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NLRB ISSUES COMPLAINTS AGAINST McDONALD'S AS A JOINT EMPLOYER, THREATENING THE FUTURE OF OPERATING UNDER A FRANCHISE SYSTEM

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On December 19, 2014, the National Labor Relations Board (NLRB) Office of the General Counsel issued 13 complaints that involve 78 charges against McDonald's and several of its franchise operators, alleging that they violated the rights of individuals working at various McDonald's restaurants around the country. Specifically, the complaints allege that McDonald's and the franchisees took action against individuals for engaging in activities meant to improve their wages and working conditions over the past two years, including discriminatory discipline, reductions in hours, discharges and other coercive conduct.

In filing these complaints, the NLRB deemed McDonald's to be a "joint employer" with its franchise operators, making the company equally responsible for action taken in its franchise restaurants. The NLRB made this determination, in part, because it concluded that McDonald's set various requirements for how food is prepared, how stores are operated and how employees are managed. This signaled the Office of the General Counsel's intent to challenge how the NLRB has historically determined when two separate entities are a "joint employer." For 30 years, the NLRB has held that "to establish joint employer status there must be a showing that the employer meaningfully

affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *Laerco Transportation*, 269 NLRB 324 (1984). The General Counsel now requests that the NLRB hold McDonald's liable because it allegedly has "sufficient control" over its franchisee operations even if McDonald's does not have the power or authority to hire, fire, discipline, supervise or control the franchisees' employees – a much lower standard than that set in *Laerco Transportation*.

In the past two years, 291 charges have been filed at the NLRB against McDonald's and their franchisees with 86 cases deemed to be "meritorious" and 71 still pending. The complaints filed against McDonald's and its franchises were filed nationwide in various regional offices including New York, Detroit, Atlanta, St. Louis, New Orleans, Minneapolis, Phoenix and Los Angeles. Absent settlement, the NLRB has stated that initial litigation will commence on March 30, 2015.

McDonald's responded to the charges by stating that the NLRB's "actions . . . improperly and dramatically strike at the heart of the franchise system – a system that creates economic opportunity, jobs and income for thousands of business owners and

their employees across the country” and that it was “disappointed with the Board’s decision to overreach and move forward with these charges” and that it would challenge them.

In response to the complaints, representatives of the U.S. Chamber of Commerce, the International Franchise Association, the National Restaurant Association and the National Retail Federation were quick to decry the action of the NLRB. These organizations warned that the move could result in the loss of thousands of jobs as companies decide how to move forward in franchising. Labor unions have targeted franchise businesses, including McDonald’s, for unionization, and this action by the General Counsel is seen by many as an opportunity for unions to overcome a number of obstacles to unionization in industries such as fast food. The corporate franchise structure, low wages and high turnover have traditionally made it very difficult and expensive for unions to launch and organize campaigns against fast food operators. However, this decision to file complaints, coupled with the recent

NLRB election rule changes, is changing the playing field. In addition, the NLRB is expected to issue a decision shortly in a related case, *Browning-Ferris*, where it will likely adopt a new joint employer standard.

The filing of these complaints is merely the opening salvo in what is expected to be a long and vigorous fight that will likely take years to resolve. Accordingly, companies looking to franchise their businesses and companies and/or individuals looking to purchase franchises should pay close attention to this case and consult with their attorneys to navigate the new age of franchising established by the NLRB’s action.

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