

Separate Franchise or Joint Employer? – The Ninth Circuit rules in favor of McDonald's NOT being a Joint Employer of its Franchisee's Employees

Labor & Employment Law Update

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The Ninth Circuit U.S. Court of Appeals ruled in a California lawsuit that one of the most recognized franchises, McDonald's, does not exert sufficient direction or control over its franchisees' employees to be considered a joint employer under California statutory or common law and therefore is not liable for how the franchisee treats its employees.

In doing so, the Ninth Circuit affirmed the District Court's ruling that McDonald's was not an employer under California's Labor Code definition under the "control" definition, the "suffer or permit" definition or under California common law. The court also rejected the Plaintiffs' claims that McDonald's could be held liable under an ostensible-agency theory or that McDonald's owed the employees a duty of care.

In this case, Plaintiffs argued that McDonald's requirements of the franchisee made it a joint employer. Specifically, Plaintiffs argued that McDonald's exerted control through the franchise agreement that required the franchisee to use its point of sale (POS) system and in-store process (ISP) computer systems every day to open and close each location, managers received training at McDonald's Hamburger University and then trained employees on meal and rest break policies, required franchisee employees to wear uniforms, and the franchisee voluntarily used McDonald's computer system for scheduling, timekeeping and determining overtime pay.

The court followed the California Supreme Court's rationale in *Martinez v. Combs* 231 P.3d 259 (Cal. 2010) and held that a franchisor "becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge and relevant day-to-day aspects of the workplace behavior of franchisee's employees." *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 725 (Cal. 2014). It further held that McDonald's is not an employer under the "control" definition, as it did not have "control over the wages, hours or working

conditions." *Martinez*, 231 P.3d at 277. Much like in *Martinez*, the court found that directing control over workers geared towards quality control, does not rise to the level of controlling the day-to-day work at the franchise. *Id.* In essence, branding does not represent control over wages, hours or working conditions.

The court also held that McDonald's was not an employer under the "suffer or permit" definition because it did not have any power to prevent the employees from working by hiring or firing them, directing them where to work, or setting their wages and hours.

The court further found that although there was evidence suggesting that McDonald's was aware that the franchisee was violating California's wage and hour laws, there was no evidence that McDonald's had the requisite level of control over the employees' employment to render it a joint employer.

This is a major win for franchisors and employers, considering the influx of cases alleging franchisors are "joint employers" of their franchisees' employees. It should be noted that this win may be short lived as the U.S. Department of Labor is working to modify or update its definition of when a franchisor is considered a joint or partial employer of its franchisee's employees.

Additionally, this case must be viewed in context of the U.S. District Court of New Jersey's recent decision in *Michalak v. ServPro Industries, Inc.*, where the court held that the Plaintiff's allegations that ServPro "issued manuals, training materials and other writings" specifying policies and procedures for hiring, training, disciplining and firing employees were sufficient to establish an agency relationship and avoid dismissal at the motion to dismiss stage. The court further held that the Plaintiff's allegations that she informed ServPro and that ServPro tipped off the franchisee and buried the complaint, was sufficient to support a claim that ServPro had aided and abetted discriminatory conduct in violation of New Jersey law.

When making the leap to becoming a franchisor or selling franchisees it is important to understand how much direction or control is too much and what actions or requirements could open you up to liability for the actions of your franchisee. As such, it is vitally important that franchisors team with knowledgeable labor and employment counsel that can keep them up to date on the evolving risk of being a joint employer or having an agency relationship with their franchisees.

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