Walking the Tightrope: A History of the Joint Employment Standard and Its Application to the Franchising Business

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I. Introduction

"In war, prepare for peace; in peace, prepare for war."[1] With the everchanging political landscape and the resulting change in legal standards and administrative priorities, some employers might be thinking that joint employment is on the backburner. Do not fall prey to this pattern of thinking. Instead, employers are urged to use this time wisely and prepare for the future.

The franchise business model is rife with potential joint employer traps and pitfalls. Franchisors have been "walking a tightrope" to ensure that they provide a uniform and consistent product and experience for those they serve, while maintaining an arms-length relationship with franchisees and their employees as it relates to terms and conditions of employment in their franchisees' work sites. That can be incredibly difficult because franchisors are often held responsible in the court of public opinion for the illegal or unwise activities of their franchisees.

It is incredibly important to conquer the tightrope as a ruling of joint employment subjects a franchisor to significant risk with potentially devastating financial consequences. If a court finds a franchisor to be a joint employer of the employees of its franchisees, the franchisor could potentially be jointly and severally liable for non-compliance and subject to financial penalties under several labor and employment laws, including but not limited to pay practices under the Fair Labor Standards Act ("FLSA"), discrimination or harassment under Title VII, unfair labor claims under the National Labor Relations Act ("NLRA"), and failure to provide certain employee benefits. Thus, if a franchisee violates its employee(s)' rights, the franchisor could be independently responsible for the *entire* amount of the resulting liability via a successful joint employment claim. A plaintiff under those circumstances often concentrates efforts on the entity with the perceived "deepest pockets," which may also implicate the founder and/or Chief Executive Officer of the brand. As you can imagine, any franchisor must find the right balance in their relationship with their franchisees to avoid joint employment liability while ensuring brand standards are adequately met. Just as significantly, a joint employer finding could also require a franchisor to recognize and bargain with a union on behalf of franchisee employees.

The first step in avoiding joint liability is to assess and understand the applicable standard for the laws that could trigger joint employment liability. In this paper, we will delve into the ways that joint employment is determined and provide practical advice and guidance on avoiding joint liability. We will provide a historical overview of the joint employment landscape to help explore the current direction of joint employment liability, unpack the various tests used to establish an employment relationship, and explore

[1] Sun Tzu, author of "The Art of War" written over 2,500 years ago.

similar standards related to independent contractor misclassification issues and the single enterprise theory of liability. We will also review the holdings of multiple joint liability cases and provide practical advice for a franchise system to avoid joint employment liability.

A. Current Status of the Standards

While historically the franchise model was developed as an independent contractor relationship between the franchisor and franchisee, the last few years have resulted in a convoluted political climate and an ever-shifting landscape. For example, in 2022, the National Labor Relations Board ("NLRB") issued a notice of proposed rulemaking to establish a new rule to determine whether multiple entities jointly employ workers under the NLRA for purposes of union organizing and liability for violating certain employee protections afforded under the Act. The new rule would have greatly expanded the scope of who would be considered a joint employer. Under the proposed rule, franchisors would have a significant risk of joint employment liability. The rule was finally published in October of 2023; however, it never went into effect. The rule was quickly challenged in several courts and both the House of Representatives and the Senate passed resolutions to nullify the rule. President Biden vetoed these resolutions; however, a Texas court vacated the new joint employer rule, which officially quashed the rule. The NLRB initially appealed the order vacating the rule but later withdrew the appeal. As a result, the previous rule put in place under President Trump in 2020 went back into effect. It is likely that the 2020 rule will remain in effect during Trump's second term.[2]

Additionally, in President Trump's first term in office, the Department of Labor ("DOL") established a rule attempting to clarify the various federal courts' application of different tests to determine joint employer status under the FLSA. That rule created a four-part test that examined who: "(1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records."[3] Under the rule, the second entity must *actually* exercise, either directly or indirectly, at least one of the four factors.[4] However, that rule was blocked by a federal judge in September of 2020.

Early in the Biden administration, the Department of Labor rescinded the Trump-era rule but did not issue a new one.[5] The Department said it would "continue to consider legal and policy issues relating to FLSA joint employment before determining whether alternative regulatory or sub-regulatory guidance is appropriate."[6] As a result, there has generally been a return to the economic realities test. However, given President Trump's initial attempt to create a narrower test for determining joint employment status, it is possible that a similar, pro-employer rule may be pursued in his second term.

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[2] A summary of this standard can be found below in section "Joint Employment Under the NLRA."
[3] 29 C.F.R. § 791.
[4] *Id*. (emphasis added).
[5] 29 C.F.R. § 791.
[6] *Id*.

Similarly, the test for determining if an individual is an employee or an independent contractor under the FLSA has changed under the previous two administrations. At the end of President Trump's first term, a rule was put into place streamlining the manner the totality-of-the-circumstances test would apply to existing economic realities test for determining if a worker was an employee or independent contractor. The new test examined the worker's status based on two core factors: (1) the nature and degree of an individual's control over the work; and (2) an individual's opportunity for profit or loss. However, in 2022, the Department of Labor announced that they planned to return to a more traditional economic realities test where the totality-of-the-circumstances standard applied equally to all factors rather than establishing two core factors. The final version of that rule became effective in March of 2024. The new Trump administration may pursue the prior modifications giving greater weight to the two core factors, making it more likely for an individual to be classified as an independent contractor.

However, until any changes occur under the new administration, the best thing a franchise can do is become familiar with the various tests used to establish a joint employment relationship and the other related standards currently in place.

B. Tests Used to Establish an Employment Relationship in the Franchise Context

1. Joint Employment Under the NLRA

As discussed, the current standard for determining joint employment under the NLRA was established in 2020. Under the current standard, a joint employer relationship can only be found if the second entity possesses and exercises "substantial direct and immediate control" over the essential terms and conditions of another entity's employee(s).[7] The non-exhaustive list of terms and conditions of employment include "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction."[8] Under the rule, the two entities must "share or codetermine" the terms or conditions of employment.[9] The rule defines this to mean, "the possession and exercise of such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees."[10] This could include indirect control, contractually reserved control, or control over mandatory subjects of bargaining, "but only to the extent [they] supplement evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment.'"[11] Under the rule, "substantial direct and immediate control" means, "direct and immediate control that has regular or continuous consequential effect on an

[7] 29 C.F.R. § 103.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

essential term or condition of employment of another employer's employees," and it is not, "sporadic, isolated, or de minimis basis."[12]

2. Joint Employment Under the FLSA

Under the FLSA, an employer is any person acting directly or indirectly in the interest of an employer in relation to an employee.[13] Considering the breadth of this definition, it is easy to see how multiple entities could be considered an employer for any number of employees and become jointly and severally liable for certain damages regarding the employee(s)' employment. The biggest question facing employers in connection with FLSA joint employer liability is whether the entities, "share or codetermine… matters governing employees' essential terms and conditions of employment?"[14] Again, the breadth of this definition is alarming. Terms and conditions of employment may include influence over "wages, benefits and other compensation; hours of work and scheduling; the assignment of duties to be performed; the supervision of the performance of duties; work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; the tenure of employment, including hiring and discharge; and working conditions related to the safety and health of employees."[15]

3. Independent Contractor Tests

The current rule for determining independent contractor status under the FLSA was published by the Department of Labor in January of 2024.[16] The new rule is in line with the economic realities test and provides a non-exhaustive six-factor test to determine if an individual is classified as an employee or independent contractor.[17] The six factors are "a worker's opportunity for profit or loss; investments made by a worker and the potential employer; the degree of permanence of the work relationship; the degree of control an employer has over the work; the extent to which work performed is integral to the employer's business; and the use of a worker's skill and initiative."[18] None of the factors have a predetermined weight, and they are all, "considered in view of the economic reality of the whole activity."[19] The list is non-exhaustive, and the analysis may consider additional factors. A court will consider all of these factors, in addition to others, to determine, overall, if the individual should be classified as an employee or an independent contractor.

Notably, various states have also implemented different and broader independent contractor tests of their own, as detailed below. Specifically, the application of the ABC

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[12] *Id.*
[13] 29 U.S.C. § 203(d).
[14] 29 C.F.R. § 103.40 (b).
[15] 29 C.F.R. § 103.40 (d).
[16] 29 C.F.R. § 795.
[17] *Id.*
[18] *Id.*
[19] *Id.*

test in the context of franchise systems has been the recent focus of several allegations of misclassification.

