

NLRB General Counsel Allows Franchisor to be Joint Employer for Labor Claims

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The National Labor Relations Board's (NLRB) Office of the General Counsel recently authorized complaints to be issued against a major restaurant franchisor as a joint employer along with its franchisees in claims of alleged NLRA violations. Under the General Counsel's non-precedential ruling, if the franchisee "cannot reach settlement in these cases, complaints will issue and [the franchisor] will be named as a joint employer respondent."

The franchisor in the case has said it will contest the General Counsel's determination, stating that it "changes the rules for thousands of small businesses, and goes against decades of established law regarding the franchise model in the United States."

Many view this decision as at odds with legal precedent that largely protected franchisors from liability for conduct by their franchisees and made the franchising decision so appealing and popular with businesses today. Certainly, the NLRB General Counsel's decision to issue the complaints is not the law in almost all states. However, since this is not the first time a court or agency has reached such a conclusion, all franchisor's need to pay heed and revisit their practices.

California's Similar Decision – the Domino's Case

In 2012, a California Court of Appeals found franchisor Domino's Pizza liable for sexual harassment by one of its franchisee's employees. In *Patterson v. Domino's Pizza LLC*, the court held that the franchise agreement is not dispositive of the issue of whether a franchisor has an independent contractor relationship with its franchise. The court found sufficient evidence to determine that the franchisor exercised significant control over the local operations of the franchise, creating an agency, rather than an independent contractor, relationship.

In doing so, the court looked at several factors, including: Domino's management of the franchisee's employees; supervision and regulation of employee training of workers; setting of qualifications and standards for the appearance and demeanor of the franchisee's employees; access to the store owner's computer; imposition of standards on the format of the franchisee's financial statements and record keeping methods; and control over whether the franchisee may engage, or own any interest in any other business activity.

The California Supreme Court has granted appeal of this case and has not yet made its ruling on whether to uphold Domino's liability for its franchisee's conduct. Franchisors should pay close attention to the decision and whether it reinforces the trend toward franchisor vicarious liability.

Franchisors Should Try to Protect Themselves from Vicarious Liability

Based on these recent events, no longer can franchisors automatically rely solely on the independent contractor designation in their franchise agreements to shield them from liability for actions of their franchisees. Franchisors face a greater risk that courts, and now the NLRB, will be more prone to examine the totality of factors and circumstances in addition to the language of the franchise agreement in order to determine which entity ultimately controls the business and the employees. Therefore, a franchisor should carefully consider how to balance its need to control and police its

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franchisees to protect its brand and image against the requirement that it permit its franchisees to operate as independent businesses.

In some cases, a court or administrative law judge may find that the language of the franchise agreement is inconsistent with the actual relationship between the entities. While a single factor might not give rise to franchisor's liability, excessive control over franchisee's business and employees might be deemed to subject the franchisor to potential risk. Franchisors need to understand this risk and take steps to ensure their independence from their franchisees, while still adequately protecting their brands and reputation and increasing their goodwill. Please contact us to discuss the specific steps franchisors can take to protect the company and prevent vicarious liability.

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