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Fox Rothschild Podcast

Featuring Franchise Partners Elizabeth Sigety and John Gotaskie

We are talking today about the changing joint employer standard in franchising with Elizabeth Sigety and John Gotaskie on Fox Rothschild Podcast. Liz is a partner in the firm's offices in New York City, Philadelphia and Bucks County, and she chairs the firm's Franchising, Licensing & Distribution Group, and co-chairs the firm's Emerging Companies Practice Group. John is a partner and litigator with Fox Rothschild in Pittsburgh who is editor of the firm's Franchise Law Update blog. They represent clients in a variety of corporate, venture finance, franchising, licensing and distribution matters as well as in commercial litigation. Liz, John, good morning.

Elizabeth Sigety: Thank you. Good morning.

John Gotaskie: Good to be here.

***Question:** Liz, I understand that the National Labor Relations Board recently made a rather controversial ruling impacting franchisors and involving the "joint employer" standard.*

Elizabeth Sigety: Yes, most definitely. In case listeners have not kept a close eye on the business press, they may have missed the NLRB's late August decision involving Browning-Ferris Industries. They voted in a three to two decision along partisan lines. The NLRB overturned the joint employer standard which has existed for the past three decades. This is a highly important decision because if a company is a joint employer, it could then be subject to collective bargaining and a large variety of employment-related claims formerly reserved for the direct employer.

***Question:** John, what could this mean in addition for the franchise community?*

John Gotaskie: For the franchisor and franchisee community, focused on any number of entrepreneurial opportunities, this ruling meant waking up to a different world. The old standard required that a company utilizing the services of employees of another company would be considered a joint-employer only if it had "direct control" over working conditions – and that means the direct ability to hire and fire employees and that type of direct control. The new standard, on the other hand, states that two or more employers are joint employers if they "share or codetermine those matters governing the essential terms and conditions of employment," a much more nebulous standard.

***Question:** Liz, this is definitely not good news.*



Elizabeth Sigety: Correct. In reading the NLRB’s decision, what was once considered the “essential terms and conditions of employment” now seems to be somewhat unclear – both respecting the breadth and importance of each. They certainly include, as the opinion states, the “hiring, firing, discipline, supervision and direction,” which is very broad in the first place; however, the NLRB states that it intends to be inclusive, and this list is *not* exhaustive. This is what is making some employers – especially in the outside staffing and in the franchise industry – very nervous.

Question: John, can you give our listeners some background of the facts of the ruling?

John Gotaskie: The actual facts of the decision concern the use by Browning-Ferris Industries of an outside staffing firm. The union wanted to represent the workers employed by the staffing firm and argued that those employees should be deemed Browning-Ferris employees and thus able to be part of the union. But, instead of simply ruling on *this* case, the NLRB took the opportunity to restate its position more generally into one that would capture far more contractual relationships than previously.

Elizabeth Sigety: And I’d like to point out as well that the minority dissent highlights their concern of the uncertainty created by the decision in addition to the complexity of business relationships it creates. For example, if this were a franchise and the union brought a successful petition that the employees of one franchised location should be deemed employees of the franchisor, because of the joint employer doctrine, how might this effect other franchise locations, each owned by different people? Who is ultimately sitting at the collective bargaining table? While the decision makes clear that the choice of whether an entity is a joint employer is fact-specific and does not automatically apply to other business models, the way that the staffing, franchise or other businesses should move forward is very uncertain.

Question: John, how do you see these concerns playing out in everyday business?

John Gotaskie: Well, if for example a franchisor requires that a fast-food restaurant be open from 11 a.m. to 11 p.m. every day, which isn’t unusual, then that the food be prepared in a certain manner, that employees wear certain uniforms, do those types of factors mean that all of the sudden now, the franchisor is codetermining matters governing the conditions of employment? Now under law, for a franchisor to maintain ownership and control of its trademark, to protect the brand quality behind that trademark, it’s necessary to control certain things. If it loses this control as a result of this ruling or future rulings by the NLRB, it can lose the rights to its trademark, which would be a real problem. So trademark law here is conflicting with what the NLRB does, in our opinion, and it mandates that a franchisor maintain a level of control, relating to quality and product and the brand. And frankly from my perspective, and I bet that everyone agrees, don’t you want the same cup of coffee every time you go to your favorite local franchised coffee shop? Right?



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Elizabeth Sigety: Yes, right. I think these two sets of laws pull the franchise industry in opposite directions. Franchisors may fear that certain support and controls could create a risk that the NLRB may make a franchisor a joint employer. This could result in franchisors withdrawing valuable support, resources and brand protections for fear that these resources may be used as evidence of control under that standard. One of the main reasons franchisees purchase a franchised business is to get that support, to get the brand name, to get the experience from the franchisor. But, on the other hand, franchisors may feel they have to exercise more control, maybe excessive control, in order to ensure that there are fewer potential claims against them, if they think that they can be come after for things that the franchisee does with their employees. But franchisees on the other hand are independent businesses. They don't want the franchisor telling them who to fire or how to run their business on a day-to-day basis. So, what to do?

Question: Liz, have there been any developments since the ruling?

Elizabeth Sigety: I think there's going to be a lot of developments, but one that's happened in the last week or so is that a couple members of Congress are sponsoring a bill called the "Protecting Local Business Opportunity Act." It's a simple bill that essentially amends the National Labor Relations Act to return the determination of "joint employer" to the "direct control" standard that existed before the NLRB ruling. But the future of the bill is very uncertain.

Question: John, what do you see when gazing into your crystal ball?

John Gotaskie: This issue isn't going away. That's what I see. And if it ever goes away, it's not anytime soon. There already has been a ton of litigation in the past about what "direct control" means. Now we're going to have additional litigation. Supporters of employers and small businesses are going to struggle to protect their rights to run their businesses, and currently the NLRB as it's constituted and the unions are going to continue to push this in an attempt to create greater opportunities for collective bargaining.

Elizabeth Sigety: We'll keep a close watch on these decisions. There's going to be many hours and dollars spent around this divisive issue.

Narrator: Well, thank you Liz and John. Listeners, to confidentially discuss how your franchise may need to respond to the NLRB decision, please contact Liz Sigety in Philadelphia at 215.918.3554 or at esigety – that's E-S-I-G-E-T-Y – at foxrothschild.com. Or, you may contact John Gotaskie in Pittsburgh at 412.394.5528 or at jgotaskie – that's J-G-O-T-A-S-K-I-E – at foxrothschild.com.

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