4. Single Enterprise Doctrine

In the franchising space, another area of particular concern is the "single enterprise doctrine." Under the FLSA, a single enterprise is defined as, "the related activities performed (either through unified operation or common control) by any person or persons for common business purposes, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor."[20] Essentially, to be considered a single enterprise, three factors must be met: (1) the two entities are performing related activities; (2) the activities are performed under unified operations or common control; and (3) the activities are done for a common business purpose.[21] Practically speaking, the way single enterprise theory works from a litigation standpoint is that one employee at one location has a grievance against their "employer." The disgruntled employee hires an attorney, and that attorney files a lawsuit against the local franchised business *and* the franchisor and alleges that both entities are one and the same. In other words, even if the location where the disgruntled employee was working was a separate business, that location was allegedly an agent for the larger corporation (the franchisor), and it was the franchisor who allegedly controlled all of the key areas of the business impacting the former employee.

5. Tort Related Joint Liability

Vicarious liability falls under the doctrine of respondeat superior which allows for another individual or entity to be liable for the tort by an individual when there is a master/servant agency relationship.[22] To apply, the third party must have control or the right to control the conduct of the individual committing the tort.[23] For a franchisor to be vicariously liable for a franchisee's actions or the actions of one of the franchisee's employees, the franchisor must have "control or have the right to control the daily conduct or operation of the particular 'instrumentality' or aspect of the franchisee's business that is alleged to have caused the harm before vicarious liability may be imposed on the franchisor for the franchisee's tortious conduct."[24] It is generally a high standard to

[20] 29 U.S.C. § 203(r).
[21] *Id.*
[22] *Kerl v. Dennis Rasmussen, Inc.,* 682 N.W.2d 328, 332 (Wis. 2004).
[23] *See Rainey v. Langen, 998 A.2d 342, 347 (Me. 2010); see also, Kerl,* 682 N.W.2d at 332; *Miller v. McDonald's Corp.,* 945 P.2d 1107, 1111 (Or. Ct. App. 1997).
[24] *Kerl,* 682 N.W.2d at 332.

prove a franchisor is vicariously liable for a franchisee or one of its employees, though the standard can be met and varies under state law.

C. Horizontal and Vertical Claims

Franchise systems should be specifically aware of two different theories of joint employment liability: horizontal and vertical. Under the horizontal theory, businesses that share employees risk joint employment liability. Employee sharing is particularly important in determining hours worked for the employer and potential overtime liability. Consider this example: employee A works for franchisee B and C throughout her week. During the week, she works 25 hours for franchisee B and 21 hours with franchisee C. Many franchisees think they are only responsible for the time the employee worked directly for their entity. This is not the case if the two entities in question are found to be joint employers. If a joint employment relationship were established under this example, employee A worked 46 hours during her work week without distinction between employers. Assuming she is not in a locality with unique overtime laws where overtime kicks in before 40 hours, she is entitled to 6 hours of overtime at time and one half of her regular rate of pay. Under joint employment liability, both entities may be jointly and severally liable for the unpaid overtime, attorneys' fees, and any liquidated damages. Further, this example was only one employee for one week – consider the repercussions when you have dozens or hundreds of employees who have been subjected to this type of employee sharing program for years! This "bet the company" type of lawsuit is one no employer wants to face.

Under the vertical theory, the more a franchisee relies on the franchisor for day-to-day support of their employment relationship with their employees, the greater the chance the franchisor will be found to be a joint employer of their employees. The joint employer standard under the FLSA is typically the economic realities test to determine liability under a joint employment theory.

II. The Evolution of the Joint Employer Standard under the NLRA

A. The Early Years: Direct and Immediate Control Standard and *Love's BBQ*

As discussed, the NLRB's joint employer standard is used to determine whether two businesses share liability for collective bargaining obligations, unfair labor practices, and other labor and employment-related obligations and liabilities arising under the NLRA. This section more closely examines the evolution of the NLRB's joint employer standard, its impact on franchising, key NLRB decisions and guidance, and recent legal and legislative developments affecting the joint-employer doctrine.

1. *TLI* and *Laerco*: Direct and Immediate Control Standard[25]

The term "employer" is not defined in the NLRA. Section 2(2) states only that, "[t]he term 'employer' includes any person acting as an agent of an employer, directly or

[25] This section is derived from former Chairman Miscimarra's and former Member Johnson's authoritative summary of the background of the joint-employer doctrine in their dissenting opinion in *Browning-Ferris*

indirectly." In the decades after the passage of the NLRA, this statutory ambiguity gave rise to confusion where two or more firms shared a business relationship involving, at least putatively, the use of a single entity's employees to achieve the production goals of both businesses. The Board ultimately clarified the doctrine in two cases decided in 1984—*Laerco Transportation* and *TLI*, *Inc.*—by adopting the Third Circuit's joint-employer standard in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*[26] According to this standard, the basis of a joint-employer finding is that two or more entities, "share or co-determine those matters governing the essential terms and conditions of employment."[27] The Board in *TLI* and *Laerco*, accordingly, premised the joint-employer inquiry on whether a putative joint employer, "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[28]

Both *TLI* and *Laerco* involved a contractual relationship between a company supplying labor to a company using it. These types of cases are prone to joint-employer risk because the "user" company inevitably interacts with (and may direct) the "supplier" company employees during the course of operations. In such cases, the Board held that evidence of the "user" employer's actual but "limited and routine" supervision and direction would *not* trigger joint-employer liability. Subsequently, in *AM Property Holding Corp.*, the Board held that supervision was "limited and routine" where a user company tells supplier employees what work to perform or where and when to perform the work, but not *how* to perform the work.[29] *AM* held further that the contractual relationship between the parties, which in the case gave the user company the right to approve hires by the supplier company, was not sufficient to establish a joint employer relationship.[30] Instead, the Board, "looks to the actual practice of the parties."[31]

Because the joint-employer case law did not historically apply to entities that *actually* exercised control in practice over another's entity's direct employees, the Board has never found that a franchisor is a joint employer with its franchisee's employees. The Board's decision in *Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62* ("*Love's BBQ*"), clearly established that franchisors do not exercise the control required to trigger joint-employer liability.[32] In such relationships, "the only control the franchisor exercise[s] over the franchisee [is] that necessary to ensure the uniformity of operation and goodwill of the integrated enterprise of which [the franchisee] [was] a part[,]" including design, decoration, décor, the type of equipment, minimum hours of operation, and other aspects

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Industries of California, Inc., 362 NLRB 1599 (Aug. 27, 2015). Mr. Miscimarra and Mr. Johnson are now partners at Morgan Lewis.

[26] *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 117, 1124 (3d Cir. 1982).

[27] *Id.*

[28] *Laerco*, 269 NLRB at 325; *TLI*, 271 NLRB at 798.

[29] *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007).

[30] *Id*.

[31] *Id*.

[32] *Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979).

pertaining to the overall operation of the business.[33] In short, just because the franchisor imposes standards on the franchisee that are necessary to maintain the viability of the franchisor's brand, it does *not* mean that such control triggers joint-employer liability.

Love's BBQ remains influential because it reinforced the principle that franchisors could avoid joint employer liability as long as their involvement remains focused on branding and operational oversight (i.e. brand standards), rather than on direct employment management.

B. The *Browning-Ferris Industries* Decision (2015): Expanding the Standard

The Obama Board overruled the *TLI* and *Laerco* standards in its controversial decision in *Browning-Ferris Industries of California, Inc.* ("BFI" or "*Browning-Ferris*").[34] The Board majority in *BFI* found that, "two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."[35] Importantly, the Board held further that (i) it would *no longer require* that a joint employer actually exercise authority over a group of employees before triggering joint-employer liability, and (ii) it would construe the meaning of "share or codetermine" broadly to encompass a wide range of control, including control not actually exercised, but reserved by contract.[36] In other words, mere "reserved" control may be enough to establish joint-employer status. In doing so, the majority made clear that the Board could give dispositive weight to virtually any aspect of the putative employment relationship, and even a power reserved by contract could alone suffice to trigger joint-employer liability, even if such power is *never actually exercised*. In the words of the *BFI* dissent, the majority decision was an "analytical grab bag from which any scrap of evidence regarding indirect control or incidental collaboration as to any aspect of work" may suffice.[37] The *BFI* majority also inappropriately imposed a policy-based economic realities test, not a test premised on common-law agency principles.

