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New Texas Law Says Franchisors, with Exception, Not Employers of Franchisees' Workers

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The Texas Labor Code has been amended to provide that a franchisor is not considered an employer for claims related to employment discrimination, wage payment, the Texas Minimum Wage Act, and the Texas Workers' Compensation Act, among other laws. According to S.B. 652, this is so unless the franchisor has been found by a state court of competent jurisdiction to have exercised a type or degree of control over its franchisee or its franchisee's employees not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand. The amendment goes into effect on September 1, 2015.

The bill was introduced by state Senator Charles Schwertner, reportedly because of franchisors' concerns that recent National Labor Relations Board actions targeted franchisors for franchisees' labor law violations. The NLRB's General Counsel has issued unfair labor practice complaints alleging that certain franchisors are "joint employers" with their franchisees who allegedly have violated employees' rights. This opened franchisors to lawsuits for the actions of franchisees, critics asserted. Current NLRB decisions treat two companies as joint employers only if both exercise a significant degree of direct control over the same employees. Direct control requires that a putative joint-employer have control over terms and conditions of employment of the subject employees. This includes hiring and firing, setting work hours, determining compensation and benefits, and exercising day-to-day supervision.

Senator Schwertner commented that the NLRB actions "called the common understanding of a franchisor-franchisee relationship into question…." That common understanding is that a franchisee is responsible for all employment decisions regarding employees of the franchisee and the franchisor has no interaction with or authority over the franchisee's employees.

Despite the new law's protection for franchisors in Texas, it is uncertain how the exception – in this case the type of control exerted by a franchisor that is not customarily exercised to protect a franchisor's trademark and brand – will be interpreted. And, although the NLRB General Counsel's actions may have been the catalyst for the new Texas law, because of the strong pre-emptive reach of the NLRA, it is unlikely that the law will impact NLRB decision-making about joint employment. That decision-making is likely to be based on a different analysis than at present in the not-too-distant future. In a brief filed with the Board in connection with a case involving Browning-Ferris Industries (Case 32-RC-109684), the NLRB's General Counsel has urged the Board to abandon the current

“direct control” joint-employer standard and replace it with a “totality of the circumstances” test – one based on whether an alleged joint-employer exercises either direct or indirect control over the subject employees who work for another employer, and even to consider whether the alleged joint-employer has “unexercised potential to control working conditions” of those employees.

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