Are Franchisors Joint Employers With Their Franchisees?



Franchising owes much of its success to the nature of the relationship between franchisor and franchisee. The essence of that relationship is that the franchisor and the franchisee are independent contractors, with separate and distinct obligations, premised on the franchisee having the opportunity to operate, and profit from, its own independent business. Franchise agreements expressly provide that the relationship between the parties is one of independent contractor-franchisor and not one of partnership, employment or agency. The typical provision in a franchise agreement describing the nature of the relationship reads as follows:

The relationship between the parties is that of independent contractors and no partnership, joint venture, agency or employment is created or intended to be created by this Agreement. The Franchisee agrees that it has no authority to bind or to attempt to bind the Franchisor in any manner or form whatsoever or to assume or to incur any obligation or responsibility, express or implied, for or on behalf of or in the name of the Franchisor. The Franchisee shall use its own name in obtaining or executing contracts or making purchases so that the transactions shall clearly indicate that the Franchisee is acting on its own behalf and not on behalf of the Franchisor.

This characterization of the franchise relationship as one between independent parties was thrown in disarray by a recent decision of the General Counsel of the US National Labour Relations Board ("NLRB"). In late July, 2014, out of 180 unfair labour practice charges filed against both McDonalds franchisees and their franchisor, McDonald's USA LLC, the General Counsel has alleged that McDonald's USA LLC and its franchisees were joint employers in 43 of these claims. Not surprisingly, this decision could have huge implications for franchisors, both from future claims by employees of franchisees and from claims by other third parties. Further, if the claims are successful, fast food workers of other franchised systems will make similar complaints of unfair labour practices against the franchisor of their employer.

Under the United States federal *National Labour Relations Act,* a joint employer relationship exists where two separate legal entities share the ability to control essential terms and conditions of employment. Previously, the NLRB based its determination of a joint employer relationship on a determination by a party of

“direct and immediate control over workers’ terms and conditions of employment. In asserting claims for unfair labour practices, stemming from demands by fast food workers for a higher minimum wage, labour organizers claimed that McDonalds’ exercised this level of control over its franchisees’ employees. This purported control included the prescribing by McDonalds of employee training programs and the uniforms to be worn as well as McDonald’s undertaking of inspections of a franchisee’s restaurant to ensure compliance by the franchisee with the McDonald’s policies and procedures for a restaurant operation.

In allowing the claims to proceed against McDonald’s, the General Counsel supported the application of a new, broader joint employer test which would consider the totality of control that a franchisor has over the business of its franchisees. The new test would not distinguish between direct, indirect or potential control by a franchisor over working conditions at a franchised business. In effect, the new test could deem a franchisor’s policies and procedures for operation and management of a franchised business as indirect control over a franchisee’s employees. Franchise systems are built upon the consistency and uniformity attained by the imposition of standard policies and procedures. These mandated policies and procedures are essential to the success of a franchise system, by ensuring uniformity throughout the franchise network and for the purpose of preserving and protecting the name, brand and goodwill of the franchise system and of its trademarks. Furthermore, these policies and procedures, often contained in the franchisor’s operations manuals, also prescribe authorized product and service offerings, authorized or designated supplies and suppliers as well as health and safety compliance requirements for the day-to-day operation of the franchised business. Rarely, however, does a franchisor prescribe or become involved with the day-to-day hiring, firing or terms of employment of a franchisee’s employees. On the contrary, most franchise agreements expressly provide that the franchisee is solely responsible for these matters as well as for the training of its employees and staff.

The decision by the NLRB General Counsel to add McDonalds as a joint employer in these unfair labour practice claims is not legally binding and must still be addressed by the courts. However, the stage may have been set for franchisors to re-visit their operations manuals, and their franchise agreements, to ensure that only the controls necessary to protect the brand and to ensure uniformity throughout the system are mandated for compliance by franchisees.

There is little doubt that a similar fate exists for franchisors in Canada. Franchisors can no longer assume that they will not be found to be the employer of their franchisees’ employees. Accordingly, franchisors must ensure that they do not exert control over the day-to-day business of their franchisees or mandate policies beyond what is required to maintain the integrity of the franchisor’s brand and system. As it relates to a franchisee’s employees, it may be sufficient, and necessary, to require only that the franchisee comply with the law. Franchisees must be given as much freedom as possible to operate their own businesses within the confines of the franchise system, short of carrying on the franchised businesses in a manner which could undermine the franchise system as a whole. Franchisors should not be involved in or mandate any policies regarding the hiring, firing or disciplining of employees or with respect to the terms of an employee’s employment, pay or benefits. The imposition by many franchisors today of consistent employee health and benefits plans throughout the franchise system will likely now be a risk factor for franchisors, a policy which franchisors ought to re-visit.

Franchisors should now be proactive in reviewing their franchise agreements and operations manuals and revising their policies and procedures as necessary to ensure that only the controls, procedures and programs essential to maintain uniformity in

the product or service offering, and to protect the brand, are mandated for compliance in the operation of the franchised businesses.

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