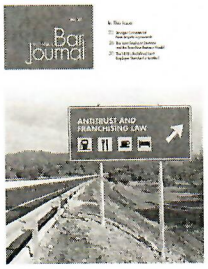

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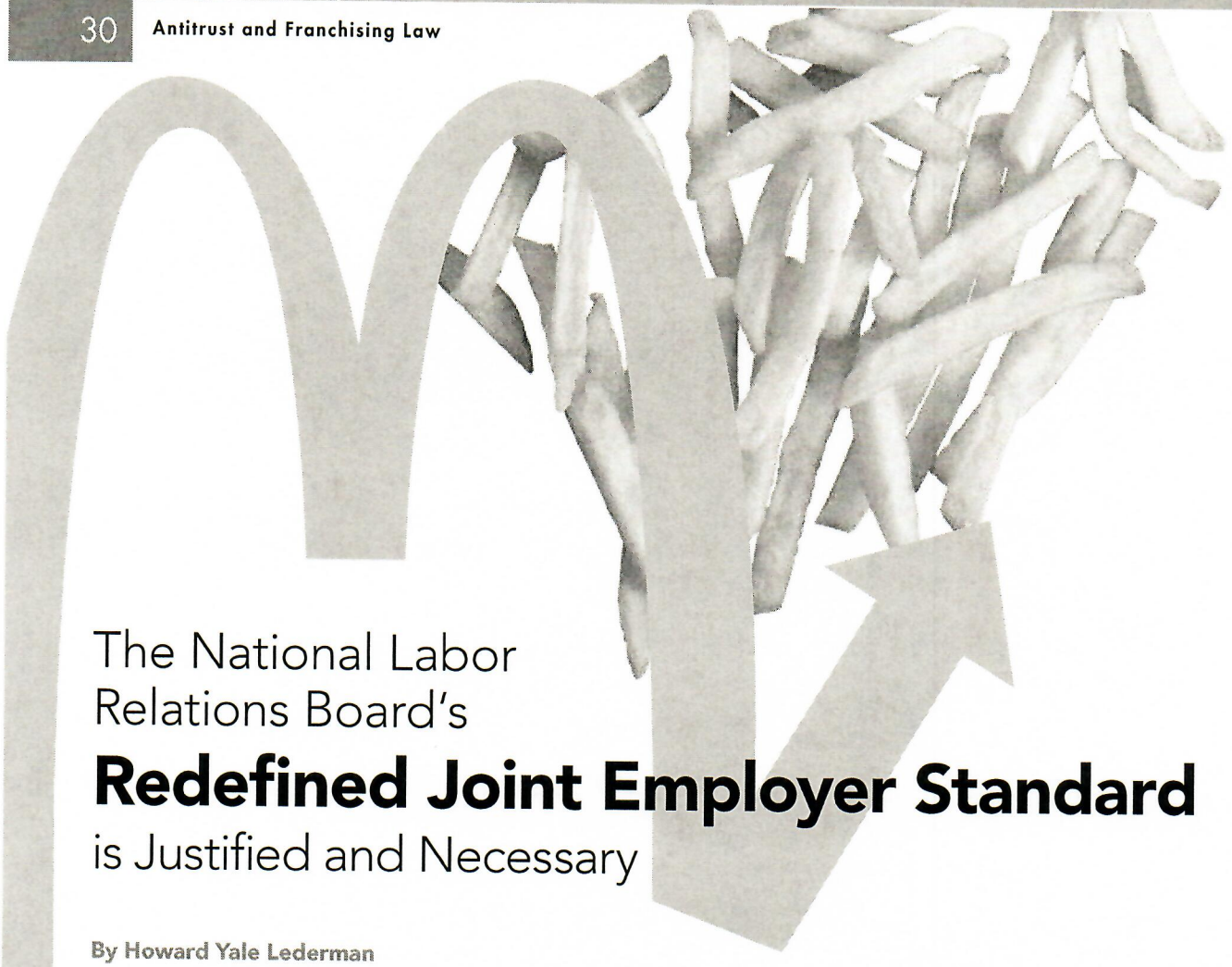

