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177 DLR C-1

## Restaurants

### To Unions, McDonald's Joint Employer Status No Slam Dunk, as Fast Food Push Intensifies



By Ben Penn

Sept. 3 — When the National Labor Relation Board general counsel recently authorized complaints alleging McDonald's USA LLC is a joint employer with franchised stores, the news was widely hailed by unions and progressive groups as a major victory for the national fast food worker organizing campaign.

But McDonald's is challenging the general counsel's view on joint employer status and those cases could take years to wend their way through the NLRB and the courts. Prospects for short-term advances for the union-backed campaign hinge not on the NLRB or the courts, but rather on the campaign's ability to amplify pressure on the fast food giant, sources told Bloomberg BNA.

NLRB General Counsel Richard F. Griffin's recent notice instructing regional offices to allege that McDonald's is a joint employer with its franchisees in numerous pending unfair labor practice cases was described in a July 29 NLRB statement as resulting from "activities surrounding employee protests" (145 DLR A-1, 7/29/14).

All authorized cases stemmed directly from employer responses to workers' involvement in the national organizing effort coordinated and funded by Service Employees International Union, a campaign spokeswoman told Bloomberg BNA Sept. 8. Asked to corroborate the campaign's assertion and provide case documents, the NLRB and attorneys filing charges in multiple cities across the country declined.

The national campaign lacks a formal title but is often referred to as the Fight for \$15 or Fast Food Forward. The coalition of unions and other allies supporting higher pay for fast food workers has begun to strategize around Griffin's announcement.

Stakeholders also are watching a pending board case raising the question whether Browning-Ferris Industries of California Inc. is the joint employer of workers furnished by another company (146 DLR AA-1, 7/30/14). The board's eventual ruling in the case has the potential to affect joint employer status in the entire private sector.

Griffin argued in a brief in the *Browning-Ferris* case that technological changes allow franchisers to dominate franchised businesses and that the board should "adopt a new standard that takes account of the totality of the circumstances, including how the putative joint employers structured their commercial dealings with each other."

#### Eleventh Walkout Added Civil Disobedience

The first public test of whether the general counsel's announcement regarding the McDonald's cases added momentum to the effort to mobilize the nation's nearly 4 million fast food workers came Sept. 4, when employees in 150 cities walked off their jobs, organizers said (171 DLR A-12, 9/4/14). For the first time, they said, participants engaged in acts of civil disobedience, leading to at least 436 arrests, and home care workers joined the protests.

The strikes and protests to demand a \$15 industrywide hourly wage floor and union rights marked the 11th in a series of coordinated one-day walkouts since November 2012 (230 DLR A-12, 11/29/12).

But the general counsel's announcement already has had two kinds of impact, according to union and management sources. The fast food campaign now feels emboldened that it will have sufficient worker support to force McDonald's to the bargaining table and major fast food companies are expected to halt or slow their franchise expansion pending completion of the NLRB cases.

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Reflecting a common labor movement sentiment, Sarita Gupta, executive director of SEIU's ally Jobs With Justice, said Aug. 19 "a big reason workers have lost bargaining power is because employers like McDonald's are able to say it's somebody else's responsibility. It was like a shell game for too many workers; nobody knew who their real boss was."

The NLRB general counsel's stance "says McDonald's is the boss, so

***acts of civil disobedience, leading to at least 436 arrests, and home care workers joined the protests.***

that's who we're going to go after and set forth demands on," Gupta said. "Yes, there are likely to be legal challenges, but our take from an organizing perspective is we're going to run with McDonald's as the boss and McDonald's should do better."

### **Level of Protest Activity Strongly Contested**

An assessment of whether the NLRB general counsel's McDonald's announcement led to more workers on the picket lines Sept. 4 than in previous demonstrations is difficult.

The campaign has declined to provide a more detailed estimate of the number of strike participants in September and May beyond stating "thousands" of workers walked off their jobs in the 150 cities combined.

