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## Franchise Law with Zing

***Client Alert on the NLRB General Counsel's  
Statement Concerning McDonald's USA LLC  
with Practical Tips for Actions Items to Consider***

***August 8, 2014***

There have been many reports that the National Labor Relations Board (known as the NLRB in Washingtonian alphabet-speak) has issued an order, published a decision, or otherwise reached a final conclusion in a case involving the McDonald's franchise system. While those reports are premature – the issue raised is serious and deserves careful attention by franchisors, licensors, manufacturers, and others.

***Q1. What happened so far?***

**A1.** The NLRB's General Counsel (GC) announced on July 29, 2014 that his office has decided that it had cause to file a complaint against McDonald's USA LLC - the franchisor of the "McDonald's" franchise system - and some of its franchisees, alleging that they were joint employers, and therefore jointly responsible for alleged unfair labor practices (ULP's). The GC's statement was issued in advance of negotiations with McDonald's and its franchisees. So far, the facts underlying the GC's conclusion have not been made public. However, as explained below, other actions involving the GC and the NLRB provide some clues to the GC's reasoning.

***Q2. What will happen next?***

**A2.** If a settlement is not reached, then there are several procedural steps before a final decision is reached in this matter. First, the GC would issue an administrative complaint within the NLRB (an agency under the US Department of Labor). Second, an administrative law judge (ALJ) within the NLRB will hear the case. Third, the ALJ will render her/his decision. Fourth, the case will almost invariably be appealed to the full NLRB (a five-member agency) for review. Fifth, the NLRB will render its decision. Sixth, the NLRB's decision can be appealed, typically to the U.S. Court of Appeals for the District of Columbia Circuit. And, Seventh, the D.C. Circuit decision could be appealed to the U.S. Supreme Court.

***Q3. Why did the General Counsel act?***

**A3.** The GC has not released information about the underlying facts of the McDonald's matter. Until those details are made known, we have to rely on the broader context for clues about the GC's viewpoint.

Under the current standard for evaluating whether parties might be considered "joint employers," a typical franchisor (and, for that matter, a typical licensor) would not be considered to be a joint employer with its franchisees. In May 2014, in a case on review from an ALJ decision that does not involve a franchise company, the NLRB

invited interested parties to file amicus briefs on the subject of whether the Board should adopt a new standard for whether two entities should be considered "joint employers." The NLRB's invitation was issued in connection with *In re Browning-Ferris Industries of California, Inc.*, NLRB Case 32-RC-109684, and the invitation was announced on the Board's website, at <http://www.nlr.gov/news-outreach/news-story/nlr-invites-briefs-joint-employment-standard>.

In June 2014, the GC submitted an amicus brief in *Browning-Ferris* advocating that the Board adopt a new "joint employer" standard. The GC's brief specifically referenced franchising, arguing that "the advent of new technology has enabled some franchisors to exercise indirect control over employee working conditions beyond what is arguably necessary to protect the quality of the product/brand." More to the point, the GC's brief included the following passage, which may provide a helpful clue as to the direction that the GC's office will take in the McDonald's matter and elsewhere:

*Franchising (and outsourcing arrangements that triangulate employment relationships) also illustrates how the current joint-employer standard undermines meaningful collective bargaining. In these commercial arrangements, an employer inserts an intermediary between it and the workers and designates the intermediary as the workers' sole "employer." But notwithstanding the creation of an intermediary, franchisors typically dictate the terms of franchise agreements and "can exert significant control over the day-to-day operations of their franchisees," id., including the number of workers employed at a franchise and the hours each employee works. Although franchisors generally claim that they have no influence over the wages franchisees pay to their employees, some franchisors effectively control such wages "by controlling every other variable in the business except wages."*

*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. Thus, current technological advances have permitted franchisors to exert significant control over franchisees, e.g., through scheduling and labor management programs that go beyond the protection of the franchisor's product or brand.*

*Some scholars have posited that franchisors consider avoidance of unionization and the collective-bargaining process to be the "prime advantage of franchising," and "[i]n some cases, the driving force behind the conversion of fully integrated, employee-operated businesses to franchised operations is an attempt to prevent or remove the supposedly harmful effects of unionization and thereby increase profits.*

Amicus Brief of the General Counsel, at 15-16 (emphasis added and citations omitted) (available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45817b1e83>). While the passage quoted above is ominous, it may provide some hints about how franchisors might limit their exposure (as noted below in Q4).

**Q4. What steps should franchisors consider taking now?**

**A4.** Companies should take heed of the General Counsel's announcement to consider whether they are too intricately involved in their franchisees' employment practices. While the following best practices might have to be modified once more details become available, we recommend consideration of these ten action items:

1. Franchisors should make clear in their franchise agreements and all other settings (e.g., manuals, monthly newsletters, conventions, etc.), that their franchisees are, in fact, solely responsible for soliciting, hiring, firing, and managing their own employees.
2. Franchisors should adopt only those controls necessary to protect and enforce their brand. Controls relating to the terms under which their franchisees can employ individuals ought to be carefully evaluated and, where possible, avoided.
3. Franchisors should examine the degree to which their required unit-level technology (e.g., POS systems) imports, uses, analyzes, or otherwise interacts with franchisees' H.R. data. Among other things, a POS system or computer program that includes a wage and hour matrix, that includes a module for scheduling employee shifts, or that involves the franchisor in the decisions that the franchisee makes with respect to those matters should be carefully evaluated. (The GC's brief in *Browning-Ferris* made note of technology that allowed franchisees to schedule shifts, manage labor schedules and costs, and other operational details.)
4. Franchisors should avoid having a direct role in recruiting, training, supervising, or directing non-management personnel. While the franchisor must train the franchisee and its senior managers, those individuals, in turn, should be the ones to train line-level employees. Franchisors that have a centralized website on which potential unit-level employees can make an application ought to reconsider that approach.
5. When conducting site visits and inspections, the franchisor's personnel should walk through the business or otherwise review operations only with the franchisee or one of the franchisee's managers, and let the franchisee or manager speak to and instruct the franchisee's employees.
6. Franchisors should be certain that their franchisees use conspicuous signage to make clear – to the public, to their franchisees, and to the franchisee's employees – that each franchisee is independently owned and operated.
7. Franchisors should be especially careful that their franchisees not use the franchisor's name or marks in their corporate name or in employment-related documents (e.g., applications, employment agreements, payroll checks, pay stubs, evaluation sheets, etc.) - with the goal of making sure that the franchisee's employees have no reason to believe that they are employed by the franchisor.
8. Franchisors should avoid making statements (or taking action) about union organizing efforts or other activity at the franchisee's workplace, and should avoid playing any role in the labor-management context. (As noted above, the GC's brief in *Browning-Ferris*, rightly or wrongly, characterized franchising as a way to

interpose a party (e.g., the franchisee) between the franchisor and employees, so that the franchisor could avoid a direct employment relationship and, therefore, exposure to union activity.)

9. Franchisors should consult with labor and employment counsel and to determine whether it makes sense, in their circumstances, to recommend or require franchisees to directly engage an approved outside company to provide HR training, guidance, and on-site evaluations with respect to various HR procedures, rather than the franchisor providing those functions. Of course, the franchisor would need to have contractual authority to impose a requirement.
10. Franchisors should train their entire staff (especially field support teams) on why these standards are important, so that the franchisor's entire organization understands and observes these best practices. A franchisor's own general counsel should monitor and evaluate compliance with these standards, make adjustments as needed, and periodically report to the senior executive team on the status of these matters.

We are happy to answer any questions on this topic. Please contact any of us at Plave Koch at 703.774.1200.

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