JOINT-EMPLOYER UPDATE

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The Good News: The Future of Franchising Is Promising

“Franchise growth is expected to stabilize in 2022, expanding by 2.2% to reach a total of 792,014 franchise establishments, 17,000 more than 2021 [and] Franchises’ GDP contribution to the overall economy will remain stable at 3% in 2022, but the growth rate is likely to slow to 5.7%, still higher than the pre-pandemic level.”

- IFA Special Report (February 16, 2022)
The Not-So-Good News: Joint-Employer Liability Is Coming to a Franchise Near You

Different Laws, Different Standards

- Fair Labor Standards Act (wage & hour)
- National Labor Relations Act (labor-management relations)
- Title VII of the Civil Rights Act & other federal civil rights laws (non-discrimination)
The Not-So-Good News: Joint-Employer Liability Is Coming to a Franchise Near You

Not just the franchise model...

- Staffing Agencies
- Security Guards
- Drivers/Delivery Services
- Janitorial Services
- Groundskeepers, Caddies
- And more...
FAIR LABOR STANDARDS ACT

• Governs which employees are eligible for minimum wage, overtime
• Historically, multi-factor test, applied in different ways by different courts
• Joint Employer may be joint-and-severally liable for damages
  • Ex: Franchisee fails to pay eligible employees overtime; Plaintiff’s counsel sues franchisee, but also national franchisor (deep pocket!)
FAIR LABOR STANDARDS ACT

Trump Administration (January 2020):

Joint-Employer regulation sets forth a four-factor balancing test for determining joint-employer status under the FLSA. In determining whether a second company is a joint employer of a worker, the DOL will examine whether the putative joint employer:

• Hires or fires the employee;
• Supervises and controls the employee’s work schedule or conditions of employment to a substantial degree;
• Determines the employee’s rate and method of payment; and
• Maintains the employee’s employment records.

No single factor is dispositive in determining joint-employer status, and the weight of each of the factors may vary based on the facts of each case. The final rule does make clear, however, that mere maintenance by one company of employment records of another will not, itself, establish joint-employer status.
Legal Challenge

• February 2020: Coalition of State Attorneys General challenge final rule in U.S. District Court (S.D.N.Y.)
  • Littler intervened on behalf of IFA and other trades to defend the rule
  • Appealed to Second Circuit Court of Appeals
• September 2020: Court strikes down the substance of the rule
• March 2021: Biden DOL proposes to withdraw final Trump rule
• July 2021: DOL withdraws Trump-Era regulation
• October 2021: Second Circuit Court of Appeals dismisses appeal as moot (but vacates problematic lower court decision)
FAIR LABOR STANDARDS ACT

• Current status: FLSA multi-factor tests, applied inconsistently across various circuits
• DOL may issue new regulations, Administrator’s Interpretation, or something else entirely
Consequences of Joint Employer Status: Joint employer may be required to bargain with a union representing jointly employed workers; can be subject to joint and several liability for unfair labor practices committed by the other employer; and may be subject to labor picketing that would otherwise be unlawful.
• 2015: Obama Board issues decision in *Browning-Ferris Industries*

• Dramatic expansion of joint-employer liability: extends joint-employment to include “indirect control” and “reserved right of control” (even if not ever exercised)
NATIONAL LABOR RELATIONS ACT

• December 2017: Board overrules *Browning-Ferris* in *Hy-Brand Industrial Contractors, Ltd.*

• February 2018: Board vacates *Hy-Brand* (alleged conflict of interest)

• September 2018: Trump Board proposes joint-employer regulation to overturn *Browning-Ferris*

• December 2018: DC Circuit holds that indirect control and reserved right of control are relevant to the common-law definition of employment, but that Board incorrectly applied them to the facts of *Browning-Ferris*
February 2020: Trump Board Issues Final Rule Under NLRA

Employer will be considered a joint employer of a separate company’s employees only where that employer possesses and exercises “substantial direct and immediate control” over the essential terms and conditions of employment (such as hiring, firing, discipline, supervision, and direction) of the second company’s employees. Even where an employer exercises direct control over another employer’s workers, it will not be held to be a joint employer if such control is “limited and routine.”
NATIONAL LABOR RELATIONS ACT

• December 2021: Biden Board announces it will issue revised joint employment rules
• Expect to see proposed rule in next few months
• Expect to revisit joint-employment to include “indirect control” and “reserved right of control”
EEO Laws

• Various multi-factor tests under different statutes (Title VII, Age Discrimination in Employment Act, ADA)
• EEOC still Republican majority; expected to shift to Democrat majority sometime this summer
• Expect action on proposed joint-employment standard