C. *BFI* and Franchising: the *Freshii* Division of Advice Memorandum and the Consolidated Unfair Labor Practice Cases Against McDonald's

BFI did not directly involve franchised businesses, but a Division of Advice memorandum released in 2015 (before *BFI*) provided at least *some* guidance on how the new standard may apply to franchised businesses ("*Freshii*").[38] It is important to note that Division of Advice memorandum are not precedential, but as the Agency's only guidance

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[33] *Id.* at 121.

[34] *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599 (Aug. 27, 2015).

[35] *Id*.

[36] *Id*.

[37] *Id*.

[38] *See Nutritionality, Inc. d/b/a Freshii*, Case Nos. 13-CA-134294, 13-CA-138293, and 13-CA-142297 (NLRB Div. of Advice, Apr. 28, 2015).

to franchisors/franchisees as it relates to joint employer status, they are an important view into the Agency's thinking on this issue.

The Division of Advice concluded that *Freshii* was *not* a joint employer with its franchisees because it did not directly or indirectly control the employees,' "core terms and conditions of employment." That is, Freshii was not involved in, "hiring, firing, discipline, supervision, or setting wages," despite the following:

- Freshii provided its franchisees with an Operations Manual containing "mandatory and suggested specifications, standards, operating procedures and rules." These "System Standards" stated that they covered "any aspect of the operation and maintenance of the restaurant," including staffing levels, job functions for restaurant employees, and standards for training managers.

- Freshii distributed to franchisees an Operations Manual offering optional guidance on human resources matters, such as hiring and scheduling employees (e.g., a sample hiring advertisement and sample interview questions). The manual also included a recommended calculation for determining labor costs for use in scheduling employees; an optional employee handbook with sample personnel policies.

- Freshii contracted with individuals to be development agents, who assisted franchisees in designing and building their restaurants. The training included instruction on how to schedule employees and use the point-of-sale system. The development agent also trained the entire staff for three days prior to the opening and stayed for five days after opening to ensure the store was running smoothly.

- Development agents also conducted monthly store evaluations for all franchisees. The purpose of these evaluations was to ensure that employees wore appropriate Freshii uniforms, that food was properly made, that the store was clean, and that the store used promotional material appropriately. Beyond the monthly store evaluations, development agents also visited franchisee stores once or twice a month. During one such visit in the case at issue, a development agent noticed that the restaurant was overstaffed and relayed that observation to the franchisee, but the franchisee was not required to act on the feedback.

In reaching their conclusion, the Board noted that Franchisees at Freshii were exclusively responsible for hiring, setting wages and benefits, giving raises, disciplining, hiring, and firing. While Freshii's Operations Manual included sections on coaching and counseling policies, as well as employee conduct that may warrant discharge, no franchisees were required to follow those sections, and there was no evidence in the case that any employee had been disciplined or discharged because of a development agent's findings during a monthly store evaluation or a random visit.

Freshii was instructive for franchisors concerned about the prospect of a radical new joint employer standard because it appeared to carve out a franchisor's core business function as significant evidence of joint employment: the issuance of brand

standards designed to promote a uniform and high-quality product and customer experience.

Nonetheless, *Freshii* was only minor consolation because the subsequent *BFI* standard suggested that a broad range of "indirect" control could suffice to establish joint-employer liability, and the Board's General Counsel was subsequently pursuing a nationwide complaint against McDonald's USA alleging that it was a joint-employer with hundreds of Company Owner/Operators. That landmark case ended without a decision due to the first election of President Trump in 2016.

D. The Trump-Era Rollback: The Return to Direct Control (2017-2020)

In President Trump's first term, the NLRB moved quickly to reverse *Browning-Ferris* and reinstate a narrower joint employer standard, ultimately adopting a new joint employer standard by rulemaking rather than by case adjudication (the "2020 Rule").[39] The 2020 Rule returned to the Board's long-standing test for determining whether two employers, "share or codetermine," employees', "essential terms and conditions of employment," where evidence of control that is, "indirect," "limited or routine," or "contractually reserved but never exercised," is insufficient by itself to establish joint employer status.[40]

Specifically, as stated above, the 2020 Rule provided that to establish joint employer status, the putative joint employer, "must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of [employees'] employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees."[41] Indirect control and reserved control can be considered as relevant factors but are not by themselves sufficient to establish a joint employer relationship.[42] Additionally, the 2020 Rule defined, "essential terms and conditions of employment," exclusively as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.[43]

E. The Biden Administration's 2023 Rule and Subsequent Invalidation

After the election of President Biden in 2020, the joint-employer pendulum swung back toward the *BFI* standard. In October 2023, President Biden's NLRB reinstated the *BFI* framework through yet another rendition of the joint employer rule. The intent was to rescind and replace the 2020 Trump Rule through what we refer to as the "2023 Rule."[44] The 2023 Rule, which was scheduled to go into effect on March 11, 2024, would have

[39] 85 Fed. Reg. 11184 (Feb. 26, 2020).

[40] *Id.* at 11185.

[41] 85 Fed. Reg. at 11205, 11235.

[42] *Id.* at 11209, 11235.

[43] *Id.* at 11184, 11235–36.

[44] 88 Fed. Reg. 73946 (Oct. 27, 2023).

vastly expanded the Board's joint employer standard and deemed virtually any company that contracts for third-party labor as a joint employer. The 2023 Rule provided that a company would be a joint employer if it exercised control (whether directly, indirectly, or both) over, or had the right to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment – even if that control was only reserved and never actually exercised.[45] The 2023 Rule also broadened the definition of, "essential terms and conditions of employment," to include, "work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline," and, "working conditions related to the safety and health of employees."[46] This definition could conceivably reach almost every contractual arrangement between businesses (including franchisors/franchisees) because almost every contract contains some direction or service-level standards about how work ought to be performed. Discovery related to actual exercise of control would become virtually irrelevant because the authority to exercise some level of control would presumably be enough to meet the modest new standard.

However, on March 8, 2024, the U.S. District Court for the Eastern District of Texas vacated the 2023 Rule and its purported rescission of the prior 2020 Rule, finding that (1) the Board failed to provide a sufficient justification in the 2023 Rule for rescinding the 2020 rule; and (2) the 2023 Rule was contrary to the Board's authority because it exceeded the bounds of the common law definition of an "employer."[47] The Board appealed this decision to U.S. Court of Appeals for the Fifth Circuit, but voluntarily withdrew it just two months later.

III. The Future of Joint Employment Under Trump and a Republican Congress

During his second term, President Trump is expected to rescind any remnants of the Biden-era joint employment rule and reinstate a direct and immediate control standard. Congress may also decide to take legislative action on the joint employer issue, limiting the ability for continued flip flopping standards as a result of Executive action in the future. In a recent Congressal session, for example, Congressman James Comer (R-Ky.) introduced a bill that would permanently codify the narrow, direct-control standard.[48] Representative Comer's bill likely reflects the prevailing view among congressional Republicans on the joint-employer issue, although it remains to be seen whether such legislation is a priority for the current administration or if the legislation has enough support in a Congress where Republicans currently have only a slim majority.

In addition, Senator Josh Hawley (R-MO) in 2024 voted against a Senate bill disapproving of the Biden joint employer standard under the Congressional Review Act,

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[45] *Id.* at 73983.

[46] *Id.* at 74017–18.

[47] *See Chamber of Com. v. NLRB*, No. 6:23-CV-00553, 2024 WL 1203056, at *14 (E.D. Tex. Mar. 18, 2024).

[48] *See* Save Local Business Act, H.R. 2826, 118th Cong. (2023).

suggesting that at least some Republicans are reconsidering their opposition to broader joint employer theories.

Meanwhile, Congressional Democrats have reintroduced the Protecting the Right to Organize (PRO) Act, which would codify the *Browning-Ferris* joint employer standard. This legislation is certain to fail but nonetheless underscores the joint-employer issue as a continuing subject of debate almost ten years after the issuance of the Board's *Browning-Ferris* decision.

The NLRB's joint employer standard has long been a political battleground, shifting between employer-friendly and union-friendly interpretations. With the invalidation of the Biden-era rule, businesses are temporarily shielded from joint employer liability expansion in the context of the NLRA. However, the issue remains unsettled and other theories of joint employment liability still loom. The Trump administration is likely to further solidify the narrow joint employer standard under the NLRA, while legislative efforts like Representative Comer's bill could provide a long-term solution for business groups.

