"McPloyer" – Who is the "real" employer in a franchised operation?

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The franchise world was dealt a discomforting blow on December 19, 2014. McDonald's USA, LLC, was jointly named with its franchisees in complaints asserting numerous labor law violations filed by the National Labor Relations Board's ("NLRB") Office of the General Counsel..[1]

The NLRB's decision to label McDonald's itself as a "joint employer" with its individually owned and operated franchised restaurants was the latest development in a two-year campaign, initiated by union groups, to undermine the distinction between the duties of franchisor and franchisee. Starting in late November 2012, these groups filed unfair labor practice charges in twenty (20) regions against numerous McDonald's franchisees, as well as the parent corporation itself.[2] The franchise world waited anxiously for the NLRB to render its Decision on whether it would support the charges brought by employees. The anxiety increased when the NLRB issued complaints naming McDonald's as a "joint employer" along with the local franchisees.

Supporting its decision, the NLRB found that McDonald's Corp. engages in "sufficient control" over its franchisees' operations, beyond protection of the brand, through its franchise relationship and its use of tools, resources and technology. The NLRB was persuaded, in part, by McDonald's nationwide response to employee activities.[3] The NLRB alleged that McDonald's disciplined employees who engaged in protests using interrogations, threats, reductions in hours, and terminations. Thus, the NLRB argued that the actions of McDonald's made it a putative joint employer with its franchisees, and as a result, McDonald's shared liability for violations of the Act.

The decision by the NLRB to label McDonald's as a joint employer could have major ramifications for franchisors, franchisees, employees, and insurance carriers, well beyond the issue of direct liability of a franchisor for labor law violations occurring in franchised stores. For almost fifty years, the franchise system was predicated on local franchises holding the exclusive title of employer for individual workers, and franchisors were considered to have ceded all employment law responsibilities to the local franchisees. Well settled precedent established by the NLRB defined employers as those who control the worker's essential terms of employment.[4] In turn, the franchisees held all liability for issues

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[1] McDonald's Fact Sheet, NAT'L LABOR RELATIONS BOARD (Feb. 6, 2014), http://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet.

[2] The majority of charges brought against McDonald's were for the firing and intimidation of employees in response to employees' engaging in activities aimed at improving wages and working conditions, including nationwide protests. Since November 29, 2012, of the 291 unfair labor practice charges filed, 134 have been closed, 71 are currently pending investigation, and 86 cases have been found to have merit. The NLRB Fact Sheet describes that charges which have been found to be meritorious against McDonald's and its franchises include allegations of discriminatory discipline, reductions in hours, discharges, and other coercive conduct directed at employees in response to union and protected concerted activities, including threats, surveillance, interrogations, promises of benefit, and overbroad restrictions on communicating with union representatives or with other employees about unions and the employees' terms and condition of employment. The NLRB McDonald's Fact Sheet further notes that while the Office of the General Counsel have been attempting to settle the issues, only eleven (11) of the 291 cases have been settled. The actual litigation of these remaining cases will not begin until March 30, 2015. NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchiser McDonald's, USA, LLC as Joint Employers, NAT'L LABOR RELATIONS BOARD (Feb. 8, 2015), http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against.

[3] Many franchise employees participated in worker protests to improve their wages and working conditions.

[4] Essential terms include, most notably: hiring; wage rates; firing; and job description.

arising out of the employment and control of its employees. The recent decision to label McDonald's as a joint employer has the potential to upend the traditional system.

If the trend toward joint employer labeling gains traction, there could be a monumental impact not only on labor laws, but also on workers' compensation liability, direct civil liability, and related insurance matters.

Most states have workers' compensation statutes premised on the notion of "exclusive remedy". Under this doctrine, injured workers give up the right to sue the employer under civil law. In return, injured workers are compensated by an established schedule of wage loss, medical and other benefits.[5] In practice, the worker can collect workers' compensation without having to prove fault or negligence of the employer, but generally cannot get money for pain and suffering, consequential damages, etc. The trade offs to this remedy allow the employer to enjoy immunity from civil suit, while still providing workers benefits and compensation for their work injuries. The certainty of these respective rights allows employers to obtain, and insurance carriers to accurately underwrite and price, insurance coverage for workers' compensation.

