emphasized the nature of the putative joint employer's control over employees, and stated that:

We will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority. *Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry*…. Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, *control exercised indirectly — such as through an intermediary — may establish joint-employer status*.[4]

Thus, a company may now be a joint employer if it has the *right*, directly *or indirectly*, to exercise sufficient control over an intermediary's employees, even if it does not assert that authority.

The NLRB's decision in BFI immediately, as expected, drew praise and criticism. The AFL-CIO stated that "working people won a significant victory" and the National Policy Institute described the action as "a big victory for working people and labor advocates." The International Franchise Association had a different view: "The NLRB today satisfied the politically-motivated requests of organized labor and manufactured a new joint employer standard that small businesses have long been bracing for. In doing so, the Board ignored decades of judicial precedent and bipartisan policy agreement dating back to the Johnson Administration to invent new labor law."

While BFI involved a labor contracting company and not a franchisee situation, the ruling's articulation of the joint employer standard to be applied by the NLRB — whether considered a "refinement," an "affirmation" or an "invention" — will be relevant to the franchisee cases, such as McDonald's, still in progress and not yet resolved, as well as how franchisors deal with their franchisees on matters impacting terms of employment going forward.

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Goulston & Storrs represents many owners and operators of franchised and non-franchised restaurant and retail concepts, as well as franchisors.

For questions about the information contained in this advisory, please contact your usual Goulston & Storrs attorney or one of the members of the firm's Labor and Employment or Retail, Restaurant and Consumer groups listed below.

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[1] *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner*, Case 32–RC–109684, 362 NLRB No. 186, August 27, 2015 ("BFI").

[2] Board Issues Decision In Browning-Ferris Industries, August 27, 2015, nlrb.gov.

[3] BFI at p. 2.

[4] *Id*. (*emphasis added; citations omitted*)