

Is Labor Law Putting the Franchise Business Model at Risk?

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Over the course of the last year, we have kept you abreast of National Labor Relations Board (NLRB) [case law](#) and Department of Labor (DOL) [interpretive/enforcement](#) guidance, how these agencies are changing their view of the responsibility of parent corporations for the employment relationship between employees of temporary agencies and franchises, and how these changes have the potential to drastically alter the benefits and risks of utilizing these relationships.

In what could become one of the most enlightening applications yet of this emerging shift, an NLRB hearing before an administrative law judge began last week in involving allegations by workers that McDonald's is responsible as a joint employer for the alleged labor law violations of its franchisees. The franchisors are alleged to have threatened, disciplined, or fired franchise employees who participated in [widely-publicized](#) campaigns for collective bargaining and a \$15 minimum wage.

In addition to denying the underlying allegations, the franchisees and McDonald's have to contend with the joint employer issue. In 2014, the NLRB General Counsel determined that roughly one-fifth of the allegations sufficiently raised a question about McDonald's control over its franchisees such that McDonald's could be named as a respondent to the complaints arising from the franchisees' actions.

In the meantime, in a case involving staffing agency employees, the NLRB this past summer modified its joint employer standard and applied it retroactively. As background, under the old standard, for a company to be a joint employer, it must have had and exercised direct and immediate control over such topics as hiring; firing; discipline; supervision and direction; and wages and compensation. Now, mere *possession* of that control over these topics may be sufficient to establish joint employer status; the ultimate question under the new standard is whether bargaining is "meaningful" without both "employers."

The litigation ensuing from McDonald's challenge to the General Counsel's joint-employer determination may tell us a great deal about the NLRB's application of the new standard to the franchisor-franchisee relationship.

While we will not know the results of this case for some time and therefore cannot comment on any precedent it may establish just yet, it is clear that how the NLRB applies its new standard may have profound effects. Shifting

responsibility to the franchisor undermines one of the very purposes of the franchisor-franchisee relationship: the franchisee's control and responsibility for its own employment decisions, including the terms and conditions of employment.

This, in turn, has broad implications for collective bargaining—an adverse ruling for McDonald's could mean that similar franchisors may be faced with workers organizing on a much broader scale and bargaining directly with franchisors, rather than just with each franchisee.

Going forward — This is merely the beginning of this phase of the case, and the outcome is not yet known. After this hearing, the case may be appealed to the full NLRB board for review. That decision may then be appealed to federal court. We will continue to keep you informed of any changes as they develop in this area of the law.

If you have questions, please contact your regular Hinshaw attorney or Evan Bonnett at Hinshaw's Rockford office.

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Topics

National Labor Relations Board (NLRB), Unions, Collective Bargaining Agreements, Joint Employers