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NLRB

Franchising Group Writes to NLRB's Griffin Seeking Rationale for Joint Employer Stance

By Ben Penn

Oct. 31 — Echoing three similar letters signed by 126 members of Congress, the head of the International Franchise Association wrote to the National Labor Relations Board general counsel Oct. 30 to request that he disclose an advice memorandum regarding the joint employer status of McDonald's USA LLC with its franchisees.

The IFA also submitted a Freedom of Information Act request for General Counsel Richard Griffin's memorandum, which according to a July 29 NLRB statement authorized complaints in at least 43 cases alleging that McDonald's USA LLC is jointly liable for unfair labor practices at franchisee-operated stores across the country (145 DLR A-1, 7/29/14; 146 DLR AA-1, 7/30/14).

Currently, there's great uncertainty for franchisers and franchisees—including those outside of the fast food industry—who are operating in the dark until Griffin's explanation is published, the Washington-based trade group said. It also asked Griffin to "reveal the franchise joint employer test and specify the factors [he] and the NLRB have used, or intend to use, in determining joint employment."

The IFA has been lobbying lawmakers on this issue since the July 29 NLRB announcement, prompting 126 members of the Senate and House, three of them Democrats, to sign letters to Griffin since September, IFA spokesman Matthew Haller told Bloomberg BNA Oct. 31. In a letter urging the general counsel to disclose his rationale, Reps. Virginia Foxx (R-N.C.) and Jim Matheson (D-Utah) stated, "Your determination is inconsistent with decades of settled federal law." The lawmakers added that franchisees have autonomous control of employment conditions.

NLRB Associate General Counsel Barry J. Kearney said during an Oct. 21 Bloomberg BNA webinar that discussions with McDonald's USA and other parties, including talks on how to "streamline" the litigation, are "close to the end," and that the general counsel will make a decision shortly on proceeding with the cases (203 DLR A-3, 10/21/14).

Asked Oct. 31 to respond to the IFA's letter, JoVonne Lane, an NLRB spokeswoman, declined to comment. She did say the general counsel's office has received and "will be addressing" the letter.

Joint Employer Issue of Chief Concern to IFA

To highlight the broad impact on the franchise relationship, the IFA hosted a press call Oct. 30 featuring the chief executive officer of sign manufacturer FASTSIGNS International Inc., along with one of its franchised store owners, both decrying the NLRB's potential to harm their business model.

Steve Caldeira, president and chief executive officer of the IFA, led off the call by offering updates on how non-McDonald's franchises already have been affected by the general counsel's announcement. He said since July 29, 61 new labor complaints have been filed against 27 franchises in such industries as lodging, travel and full-service restaurants. Some of those charges specifically have mentioned the McDonald's joint employer cases, Caldeira added.

Asked during the call why no representative from the restaurant industry was present, Caldeira replied that "part of [its] point" is that "this is not a McDonald's issue; it's a franchising industry issue."

The IFA's board of directors includes a seat for John Kujawa, vice president of franchising for McDonald's USA. Kujawa also sits on the IFA's executive committee, but according to Haller, hasn't been involved in the association's communication with the general counsel's office.

In September, the IFA told Bloomberg BNA that it's increasing federal lobbying efforts to combat the push to expand franchisers' joint employer liability (186 DLR A-14, 9/25/14).

In addition, Caldeira told reporters on the call that the IFA soon will launch a hotline and informational website, both designed to educate members with questions about the potential for a new joint employment standard in franchising. Caldeira acknowledged that the group "[doesn't] know a lot because" Griffin "has not been forthcoming" regarding his decision.

Discussion Centers on Technological Advances

Although the advice memorandum remains sealed, a management-side labor attorney joined the IFA's call to refute a legal theory Griffin advanced at a West Virginia University labor law conference Oct. 24.

At the conference, Griffin referenced labor efficiency software programs that corporate franchisers provide to their franchisees, according to Michael Lotito, co-chair of Littler Mendelson's Workplace Policy Institute.

Lotito said he thinks “a fair interpretation” of Griffin's comments is that because there are now software programs to deal with staff and scheduling issues, franchisers have “much more direct control” over franchisees than when the NLRB first established that franchisers aren't joint employers with franchisees.

But Lotito added that conversations he's had with franchised business owners indicate that “not all of them have these kinds of software programs, and even if they do have them, it's nothing more than a tool” to determine staffing levels. “In no way is the franchiser directing” franchisees “to do something” based on the technology, Lotito said.

