

# The Unions Get Their Day: Evolving NLRB, Independent Contractor, Employment and Minimum Wage Issues

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# Introduction and Presenters



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# Agenda

- ▶ Overview of NLRB Joint Employer Litigation
- ▶ Developments with Independent Contractor Issues
- ▶ Minimum Wage Landscape
- ▶ Preparations and Best Practices

# Timeline of NLRB Joint Employer Complaints

- ▶ November 2013: NLRB regional offices investigate Unfair Labor Practice charges filed against McDonald's and its franchisees as joint employers
- ▶ July 29, 2014 to Present: additional charges filed bringing total to **310**
  - ▶ **107** found to be meritorious by the NLRB; **54** still under investigation
- ▶ March 30, 2015: Complaints proceed to ULP hearings; split into three phases: Manhattan, Chicago and Los Angeles

## WHY did the NLRB think the charges had merit?

- ▶ ...through its franchise relationship and its use of tools, resources and technology, [McDonald's] engages in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of our Act.
- ▶ This finding is further supported by [McDonald's] nationwide response to franchise employee activities while participating in fast food worker protests to improve their wages and working conditions.

# What Does Browning-Ferris Have To Do With It?

- ▶ **CURRENT Joint Employer Standard Under NLRA:** Company must exhibit *direct* control over employees to be deemed a joint employer
- ▶ **NLRB General Counsel's PROPOSED NEW standard:** current standard "inhibits meaningful collective bargaining" and should be expanded beyond direct control test to include indirect or even potential control
- ▶ Many predicted a ruling would come in December 2014, but it is still pending

# “Joint Employer” not Limited to NLRB

- ▶ Wage & Hour Violations
- ▶ Occupational Health & Safety Administration
- ▶ Affordable Care Act
- ▶ Blacklisting in Federal Contracting
- ▶ Civil Rights Act of 1964
- ▶ Americans with Disabilities Act
- ▶ Equal Employment Opportunity Commission

# Employees or Independent Contractors?

- ▶ State and federal Department of Labor focus
- ▶ “The FY 2015 budget provides nearly \$14 million to help identify and combat the misclassification of workers as independent contractors, which deprives workers of the benefits and protections to which they are legally entitled, such as minimum wage, overtime pay, unemployment insurance, and anti-discrimination protections. This includes \$10 million in continued grants to States to recover unpaid unemployment taxes and an increase of \$3.8 million for WHD personnel to investigate violations.”



# Employees or Independent Contractors?

- ▶ Case developments
- ▶ Class actions pending in 2015:
  - ▶ Jani-King of Philadelphia, Inc.
    - ▶ Eastern District of Pennsylvania
  - ▶ CleanNet U.S.A., Inc.
    - ▶ Eastern District of Pennsylvania
    - ▶ Northern District of Illinois
  - ▶ Massage Envy Franchising LLC
    - ▶ Southern District of California
- ▶ State and federal wage and hour claims
- ▶ Claim: Franchisee is an employee of franchisor



# Employees or Independent Contractors?

- ▶ 20-factor IRS test, control test, economic realities test
- ▶ IRS test is broadly split in 3 areas
- ▶ Key factor: CONTROL
  - ▶ Behavioral Control
  - ▶ Financial Control
  - ▶ Type of Relationship



# Employees or Independent Contractors?

- ▶ Behavioral Control
- ▶ Is the franchisee told:
  - ▶ When and where to do the work
  - ▶ What tools or equipment to use
  - ▶ What workers to hire or assist with the work
  - ▶ Where to purchase supplies and services
  - ▶ What work must be performed by a specified individual
  - ▶ What order or sequence to follow when performing the work



# Employees or Independent Contractors?

- ▶ Financial Control
- ▶ Does the franchisee have a significant investment in his tools/equipment?
- ▶ Are the franchisee's expenses reimbursed by the business?
- ▶ Does the franchisee have an opportunity to share in the profit or loss?
- ▶ Is the franchisee available "on the market?" Does he advertise his services?
- ▶ How is the franchisee paid?



# Employees or Independent Contractors?

- ▶ Type of Relationship
- ▶ Is there a written contract?
- ▶ Is the franchisee going to receive any benefits?
- ▶ Is the relationship for a specific period of time or is it ongoing?
- ▶ Are the services being provided a key part of the business's activity?
- ▶ A written contract **does not** determine the relationship.



# Minimum Wage

- ▶ July 15, 2015: California Governor Jerry Brown signs bill requiring professional football and basketball teams to classify their cheerleaders as employees.
  - ▶ “Today we took an important step toward ensuring that multibillion dollar sports teams treat cheerleaders with the same dignity and respect as every other employee who makes the game-day experience special.” Lorena Gonzalez, D. San Diego.
- ▶ July 16, 2015: Kansas City passed law increasing minimum wage to \$13/hour over a four and a half year period.
  - ▶ Sometimes it’s important to “take a stand” even though it is “precarious.” Councilman Scott Wagner.

# Minimum Wage Developments

- ▶ State laws
- ▶ California:
  - ▶ \$9.00; \$10.00 January 1, 2016
- ▶ Colorado:
  - ▶ \$8.23; Increases or decreases annual
- ▶ Illinois:
  - ▶ \$8.25
- ▶ Minnesota:
  - ▶ \$8.00; Large employers \$9.00, small employers \$7.25 on August 1, 2015
- ▶ Washington:
  - ▶ \$9.47; Annual indexed increases



# Minimum Wage

- ▶ Local laws
- ▶ Seattle: \$10/11
- ▶ San Francisco: \$12.25
- ▶ Oakland: \$12.25
- ▶ Los Angeles: \$9
- ▶ San Diego: \$9.75
- ▶ Santa Fe: \$10.84
- ▶ Chicago: \$10
- ▶ Louisville: \$7.75
- ▶ Portland ME: \$7.50
- ▶ NYC: \$8.75





# Minimum Wage

- ▶ Ross Stores Case, Northern District of California, February 2015
- ▶ Ross Stores, Inc. contracted with a third-party contractor, USM, Inc. for janitorial services in California
- ▶ Current and former janitors alleged that Ross and USM violated California Labor Code Section 2810 and other California laws by underfunding the janitorial contracts
- ▶ Section 2810: Contract for labor or services with construction, farm labor, garment, janitorial, or security guard contractors must provide sufficient funds to allow for compliance with applicable law
- ▶ Court denied Ross Stores' motion to dismiss, case was litigated for a year and then settled for \$2.3 million
  - ▶ 130,000 documents produced in discovery

# Best Practices

- ▶ Understand the FUNDAMENTALS of Franchising.
- ▶ Be DELIBERATE and INTENTIONAL in requirements and recommendations.
- ▶ Stay away from your franchisees' EMPLOYEES.
- ▶ EDUCATE the decision-makers (your field staff).
- ▶ Use the FRANCHISE AGREEMENT and the OPERATIONS MANUAL to define roles and protect the system.

# Questions

