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Shifting Landscape: Labor and Employment Matters to Watch in 2017

In the New Year the franchise industry will continue to grapple with the same labor and employment challenges we faced in 2016. But we anticipate positive developments on several fronts. The legal conversation has been dominated by the NLRB and its expansive joint employment standard, vicarious liability, overtime pay, and minimum wage increases. Even if the federal government now pulls back on some of these initiatives, franchised businesses should be prepared for continued battles at the state and local level on many of the same issues. Here we highlight several key developments that will further inform the conversation and perhaps provide a glimpse of things to come in 2017.

Changes at the Department of Labor

Under the Obama administration, the U.S. Department of Labor (DOL) has been very active in issuing guidance to protect workers and cracking down on labor and employment law violations. The DOL has targeted the franchisor-franchisee relationship through aggressive regulation, guidance memoranda, and administrative enforcement actions, seeking to classify it as an employment relationship and expanding joint employment liability to franchisors for violations of the franchisees. Under a new administration and a new Secretary of Labor, the DOL could be poised for a considerable transformation. President Donald Trump's pick for Secretary of Labor, Andrew Puzder, is the CEO of CKE Restaurants, owner of the franchised Carl's Jr. and Hardee's brands. If confirmed, Puzder will have the authority to materially change the DOL's direction and priorities on issues like joint employment, the number and kind of enforcement actions, minimum wage, and overtime protections.

New Overtime Rule Blocked

A last-minute nationwide injunction issued by a Texas federal court blocked the DOL's new overtime pay rule from taking effect on December 1, 2016, as planned. The DOL has filed an appeal, but the issue will likely be resolved by the new DOL rather than the courts. While they wait on a resolution, employers might be well advised to audit their workforce

to determine which course of action to take (e.g., reclassify, salary increases, or revise work schedules) in the event the DOL's rule takes effect. Moreover, because the injunction has no impact on state wage and hour laws regulating overtime exemptions, employers must in any event take appropriate steps to comply with those laws.

Joint Employment Litigation Update: *McDonald's* and *Browning-Ferris*

NLRB v. McDonald's. The NLRB and McDonald's agreed to bifurcate the pending joint employment lawsuits, which will speed the administrative hearings through the NLRB process and, barring a settlement, more quickly move the issue to the regular courts.

Even with the bifurcation, the future of these cases and the positions taken by the NLRB will be impacted by President Trump's appointments to the NLRB over the next couple of years and, as importantly, what happens when the term of the current General Counsel of the NLRB—the main driver behind the NLRB's joint employer actions against franchise companies—expires in November 2017. Indeed, President Trump has appointed Republican NLRB Member Philip Miscimarra, one of the dissenters in *Browning-Ferris*, to serve as acting chairman of the agency. This appointment could mean a shift to more business-friendly labor policies.

NLRB v. Browning-Ferris. Oral argument in the appeal of *Browning-Ferris*, which will decide whether to overturn the NLRB's new joint employer standard, is scheduled for March 9, 2017.

Salazar v. McDonald's. McDonald's recently prevailed in defeating certification of a class of 1,200 workers employed at 8 franchised restaurants who claimed that McDonald's jointly employed them. The franchisees settled with the workers in March 2016, but the case proceeded against McDonald's. In August 2016, a California federal judge dismissed the employees' joint employment claims because McDonald's did not retain or exert direct or indirect control over their hiring, firing, wages, hours, or material working conditions. Even so, the court allowed the claims to proceed under an ostensible agency theory, where McDonald's could potentially be vicariously liable on the basis that employees believed they were employed by McDonald's. To support that notion, the employees claimed that they applied for employment on the McDonald's website, wore McDonald's branded uniforms, received orientation materials and training from McDonald's, and received paychecks with the McDonald's logo. However, in a decision issued earlier this month, the court found that some workers received different information that led them to believe that the franchisees were their sole employer. This case provides valuable practice pointers to franchisors and franchisees alike regarding the current joint employment and vicarious liability landscape.

Possible Federal Joint Employment Legislation

In addition to the administrative and regulatory changes that could move the needle on the joint employer issue, it is possible that we could see favorable federal legislation in 2017. For example, Congress could amend the definition of "employer" in the FLSA and other federal laws to explicitly provide that franchisors are not the employers of their franchisees or the franchisees' employees. This sort of Congressional action would mirror the recent state legislation amending local wage and hour laws. Or, Congress could renew efforts to legislate the issue—like (1) the Protecting Local Business Opportunity Act, which sought to reverse the NLRB's broadened joint employer standard adopted in *Browning-Ferris* and require "actual, direct, and immediate" control over employees to be considered a joint employer, and (2) the Protecting American Jobs Act that stalled in the House and which would have limited the power and authority of the NLRB and its General Counsel.

It will be important for all employers to watch what will undoubtedly be fast-paced developments in 2017 as the administration shifts to what most expect will be a more business-friendly environment. We're sure there will be lots of discussion and prognosticating at the IFA Convention next week. Cheng Cohen will be there in full force, and we look forward to seeing and speaking with you on these and other issues.

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