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FRANCHISORS AND FRANCHISEES: JOINT EMPLOYERS?

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On July 29, 2014, the National Labor Relations Board's (NLRB's) general counsel made an announcement portending a possible paradigm shift in labor relations.

In recent months, the NLRB's general counsel has investigated charges that McDonald's, USA, LLC (McDonald's) and its franchisees violated the National Labor Relations Act in actions they allegedly took following labor protests. Though the general counsel's office appears to favor a settlement between the allegedly aggrieved employees and McDonald's and its franchisees, it plans to authorize complaints in meritorious cases.

In such cases, the NLRB's general counsel has indicated that "McDonald's franchisees and/or McDonald's, USA, LLC will be named as a respondent if parties are unable to reach settlement." The general counsel's brief press release can be found by following this [link](#).

The NLRB's general counsel's position is unusual. Typically, franchisors and franchisees are not considered joint employers. Thus, aggrieved franchisee employees are limited to recovering damages and other remedies solely from their actual employer—the franchisee. Indeed, even in instances where a franchisor, such as McDonald's, fully controls the manner of the franchisee's operations, conducts frequent inspections and trains franchisee employees, it is not considered a joint employer unless it has some control of the franchisee's labor relations. *See, e.g., Evans v. McDonald's Corp.*, 936 F.2d 1087, 1090 (10th Cir. 1991). That is, only if the franchisor shares or co-determines, along with the franchisee, those matters governing the essential terms and conditions of employment is the franchisor also considered the employees' employer. *See Sandoval v. City of Boulder*, 388 F.3d 1312, 1323 (10th Cir. 2004).

To be sure, the NLRB's general counsel's decision to name a franchisor as a joint employer changes little at this point. If settlement discussions fail and complaints issue, the NLRB will be left with the question of whether the joint-employer theory applies to McDonald's and its franchisees given the alleged violations. And even if the NLRB applies the theory to hold McDonald's liable, McDonald's will almost certainly mount an aggressive appeal in the federal courts. That context is essential to bear in mind.

But the NLRB's general counsel recent announcement suggests that historical legal barriers between franchisors and franchisees may erode—at least in situations involving the National Labor Relations Act.

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