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A Wake Up Call To Franchisors: The Big Mac Attack

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In the wake of recent activity by the National Labor Relations Board (NLRB) concerning unfair labor practice charges against McDonald's franchisees and franchisor McDonald's, USA, LLC, coined by some as the "Big Mac Attack", franchisors have become concerned that the landscape may be shifting with respect to the traditional franchisor-franchisee relationship, and potential franchisor liability for the acts and omissions of franchisees.

Typically, "one owes no duty to control the conduct of another, or to warn those endangered by such conduct," absent a "special relationship." *Zelig v. County of Los Angeles*, 27Cal.4th 1112, 1129 (2002). Importantly, with respect to franchisors, "[a] typical franchisee-franchisor relationship does not constitute a "special relationship." *Wickham v. Southland Corp.*, 168 Cal.App.3d 49, 61-62 (1985). However, California Civil Code Sec. 2307 provides that "an agency may be created and an authority may be conferred by a precedent authorization or a subsequent ratification."

In light of this well established authority, the franchisor's analysis has always centered on the "creation" or "ratification" of such authority. Traditionally, creating or ratifying an act or omission of a franchisee normally requires the franchisor to have actual awareness surrounding a situation. However, willful blindness or an unreasonable failure to investigate can be sufficient to establish franchisor liability. "Ordinarily, the law requires that a principal be apprised of all the facts surrounding a transaction before he will be held to have ratified the unauthorized acts of an Agent. However, where ignorance of the facts arises from the principal's own failure to investigate and the circumstances are such as to put a reasonable man on inquiry … he may be held to have ratified despite full knowledge." *Reushe v. Cal. Pacific Title Ins. Co*., 231 Cal.App.2d 731, 737 (1965).

In addition to creation or ratification of franchisee authority, aiding and abetting is also a potential liability for franchisors in the rare event that the franchisor had knowledge of the franchisee's bad acts, and took some steps that substantially assisted the wrongful act. *Peel v. BrooksAmerica Mortg. Corp*., F.Supp.2d 2011 WL 2174373, *7 (C.D. Cal.June 1, 2011). Such acts are generally uncommon, but must be part of any analysis of potential franchisor liability.

In any event, and as briefly discussed in the introduction to this article, in the wake of the NLRB's McDonalds' complaints, franchisors should also be keenly aware of a new area of potential joint employer liability with their franchisees.

With respect to those complaints, in the summer of 2014, the NLRB's Office of the General Counsel investigated charges alleging that McDonald's franchisees and their franchisor, McDonald's, USA, LLC, violated the rights of employees under the National Labor Relations Act (NLRA) as a result of activities surrounding employee protests. The disciplined workers claimed McDonalds illegally fired, threatened or otherwise penalized them for their pro-labor activities.

In a departure from similar cases, in December 2014, the NLRB issued complaints against McDonald's, the franchisor, saying it is jointly responsible with its franchises for unfair labor practices. The NLRB found that McDonald's, the franchisor, exercised so much control over its franchisees that it was the "top boss", noting that McDonald's requires franchise owners to strictly follow its rules on food, cleanliness and employment practices and that it often owns the restaurants that franchisees use. In reaching its conclusion, the NLRB employed a more lenient "industrial realities test" rather than its more recent "joint employer" standard.

Under the recent "joint employer" standard, a franchisor must share or jointly determine those matters governing employee's working conditions and terms of employment in order to be found to be a joint employer under the NLRA. The proposed "industrial realities test" is more relaxed, finding a joint employment relationship if a franchisor exercises control over day-to-day operations of franchisees, regardless of whether the franchisor exercises any direct control over the franchisee's employees.

Following in the aftermath of this "Big Mac Attack", on April 28, 2015, the NLRB issued an advice memorandum addressing when franchisors may be considered joint employers with franchisees for purposes of the NLRA. In the advice memorandum, the NLRB found that a restaurant franchisor and its development agent were not joint employers with a Chicago-based franchisee under either the prior "joint employer" standard or the "industrial realities test." The franchisor's control over the franchisee in that instance was limited to product and brand quality

protection (i.e., regulations regarding food preparation, recipes, menu, uniforms, décor, store hours and initial employee training prior to the franchise opening) to ensure "a standardized product and customer experience, factors that clearly do not evidence sharing or codetermining matters governing the essential terms and conditions of employment."

Notwithstanding the advice memorandum, the departure by the NLRB from its more recent "joint employer" standard is obviously causing grave concern throughout the hospitality industry. Many contend that the NLRB's position undermines the idea that the franchisee, not the franchisor, is generally responsible and liable for any legal violations, concerning negligence, wage-and-hour violations, discrimination, among other things. Franchisors need to be sure to maintain the requisite separation between franchisor and franchisee to avoid a joint employment relationship, and should confer with competent counsel to help make that determination.

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