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Joint Employer Status for Franchisors Sees Some Reprieve, But Not Enough Yet for Celebration

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At the behest of its General Counsel Richard Griffin, the ***National Labor Relations Board*** was looking to recast the joint employer test under the *National Labor Relations Act* (NLRA) within the franchise model of business, and make corporate franchisors potentially responsible for alleged unfair labor practices committed by their franchisees. This significant shift was met with no small degree of concern, as a recast joint employer test would not only raise significant issues under the NLRA, but also likely portend bigger concerns in other areas as well. Against this backdrop, one might expect the Board's next pronouncement in this area would reinforce the position taken by the General Counsel. Yet in a recent Division of Advice statement, the Board acted with some welcomed restraint. However, that advice memorandum should not be seen as cause for celebration, as it is light on analysis and does not necessarily reveal how the Board will continue to approach joint employer questions within the franchise model going forward.

The recent advice statement concluded that a Chicago restaurant was not a joint employer with its franchisor under either traditional NLRB joint employer standards or the new standard recently argued for by the NLRB General Counsel. The NLRB found no evidence that that the franchisee "shares or codetermines with [the franchisor] matters governing the essential terms and conditions of employment of [the franchisee's] employees."

The NLRB's recent advice memorandum came after the franchisee was accused of firing two employees for trying to unionize its workforce, finding that the franchisor did not sufficiently affect matters pertaining to the employment relationship with the franchisee's employees, and played no role in decisions regarding hiring, firing, training, disciplining, or supervising franchisee employees, among other things. Further, even under the General Counsel's proposed new standards for joint employer status — e.g., joint employer status exists where, under the totality of the circumstances, the putative employer wields "sufficient influence" over the working conditions of employees of the franchisee such that meaningful bargaining could not occur in its absence — the memorandum found insufficient evidence to support joint employer status since the franchisor did not "significantly influence the working conditions" of the franchisee's employees. The memorandum concluded that meaningful collective bargaining could occur in the franchisor's absence since it did not directly or indirectly control or restrict the employees' core terms and conditions of employment.

While the NRLB's findings in the advice memorandum may seem like welcome news for employers

and franchisors alike, the analysis undertaken and its ultimate conclusion are not as robust as employers might like in this era when the franchise model of business is under attack. Primarily, the manner in which the subject franchisor franchises its brand is, as the NLRB found, hands-off in most respects, and especially as it relates to employment matters. Likewise, the analysis in the memorandum is fairly light, and does not make any bright line conclusions or pronouncements regarding its future application of a specific joint employer standard.

The uncertainty surrounding April's statement is particularly apparent when juxtaposed to the General Counsel's position and actions toward other franchise businesses and the franchise business model in general. For example, the General Counsel recently elicited an outcry from franchisors when he alleged that joint employer status existed after franchisees supposedly violated the rights of employees participating in nationwide protests seeking higher wages. Thus, while the latest pronouncement is a welcome change of tone from the NLRB, the advice memorandum's positive conclusions do not eliminate the trepidation surrounding employment issues within a franchise business model, since questions remain about a specific standard the NLRB will apply when examining a joint employer relationship.

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