And, despite these efforts, the pendulum may still swing again under a future Democratic administration and Congress, ensuring that the joint employer debate remains a central issue in labor law for years to come.

IV. The Role Unions Have Played in Shaping the Joint Employer Standard

Unions and in particular, the Service Employees International Union (SEIU), have been a major force behind the effort to expand the joint employer standard. Since 2012, SEIU has financed a major public relations campaign to target the franchising business model generally and quick service restaurants specifically. The effort is intended to pressure the franchisees to agree to unionizing the restaurants, even if the employees in those restaurants have no interest in union representation. SEIU's effort has been stymied by the fact that the NLRB's joint employer doctrine has long recognized that bona fide franchisors do not control the terms and conditions of employment of franchisee employees.

In the absence of a joint employment standard that accommodates their organizing objectives, SEIU has turned to advocating joint-employer principles at the state level. For example, California, through Assembly Bill 1228, created a "fast food council" within the California Department of Industrial Relations. The purpose of this council is to promulgate minimum employment standards for quick service restaurants—many of which are in a franchisor-franchisee relationship. These minimum employment standards include, but are not limited to, wages, working conditions, and training to ensure the well-being and security of workers employed in this industry. California also, through AB 1228, established a $20 minimum wage for quick service restaurant workers, which took effect on April 2024. This minimum wage is subject to change on an annual basis. This effort was largely driven by the SEIU and is representative of the Union's 15-year attempt to force franchisors and franchisees into collective bargaining.

A. How Expansive Joint Employer Theories Help Unions Organize

Joint employer laws allow unions to organize workers in industries that might otherwise be difficult to organize. In situations where workers are employed by a franchisee or a staffing agency, the franchisor (or a larger company in the supply chain) might not be legally responsible for their working conditions. By pushing for a joint employer designation, unions can:

- *Easily organize workers at multiple levels*: A joint employer ruling could allow unions to organize workers across multiple locations or employers within a given industry or company. For instance, if workers at individual franchise locations are considered employees of both the franchisee and the parent company (franchisor), unions can push for collective bargaining for all workers under that umbrella. This can also arise under the concept of "sectoral bargaining," which would mean that multiple companies in the same industry could be considered joint employers. This would make it easier for unions to organize employees and, if they succeed, negotiate a contract for many workers within the same sector / industry.

- *Mobilize workers in industries that resist unionization*: Some industries, particularly quick service restaurants or retail, are resistant to unionization due to the fragmented employer structure (franchisees, contractors, etc.). With an expansive joint employer standard, unions can more easily overcome these hurdles and push for union recognition.

B. Influencing Labor Laws and Regulations

Unions also use joint employer laws to influence public policy and labor regulations. When a broader definition of joint employer is applied, it can lead to stronger worker protections, particularly in industries where workers are perceived to be vulnerable to exploitation. Unions use this as a political tool with promises to:

- *Push for legislative change*: By demonstrating the challenges workers face when large corporations are not held responsible for labor violations, unions advocate for legislative changes that expand the joint employer standard at both the state and federal levels. For instance, they may lobby for laws that require franchisors or parent companies to be considered joint employers and ensure fair wages, working conditions, and benefits for workers at franchised or contracted locations.

- *Strengthen enforcement of labor laws*: With joint employer laws in place, unions state they can encourage agencies like the NLRB or the U.S. Department of Labor to enforce labor laws more effectively and hold larger employers accountable for violations occurring at franchisee or subcontractor locations.

- *Create Grassroots Movements*: Through social media, workers can come together to form grassroots movements that seek to advance their agenda. Whether it is for a single issue or a multitude of concerns that employees have identified, unions claim that organizing from the bottom up can, over time, lead to significant

movements that have consequential effects on the labor movement (e.g., Starbucks Workers United).

C. Strategic Litigation & Rulemaking

Unions sometimes use legal challenges or advocate for rulemaking to expand or modify the joint employer definition. Through strategic litigation, they seek to push for court decisions or regulatory changes that broaden the interpretation of what constitutes a joint employer. This legal approach can:

- *Set precedents for future cases*: By bringing lawsuits or challenging regulatory decisions that narrow the joint employer standard, even if there is a likelihood of losing, unions aim to influence future rulings that could create more favorable conditions for organizing and bargaining.

- *Challenge corporate practices*: Unions often use legal action to challenge corporate structures or practices that they believe undermine workers' rights. For example, unions might argue that companies are evading responsibility for workers' welfare and one of their roles is to use joint employer laws to hold them accountable by using complex franchising or contracting models to limit liability.

V. Beyond the NLRA: The History and Application of Other Joint Liability Standards to the Franchising Business

A. Joint Employment Under the Fair Labor Standards Act

The courts have typically applied the economic realities test to determine if a franchisor is a joint employer of a franchisee or its employees under the FLSA. While specific factors analyzed may vary, overall, the courts will review the following four factors to determine if a franchisor is a joint employer: (1) whether the franchisor had the power to hire and fire employees; (2) whether the franchisor supervised and controlled employee work schedules or conditions of employment; (3) whether the franchisor determined the rate or method of payment; and (4) whether the franchisor maintained employment records for the franchisee.[49]

An example of a joint employment finding under this test occured when minor league baseball players brought suit claiming FLSA violations.[50] The baseball players alleged that the specific clubs they played for (the franchisee) and Major League Baseball (the franchisor) were jointly and severally liable for the violations.[51] The court concluded that the franchisor did have significant control over the franchisee.[52] Specifically, the franchisor in this case had significant control over the hiring and firing of plaintiffs, including: conducting the first-year player draft, which required plaintiffs to upload forms

[49] *Zheng v. Liberty Apparel Co.,* 355 F.3d 61, 67 (2d Cir. 2003); *see also Burnett v. Wahlburgers Franchising LLC,* No. 16-CV-4602 (E.D.N.Y. Mar. 19, 2021).
[50] *Senne v. Kan. City Royals Baseball Corp.,* 591 F. Supp. 3d 453 (N.D. Cal. 2022).
[51] *Id*. at 516.
[52] *Id*. at 528.

and provide medical records through their portal and required drug testing; engaging in formal recruiting of the plaintiffs; drafting and approving the players before they could play; clearing any player not drafted before the franchisee could sign them; and having the ability to take negative action against the plaintiffs for any bad conduct, including making them ineligible to play (essentially firing the player).[53] The franchisor met the other three elements of the test as well by maintaining records for plaintiffs (employment contracts, documents related to work assignments and transfers, records of past infractions or discipline); setting terms and conditions under the contract for all first-year players; setting and enforcing mandatory rules and policies for plaintiffs (tobacco and drug use policies, on-field behavior policy); controlling first-year players' rates under the uniform contract; and sponsoring benefit programs for plaintiffs.[54]

In contrast, when a plaintiff employed at various Jack in the Box locations filed suit against both the franchisor and franchisee, the court in this case granted summary judgment in favor of the franchisor because it was not involved in making work schedules, setting salaries, providing benefits like insurance, and providing nonmanagerial training.[55] While the franchisor did provide a payroll system for use, it was merely ministerial and the human resources and training materials provided by the franchisor were not sufficient to establish control over the franchise employees.[56]

B. (Mis)Classification of Workers or Franchisees as Employees, as Opposed to Independent Contractors

The potential misclassification of workers as independent contractors can be of significant concern to businesses, whether franchises or otherwise. The reason for this concern is that when a worker is treated as an employee, they are entitled to protections under federal and state law, such as minimum wage and overtime pay protections under the Fair Labor Standards Act (the "FLSA"). By contrast, independent contractors are not entitled to overtime pay or employee benefits. While FLSA and state wage and hour laws permit an employer to categorize a worker as an independent contractor, courts and state and federal enforcement agencies apply different tests to determine who should be considered an employee under the applicable employment laws.[57]

1. Different Definitions of an "Employee"

In determining whether a worker should be considered an employee under the FLSA or state law, courts typically look to the definition of "employee" in the applicable statute. Under the FLSA, an employee is defined as "any individual employed by an employer."[58] In turn, an "employer" is defined as "any person acting directly or indirectly

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[53] *Id*. at 518-19.
[54] *Id*. at 519-28.
[55] *Gessele v. Jack in the Box, Inc.,* No. 3:14-CV-1092-BR, (D. Or. Dec. 13, 2016).
[56] *Id*.
[57] The IRS also implements a different test and can determine that an employer may owe back taxes if it has improperly classified a worker as an independent contractor.

