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FRANCHISING

NLRB's 'Joint Employer' Thrust Defies 50 Years of Judicial Precedent

In my last column ("NLRB's Misguided 'Joint Employer' Thrust Against Franchising," NYLJ, Oct. 22, 2015), I reported on the National Labor Relations Board (NLRB) General Counsel's efforts to have franchisors declared "joint employers" of their franchisees' employees and how the NLRB general counsel's thrust clashes with the business structures and norms of franchising, the Lanham Trademark Act and every federal and state franchise law extant in the United States.

In this article, I analyze how the NLRB general counsel's approach is refuted by 50 years of virtually unanimous judicial decisions and address a recent NLRB decision greatly expanding who may be deemed a "joint employer" (and how this decision discarded 30 years of NLRB precedent). I will also discuss the harsh consequences which may pertain should the NLRB general counsel succeed in his efforts to have franchisors declared the "joint employers" of their franchisees' employees.

By **David J. Kaufmann**

Judicial Precedent

The NLRB General Counsel's charge that McDonald's is the "joint employer" of its franchisees' employees is refuted by the vast majority of judicial decisions addressing the issue, which almost universally affirm that the franchisor-franchisee relationship is that of independent contractors. The number of cases so holding is staggering in number.

Perhaps the principle was best enunciated in *Cislaw v. Southland Corp.*, in which the California Court of Appeal ruled that "the franchisor's interest in the reputation of its entire system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent."[1]

As the California appeals court observed in *Kaplan v. Coldwell Banker Residential Affiliates:* "If the law was otherwise, every franchisee who independently owned and operated a franchise would be the true agent or employee of the franchisor."[2]

As noted, the number of decisions similarly holding that the franchisor-franchisee relationship is an independent contractor relationship—and not that of employer-employee or joint employer—are staggering in number and citations of same would simply overwhelm this column. For the latest New York decision so holding, see *Saleem v. Corporate Transportation Group*,[3] in which the Southern District of New York held that a franchisee was properly classified as an independent contractor rather than an employee under the Fair Labor Standards Act.

> Almost uniformly, the courts have held that no employment or joint employment relationship exists between the franchisor and its franchisees or its franchisees' employees.

Similarly, over the past 50 years the courts have had ample opportunity to determine the issue of whether a franchisor is the employer of its franchisees or the joint employer of its franchisees' employees. Almost uniformly, the courts have held that no such employment or joint employment relationship exists between the franchisor and its franchisees or its franchisees' employees, directly refuting the premise underlying the NLRB's complaints against McDonald's marks by monitoring

» Page 7

Most recently, this almost universal principle was enunciated in *Patterson v. Domino's Pizza*,[4] in which an employee of a franchised Domino's Pizza restaurant brought an action against both its franchisee and franchisor Domino's alleging that she was sexually harassed and assaulted while working at her franchised restaurant. Domino's moved for summary judgment, which the trial court granted but which grant was reversed by the California Court of Appeal.

Reversing the California Court of Appeal and reinstating the trial court's grant of summary judgment to Domino's, the California Supreme Court emphasized in elaborate fashion the very premise advanced repeatedly in this column: the vital importance in franchising of the trademark license and the requirement of trademark law that a franchisor exercise controls with respect to those operating under its licensed name, marks and logos in order to protect same:

> The system-wide standards and controls (imposed by the franchisor) provide a means of protecting the trademarked brand at great distances. The goal—which benefits both parties to the contracts—is to build and keep customer trust by ensuring consistency and uniformity in the quality of goods and services, the dress of franchise employees, and the design of the stores themselves....The franchise arrangement puts the franchisee in a better position than other small businesses. It gives him access to resources he otherwise would not have, including the uniform operating system itself.[5]

In footnote 15 of its decision, the California Supreme Court in *Patterson* repeated another theme of this column: "Federal trademark law plays some role in this process... [F]ederal law obligates a licensor of trademarks, such as a franchisor, to protect the integrity of its registered and unregistered

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Franchising

« Continued from page 3

their use, as well as the quality of the goods and services bearing such marks...[A] trademark may be deemed abandoned under federal law if a licensor fails to exercise sufficient control over its use by its licensee."[6]

Emphasizing that franchisor standards and controls do not trigger a "joint employer" scenario, the court in *Patterson* observed most strongly:

> A franchisor, which can have thousands of stores located far apart, imposes comprehensive and meticulous standards for marketing its trademarked brand and operating its franchises in a uniform way. To this extent, the franchisor controls the enterprise. However, the franchisee retains autonomy as a manager and employer. It is the franchisee who implements the operational standards on a day-to-day basis, hires and fires store employees, and regulates workplace behavior. Analysis of the franchise relationship...must accommodate these contemporary realities. The imposition and enforcement of a uniform marketing and operational plan cannot automatically saddle the franchisor with responsibility for employees of the franchisee who injure each other on the job...[W]e cannot conclude that franchise operating systems *necessarily* establish the kind of employment relationship that concerns us here. A contrary approach would turn business format franchising on its head.[7]

Concluding that franchisor Domino's "had no right or duty to control employment or personnel matters for its franchisee...[and] lacked contractual authority to manage the behavior of [its franchisee's] employees while performing their jobs," the court found extant no triable issue of fact and, as noted, reinstated the order of summary judgment granted to Domino's by the trial court.

Patterson hardly stands in a vacuum. See, for example, *Kerl v. Dennis Rasmussen*[8]; *Gray v. McDonald's USA*[9]; *Oroczo v. Plackis*[10]; *Reese v. Coastal Restoration and Cleaning Services*[11]; and, *Coworx Staffing Services v. Coleman*.[12]

'Browning-Ferris'

The NLRB General Counsel had his way in *Browning-Ferris Industries of California*,[13] in which the NLRB held that two or more entities would be deemed joint employers of the same employee if they "share or codetermine those matters governing the essential terms and conditions of employment." Rejecting 30 years of precedent, the NLRB in *Browning-Ferris* went on to declare that reserved authority to control terms and conditions of employment, even if not exercised, is sufficient for a "joint employer" finding.

Per the NLRB, factors to be considered in determining whether a joint employer establishes "essential terms and conditions of employment" include setting wages and hours; dictating the number of workers to be supplied; controlling scheduling; assigning work; and, determining the manner and method of work performance (including the issuance of operating instructions). And, according to *Browning-Ferris*, it is of no consequence that the direction and control of aspects of employment are communicated directly by the putative joint employer or indirectly through the intermediary which actually employs the subject workers.

The Browning-Ferris decision is a nightmare for franchisors. After all, the very basis of franchising is unit replication fostered by required adherence to franchisor standards governing everything from the interior and exterior attributes of a franchised unit to what will be sold thereat. In the fast food sector, the standards dictate what items may (and may not) be offered by franchisees and how they will be prepared. In the guest lodging sector, the standards require franchisees to adhere to detailed reservation, service, renovation, safety and other requirements. I could go on, but you get the point. The Big Mac tastes the same in San Diego as it does in Boston and that franchise business goal of uniformity—and the goal of protecting and preserving one's trademark—depends on a franchisor issuing standards governing how franchised businesses must operate and requiring franchisee adherence thereto.

> According to the U.S. Census Bureau and the International Franchise Association, franchising companies and their franchisees account for nearly $1.3 trillion in annual U.S. retail sales along with $304 billion in payroll and $802 billion of output.

So it is that the Browning-Ferris decision is certainly not a good harbinger for McDonald's (currently before the NLRB on charges that it is the joint employer of its franchisees' employees). Especially since, just the week before *Browning-Ferris* was decided, the NLRB denied McDonald's motion for a description of what precise ways the NLRB General Counsel is contending that McDonald's controls its franchisees' employees, with the NLRB declaring that its general counsel's simple "control" allegation was sufficient.

However, in contrast to some of our colleagues, we are not panicking over the decision in *Browning-Ferris*. Instead, we note a few nuggets in that decision—and in a prior "Advice Memorandum" issued by the NLRB General Counsel—which may presage a different result for McDonald's and other franchisors. After all, *Browning-Ferris* involved a recycling facility that used workers furnished by a staffing company—which workers were in large part directed by the recycling facility itself. The recycling center's control over many aspects of the staffing company's employees was extensive, far more so than in virtually any franchise setting.

Perhaps the NLRB understands this, for in a footnote to its Browning-Ferris decision, it noted that the particularized features of the franchisor-franchisee relationship were not present in the Browning-Ferris scenario and thus were not being addressed. Moreover, in his April 28, 2015 "Advice Memorandum"[14] as to whether fast-casual restaurant franchisor Freshii was the joint employer of its franchisee's employee, the NLRB's Associate General Counsel declared that it was not, even under the expanded joint employer standard urged by the NLRB General Counsel and adopted in *Browning-Ferris*, since the franchisor played no role in the franchisee's hiring, firing, disciplining or supervising employees and was in no fashion responsible for those employees' wages, raises or benefits. At most, said the NLRB Associate General Counsel, the franchisor's control over its franchisee's operations were limited to insuring a standardized product and

customer experience and protecting the quality of its product and brand.