McDonald's Sept. 4 claimed no more than 10 employees scheduled to work that day failed to show up and instead took part in the protests.

Kendall Fells, an SEIU coordinator, asserted in May that McDonald's is able to reduce the number of employees who walked off the job by intentionally keeping workers it knows have taken part in past actions off the schedule for the planned strike day. Campaign spokespeople repeatedly have refused to explain why a more specific estimate than "thousands" is not available, beyond stating they will not engage in a numbers game with the fast food industry.

***McDonald's Sept. 4 claimed no more than 10 employees scheduled to work that day failed to show up and instead took part in the protests. When asked to respond to the allegation that it removes expected protestors from the day's work schedule, a McDonald's spokeswoman said, "We do not offer comment on purported story lines created to attract media attention."***

When asked to respond to the allegation of removing protestors from the work schedule, McDonald's spokeswoman Heidi Barker Sa Shekhem told Bloomberg BNA in an e-mail Sept. 1, "We do not offer comment on purported story lines created to attract media attention."

Barker Sa Shekhem wrote in an Aug. 29 e-mail that "the vast majority of protestors" in past actions "are not McDonald's workers, but are paid participants." The company does not define the walkouts as strikes, because business operations continued. McDonald's statements repeated the payment accusation on Sept. 4,

declaring that the company has heard workers were paid up to \$500 to protest and get arrested.

"Workers are not getting paid to strike," Fells said Sept. 4. "It's an age-old tradition in the union movement that workers who are losing pay by going on strike get support from other workers through strike funds. Other workers are supporting strikers through a strike fund, as they have since this movement started. McDonald's seems desperate to change the subject" from its low wages, Fells said.

### **Mum's the Word from Fast Food Giants**

Whether the repeated organizing activity translates into collective bargaining, within or outside the National Labor Relations Act framework, still depends on employers' willingness to initiate a conversation with workers or their bargaining agents.

There's no evidence that McDonald's or other leading burger chains Wendy's and Burger King have engaged in a dialogue with the campaign or workers about their demands. McDonald's, through Barker Sa Shekhem, confirmed to Bloomberg BNA Sept. 2 that it has not had such discussions.

The national campaign's focus on corporate parents lends credence to the notion that it is seeking a companywide solution that includes a \$15 minimum wage and union representation, rather than proceeding store by store.

Publicly, McDonald's and industry groups such as the National Restaurant Association, the International Franchise Association and the U.S. Chamber of Commerce, have denied the existence of a widespread worker movement, attributing the activity instead to SEIU's alleged desperation to restore declining bargaining power.

The business groups maintain that a new legal standard that would treat McDonald's and its franchisees as joint employers would be a preposterous departure from the NLRB's decades-long precedent. Decisions such as hiring and firing are made entirely by franchisees independent of the corporate franchiser, they say.

However, a more liberal NLRB joint employer definition could put franchisers in the situation of having to bargain on behalf of franchisees. The board's current standard—formed 30 years ago in *TLI, Inc.*, 271 N.L.R.B. 798, 117 LRRM 1169 (1984), and *Laerco Transportation*, 269 N.L.R.B. 324, 115 LRRM 1226 (1984)—holds that a joint employer finding requires proof that an organization has substantial, direct, and immediate control over employment matters, not just potential "limited and routine" supervision of the employees of a contractor, leasing firm, or other intermediary.

That precedent, Griffin wrote in a June amicus brief in *Browning-Ferris*, has applied an improperly narrow view of commercial relationships and joint employer status.

### **Campaign Already Pivoting**

Independent of the NLRB general counsel's action, organizers were already prepared to advance from the campaign's initial phase of "reaching the hearts and minds of the American public" about the poor quality of these jobs, Gupta said.

"I think the phase that we're really pivoting into" now is "the company can do something about it," Gupta told Bloomberg BNA Aug. 19. "This isn't just let's feel sorry for the workers; this is let's actually hold McDonald's accountable."