It has been well accepted that the franchisee must either be self-insured or obtain workers' compensation insurance. The franchisor, on the other hand, does not anticipate the potential for employer's liability at the local franchise level, and therefore, they typically do not carry coverage for workers' compensation insurance for the employees of the franchisee.[6] Now that the NLRB has introduced the notion that the worker may have two joint employers - the franchisee and the franchisor, the transitional scheme may change.

First and foremost, this new joint employer designation may open the door to workers' compensation actions against both purported employers. Presumably, the NLRB's logic could be used to embolden a worker to assert that the franchisor corporation exercised "sufficient control" of the worker to warrant joint employer status. If, for example, the franchisor provides employee handbooks, safety manuals, operation procedures, and quality control standards on the work activities of the employees, or if they assess, recommend or correct practices by workers through regional management, does the franchisor cross the line into "sufficient control" to be deemed a joint employer? If the franchisor exercised "sufficient control of the worker, and is deemed a "joint employer," which of the two "employers" is responsible for paying workers' compensation benefits?

Most states now determine which entity is the "real" employer by engaging in a very fact specific investigation of numerous criteria. Generally, four main elements are analyzed: whether the employer had the right to select the employee, the right and power to remove the employee, the power to direct the manner of performance, and the potential power to control the employee.[7] Analysis may also be affected by the terms of relevant contracts and agreements, the intention of the parties, or actual exercise, as opposed to power to exercise, control of the manner of performance of the work. In a heavily standardized work situation in which virtually every aspect of the job has been reviewed, directed or provided by the franchisor, a finding of joint employment, if legally allowable, may be factually supportable.

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[5] Although the worker is generally barred from suing the employer, the worker can sue third parties who may have been even partially responsible for the injuries

[6] This fit well with the notion that the local worker is under the direct supervision and control of the local franchisee, and therefore was the worker's sole employer

[7] Sunset Golf Course v. WCAB (Dep't of Pub. Welfare) (State Workmen's Ins. Fund) (Golden), 595 A.2d 213 (Pa, Cmwlth. 1991).

Once we cross the threshold of the world of "joint employers," scores of controversies will arise. For example, which of the two employers must carry workers' compensation insurance for the local franchisee's workers? What if one "employer" does, and the other doesn't? How will premiums be set and reserves maintained by carriers for the two different "employers?" Which entity has the burden of compliance with state, local and federal employee safety and injury reporting? Which entity actually pays money to injured workers – the franchisor, the franchisee, or both? There is limited precedent for apportionment of benefits between dual or multiple employers. In Pennsylvania, for example, there is a reported case in which two dentists effectively controlled the work of one secretary in a common office.[8] The Court determined that payment of benefits to the employee should be equally apportioned between the two employers.[9] In addition to an apportionment of workers' compensation liability, the Commonwealth Court of Pennsylvania has also determined that the two employers were jointly and severally liable for the employee's work-related injury.[10] In other words, either employer may be required to pay all of the benefits owed to the employee and look to the other employer for indemnification.

If both entities are deemed employers, is the injured worker barred from filing a civil suit against either entity? If one entity is insured for workers' compensation, and the other is not, can the worker sue the uninsured entity under civil law? Who has the right and duty to administer claims? What if the franchisee and the franchisor disagree as to whether a claim should be paid or contested? Is one bound by the decisions of the other?

Additionally, how is the finality of a workers' compensation settlement affected? After settling with one employer, can the claimant demand another settlement from the other? What if only one of the employers agrees to an amount? Settlement becomes substantially more complicated in a joint employer situation.

We can only posit questions at this time. Our fear is that there will be a parade of unintended consequences from the push for "joint employer" recognition by the NLRB if it is adopted by other agencies or courts. If McDonald's is eventually found to be a joint employer, the vast majority of entities in the franchise world will be humming a drastically different tune than: "I'm loving it."

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[8] Hatter v. Lenox, 212 A.2d 916 (Pa. 1965).
[9] Id.
[10] 3D Trucking Co., Inc. v. WCAB (Fine & Anthony Holdings Intern.), 921 A.2d 1281(Pa. Cmwlth. 2007).