[58] 29 U.S. Code § 203(e)(1).

in the interest of an employer in relation to an employee" (29 U.S. Code § 203(d)), and the term "employ" means "to suffer or permit to work."[59]

Given that the definition of "employee" under applicable statutes is often circular and lacking detail, courts developed several tests for analyzing whether a worker is an independent contractor or an employee:

- **Right to Control Test**: Some courts have applied the "right to control" test when differentiating between employees and independent contractors. This test follows the ten factors set forth in the Restatement (Second) of Agency § 220(2) when determining if a worker is an employee or independent contractor.[60] The gist of these factors examines "the hiring party's right to control the manner and means by which the product is accomplished."[61] This test has particular significance in the franchise context because the franchise agreement almost always gives the franchisor the right to exert some level of control over the franchisee's operation to protect the use of its trademark.[62] Indeed, the Lanham Act (15 U.S.C. § 1127) requires that a franchisor exert that level of control or risk abandoning its mark.[63]
- **Economic Reality Test**: Another test some courts and the United States DOL use is known as the Economic Realities Test. The original iteration of this test examined whether the individuals "as a matter of economic reality are dependent upon the business to which they render service."[64] Later cases set forth the following factors to consider when performing this analysis: "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required in the claimed independent operation."[65] During the first Trump administration, the DOL promulgated a rule that focused the economic realities test on two "core factors": (1) the nature and degree of the individual's control over

[59] 29 U.S. Code § 203(g).

[60] *Community for Creative Non Violence v. Reid*, 490 U.S. 730 (1989).

[61] *Id.*

[62] *See, e.g.*, *Allen v. Choice Hotels Int'l*, 942 So. 2d 817, 826-27 (Miss. Ct. App. 2006) (noting that a franchisor often exercises "'contractual quality and operational requirements necessary to the integrity of the franchisor's trade or service mark'" (quoting *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 338 (Wis. 2004)).

[63] *Id.* at 826; *see also* Joseph Schumacher et al., *Retaining and Improving Brand Equity by Enforcing System Standards*, 24 Franchise L.J. 10, 10 (Summer 2004) (a franchisor has "a legal duty to control the quality of goods and services under its mark or risk abandonment of its trademark"); *Patel v. 7-Eleven, Inc.*, __ N.E.3d __, 2024 WL 4046630, *5 (Mass. Sept. 5, 2024) (stating that a franchisor has an obligation under Federal law to "[p]olic[e] the use of the brand, through quality, marketing, and operational standards, [which] is necessary to maintaining its value and continued primary function as a beacon to consumers indicating the source of particular goods or the quality of a particular store. . . . Significantly, a franchisor's failure to control and supervise the use of its brand can result in dilution of the brand and eventually a determination that the brand has been abandoned under Federal law.").

[64] *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

[65] *United States v. Silk*, 331 U.S. 704, 716 (1947); *Schultz v. Cap. Int'l Sec., Inc.*, 466 F.3d 298, 304–05 (4th Cir. 2006) (setting forth six factors).

the work, and (2) the individual's opportunity for profit or loss.[66] Only if an examination of those two core factors led to different conclusions regarding the worker's classification would the following three factors be considered: (1) the amount of skill required; (2) the degree of permanence of the working relationship; and (3) whether the work is part of an integrated unit of production.[67] The Biden administration withdrew the Trump administration's independent contractor rule and ultimately adopted a new rule that reverted to a version of the prior test.[68]

- **ABC Test**: The third test, applicable in approximately 27 states,[69] is known as the ABC test. The ABC test combines certain aspects of the right to control and economic reality test and examines "the economic realities of the work relationship as a critical factor in the determination, but focuses on the employer's right to control the work process as a determinative factor."[70] Typically, under the ABC test, a worker is considered an employee unless the hiring entity can prove the following three elements:

  > (A) "That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
  > (B) That the worker performs work that is outside the usual course of the hiring entity's business; and
  > (C) That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."[71]

  If the hiring entity can establish each of these elements, then the worker will be classified as an independent contractor.

2. Application in the Franchise Context

Most courts applying these tests in the franchise contexts have found that franchisees are independent contractors, not employees, of franchisors. Significantly, courts recognize that a franchisor is required to exercise some degree of control over the

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[66] *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168 (Jan. 7, 2021).

[67] *Id.*

[68] *Employee or Independent Contractor Classification under the Fair Labor Standards Act*, 89 Fed. Reg. 1638 (Jan. 10, 2024).

[69] Congressional Research Service, CRS Report No. R46765 *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act and the ABC Test*, Jon O. Shimabukuro (April 20, 2021).

[70] Bureau of Labor Statistics, Monthly Labor Review, *What is an employee? The answer depends on the Federal law*, Charles J. Muhl, p. 9 (January 2002).

[71] *Dynamex Operations W. v. Superior Court*, 232 Cal. Rptr. 3d 1,8 (Cal. 2018).

franchisee, and no court has held that such control, standing alone, is enough to classify a franchisee as an employee rather than an independent contractor.[72]

Certain cases have held that franchisees could be considered employees, but those cases are primarily in the janitorial context. For example, in *Awuah v. Coverall North America, Inc*., the court noted that the janitorial franchisor failed to establish Prong B of the ABC Test, reasoning that, "[d]escribing franchising as a business in itself, as Coverall seeks to do, sounds vaguely like a description for a modified Ponzi scheme—a company that does not earn money from the sale of goods or services, but from taking in money from unwitting franchisees to make payments to previous franchisees."[73]

One recent case addressing the independent contractor status of franchisees is *Patel v. 7-Eleven, Inc.* pending in federal court in Massachusetts. There, a putative class of 7-Eleven franchisees contended that they were employees under the Massachusetts Independent Contractor Rule ("ICL"), which codifies the ABC Test. In 2015, the federal District Court found that the ICL did not apply to a franchise relationship because, "there is an 'inherent conflict" between Prong A of the ABC Test, which requires the "worker" be "free from control in connection with the performance of the service," and the FTC Franchise Rule, which contemplates a franchisor will "exert or [have] authority to exert a significant degree of control over the franchisee's method of operation."[74] Plaintiffs appealed, and the First Circuit certified the following question to the Massachusetts Supreme Judicial Court "SJC": "[w]hether the three-prong test for independent contractor status set forth in [the ICL] applies to the relationship between a franchisor and its franchisee, where the franchisor must also comply with the FTC Franchise Rule." The SJC ultimately found no conflict existed because the FTC Franchise Rule "is a pre-sale disclosure rule" that "does not regulate the substantive terms of the franchisor-franchisee relationship."[75] Given the FTC definition of a franchise, the SJC found that "control" is not necessarily the defining element because a franchisor can either exert, "a significant degree of control over the franchisee's method of operation, or provide significant

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[72] *See Patel v. 7-Eleven, Inc*., 489 Mass. 356, 370 (2022) ("This threshold is not satisfied merely because a relationship between the parties benefits their mutual economic interests."); *AC&C Dogs, LLC v. New Jersey Dep't of Lab*., 332 N.J. Super. 330, 335 (App. Div. 2000) ("The statute does not make responsibility for unemployment contributions contingent upon receipt of an economic benefit; if it did, it would be difficult to envision an economic relationship that could be exempted. Rather, it refers to remuneration for 'services.' 'The implication of this section is that the remuneration flow from the putative employer to the alleged employee.'" (quoting *Koza v. New Jersey Dep't of Labor*, 307 N.J. Super. 439, 444 (App. Div. 1998))); *Kirby v. Indiana Emp. Sec. Bd*., 158 Ind. App. 643, 644, 648 (1973) (finding that "no services were rendered" where putative workers paid putative employer "a straight percentage of their gross receipts").

[73] *Awuah v. Coverall North America, Inc*., 707 F. Supp. 2d 80, 84 (D. Mass. 2010); *See also Vazquez v. Jan-Pro Franchising Intl*., Inc., 923 F.3d 575 (9th Cir. 2019) (remanding case to district court for further consideration of Prong B, including whether franchisee employees are necessary to franchisor's business, whether franchisee employees continuously work in franchisor's system and whether the franchisor hold itself out as a cleaning business or franchising business).

[74] *Patel v. 7-Eleven, Inc*., 485 F. Supp. 3d 299, 309 (D. Mass. 2020).