Asked to discuss how the general counsel's announced stance on joint employers could interact with this mission, former NLRB Chairman Wilma Liebman told Bloomberg BNA Aug. 25 that at the very least it will keep the fast food campaign on its previous trajectory.

"I think it is certainly a logical possibility that the fact that the general counsel has proceeded like this would be an encouragement for people that are interested in the campaign" and that workers' concerted activity "would continue and maybe accelerate," said Liebman, who was a board member from 1997 to 2011 and has advised attorneys working on the fast food campaign's joint employer argument.

While SEIU leadership declined an interview request, the national organizing director for AFL-CIO, Elizabeth Bunn, told Bloomberg BNA Aug. 22 that the general counsel's position helps the fast food campaign by tilting the legal balance in the workers' direction.

"This adds an additional legal incentive for McDonald's to do the right thing" by its employees, said Bunn. Although the SEIU left the AFL-CIO and is affiliated with the Change to Win labor federation, the AFL-CIO is still tracking the joint employer issue and supporting fast food workers, she said.

"Any time there's a decision or a policy or even an understanding on the part of employers that it's in their interest to allow workers to exercise their rights in the workplace, that helps organizing," Bunn said.

### **General Counsel Found 43 Cases Have Merit**

Bunn was referring to the general counsel's finding that at least 43 out of 181 unfair labor practice charges filed against McDonald's USA and its franchisees since November 2012 have merit.

If the companies and the general counsel are unable to reach a settlement over allegations that McDonald's violated employee rights "as a result of activities surrounding employee protests," NLRB regional offices will issue complaints naming the parent company as a joint employer respondent along with the franchisee, according to a July 29 NLRB statement.

Micah Wissinger, a partner in Levy Ratner P.C. in New York who represents fast food workers involved in some of the ULP cases, said during a July 29 press call that "whatever happens, McDonald's" corporate "is now going to be part of the equation."

McDonald's USA "will contest this allegation in the appropriate forum," Heather Smedstad, the company's senior vice president of human resources, said in a July 29 statement.

### **Campaign Seeks to Capitalize on Potential Standard**

But unions are not content to wait for the McDonald's and Browning-Ferris cases to work through the NLRB's elongated process.

Richard Trumka, president of the AFL-CIO, said it's not too soon to map out a plan to capitalize on a possible new joint employer standard.

"We're looking at that right now; it really takes a while to go up the food chain—it's not as simple as people think to figure out who is the controlling entity. A lot of times it gets back to a hedge fund somewhere," Trumka said, responding to a Bloomberg BNA question at a Christian Science Monitor breakfast Aug. 28 (167 DLR A-10, 8/28/14).

Trumka cited the AFL-CIO's burgeoning affiliate, the National Taxi Workers Alliance, as a way his federation is already combating the perception that certain employees cannot be organized (162 DLR A-14, 8/21/14).

Union sources declined to try to predict whether and when the NLRB general counsel's announcement might lead to organizing victories.

Fells said during the July 29 press call that the general counsel's action means "at some point McDonald's has to make a decision on if it makes sense to keep fighting with these workers or does it make more sense to actually come to the table."

Liebman said she expects McDonald's will assess the strength of its legal case, factoring in the pressures from walkouts and the growing negative public attention. "Whether all this attention, all this publicity, all this scrutiny will put pressure on the company to want to address these problems and perhaps to start talking to the campaigners and the union, it's hard to say what their reactions will be," Liebman said.

McDonald's, which denied Bloomberg BNA's request to interview HR executive Smedstad, declined to discuss whether the company would consider meeting with workers or organizers. "We don't believe it's prudent or responsible to speculate on 'what if' or 'would you' scenarios," Barker Sa Shekhem wrote in an Aug. 29 e-mail.

Yet behind the scenes, McDonald's government disclosures tell a different story. In the company's annual 10-K filing with the Securities and Exchange Commission for 2013 made public earlier this year, McDonald's acknowledged that the worker campaign poses a potential threat to earnings. A list of risks to future profits included, "The impact of campaigns

by labor organizations and activists” to “promote or threaten boycotts, strikes or other actions involving the industry, McDonald's or our suppliers and franchisees.”

