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Joint Employer Theory: Did Subway Go off the Tracks?

By **David J. Kaufmann**

What were they thinking? On July 26, 2016, the franchisor of Subway restaurants (Doctor's Associates Inc.) entered into a "Voluntary Agreement" with the U.S. Department of Labor's (DOL) Wage and Hour Division under which Subway pledged to take steps to ensure that its franchisees comply with wage-and-hour laws.[1] But among other steps Subway pledges to undertake under the Voluntary Agreement is the possibility of "...us[ing] technology to support franchisee compliance, such as building alerts into the payroll and scheduling platform that Subway offers as a service to its franchisees."

Or, in plain English, the very type of franchisor interaction with franchisee payroll activity that has been deemed by the National Labor Relations Board (NLRB) to render franchisors the "joint employers" of their franchisees' employees, specifically in the pending case the NLRB launched against McDonald's Corporation two years ago.

It was then (on Dec. 19, 2014 to be precise) that NLRB General Counsel Richard Griffin, Jr. issued complaints[2] against McDonald's Corporation and certain McDonald's franchisees, alleging that those franchisees violated the rights of employees working at their franchised restaurants at various locations around the country—and asserting that McDonald's, as a "joint employer" of those franchisees' employees, was equally liable with its franchisees for any violations of the National Labor Relations Act (NLRA)[3] that may have transpired.

The kicker? Absolutely nothing in the DOL/Subway Voluntary Agreement precludes the NLRB, under its new draconian joint employer analysis, from alleging that Subway is the joint employer of its franchisees' employees precisely because of the franchisee payroll and scheduling activities it agreed to engage in under the DOL Voluntary Agreement. There is absolutely no language in the Voluntary Agreement stating, suggesting or even inferring otherwise.

Aspects of Control

The NLRB complaints against McDonald's as a joint employer were not accompanied by any decision, memoranda, memorialization or report illuminating the rationale or logic behind them. However, in an amicus brief in another case, the NLRB General Counsel contended that "...franchisors typically dictate the terms of franchise agreements and can exert significant control over the day-to-day operations of their franchisees...Some franchisors even keep track of data on sales, inventory, and labor costs; calculate the labor needs of the franchisees; set and police employee work schedules; track franchisee wage reviews...Thus, current technological advances have permitted franchisors to exert significant control over franchisees, e.g., through scheduling and labor management programs that go beyond the protection of the franchisor's product or brand."[4]

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Thus, the very activities cited by the NLRB General Counsel as indicative of franchisor control over franchisee employees sufficient to render the franchisor a "joint employer" of such employees are precisely the type of activities in which the DOL/Subway Voluntary Agreement envisions franchisor Subway will engage.

In fact, noted one business journal, the NLRB could use the Voluntary Agreement standing alone to prove a joint employer case against Subway.[5]

On Aug. 1, 2016, the International Franchise Association (to which Subway belongs) reiterated this very point: "Legitimate concerns now exist as to which franchisor actions cross the line and could serve as evidence of a joint employment relationship in future litigation or a government enforcement action. Without assurances that their compliance efforts will not be used against them by another government agency, or plaintiff attorneys, franchisors are caught in an inevitable catch-22."

And the head of the Department of Labor's Wage-and-Hour Division, Dr. David Weil—one of the very architects of the "franchisor-as-joint employer" theory—stated in the release accompanying the Voluntary Agreement that: "Our work with Subway breaks new ground in how we can work with the regulated community...to channel their influence to insure that all employees along a supply chain or otherwise linked in commerce play by the rules." Of course, in many of his writings, this is precisely the type of "influence" that Weil claims gives rise to a franchisor being the joint employer of its franchisees' employees.

Other Franchisors

It appears that the Department of Labor has been trying to get other franchisors to enter into similar Voluntary Agreements—but that negotiations with at least one national retail food franchisor stalled after Weil declined to assure it that the National Labor Relations Board would not use Voluntary Agreement wage-and-hour compliance activity as evidence that the franchisor was the joint employer of its franchisees' employees.[6]

The Department of Labor offers no protection from the NLRB charging that » Page 6

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Franchising

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Subway's Voluntary Agreement obligations give rise to its serving as the joint employer of its franchisees' employees. In fact, notes the Department of Labor: "The NLRB is an independent agency and its decisions are based on a different statute."[7]

It appears that Subway entered into the Voluntary Agreement only to protect its bottom line. According to Bloomberg BNA, the Department of Labor Wage and Hour Division Administrator Weil advised that the Voluntary Agreement was entered into because "Subway insisted that it must not face added risk of Fair Labor Standards Act joint employer liability, while the DOL needed to retain enforcement authority over Subway's franchisees."[8] In fact, Weil proves a master of understatement in this regard, since an FLSA joint employer case against Subway arising from labor law misdeeds of its franchisees could engender massive fines, penalties, awards and legal fees. So it would appear that Subway, looking to avoid such significant exposure, elected to enter into the Voluntary Agreement instead.

So it is that Subway may have left the station of Department of Labor Fair Labor Standards Act enforcement activity—only to arrive next at the station of NLRB enforcement activity.

1. https://blog.dol.gov/2016/08/01/keeping-it-fresh-new-agreement-with-subway.
2. National Labor Relations Board case number 02-CA-093893 (Region 02-New York, New York).
3. National Labor Relations Act of 1935, 29 U.S.C.A. §§151-169 (2000).
4. Brief for the NLRB General Counsel, as Amicus Curiae Supporting Respondents, Browning-Ferris Indus. of Cal., Inc.
5. http://www.businessmanagementdaily.com/46796/subway-pact-raises-joint-employer-concerns, Aug. 11, 2016.
6. Penn, "Subway, DOL Sign Compliance Deal for Franchisees," Aug. 1, 2016, 2:01 PM ET, ©TheBureau of National Affairs, Inc.
7. http://nrn.com/quick-service/subway-reaches-labor-deal-regulators, Aug. 11, 2016.
8. Supra. at f.n. 6.