The National Labor Relations Board's **Redefined Joint Employer Standard** is Justified and Necessary

By Howard Yale Lederman

This article is a response to the preceding article by David Steinberg, Derek McLeod, and Emily Mayer, "Uncertainty Abounds: The Joint Employer Doctrine and the Franchise Business Model." The authors examine the billion-dollar question of whether redefining the joint employer doctrine "will be detrimental to the franchise industry." I say no. They assert that this redefinition will be franchising's "death knell." I respond that it won't.

Why? Because the redefined standard is not a per se standard, but a case-by-case, multi-factor standard. "[D]etermining joint-employer status has always been a factual issue regardless of how the [National Labor Relations] Board has defined the standard."[1] Thus, the proponent must specify facts supporting joint employer status. Also, several states have barred state agencies and courts from using the redefined standard.[2] The authors cite the *Freshii* case, in which the NLRB's general counsel applied the new standard, but concluded that the franchisor and franchisee were not joint employers.[3] So franchisor joint employer status will not be universal.

According to the authors, "most franchisors take a hands-off approach to the terms and conditions of employment offered by their franchisees" and instead focus on employee conduct and behavior that affects brand image and product quality. If so, most franchisors will escape joint employer liability. Therefore, the redefined standard does not sound franchising's death knell.

"[A] joint-employment relationship exists when two legally separate businesses are deemed jointly liable for employment-related claims."[4] This occurs when they both exercise significant control over a particular group of employees.[5]

To find a joint employer relationship under the redefined standard, the proponent must demonstrate that the claimed joint employers "codetermine those matters governing the essential terms and conditions of employment."[6] The proponent must show a common-law employment relationship with the employees in question through actual franchisor control over such

employment matters as hiring, firing, discipline, and hours. If successful on those two factors, the proponent must then establish that the putative joint employer "possesses sufficient [contractual] control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."[7] To be sufficient, the franchisor must have contractual control through the franchise agreement, operating agreement, or policy directive provisions.[8]

In the *McDonald's* cases, the NLRB's general counsel found evidence that McDonald's uses software to monitor when a franchise is not cost efficient, when too many employees are on duty, when the franchisee must reduce labor costs, and when it must send employees home. McDonald's enforces the software's findings. Thus, the franchisor, not the franchisee, is determining employment terms and conditions—in this case, employee schedules.[9]

Joint employer examples go beyond McDonald's. In *Patterson v Domino's Pizza, LLC*,[10] the evidence for holding Domino's to be a joint employer with its franchisee was strong and persuasive. Domino's dictated employee personnel file document requirements, time card and daily time report requirements, and employee appearance. The franchisee had to follow Domino's area leaders' directions—"If you didn't, you were out of business very quickly."[11] When a Domino's area leader told the franchisee to fire an employee, the franchisee fired the employee.

Based on the above evidence, the California Court of Appeals found Domino's was a joint employer with its franchisee. The California Supreme Court reversed in a 4–3 decision over a strong dissent. The dissenters rightly emphasized Domino's actual and contractual power to tell its franchisee whom to hire and fire.[12]

The evidence in these cases shows joint employer status. McDonald's and Domino's had extensive actual and contractual control over the franchisees' employment decisions. In advocating the contrary position, the authors assert that defining McDonald's as the franchisor control benchmark would be erroneous. Their assertion overlooks the fact that based on its extensive actual and contractual control, McDonald's has defined itself as the joint employer benchmark.

FAST FACTS

The National Labor Relations Board's 2015 redefined joint employer standard will not destroy franchising, but better it.

The redefined joint employer standard is a re-adoption of the NLRB's original standard.

The redefined joint employer standard does not impair franchisor assistance and guidance to franchisees, but does help prevent franchisor over-control of franchisees.