Barker Sa Shekhem emphasized that the 10-K filing referred to potential risks and “not confirmations” of unrest. She declined to explain what necessitated the campaign's inclusion on this list.

It is clear to union sympathizers such as Cornell University labor professor Kate Bronfenbrenner that the campaign must not relinquish its focus on grassroots worker organizing. The NLRB general counsel's position on joint employer status in the McDonald's cases is an “enormous psychological victory,” allowing “workers who are taking the risk” to gain confidence, Bronfenbrenner told Bloomberg BNA Aug. 19.

Involving workers in a comprehensive campaign in and out of the workplace, particularly in places where fast food companies are trying to expand, will fuel increased pressure, Bronfenbrenner added. It all can culminate in an employer agreement if “the cost for the company of not paying more money or not signing some kind of agreement is greater than the cost of not doing that.”

Glenn Spencer, vice president of the U.S. Chamber of Commerce's Workforce Freedom Initiative, said in an Aug. 12 interview “the franchiser would typically not sign a card check or neutrality agreement that's going to extend out to all the franchisees.” Therefore, “the SEIU at the bargaining table is going to have to make it as contentious as possible, ratchet up demands and say we can make all that pressure go away if you'll just sign this.”

### **International Pressure, Civil Disobedience**

The campaign has already evolved over the last year in several ways, including a nationwide day of walkouts in May that was synchronized with international protests on six continents (94 DLR A-9, 5/15/14).

The international element of the organizing drive is seen by organizers as critical in light of the fast food industry's global presence and majority share of sales rooted overseas. According to a McDonald's analysis of its 2013 financial information, 24 percent of global sales last year came from its more than 14,000 U.S. stores. The remaining 76 percent of sales were from the more than 21,000 McDonald's locations overseas.

In a July 3 background press call, a top-level fast food campaign strategist said the global aspect will deepen over the next year.

Considering McDonald's thus far does “not agree with the premise that it's in their self interest” to meet with workers and their supporters, “I certainly think that globally it's important for them to learn the lesson that it is in their self interest,” the AFL-CIO's Bunn said.

The campaign was able to align a U.S. strike with international protests for the first time in May through an accord reached with the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), which includes 396 trade unions in 126 nations representing 12 million workers.

Scott DeFife, the National Restaurant Association's executive vice president for policy and government affairs, dismissed the international component as “another aspect of the PR effort” by SEIU, and not a signal of mounting pressure. “They got alignment with one very large international union to rally to their cause, but that is not necessarily an indicator of where things are going, nor does it have any relevance to the law here” in the U.S., DeFife told Bloomberg BNA Aug. 27.

Management attorney Donald Schroeder, of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo in Boston, said in an Aug. 27 interview that social media has facilitated unions' overseas networking and been a “huge benefit” for them. However, he expects “an uphill battle to establish an international corporate campaign” by unions to pressure McDonald's.

In a tactic just launched with the Sept. 4 strikes, workers engaged in civil disobedience to intentionally get arrested during protests. This followed a July 26 vote at a fast food worker convention in Chicago where some 1,300 workers unanimously passed a resolution to “engage in non-violent direct action” to “make large corporations hear” them, organizers said (144 DLR A-6, 7/28/14).

Participation in the Sept. 4 protests may have expanded in several cities in which SEIU encouraged its legions of home health care worker members to march in solidarity with fast food employees. This added hundreds of protestors across the nation, a campaign spokeswoman said, but the union did not provide an estimate of how many home care workers actually participated.

One additional and perhaps least expected ally for the worker movement came in the form of SEIU California's partnership with the state's franchisees. Together, they advocated for a recently passed bill that awaits a decision from Gov. Jerry Brown (D). The legislation (S.B. 610) would protect franchise owners from early termination of their contracts by corporate franchisers, and is seen by SEIU as key to freeing up franchisees to improve workplace conditions (163 DLR A-11, 8/22/14).

