

## FRANCHISING OPPORTUNITIES IN SOUTHERN CALIFORNIA

# Can a Franchisor Avoid Becoming the Joint Employer of its Franchisee's Employees?

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**T**HE hottest issue in franchising today has united franchisors and franchisees in a battle to defend franchising itself against a movement to unionize workers and a perceived imbalance in the workplace. It is an effort to make franchisors responsible for their franchisees' employees by making the franchisors joint employers of those employees.

The basic theory behind this threat stems from the demise of large companies that formerly employed workers from cradle to grave, providing them with salaries, benefits and pensions. In an effort to develop a more efficient economic model (and more profit for investors), many of these companies began outsourcing elements of their operations, and focusing instead on their so-called core competencies. Dr. David Weil, the current head of the Department of Labor's (DOL) Wage and Hour Division, refers to this structural change as "fissuring." The fissured workplace has developed as a result of a number of methods of doing business, including franchising, according to this analysis.

How to fix the problem? In the opinion of some, the solution is to make franchisors responsible for wage and hour violation complaints of their franchisees' employees. Studies have shown that franchisors who own operations have fewer labor law violations than those of franchisees. If the franchisor is responsible, that translates into fewer violations, right? Coincidentally, it also makes collective bargaining and unionization an easier process. The National Labor Relations Board (NLRB) has targeted McDonald's, allowing complaints to proceed against both the franchisee and the franchisor. The Occupational Safety and Health Administration (OSHA) is exploring making franchisors liable for workplace safety. And, of course, the DOL is behind the new standard for joint



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employment as well.

The problem is, if the franchisor is responsible, why would it ever risk placing control of operations and employees in the hands of a third party, a franchisee? If this quest is successful, fewer companies will franchise and fewer individuals will have the opportunity to own their own businesses as franchisees. An extremely successful method of product and service distribution will wither on the vine.

While this battle plays out, what can franchisors do to protect themselves against becoming joint employers? Here are a few suggestions:

#### Focus on the "Operations Manual"

Protecting brand standards is good; exerting control over franchisees' operations is bad. A franchisor should consider renaming its operations manual and calling it a brand standards manual. Franchise Agreements will often define an operations manual broadly to encompass all information related to the franchise including "manuals, handbooks, policies, guidelines containing information related to the franchise system and other writings containing the franchisor's standards, methods and procedures." Many franchise agreements even incorporate the manual by reference in the agreement itself. The problem is that these franchisors likely did not intend to incorporate sample employee handbooks or

employment forms into their agreement since that might be later used to bolster claims of joint employment. Franchisors should instead consider limiting the definition of manual to a single document that protects the brand and excludes employment related information.

#### Define the Franchisor/Franchisee Relationship

Most current forms of franchise agreements will include a provision stating that the franchisee is an independent contractor and that no fiduciary relationship exists between the franchisor and franchisee. That may no longer be enough to protect franchisors. Franchisors should consider stating that the franchisor has no direct or indirect control over or responsibility for hiring, firing, disciplining or training the franchisee's employees.

#### Educate Field Personnel

Employees and representatives of a franchisor who regularly interact with franchisees (referred to as "field personnel") are frequently not clued in to legal developments in franchising. Franchisors should routinely educate their field personnel to understand what a joint employer is and what vicarious liability means. Training should include what to say and not to say to franchisees and franchisees' employees to reduce the risk to the franchisor. For example, field per-

sonnel should not directly communicate about the business with non-management employees, but should instead communicate about the business with the owner or general manager of a franchised business. Field personnel also need to know that they must not play a role in hiring, firing, setting wages or work hours, or in disciplinary decisions of the franchisee's employees.

#### Revisit Inspection Procedures

Franchisor inspections of franchisees' businesses are a key component to quality control in most franchise systems. Inspections help preserve brand standards and ensure compliance. Inspection agents need to be educated on how to communicate issues to the franchisee, how to document their findings and how to properly follow up to ensure corrective action has been taken. Franchisors might also consider hiring third parties to conduct inspections to distance the franchisor from the process and to ensure that inspections are conducted in a systematic fashion.

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