[75] *Id.* at *6.

assistance in the franchisee's method of operation."[76] The SJC further found that the Franchise Rule disclosure obligations "do not run counter to proper classification of employees and, importantly, does not necessary make the franchisee an employee under Prong A."[77] "Indeed, 'significant control' over a franchisee's 'method of operation' and 'control and direction' of an individual's 'performance of services' are not necessarily coextensive," the SJC reasoned.[78] The First Circuit reversed the grant of summary judgment and remanded back to the District Court. On remand, the District Court again entered summary judgment in favor of 7-Eleven, finding that the ABC test was not satisfied because the plaintiffs could not establish they were "performing any service" for their putative employer.[79] On appeal, the First Circuit again certified a question to the SJC: "Do [the plaintiffs] 'perform[] any service' for 7-Eleven within the meaning of [the ICL], where, as here, they perform various contractual obligations under the Franchise Agreement and 7-Eleven receives a percentage of the franchise's gross profits?"[80] The SJC answered that question "no."[81] While affirming, "[t]he purpose of the independent contractor statute is 'to protect workers by classifying them as employees," the SJC held that the relationship between 7-Eleven as a franchisor and the plaintiffs as franchisees, "which generally are typical of franchise relationships, do not indicate that the plaintiffs are in fact employees…."[82] Addressing squarely the elements of the 7-Eleven franchise system, the SJC held that the -franchisees are not providing service to 7-Eleven but rather are operating their own independent businesses. The SJC concluded that, "the contractual obligations of the franchisees to operate their convenience stores in a manner that preserves the integrity of the brand does not satisfy the threshold determination" under the independent contractor statute.[83] The First Circuit has not yet issued its ruling applying the SJC's decision.

C. Vicarious Liability Theories Asserted Against Franchisors

Other cases seek to hold franchisors liable for the acts of their franchisees under traditional vicarious liability theories. Typically, plaintiffs in these cases focus on the control that franchisors actually exert, or have the right to exert, over the operations of their franchisees. Courts generally recognize that, "[a] franchisor does not 'control' the franchisee by retaining certain rights such as the right to enforce standards, the right to terminate the agreement for failure to meet standards, the right to inspect premises, the right to require that franchisees undergo certain training, or the mere making of

[76] *Patel v. 7-Eleven, Inc*., No. SJC-13166, 2022 WL 869486, at *6 (Mass. Mar. 24, 2022).

[77] *Id*. at *6-7.

[78] *Id*. at *7.

[79] *Patel v. 7-Eleven, Inc*., 618 F. Supp. 3d 42, 49 (D. Mass. 2022).

[80] *Patel v. 7-Eleven, Inc*., 81 F.4th 73, 76 (1st Cir. 2023).

[81] *Patel*, 2024 WL 4046630, at *2.

[82] *Id.*

[83] *Id*. at *10.

suggestions and recommendations."[84] Rather, most courts have held that a franchisor only is liable for the acts of its franchisees where the franchisor controls the specific mechanism of injury.[85]

One recent example of a court finding a franchisor vicariously liable is *Hagman v. Massage Heights Franchising, LLC*. There, plaintiff allegedly was sexually assaulted by an employee of a Massage Heights franchisee in Houston, Texas. Plaintiff sued the franchisee, the employee and Massage Heights for negligence, premises liability, vicarious liability, respondeat superior, violations of the Texas Deceptive Trade Practices Act, and gross negligence. At trial, Massage Heights moved for a directed verdict on all of plaintiff's claims against it, arguing that there was no evidence to support plaintiff's claims and that the franchisee employee's criminal act was a new and independent cause that broke the chain of causation. The trial court denied Massage Heights' requests for a directed verdict. The jury found all the defendants were negligent for causing plaintiff's injuries; that Massage Heights was 15% responsible; and awarded plaintiff $1,500,000 in damages and $1,800,000 in exemplary damages. On appeal, Massage Heights argued, among other things, that the judgment should be reversed because it did not control the supervision of its franchisee's employee. The appellate court in Texas rejected this argument, reasoning that, per the terms of the franchise agreement, Massage Heights "retained control over the means, methods, and details of the massages provided by masseuses in its franchisees' locations as well as the interactions between the masseuses and the clients. . . . That the franchise agreement allowed [Massage Heights'] franchisee to make independent decisions regarding the hiring, firing, and training of the franchisee's staff does not excuse [Massage Heights] from the duty to act reasonably with regard the detail over which it did retain control—providing massages to customers by

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[84] *Allied Servs., LLC v. Smash My Trash, LLC*, No. 21-CV-00249, 2024 WL 2842633, *42 (W.D. Mo. May 16, 2024).

[85] *See Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 742 (Cal. 2014) *Papa John's Int'l., Inc. v. McCoy*, 244 S.W.3d 44, 56 (Ky. 2008) ("A franchisor is vicariously liable for the tortious conduct of the franchisee when it, in fact, has control or right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm."); *Kerl v. Dennis Rasmussen, Inc*., 682 N.W.2d 328, 338 (Wis. 2004); *Kennedy v. W. Sizzlin Corp*., 857 So. 2d 71, 76 (Ala. 2003); *Ciup v. Chevron U.S.A., Inc*., 928 P.2d 263, 268 (N.M. 1996); *Stenlund v. Marriott Int'l, Inc*., 172 F. Supp. 3d 874, 883-85 (D. Md. 2016); *Hong Wu v. Dunkin' Donuts, Inc*., 105 F. Supp. 2d 83, 87-89 (E.D.N.Y. 2000); *Schlotzsky's, Inc. v. Hyde*, 538 S.E.2d 561, 563 (Ga. App. 2000); *Chelkova v. Southland Corp*., 771 N.E.2d 1100, 1111 (Ill. App. 2002); *Miller ex rel. Bailey v. Piedmont Steam Co.*, 528 S.E.2d 923, 927 (N.C. App. 2000); *Pate v. Alian*, 49 P.3d 85, 90 (Okla. App. 2002); *Helmchen v. White Hen Pantry, Inc*., 685 N.E.2d 180, 182 (Ind. App. 1997); *Allen*, 942 So. 2d at 827-28 ("In looking at whether there is an agency relationship between the franchisor and the franchisee, the majority of courts do not consider the rules and regulations, which are part of the franchise agreement, as a measure of direction and control. Instead, the courts find that these very specific and strict rules are a way for the franchisor to protect its trademark and to protect the public. We find no evidence in the record which would show that Choice had the right to control the day-to-day activities of the Gulfport Comfort Inn. Without such a showing of control or right to control, the franchisor should be granted summary judgment."); *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 23 (Tex. 1993) ("[T]he court's inquiry must focus on who had specific control over the safety and security of the premises, rather than the more general right of control over operations.").

masseuses."[86] Massage Heights' appeal to the Texas Supreme Court is fully briefed and pending.

Another recent decision affirming a finding of vicarious liability against a franchisor is *Coryell v. Morris*.[87] There, the appellate court affirmed a jury's finding that Domino's Pizza was vicariously liable for the negligence of its franchisee's delivery driver who hit and seriously injured the plaintiff in an automobile accident. The appellate court considered whether Domino's had control over the franchisee's operations and whether the particular aspects of the franchise relationship there supported a finding of control. The court concluded that the level of control Domino's retained over its franchisee "exceeded mere protection of its brand and trademark" and subjected the franchisee, "to Domino's will as to the minutia," of the store's staffing and operations. To support its conclusion, the court pointed to various aspects of the franchise agreement that addressed the appearance of employees and the condition of delivery vehicles.

D. Single Enterprise Theory

There are three elements that must be met to establish a single enterprise relationship: (1) the two entities are performing related activities; (2) the activities are performed under unified operations or common control; and (3) the activities are done for a common business purpose. While the factors considered for determining if there is a single enterprise vary somewhat by state, a court may consider any or all of the following factors: commingling of funds or assets; the failure to maintain adequate and separate records; overlapping ownership and/or management; overlapping policies and procedures; use or overlap of resources including equipment, business locations, and/or software; the use of the same employees; undercapitalization; the disregard of legal formalities and the failure to maintain arm's length relationships among the entities; performing the same business activities and/or performing in the same industry; and other factors as determined by the courts.[88]

Under the first element, the activities must be related, but they do not have to be identical. For example, one court found that a shoe store and a dress store met this element because they each sold articles of clothing to the general public.[89] Another court found that two entities were performing the related activity of home health services when one company provided health services to clients in their homes and the other provided Medicare services.[90] Finally, another court ruled that the management of single family homes and the management of apartment buildings was similar enough to meet the element.[91]

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[86] *Hagman v. Massage Heights Franchising, LLC*., 679 S.W.3d 298 (Tx. Ct. App. 2023).

