Joint Employer Rulings By The NLRB and California Courts

The franchise industry has been closely following the National Labor Relations Board (NLRB) ruling in July 2014 that franchisors can be considered joint employers with their franchisees. Since that ruling, we have been watching to see if and when the NLRB would issue complaints against McDonald's USA, LLC. On December 19, 2014, the NLRB issued 13 complaints against McDonald's USA, LLC and various franchisees under the premise that McDonald's USA, LLC is the joint employer of the employees filing the complaints. The complaints involve 78 charges and will be heard by the NLRB in consolidated hearings beginning in March of this year.

The NLRB investigation found that "McDonald's USA, LLC, through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisee's operations, beyond protection of the brand, to make it a putative employer with its franchisees, sharing liability for violations of our Act[i]." The NLRB stated that the "finding is further supported by McDonald's USA, LLC's nationwide response to franchisee employee activities while participating in fast food worker protests to improve their wages and working conditions."

Contrary to the NLRB view, two (2) recent cases out of California have decided that franchisors were not joint employers with their franchisees.

- *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474 (2014): Patterson involved an employee allegation of sexual harassment at a franchised location. The Court found that Domino's was not liable for the sexual harassment because Domino's was not responsible for the hiring, firing or training of the employee that committed the alleged harassment. The Court acknowledged that franchisors establish "comprehensive and meticulous" standards for the purpose of maintaining brand uniformity, and that the application of an agency theory to the franchise relationship must adapt as the franchising industry grows.
- *Vann V. Massage Envy Franchising, LLC, et. al.* USDC, Southern District of California, Case No. 3:13-CV-02221-BEN-WVG: Vann involved an

employee allegation of violations of California wage and hour laws. On January 6, 2015, the Court granted Massage Envy's Motion for Summary Disposition on the grounds that there was no evidence that Massage Envy exercised any involvement over the terms of Vann's employment or employee work schedules. Further, the Court found that Massage Envy's policies, as raised by Vann, were policies in place to maintain brand uniformity, a concern of franchisors.

During the time between the NLRB ruling and the issuance of their complaints, multiple lawsuits have been filed against franchisors across the country for violations of the Fair Labor Standards Act and state wage and hour laws, alleging that the franchisor is the employer and/or joint employer and/or single employer of the franchisee. The allegations attack the franchise business model at its core by claiming, among other things, that 1) the franchisor and franchisee operate in identical industries, 2) the franchisor is necessary for the success of the franchisee, 3) that the franchisor exercises substantial control over all franchisee units through the use of operation manuals, computer systems and software, product and service offerings, pricing, and uniform standards.

Along with the rest of the franchise industry, we continue to watch this ever-changing area of law.

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[i]McDonald's Fact Sheet, issued by the National Labor Relations Board at h tt p : / /w w w . nlr b . g o v /news-outreach/fact-sheets/mcdonalds-fact-sheet