# The 'Big Mac' is Under Attack: Radical NLRB Labeling the Franchisor as "Joint Employer" of Franchisee Employees

## Labor & Employment Law Update

By Jeffrey Risch on August 8, 2014

Franchisors across the U.S. may be surprised to learn that the general counsel for the National Labor Relations Board has taken the position that they are likely joint employers with their franchisees under the National Labor Relations Act (NLRA). The announcement came in the context of finding joint liability for alleged unfair labor practices, but the true impact and purpose is to open the door to unionization of all employees of local franchises as a single bargaining unit of the corporate franchisor.

Since 2012, the NLRB has received 181 complaints from employees of individual McDonald's franchises claiming that their rights were violated when they were disciplined or fired for participating in union-organized employee protests. On July 29, 2014, the general counsel released a statement saying that his office is prepared to move against the individual franchisees along with franchisor McDonald's, USA, LLC, as joint employer respondents on 43 charges unless settlements can be reached. In other words, the NLRB is going to try and muscle McDonald's into submission. Time will tell how it all plays out, but it is anticipated that the courts will ultimately have to intervene.

Since the early 1980s, a finding of "joint employer" status requires both entities to exercise direct and immediate control over the employees and the terms and conditions of their employment. Determinative factors include having the power to hire and fire, setting work schedules, determining rates of pay, and keeping employment records. These factors rarely exist in traditional franchise arrangements.

In June, the NLRB accepted amicus briefs in an active matter involving the joint employer/franchisor issue. While numerous manufacturing, hospitality, and business associations strongly advocated for retaining the current test, the general counsel's brief argued that the direction and control test fails to take into account shifts in the U.S. workforce such as increasing use of contingent employees, outsourcing, and franchising. The result, the GC argued, is to

frustrate the purpose of the NLRA by limiting opportunities for collective bargaining. The general counsel went even further, suggesting (without citing actual specific factual evidence) that corporations have moved to the franchise model for the specific purpose of limiting collective bargaining. The general counsel proposed an "industrial realities" test; arguing that a franchisor's control over matters such as pricing, inventory, branding, and supply, effectively dictate the terms and conditions of employment that franchise owners could offer their employees.

It is no secret that the current NLRB is all about providing opportunities for collective bargaining and with an estimated 3-5 million fast food workers in the U.S., many of whom are paid at the lower-end of the wage scale, it's not surprising that unions have focused their efforts on that industry. The expense and effort of organizing and negotiating with thousands of individual franchise units makes industry-wide unionization difficult. The ability to organize all 700,000+ McDonald's employees through a single election and secure employment terms for (and dues from) those employees in a single collective bargaining agreement, however, would be a significant game-changer.

**Bottom Line for Employers**: The general counsel's statement does not have the effect of binding law and it could be years before a board decision applying a new joint employer standard works its way through the courts to become law, but franchisors and franchisees should be aware of the writing on the wall and be sure that the franchise documents, policies and practices clearly vest all employee-related decisions and duties in the franchisee. Additionally, employers should note that the underlying issue involved here goes well beyond the franchisor/franchisee relationship. The real issue in play here is the larger INDEPENDENT CONTRACTOR or SUBCONTRACTOR relationship. From temporary staffing relationships (see https://laborandemploymentlawupdate.com/2014/07/09/nlrb-expanding-joint-employer-standard) to the 1099-worker, the NLRB is attempting to do everything and anything in its power to broaden the employer/employee relationship. In effect, the NLRB very much wants to allow labor unions to target "dual employers" and consequently organize employees in unprecedented numbers. Yes, the 'Big Mac' is under attack, and all employers who are part of a franchise agreement, supply or use temporary staffing and/or rely on independent contractors should take serious note — and continue to work with competent legal counsel on diminishing "joint employer" liabilities.