Thus, we think it is early to panic over the NLRB decision in *Browning-Ferris*—especially since, should the pending proceedings against McDonald's Corporation result in its being deemed the joint employer of its franchisees' employees, one can safely predict a swift appeal to the U.S. Court of Appeals which, we assume, will pay greater heed to federal and state franchise laws, federal trademark law and 50 years of judicial precedent than the NLRB General Counsel has evidenced to date.

Conclusion

The NLRB General Counsel's attack on the franchise paradigm threatens to cripple one of the most dynamic and fertile engines of economic growth and opportunity in the United States over the past 50 years. According to the U.S. Census Bureau and the International Franchise Association, franchising companies and their franchisees account for nearly $1.3 trillion in annual U.S. retail sales along with $304 billion in payroll and $802 billion of output.[15] These resources reveal that the U.S. franchise networks operate over 825,000 units in this country and employ more than nine million people—over 6 percent of total nonagricultural employment. McDonald's alone daily serves nearly 50 million customers at 36,000 restaurants in the United States and over 100 countries, which employ 1.9 million people.[16]

Notwithstanding this centrality of franchising to the U.S. economy and further notwithstanding the above-referenced edicts of the Lanham Act, every federal and state franchise law and the virtually unanimous determinations of the judiciary over the past 50 years, the NLRB General Counsel's attempt to shatter the franchise model continues unabated with the ongoing proceedings against McDonald's. All of this in the absence of any NLRB hearings, investigations, communications with the Federal Trade Commission (which since 1979 has regulated franchise sales activity in this country) or, seemingly, any fact-finding or evidence gathering whatsoever.

1. 6 Cal. Rptr. 2d 386, 391 (Cal. Ct. App. 1992).
2. 69 Cal. Rptr. 2d 640, 642 (Cal. Ct. App 1997).
3. 52 F.Supp.3d 526 (S.D.N.Y. 2014).
4. 333 P.3d 723 (Cal. 2014).
5. Id. at 490-91 (internal citations and quotation marks omitted).
6. Id. at 491 n.15 (internal citations and quotation marks omitted).
7. Id. at 478-479, 497-499 (emphasis in original) (internal citations and quotation marks omitted).
8. 273 Wis. 2d 106 (Wis. 2004) ("We conclude that the marketing, quality and operational standards commonly found in franchise agreements are insufficient to establish the close supervisory control or right of control necessary to demonstrate the existence of a master/servant relationship for all purposes or as a general matter...[Franchisor] Arby's did not have control or the right to control [its franchisee's] supervision of its employees.")
9. 874 F.Supp.2d 743 (W.D. Tenn. 2012) ("...[T]he undisputed evidence establishes that McDonald's and [its franchisee] are not so interrelated that they may be considered a single employer or an integrated enterprise").
10. 757 F.3d 445 (5th Cir. 2014).
11. No. 1:10 CV 36-RHW, 2010 WL 5184841 (S.D. Miss. 2010).
12. 2007 WL 738913 (Mass. Super. Ct. 2007) ("The franchisor must exert some degree of control over the franchisee to protect its trade or service mark...[A]pplying strict liability to a franchisor for the acts of its franchisee would be unfair because the franchisor's control usually does not consist of routine, daily supervision and management of the franchisee's business but, rather, is contained in contractual quality and operational requirements necessary to the integrity of the franchisor's trade or service mark").
13. 362 NLRB 186 (August 2015).
14. *Nutrionality d/b/a Freshii*, Cases 12.CA-134294, 138293 and 142297, Advice Memorandum 177-1650-0100 (April, 2015).
15. PriceWaterhouseCoopers, Economic Impact of Franchised Businesses, International Franchise Association Educational Foundation (2004); U.S. Census Bureau and U.S. Department of Commerce, 2007 Economic Census Franchise Report, www.census.gov/newsroom/releases/pdf/franchiseflyer.pdf.
16. McDonald's: Getting To Know Us, http://www.aboutMcDonalds.com/mcd/our_company.html.