

# The Bennett Law Firm

## *Client Update*

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### **NLRB's General Counsel Continues Its Effort to Expand The NLRB's Reach By Claiming that McDonald's Corporation Is Jointly Responsible With Franchise Owners For Workers' Labor Complaints**

You may recall that, in 2012, non-union fast food workers called a series of one day strikes against McDonald's and other fast food restaurants demanding a \$15 hourly wage. Two years later, the fallout from those strikes may impact all employers in how they structure their staffing and other relations.

After the strikes, fast food workers filed over one hundred complaints at the National Labor Relations Board because they were fired, had their hours cut or were otherwise the alleged victim of retaliation.

The National Labor Relations Board has issued a complaint in 43 cases against McDonald's franchisees and has named McDonalds USA, LLC, the franchisor, on the theory that it is a joint employer along with its franchisees.

This decision by the NLRB to go to complaint against the franchisor may have profound implications for many employers if the NLRB prevails on this legal strategy. Unfortunately, the outcome of this ploy may not be known for years since any case that proceeds to a trial will be the subject of multiple appeals. The impact could range far beyond just the franchise model of doing business and could alter the legal boundaries surrounding the use of independent contractors and staffing agencies. Also, the outcome may impact not just the area traditionally regulated by the NLRB, but could also impact wage and hour law, occupational safety and health and workplace discrimination, just to name a few.

The NLRB's theory is that the franchisor strictly controls the business practices of its franchisees to such an extent that the franchisor is actually a joint employer along with its franchisee. Potentially, such arguments will intrude on the legal independence employers seek when using independent contractors, temporary employment agencies and staffing companies.

These questions are not new. Decades ago, the NLRB applied a significant control test to

determine whether joint employer status existed. Over time, and being cognizant of the evolution of the American workplace, that standard evolved more or less to one requiring direct control. The NLRB's decision to prosecute McDonald's as a franchisor signals a shift back to the prior standard.

Until these issues are resolved, which likely will take years, we caution our clients to avoid making assumptions about the legal ramifications of their staffing relationships. We have little confidence that the National Labor Relations Board will get it right if and when the full NLRB takes up this issue. In all likelihood, this issue will have to be settled by the Supreme Court.

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