[87] *Coryell v. Morris*, 2025 Pa. Super. 28 (2025).

[88] *See Brock v. Hamad*, 867 F.2d 804, 806-07 (4th Cir. 1989); *see also Lima v. MH & WH, LLC*, 372 F. Supp. 3d 317, 337-38 (E.D.N.C. 2019); *Chao v. A-One Medical Servs., Inc.,* 346 F.3d 908, 914-16 (9th Cir. 2003); Reich v. Bay, Inc., 23 F.3d 110, 114-16 (5th Cir. 1994).

[89] *Brennan v. Plaza Shoe Store, Inc.,* 522 F.2d 843, 848 (8th Cir. 1975).

[90] *Chao v. A-One Medical Servs., Inc.,* 346 F.3d 908, 915 (9th Cir. 2003).

[91] *Brock*, 867 F.2d at 806.

For the second element to be met, the courts look beyond just a formal corporate structure and instead look at the practical operation of the entities.[92] The element may be analyzed by answering questions like how centralized are the significant corporate decisions? Did multiple sources or just a single source create and fund the two entities? When actually operating, how interdependent are the two entities? Are the entitles held out to the public as one or independently?

The third element, a common business purpose, is usually found if the first two elements are found: there are related activities and common control.[93]

E. Other Joint Liability Cases

1. *Bradfield v. Amazon Logistics, et al.*

In a fairly recent case, Amazon received a $16.2 million verdict after going to trial in a tort vehicle accident case.[94] In this sad case, an Amazon driver struck an eight-year-old boy on an electric bike with his vehicle while delivering packages. The child sustained significant injuries with substantial medical expenses. Amazon argued that the driver was an employee only of Fly Fella Logistics, an independent delivery service provider, and not an employee of Amazon. The plaintiff argued that Amazon was also the driver's employer because it controlled the method, manner, and time of deliveries. At trial, the plaintiff presented evidence on Amazon's policies, requirements, contracts, and practices and in essence controlled every aspect of the delivery process. The plaintiff argued that Amazon's negligent training was a factor that contributed to the child's injuries. Specifically, the training did not deal with encountering children in residential areas and on avoiding laying packages on the dashboard that could obstruct the driver's view when using a delivery vehicle without shelving for packages. Ultimately, the jury awarded the large verdict to the plaintiff and apportioned 85% of the liability to Amazon for negligent training, with only 10% liability to Fly Fella Logistics and the driver, and 5% liability to the individual who was in charge of supervising the child at the time of the accident.

VI. Strategies and Best Practices to Mitigate Joint Liability Risks

Franchisors can take several strategic steps to mitigate the risk of being classified as a joint employer with their franchisees. This is crucial, as being considered a joint employer or single enterprise can expose franchisors to increased legal liabilities and can undermine the franchise model. Here are some strategies franchisors can implement:

A. Limit Control Over Franchisee Employment Practices

Avoid Direct Supervision or Control: Franchisors should refrain from directly controlling the day-to-day activities of a franchisee's employees, including supervision, hiring, firing, and work schedules. Instead, focus on providing general guidance and support related to brand standards and operational practices, but leave employment

[92] *Donovan v. Grim Hotel Co.,* 747 F.2d 966, 970 (5th Cir. 1984).
[93] *Chao*, 346 F.3d at 916; *see also Brennan*, 522 F.2d at 848.
[94] *Bradfield v. Amazon Logistics, et al.*, 22-C-07003-S7.

decisions up to the franchisee. The more distant the franchisor is from the franchisee and its human resources related operations, the less likely there will be a finding of direct control or significant supervision.

Provide Guidelines, Not Orders: Instead of prescribing specific employment practices or job duties for the franchisee's workers, franchisors should focus on broad guidelines to ensure brand consistency (e.g., customer service standards or product quality).

B. Maintain a Clear Entity Distinction in Contracts

Franchise Agreement Clarity: Ensure that the franchise agreement clearly states the separation between the franchisor and franchisee, particularly with regard to employment matters (i.e., terms and conditions of employment). The agreement should affirm that franchisees are independent business owners responsible for managing their employees including managing their day-to-day work. Elements of control should be identified as and limited to enforcement of brand standards.

Independent Employment Relationships: The agreement should specifically indicate that the franchisee, not the franchisor, is the sole employer of the workers at the franchised location. This includes making clear that the franchisee is responsible for all hiring, firing, wages, benefits, and compliance with labor laws. Utilize acknowledgements with both franchsee owners and franchisee employees (through franchisee management) establishing this fact and outlining the responsibilities of the franchisee.

C. Minimize Involvement in Hiring and Personnel Decisions

Franchisors Should Not Hire or Fire Employees: Franchisors should avoid becoming involved in the hiring or firing decisions of franchisees' employees. While franchisors can set minimum qualifications or training requirements, they should not directly intervene in recruitment, training, discipline or termination of franchisee employees. The hiring process should be initiated by the franchisee and remain with them the entire time.

Avoid Participation in Employee Reviews or Disciplinary Actions: Franchisors should not participate in employee performance reviews or take part in disciplining franchisee employees. These decisions should remain solely with the franchisee. Further, franchisees are encouraged to create the rules / guidelines / policies governing employee reviews or disciplinary actions, or at a minimum, add to a baseline set of guidelines that the franchisor has made available as a template.

D. Control the Brand, Not the Workforce

Brand Standards Over Operational Control: Franchisors can set operational standards that ensure consistency across franchises (e.g., product quality, customer service, safety procedures) but should avoid overstepping into areas like work schedules or employee compensation. The focus should remain on brand consistency rather than dictating specific employment practices.

Separate Employment Policies: Franchisors should ensure that employees of franchisees have separate employment policies from those of the franchisor. Workers should not be treated as though they are part of the franchisor's workforce Franchisors should refrain from providing template employment related materials such as offer letters, job descriptions, handbooks, bonus programs, etc. directly to franchisees or their employees

E. Limit Involvement in Employee Benefits and Compensation

Franchisor Should Not Administer Benefits: The franchisor should avoid administering benefits (such as healthcare, retirement plans, or paid leave) for franchisee employees. Ensuring that franchisees manage their own payroll, benefits, and tax obligations can help to avoid joint employer risks.

Franchisor Should Not Set Wages or Salaries: Franchisors should refrain from setting wages or salary structures for franchisee employees. These decisions should be left to the franchisee, with the franchisor only advising on general pay structures if necessary for brand consistency (e.g., ensuring market-competitive wages).

F. Encourage Franchisee Education on Labor Laws and Best Practices

Franchisee Training on Employment Laws: Franchisors should encourage franchisees to get training or leverage external resources to help them understand labor and employment laws, including wage and hour regulations, discrimination laws, and other relevant labor standards. However, this should be done in a way that does not imply direct oversight or control of the franchisee's employment practices. For example, consider ways to leverage optional third-party resources that franchisees can easily engage directly. Additionally, any training that a franchisee provides to its employees, for example, on labor law, should be developed by a third party or the franchisee.

Compliance Assistance, Not Control: Providing guidance on how to comply with legal requirements should not cross the line into directing how the franchisee runs their business or manages their workforce. Franchisors should emphasize the importance of following the law without directly imposing how franchisees handle employment issues. It is advised that franchisee owners retain their own counsel to create a separate attorney-client relationship and avoid creating the appearance that any legal or regulatory guidance is coming from an attorney affiliated with the franchisor.

G. Regularly Evaluate and Update Manuals

Most franchise agreements require franchisees to operate their franchised businesses in compliance with the written manuals because this is the best way for a franchisor to ensure that their standards and products are uniformly delivered across the franchisee network. Since the wording of the manuals is carefully scrutinized in joint employer litigation, it is incumbent upon a franchisor to understand that manuals are "living documents." The manuals need to be regularly updated as the business evolves over time and new products, services, promotions, or processes are launched. Similarly,

it is important for a franchisor to regularly review its operations manuals and remove outdated guidance that may be inconsistent with current legal standards.

