MCDONALD'S AND ITS FRANCHISEES: THE GENERAL COUNSEL FOR THE NATIONAL LABOR RELATIONS BOARD ASSERTS THAT MCDONALD'S, USA, LLC IS A JOINT EMPLOYER

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On July 31, 2014, I participated in a panel discussion on the Al Jazeera America television program "Inside Story," hosted by Ray Suarez, regarding the recent determination by the general counsel (GC) for the National Labor Relations Board (NLRB) that McDonald's, USA, LLC is a joint employer with its franchisees. Also on the panel were Craig Becker, a former NLRB member who currently works for the AFL-CIO, and Joseph McCartin, a professor at Georgetown University.

The subject of the program was the GC's decision made on July 29, 2014, directing the NLRB regional offices that 43 of 181 charges filed against various McDonald's franchisees were meritorious and should move to complaint (if settlement is not reached). The more striking news was, of course, that the GC also indicated that it will name McDonald's, USA, LLC as a joint employer with its franchisees.

Labor views this determination as a victory and is hopeful that the decision will make organizing for fast food employees easier and that it will give their movement leverage in the efforts to seek higher wages for this sector of employees.

McDonald's, USA, LLC has vowed to fight to determination. The senior vice president for human resources for the company, Heather Smedstad, has indicated that "[t]his decision to allow unfair labor practice complaints to allege McDonald's is a joint employer with its franchisees is wrong…" She went on to state that the company "also believes that this decision changes the rules for thousands of small businesses and goes against decades of established law regarding the franchise model in the United States." Although the analysis is highly factual in any case where joint employer status is alleged, a decision could negatively impact other franchise model businesses in the restaurant industry, as well as convenience stores, hotels, and car dealerships (just to name a few).

During my appearance on "Inside Story," a short format program, the discussion about the case was somewhat limited to how the facts are applied to the current standard for joint employer status, the opinions of the panelists regarding the impact that this case could have on workers within the fast food industry, and the public

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perception of McDonald's as impacted by the determination. However, there is likely more to the story at the NLRB related to joint employer status that may impact employers not just using the franchise model, but also employers that utilize subcontractors and temporary agencies.

You see, General Counsel Griffin is currently advocating that the NLRB change the analysis regarding joint employer status generally and revert to a much broader standard. On June 26, 2014, the GC submitted an amicus brief to the NLRB in the matter of *Browning-Ferris Industries of California, Inc.* (Case 32-RC-109684) pushing this change in precedent.

Currently, the NLRB requires a showing of direct control over determinations about hiring, firing, terminations, hours of work, wages, and other essential terms and conditions of employment to establish joint employer status. This has been the law for 30 years. The GC is encouraging the NLRB to adopt a standard that would establish joint employer status where there is direct, indirect, or even potential control over terms and conditions of employment. He asserts that the NLRB's "traditional standard treated potential control – typically the unexercised ability to control employment conditions reserved in license, lease, or other commercial agreements – as sufficient to find joint employer status." He also advocates that "the traditional standard recognizes the potential to control terms and conditions of employment not based on specific contractual privileges but rather on the 'industrial realities' of certain business relationships" and a finding that an alleged joint employer is a necessary party for meaningful negotiations.

Likely, the NLRB as currently composed may adopt the standard proposed by the GC. If the NLRB adopts this broader standard in a ruling in the *Browning-Ferris* case – regardless of what happens with McDonald's – employers will have to re-evaluate their exposure to liability not just in the franchise context, but also with subcontractors and the use of temporary employees.