When asked to address how McDonald's uses its labor software, both Caldeira and Lotito replied that they couldn't speak on the company's behalf.

In addition to shedding light on the subject in West Virginia, Griffin filed an amicus brief in June urging board members to adopt a new standard for identifying joint employers under the National Labor Relations Act. In that brief, he cited franchise business relationships as a reason for doing so, fleshing out his thoughts on how technology has altered the franchising landscape.

“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; track how long it takes for employees to fill customer orders, accept employment applications through the franchisor's system; and screen applicants through that system,” the general counsel told the board.

Using technological developments like scheduling and labor management programs “that go beyond the protection of the franchisor's product or brand,” Griffin argued, franchisers have maintained and enhanced substantial control over local franchised operations.

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For More Information

Text of Caldeira's letter is available at http://op.bna.com/dlrcases.nsf/r?Open=bpen-9qdthp.

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Stephen J. Caldeira, CFE
President & Chief Executive Officer

October 30, 2014

The Honorable Richard F. Griffin, Jr.
General Counsel
National Labor Relations Board
1099 14th Street, NW, Suite 7500a
Washington, DC 20005

Dear General Counsel Griffin:

As I mentioned in our April 25 meeting earlier this year, the IFA is the oldest and largest trade association in the world devoted to representing the interests of franchising. Its membership includes franchisees, franchisors and suppliers. The IFA's mission is to protect, enhance and promote franchising through government relations and public policy, media relations and professional development programs and initiatives on issues that affect the franchising industry. IFA's membership currently spans more than 300 different industries, including more than 17,000 local franchise business owners, 1,300 franchisors and over 700 supplier members nationwide.

On July 29, 2014, your office authorized 43 complaints to be issued against McDonald's USA and a variety of its local franchise business owners as joint employers. Since then, 61 new charges have been filed against 27 other franchise brand companies and local franchise business owners. These include travel and lodging, hospitality management, full-service restaurants and operational service and maintenance industry franchises.

Clearly, your announcement has opened the floodgates for the NLRB to investigate whether any franchisor should be named as a joint employer. These multiple charges in NLRB regions across the country have caused many of our members to expend valuable time and effort that could be used to manage and grow their businesses and create jobs. These charges have also forced these hard-working local business owners to spend precious financial resources to defend against a new theory of liability, which you never articulated or made public. Then, on Oct. 24, in a speech at West Virginia University, you exacerbated the legal uncertainty by claiming the new theory your office is applying may face "a problem legally."

Respectfully, due process demands much more from your office as General Counsel of the NLRB. Your July 29 announcement regarding joint employer was of major interest to the 350 local small business owners who attended our Public Affairs Conference in D.C. last month. Many of those independently-owned small business owners, representing brands from diverse industries around the country, articulated their serious concern to their elected representatives. As a result of these efforts, 129 bipartisan members of Congress have asked you to disclose the theory behind the joint employer charges being levied against McDonald's and dozens of other franchisors across a vast array of business segments. The Congressional request rightfully aims to hold your office accountable for causing mass confusion among businesses using the long-standing, well-established franchising model.

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In an unprecedented move, you appear to have ignored decades of established law governing joint employment and franchising. Your approach is contrary to joint employment liability standards being applied in the courts across the country. For instance, in *Patterson v. Domino's Pizza*, the California Supreme Court recently rejected a proposed new standard for vicarious liability based on the franchisor's use of a uniform marketing and operational plan. The court stated that vicarious liability would attach only if the franchisor retained the employer's traditional rights of general control over day-to-day hiring, direction, supervision, discipline and discharge of the franchisee's employees. These divergent standards threaten America's 777,000 businesses that rely upon the franchise model, an industry that has outpaced the overall growth of the U.S. economy for the past five years, and which supports 8.5 million direct jobs, and nearly 18 million direct and indirect jobs accounting for over $2.1 trillion in economic output and 3.5% of U.S. GDP.

We are respectfully requesting that you immediately disclose your advice memorandum in the McDonald's cases. We also ask that you reveal the franchise joint employer test and specify the factors you and the NLRB have used, or intend to use, in determining joint employment. This disclosure is only fair, and would significantly help to stabilize a current business and legal environment of profound uncertainty. It would also allow businesses to take action, if necessary, to avoid potential liability. Nothing less than full disclosure is appropriate, in the name of due process, basic fairness and, from an Administration that stated it was going to be open and transparent with the American people.

We look forward to receiving your memorandum and supporting materials.

Sincerely,

Stephen. J. Caldeira