To mitigate joint employment risk, a manual should clearly demarcate between the franchisor's required brand standards and what are merely recommendations and best practices to help franchisees achieve required brand standards. As a general rule, if the consumer's experience is not affected by a specific process, the franchisor should not dictate how the process is accomplished in the manual. For example, a reasonable brand standard would be to have clean restrooms in the location, but a franchisor should not direct a franchisee to buy a specific type of soap for the dispensers in the restrooms. Similarly, if the franchisor has a specific product (e.g., a type of hamburger) that it wants its franchisees to sell, it's a permissible brand standard to direct the franchisee how many patties, tomatoes, slices of cheese, and condiments belong on the hamburger and in what order to assemble the ingredients. Service-based franchise systems should utilize extra caution when assessing what is brand standard because of the nature of the services provided. Direction related to the provision of the service may overlap or be construed as direction related to the employee providing the service. Whenever possible, franchisors should always avoid providing instructions related to employee-management or other employee-related matters, including hiring, firing, and disciplining franchisee employees.

H. Regularly Evaluate Training Materials & In-Field Visits

In addition to maintaining valuable manuals, franchisors should also evaluate how they train, who they train, and how they conduct field support.

Whenever possible, franchisors should limit the training they provide to the actual franchisee or, if necessary, managers of the franchisee's employees. If possible, the franchisor should utilize a "train the trainer" approach where the goal of the training is to prepare others (e.g., the franchisee or managers of the franchisee's employee base) how to train their own subordinates. In other words, the training should be a compact training program that both (a) provides specific training content on brand standards, and (b) teaches how to teach the content to others. This approach helps mitigate the claims that the franchisor is too involved in dictating the day-to-day operations of the franchised business.

Franchisors should also understand that their field support teams' actions may be misconstrued as directives "from corporate" to rank-and-file employees of the franchisee. To avoid this mischaracterization, whenever possible, the franchisee should be in attendance during field support visits and make it clear that the franchisor's field support team is there as a consultant, not as a supervisor. In addition, the field team should limit their recommendations to issues touching on brand standards (such as the wearing of required uniforms) and not provide guidance on HR issues or other employee hiring/firing/disciplinary matters.

I. Public Relations & Joint Employment Concerns

A franchisor should have a well-developed public relations strategy to build brand awareness, attract new franchisees and customers, and establish market credibility for existing franchisees by managing media coverage.

However, there is a balancing act between (a) presenting the brand as a unified entity to the public and (b) mitigating negative consequences of joint employer concerns in crisis management. Whenever possible, a franchisor should consult legal counsel in developing its public relations strategy to ensure the objectives are achieved without unintended consequences.

J. Presenting the Brand As a Unified Entity

A franchisor should direct a consistent and compelling message in its public relations strategy that focuses on brand standards and engaging and educating the public about the brand and its core values. This will ensure that the "brand promise" is properly conveyed to the public and each individual franchisee is not communicating their own perspective on what the brand standard is to the public.

K. Crisis Communications

Franchise systems are more vulnerable to crises given then network structure in delivering the product or services to the public. A crisis in one location may quickly envelope the entire brand. In today's world of social media, a PR crisis can escalate quickly and the ability to respond is crucial to a successful outcome. The ability to respond timely will be the result of pre-planning on the franchisor's part.

In a crisis communication, the first question a franchisor should ask is whether or not the incident relates to a brand standard (for example, a food safety issue) or an issue touching on joint employment (for example, a class action lawsuit brought against a franchisee by its employees for unpaid wages).

If a brand standard is implicated, the franchisor should appoint a response team, devise a strategy and brief the franchisee's team and maybe other franchisees, gather the facts about the incident, speak with one voice, take responsibility, and make it clear that the franchisor will take steps to ensure it does not happen again.

Conversely, if the crisis results from an issue touching joint employment risks, the franchisors' response should explain that it's gathering relevant facts and that each franchisee is independently owned and operated. The franchisor should reiterate that its relation to the affected franchisee is a contractual one and that the franchisee is required to comply with all applicable laws. The franchisor should communicate it will evaluate its options under the franchise agreement and commit to re-educating franchisees about their obligations under the franchise agreement.

In either scenario, it is important that once the dust settles, the team does not just move on and forget about it. Rather, the team should analyze their crisis management process, what worked and what didn't, and how to prevent similar issues from arising in the future.

L. Leverage Third-Party Vendors To Educate Franchisees

Since the various tests for joint employment ultimately examine the level of control a franchisor has over the franchisee, a good way to insulate the franchisor is to have a third party (e.g., an approved vendor) deliver important information. Some franchisors may utilize a third party law firm and provide a hotline to call on labor and employment matters or regular ongoing trainings for franchisees on labor and employment law. Other franchisors may hire industry experts to train on topics relevant to their franchisees like customer service, developing pricing surveys, and presentations on industry best practices. Franchisors should also consider providing multiple suggested or recommended vendors that remain optional for franchisees to choose to engage at their own discretion. The franchisor should reiterate that the franchisee is responsible for vetting their own optional vendors, which are not required suppliers to the system. This strategy removes the franchisor from the calculus and helps mitigate against a finding of joint employment. The strategy also has the added benefit of alleviating the franchisor of feeling that it needs to be a subject matter expert in every possible facet of the business. One word of caution is warranted, however, if a franchisor is going to leverage an "approved" or recommended vendor to provide the information – it should let that third party develop and distribute the content. The third party should not "white label" the franchisor's name onto the material or otherwise parrot back only the things that the franchisor wants it to say.

M. Potential Protections In Franchise Agreements

Similar to the discussion about manuals, most joint employment cases carefully evaluate the text of franchise agreements. As a result, it is a best practice for franchisors to specifically identify in the franchise agreement that franchisee should take certain steps to ensure that the public and its employees are not confused about who the employer is. These steps can include:

a. Ensuring that the franchisee's entity's name does not include any trademarks owned by the franchisor;
b. Requiring the franchisee to post a notice that the location is independently owned and operated;
c. Requiring the franchisee to inform its employees at training that they work for the franchisee and not the franchisor and signing an acknowledgment along those lines; and
d. Ensuring that the trademark of the franchisor does not appear on pay stubs.

In addition, franchise agreements should require that a franchisee indemnify and defend a franchisor for, among other things, claims arising out of the franchisee's conduct of the franchised business including labor and employment violations and

misclassification claims. Some franchisors specifically require franchisees to purchase wage and hour riders to their EPL insurance portfolios. Whenever possible, the franchisor should require their franchisees to name the franchisor as an additional insured on their policies and collect the Certificates of Insurance and the policy addendums establishing the status and have a compliance program in place to ensure that franchises maintain their insurance throughout the term of the franchise agreement. Finally, many franchise systems have robust resale/transfer programs and a franchisor should consider requiring departing franchisees with claims-made policies to purchase tail coverage in the event that a claim arises later, after the franchisee has left the system.

N. Avoid Using "Franchisor Employees" for Operations

Refrain from Placing Corporate Employees in Franchise Operations: Franchisors should avoid assigning their own corporate employees to work in franchisee operations. If corporate employees are placed at a franchise location, it may blur the lines between the franchisor and franchisee, increasing the risk of a joint employer finding.

Minimize Temporary or Shared Labor: If the franchisor uses temporary workers or shared labor between corporate and franchise locations, it's important to ensure these workers are not directly involved in managing or supervising franchisee employees.

O. Regularly Review Legal and Compliance Practices

Monitor Changing Regulations: As the joint employer standard can shift with political or legal developments, franchisors should stay up-to-date with changes in labor law, especially related to the NLRB's interpretation of joint employer liability. This will help franchisors understand when they might need to adjust their practices to reduce the risk of joint employer status.

Consult with Legal Counsel: Franchisors should work with legal counsel who specialize in labor and employment law and franchising to ensure that their practices align with the current legal landscape. Regular audits of franchisee relationships and practices can also help identify areas where the franchisor might be at risk of joint employer status.

P. Support Services for Franchisees

Empower Franchisees: Encourage franchisees to take full responsibility for their business operations, including hiring, training, and managing their employees. This independence reduces the perception that the franchisor has control over the workforce, thereby mitigating joint employer risks.

VII. Conclusion

There is no doubt we will continue to see changes under the new presidential administration, however, knowing the standards and potential avenues of joint liability is the best defense against the risk that exists now. Follow the practical advice provided herein for your franchise to be in the best position to avoid joint employer liability.