### **Sides Dispute Campaign's Goals**

While organizers' intention to leverage a joint employer standard that covers fast food franchisers is a given, business groups' expectations of union tactics around this idea substantially conflict with the campaign's account.

The Chamber's Workforce Freedom Initiative, which says its mission includes blocking the “anti-competitive agenda advocated by many labor unions,” is strongly opposing a redefined joint employer rule. In the meantime, the WFI is

educating members on the issue and what recourse they may have.

The WFI's Spencer, who has been tracking SEIU spending and coordination, believes the union's plan "to take on the fast food industry" includes several benchmarks. The first step, he said, was to establish worker center affiliates in major cities across the country to spark local protest activity and generate attention. A WFI analysis of SEIU's 2013 LM-2 filing to the Labor Department revealed the union funneled \$16 million to 20 such centers in 2013.

However, the spending figures do not prove that money was spent entirely on fast food organizing. For instance, while the \$1.9 million sent to the Fast Food Workers Committee in New York was for the entire purpose of "support for organizing," the \$759,000 to We Are Oregon was for political advocacy.

The second step, Spencer said, was for SEIU to "tie franchisees and franchisers together for NLRB purposes," as is playing out now in the McDonald's and Browning-Ferris cases.

He predicted the next step for the campaign will involve identifying "one of the weakest franchisees around the country where you've already got your worker center established," and to pick off that vulnerable store by bringing it to the bargaining table and forcing "the larger brand to go to the table with you."

"At that bargaining session you use every piece of leverage to force the employer to sign a companywide card check agreement, and from there you can pick off the franchises around the country," Spencer said.

Yet the campaign denies that a card check agreement is necessarily the end goal, and claims it is still uncertain whether SEIU is the best union to represent these workers.

SEIU's Fells, who trains the campaign's local organizers across the country, told Bloomberg BNA in July that there's an understanding within the SEIU and the labor movement as a whole that fast food workers may not necessarily become SEIU members. Rather, they could form an independent union, join a separate existing union, receive voluntary recognition through a card check by a neutral third party, or receive representation through non-union worker centers.

That question won't be resolved "until we get to the table with the actual industry to see how much power the workers would have," Fells said.

### **Fast Food Ripe for Non-NLRB Organizing**

Those not directly affiliated with the campaign anticipate the worker center model, rather than an NLRB representation election or card check agreement, could be the best fit for fast food organizing.

"I am all for creative thinking and experimentation" Liebman said. The NLRA is based on the industrial workplace model that was prevalent decades ago, and the statute "has been totally resistant to any legislative change for decades. I think it's not only a good idea; I think it's inevitable given the gridlock on labor law reform for so long."

She added that certain aspects of the fast food workforce make a non-NLRA model particularly desirable for those employees. "It is an industry which for a variety of reasons has probably traditionally been very difficult to organize under the labor law model" because there is a lot of turnover, few employees in each store, and workers "spread out all over a city," Liebman said. "So yes, the demographics, the very part-time nature of employment, makes it hard to organize and this kind of pervasive low-wage work, in some ways makes it very ripe for" a new type of organization.

SEIU International Vice President David Rolf, acknowledging he does not necessarily represent the consensus view among the union's leadership, told Bloomberg BNA June 25 that he's "not sure it's important for" fast food workers "to have a union. I think it's important for them to have some form of organizational power; that may look like a traditional collective bargaining unit, but it may not."

Rolf made those comments before the general counsel's announcement about the McDonald's cases, but his view hasn't changed. He said in an Aug. 19 e-mail "it remains to be seen whether fast food workers will organize" in large numbers "under traditional collective bargaining or whether they need a new model for holding these multinational corporations accountable."

