FRANCHISE LAW ALERT

6/27/14

Recent Legal Developments' Potential Impact on Franchisees

By Matthew D. Austin, Partner

Labor unions are targeting franchisees and the restaurant industry as a whole, and they are not alone. Worker centers, including Fast Food Forward and Worker's Organizing Committee, are generally closely affiliated with, i.e. fully funded by, labor unions, and are the brains behind the fast food strikes, Black Friday strikes at Wal-Mart, and raising the minimum wage in municipalities across the U.S. Below are three recent legal developments that may impact your business.

National Labor Relations Board Possibly Easing Path to Franchise Unionization

Last month the NLRB invited parties to submit briefs in *Browning-Ferris Industries* on whether the Board should "adhere to its existing joint employer standard or adopt a new standard." Given the current NLRB composition, it is widely expected that the NLRB will adopt a more lenient standard for establishing joint employer status. Currently, whether two entities constitute a joint employer under the National Labor Relations Act requires an analysis of whether they share the ability to directly and immediately control or co-determine essential terms and conditions of employment, including matters such as hiring, firing, discipline, supervision, and direction. A more lenient standard would dramatically assist labor unions in organizing fast food franchisees and franchisors.

While companies like McDonalds charge fees to operate under a corporate umbrella, an individual entrepreneur controls the business itself. Changing the joint employer standard would allow unions to organize employees at one franchise and then demand to bargain with the parent company. They could use this to force the larger parent companies to the bargaining table while only organizing a small portion of workers. Worker centers like Fast Food Forward and unions will dramatically benefit from a more lenient standard because they can organize the employees of companies beyond one franchisee. Ultimately, unions will want to force parent companies into neutrality agreements so they can pick off one franchise after another. In other words, large corporate entities could see a domino effect in which the actions of a small group of employees open the doors to unionization among millions of workers under the corporate umbrella.

Worker Centers Strike Over Free Meal

In the summer of 2013, the non-union employees of Gates & Sons Barbeque of Missouri, under the influence of the worker center Workers' Organizing Committee, engaged in a one-day strike in support of a demand for increased wages. It is permissible for workers not represented by a union to strike under Section 7 of the NLRA, which gives employees the right to engage in "concerted activities for mutual aid or protection." Further, strikers may not be retaliated against, except in certain circumstances of violence or other untoward behavior. However, in this case, after the uneventful one-day strike ended and the workers returned to work, one of their benefits (a free meal each day they worked) had been eliminated.

While normally, in non-union workplaces, an employer is free to change benefits terms, in this case, the judge found that the free meal benefit elimination was in retaliation by the employer against the workers for striking. Accordingly, he found that eliminating the benefit was a violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to restrain, coerce, or interfere with the employee's right to engage in protected concerted activity. The employer was thereby ordered to reinstate the free meal benefit and otherwise make the employees whole. The decision in this case seems routine, but the worker center involvement in the strike raises additional issues. Are worker centers essentially labor organizations? Should they be treated as such? Should their involvement influence how employers

respond? What is not in question is that the worker centers will continue to be involved in actions similar to this, and that employers need to ensure their responses are in line with the NLRA.

NLRB Strikes Papa John's Franchisee Arbitration Agreement

NLRB Administrative Law Judge William Nelson Cates found that requiring a Papa John's franchisee employee to sign an arbitration agreement waiving his right to bring a class or collective action in court or arbitration violated the NLRA, and that the agreement was unenforceable after the NLRB's 2012 D.R. Horton decision (holding mandatory arbitration agreements that bar class or collective actions infringe upon those employees' rights to concerted action).

These types of cases are catching on like wildfire. Employees enter into agreements (or agreements are located in company handbooks) precluding employees from filing class actions against employers. Instead of filing class actions, employees must individually arbitrate their claims. The NLRB decided that the hallmark of the NLRA is to protect employees' ability to act in concert with each other, and precluding employees from filing class actions violates the Act. The Board's refusal to uphold valid arbitration agreements has been overturned by the Fifth Circuit, but the NLRB has taken the position that until the U.S. Supreme Court definitively rules on the issue, it will continue to invalidate mandatory arbitration agreements. However, no case on the issue is pending before the Supreme Court and no other Circuit court has ruled on the issue. Accordingly, the Board will continue to invalidate mandatory arbitration agreements until a Circuit Court disagrees with the Fifth Circuit thus creating a circuit split for the Supreme Court to resolve.

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