A MIXED BAG ON JOINT EMPLOYMENT RULINGS, BUT THE FUTURE LOOKS PROMISING (PART II OF II)

As we noted in the prior article that we recently posted, there were two different franchisor/franchisee rulings issued this summer in the context of joint employment relationships. Recall that joint employment is an employment law theory that involves an employee who works for two ***separate*** companies—the joint employers—where both companies have the ability to control the terms and conditions of the employee's day-to-day work activities such that both companies are responsible for complying with various legal obligations owed to the employee (or so the argument goes from the employee's perspective).

Our prior article explained how a sandwich company known for its speedy deliveries side-stepped joint employment liability in a wage/hour collective action lawsuit because, in broad strokes, the judge found that the various policies issued by the corporate office were mere guidelines and that any control exerted over the franchisees related to brand standards, which the corporate office was entitled to enforce.

Chalk it up as a win in the employer column.

RULING NO. 2—NOT AS HELPFUL BUT STAY TUNED

In the second ruling, an administrative law judge with the National Labor Relations Board ("NLRB") ruled that a company known for their golden arches could ***not*** move forward with a settlement previously negotiated by the corporate office, various franchisees and the general counsel to the NLRB.

At its core, the case involved franchisee employees who had banded together and joined nationwide Fight for $15 protests (seeking base pay of $15 per hour and union representation). The employees and the NLRB were trying to hold both the ***corporate office*** and the ***franchisees*** responsible for alleged labor law violations under a joint employment theory. The case was to be settled in early July by consent of all parties—meaning representatives from the corporate office, the franchisees, the employees and the general counsel for the NLRB.

That settlement, however, was derailed by the presiding NLRB judge, who ruled ***against*** the settlement and found that the corporate office's nominal role in the resolution didn't "begin to approximate" the joint employer liability had the case gone to judgment. The fast food chain still has the right to appeal the judge's decision to the five-member board at the NLRB, so stay tuned on that front.

Based on the employer-friendly ruling described in our prior blog, coupled with the failed settlement attempt outlined in this article, the legal landscape on joint employer relationships is a little bit murky.

There is, however, an "inside baseball" component to the NLRB ruling. The lawsuit was originally launched when President Obama's appointees essentially had "control" over the NLRB. Now, however, the general counsel for the NLRB—who was in favor of the settlement—is a President Trump appointee. And the judge who issued the ruling rejecting the settlement? She is an appointee of President Obama. Different administrations, different interpretations of the law.

PRACTICAL TAKEAWAYS

In the health care industry, there's a lot of consolidation and integration that's still taking place. For example, it's a pretty common practice for a hospital to have an affiliation with a "sister" organization that runs long-term care operations. Health care employers need to be strategic about how those arrangements are set up, particularly in light of potential joint employer concerns. For example, our article from July 2018 described a multi-facility health system that's being sued under a joint employment theory for alleged FLSA violations.

Given the current legal landscape, consider the following when setting up or running integrated health systems or affiliated business operations:

- The joint employment analysis varies from jurisdiction to jurisdiction. Make sure your attorney knows which rules are in play in your geographic area.

- Be careful about giving one entity the ability to hire or fire the other entity's workers.
- Think about how the workers' schedules get established—centralized scheduling is an indicator of joint employment.
- The same holds true when establishing rates of pay—centralized HR functionality looks like joint employment.
- Who has custody of and access to employment and personnel records? If different entities within the system have a right of access, that too is an indicator of joint employment.
- Does, for example, Entity A directly or indirectly control Entity B? If so, and if employees are working at both entities, it might show that the employees are jointly employed by both Entity A and Entity B.
- Stay out of the NLRB—there's a lot of legal uncertainty at that agency right now!
- Even if you don't have a unionized workforce, you can still inadvertently pick up a NLRB charge if you try to prevent your employees from engaging in protected and concerted activity over the terms and conditions of their employment.

If you have any questions or would like additional information about these topics, please contact Dana Stutzman at (317) 977-1425 or dstutzman@hallrender.com; Mary Kate Liffrig (720) 282-2033 or mliffrig@hallrender.com; or your regular Hall Render attorney.

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