***In the fast food industry, "the demographics, the very part-time nature of employment, makes it hard to organize and this kind of pervasive low-wage work, in some ways makes it very ripe for" non-traditional representation, former NLRB Chairman Liebman said.***

Bronfenbrenner drew parallels to the first General Motors contract after the sit-down strikes of the 1930s. An initial fast food worker agreement, "is going to look a lot like the first GM unit. All they got was a contract that said what the pay was and that the union was recognized," allowing union protection regarding certain terms and conditions of employment, she said. "It was just one piece of paper" covering many plants.

Asked to describe McDonald's stance on unions, Barker Sa Shekhem wrote that the nation's largest fast food chain "respects people's rights to lawfully demonstrate and voice their own opinions, and we respect the legal right of employees to choose whether or not they want to unionize."

Burger King declined Bloomberg BNA's interview request, while Wendy's did not respond.

### **Franchising Agreements Could Slow**

As McDonald's prepares its arguments to contest joint employer status with franchisees, and the rest of the private

sector awaits a board ruling in *Browning-Ferris*, the practice of franchising arrangements is in limbo, DeFife said.

Business ramifications “can only be negative right now, because” the NLRB has created “uncertainty for businesses planning to expand under the franchise model” as far as liability going forward, DeFife added. He expects companies will be hesitant to expand through franchising, an arrangement that McDonald’s says covers at least 80 percent of its locations worldwide.

Another short-term impact, Schroeder said, is the general counsel’s announcement “has necessitated a full-blown audit by the company to ensure that the arm’s length existence of the franchiser/franchisee relationship exists.” Those steps would be taken “just to make sure there is no doubt in that regard,” he said.

Asked in a June 20 interview to describe the day-to-day relationship between franchisers and their franchisees, Steve Caldeira, president and chief executive officer of the International Franchise Association, said “I’m not sure there are interactions on a typical day.”

If the question is whether “the franchisers are in the stores telling them how to run the stores every day, the answer is no,” said Caldeira. Franchisees “follow a playbook. It’s all about ensuring that the brand remains consistent and relevant and credible,” he added. McDonald’s sits on the IFA’s board.

However, Liebman is skeptical that McDonald’s is capable of proving independence from its franchisees for purposes of employment responsibility.

“They have this model which the employees are arguing creates an enormous degree of control over the operations of the franchisees, so that there’s very little autonomy that they have in operations, including employment and human resources and labor relations,” Liebman said. “I’m going to assume that they’re probably going to be evaluating their model and how they do things, but to some extent, this is their business model,” and that’s what is “going to be tested.”

Fast food workers filed potential class actions in three states in March, in which attorneys working in collaboration with the campaign alleged McDonald’s USA is jointly responsible with franchisees for employee “wage theft” (49 DLR A-16, 3/13/14).

Plaintiffs have cited as evidence of dual control in those cases the labor efficiency software provided by the corporate parent to McDonald’s franchisees. The software instructs managers when to take employees on and off the clock.

### **Success Measured in Minimum Wage Hikes**

To Gupta of Jobs With Justice and many other campaign supporters, regardless of the exact worker head count, the campaign has already achieved success when measured by the heightened national support to raise the minimum wage. A growing number of states and localities have approved measures this year to increase floor pay. Most notable was a law passed in Seattle with SEIU’s strong support to bring the minimum wage to \$15 an hour by 2017, exactly in line with the fast food workers’ demands and the highest in the nation (175 DLR A-12, 9/10/14).

But the minimum wage discussions and legislation were not the original intention of the campaign. Rather, they were an unexpectedly successful offshoot, organizers said. They have been squarely focused on getting a fast food employer to the bargaining table—before, during and after the general counsel authorized cases alleging McDonald’s is a joint employer with the franchisees.

“We’re ready to put the pressure on McDonald’s to do right here with workers and put the same kind of pressure on other fast food companies, because this is really about people’s survival on the basic level,” Gupta said. “I think the NLRB [general counsel’s action] really helps fuel a lot of the energy and thinking around putting the pressure on the company now more than ever.”

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