CLIENT ALERTS & INSIGHTS

McDonald's Prevails Against Joint Employer Theory in Ninth Circuit

OCTOBER 2, 2019

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The Ninth Circuit ruled on October 1, 2019, that McDonald's cannot be held liable for wage and hour violations allegedly committed by a franchisee in California because McDonald's did not exert sufficient control over the franchisee's workers to qualify as a joint employer. The appellate court upheld a 2017 district court decision that found that the company did not control wages, hours, and working conditions of its franchisees.

The Ninth Circuit stated that while there was arguably evidence that McDonald's was aware the franchisee violated California's wage and hour laws with respect to the franchisee's employees, there was no evidence that McDonald's had the requisite level of control over such alleged wage and hour issues to be deemed liable as a joint employer.

While workers argued that McDonald's exerted control over them, McDonald's countered that it did not nothing more than make recommendations and offer best practices to franchisees that those franchisees were free to reject. For example, McDonald's made timekeeping software available to its franchisees, but any use was voluntary and not required.

The Ninth Circuit found that McDonald's direct control over franchisees' employees was focused on quality control, but not a "general right of control" over daily operations at the franchisee. The court stated that McDonald's and other franchisors "need the freedom to 'impose comprehensive and meticulous standards for marketing [their] trademarked brand and operating [their] franchises in a uniform way.'" The court continued that McDonald's involvement with its franchisees and the franchisees' workers is focused on maintaining such brand standards, but does not extend to control over wages, hours, or working conditions. This distinction also led the court to conclude that McDonald's did not "suffer or permit" the franchisee employees to work and, thus, could not fall within the definition of an employer under California common law.

The decision represents another battle in the ongoing joint employer determination. A parallel campaign is continuing before the National Labor Relations Board ("NLRB"). In December 2017, the NLRB overruled a 2015 precedent and restored a more traditional analysis for determining whether a company qualified as a joint employer. The December 2017 decision in *Hy-Brand Industrial Contractors* returned to a standard to establish joint employer status that required an employer to actually exert direct and immediate control that is not limited and routine over another entities' employees to qualify as a joint employer, replacing the *Browning-Ferris* test that allowed mere reserved, indirect control that could, but not necessarily was, exerted. (see our prior alert on *Hy-Brand*). The *Hy-Brand* decision, however, was vacated in February 2018 when it was determined that the deciding voter,

NLRB member William Emanuel, should have recused himself from the decision based on his past employment at Littler, which represented one of the parties in *Browning-Ferris*. (see prior alert regarding decision to vacate). In response, in September 2018, the NLRB issued a proposed rule to define "joint employer" that aligns with the vacated *Hy-Brand* decision. (see prior alert regarding joint employer rulemaking). The proposed rule is still pending.

For more information about this proposed rule update, contact a member of the firm's Labor & Employment Practice Group.

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