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EMPLOYMENT LAWSCENE ALERT: NLRB'S GENERAL COUNSEL DETERMINES THAT MCDONALD'S IS A JOINT EMPLOYER WITH ITS FRANCHISEES

In a decision that could have far reaching implications for industries that rely on the franchisor/franchisee business model, the NLRB's General Counsel, Richard Griffin, Jr., determined that 43 unfair labor practices charges against McDonald's, USA, LLC may move forward under a "joint employer" theory finding that McDonald's should be held liable along with its independently owned franchisees based upon allegations that the franchisees violated worker's rights in responding to workplace protests. The NLRB General Counsel's decision to move forward against McDonald's not only attempts to extend liability under the National Labor Relations Act to franchisors for acts of its franchisees, but it may also open the door for unions to more easily organize multiple independently owned franchise locations operating under agreement with a single franchisor.

The "joint employer" theory is a legal concept that treats two allegedly separate employers as one. The "joint employer" theory does not depend upon the existence of a single integrated enterprise, but, rather, assumes in the first instance that companies are "what they appear to be" – independent legal entities that have merely chosen to handle jointly… important aspects of their employer-employee relationship. Typically, a joint employer relationship is found between two companies where the non-employing company actively and significantly exerts control over the same employees on those matters governing the essential terms and conditions of employment such as hiring, firing, discipline, supervisions, and direction.

The NLRB General Counsel's decision to target McDonald's as a joint employer comes in unison with big labor's recent efforts to protest wage and benefits levels for fast food workers. These recent protests over wages and benefits is big labor's attempt to attack the franchisor/franchisee business model by deeming independently owned stores to have the deep pockets of its franchisors – ignoring the economic realities of the franchisor/franchisee business model. For example, the SEIU has staged protests at different fast food establishments across the country demanding wages as high as $15/hour for all fast food workers based upon the fallacy that that such wages are appropriate given the corporate

franchisor's finances. Wage demands of this type ignores the economics of operating an independent and locally-owned franchise where wages and benefits are often set based upon local market conditions as well as a franchisee's own profit and loss rather than upon the finances of its franchisor.

The NLRB General Counsel's decision to move forward with complaints that attempts to now treat McDonald's as a joint employer with its franchisees provides ammunition to big labor to further its war over wages and benefits against fast food franchisees by blurring the line between a small independently and locally-operated franchisee and its affiliated large corporate franchisor. In addition, with the NLRB willing to make clear that a corporate franchisor can now be held liable for unfair labor practices as a joint employer with its franchisees, it is only logical that the NLRB's next step will be to permit unions to organize fast food establishments based upon petitioned collective bargaining units that consist of multiple franchisee locations of a single franchisor even though the locations are independently owned and operated by different independent owners.

The NLRB General Counsel's decision to treat McDonald's as a joint employer does not currently have the effect of law. Once the NLRB issues the complaints, these cases will have to proceed through the adjudicative process leading up to a hearing before an administrative law judge before the cases might reach the full National Labor Relations Board for a decision.

Given the political make-up of current NLRB members, political ideologies will definitely pave the way for the NLRB's General Counsel's viewpoint on joint employer liability to prevail against McDonald's before the NLRB despite three decades of legal precedent that would hold otherwise. Needless to say, the battle will not end at the NLRB, as it would be expected that this issue will most likely wind-up before the U.S. Supreme Court who will make the ultimate decision on this important issue.

At this point, the NLRB will try to achieve settlement with McDonald's before proceeding to hearing with these cases. It would be expected that McDonald's will oppose any attempts to settle these cases and try to move these cases beyond the NLRB and into the courts where strong legal precedent has mostly rejected the joint employer theory for businesses set up under the franchisor/franchisee business model. It is in the federal court system where McDonald's has the best opportunity to defeat the NLRB's new approach against the fast food and other industries that rely on the franchisor/franchisee business model.

We will keep you informed of these cases before the NLRB as they develop.