The NLRB's redefined joint employer standard is not a new standard, but rather a re-adoption of its old standard

The NLRB's original joint employer standard, used for more than 40 years, was broad: the board would find joint employer status when one employer "exercised direct or indirect control over significant terms and conditions of employment of another entity's employees" or had the potential to do so, or when due to "industrial realities," the claimed joint employer was essential for true collective bargaining to occur.[13]

In 1984, the NLRB adopted the Third Circuit's narrower joint employer standard.[14] Not until 2002 did the board define the essential analysis element: "[W]hether a putative joint employer's control over employment matters is direct and immediate."[15] Though concurring, NLRB member Liebman saw that the board had adopted the new standard "without a full explanation of why it was chosen, without careful exploration of possible alternatives (including alternatives…silently abandoned), and without a clear acknowledgement of the consequences."[16]

Board members' continuing questions about the narrower standard, a changing workplace structure, and worker dissatisfaction and protests led to reevaluation. The NLRB's general counsel concluded after reevaluation that a new standard is necessary "because the existing test fails to account for 'triangular employment relationships,' which 'alter who is the employer of record or make the worker-employer tie tenuous and far less transparent.'"[17] Franchising and employee leasing situations are examples where the putative employer's position enables its employment decisions to affect the other company's employment decisions. The general counsel found the narrower joint-employer standard inadequate "because in these contexts[,] the putative employer only exercises limited, indirect, or potential control over daily employment matters" while having substantial actual control.[18]

The NLRB ruled that McDonald's is a joint employer with its franchisees facing unfair labor practice complaints filed against them. The board explained that McDonald's sufficiently controls aspects of franchisees' operations beyond brand protection, and that its nationwide response to the franchisee employees' protest activities to improve wages further demonstrated sufficient joint employer control.[19] In 2015, the NLRB redefined the joint employer standard to meet the above new employment and technological conditions and to further fundamental National Labor Relations Act purposes of enabling employees to negotiate with employers over employment terms and conditions.[20]

The franchisor has alternatives to respond to the new standard. The first is less control over the franchisee in employment

matters. In the promotion and protection of the franchisor's brand and trademarks, control over employment matters is the least important control. It does little or nothing to promote and protect the franchisor's brand and trademarks. Control over health and safety practices, customer service practices, outside supplies and services sources, and product and service quality does far more. Effective and reasonable noncompetition, nonrenewal, and termination provisions also do more.

The second alternative is quasi-franchising, where the franchisor permits franchisees to customize or personalize "peripheral...aspects of the system."[21] The franchisee gains "the right, and the obligation, to use the franchisor's back-of-house system, while retaining flexibility for entrepreneurial endeavor in building an idiosyncratic, eclectic and individualized business."[22] Bars, boutique hotels, cafes, and restaurants are good candidates for quasi-franchising because customizing practices to address diverse generations and markets can attract new or more customers and thus increase sales. Permitting franchisee control over employment matters goes hand in hand with quasi-franchising.[23]

Franchisor assistance or guidance sometimes becomes domination

The authors' position that franchisors never suspected that the NLRB or courts would hold them joint employers until the board announced the new standard and that franchisees buy franchises to obtain franchisor assistance and guidance overlooks two realities: no employer can expect legal standards to last forever, and, as previously exemplified, franchisor control over employment matters sometimes goes far beyond assistance or guidance.

Sometimes, franchisor assistance or guidance resembles Japanese assistance and guidance to its puppet state, Manchukuo. In 1931, Japan seized Manchuria from China and declared it "independent" Manchukuo. The Japanese claimed they were merely offering Manchukuo righteous assistance. The Japanese defined their mission as "'[l]ending a hand to our neighbor.'"[24] Though installing a nominal government with Manchurian cabinet ministers and Emperor Pu-Yi, the last emperor of China, as nominal ruler, Japanese military officers and vice ministers exercised the real authority. "The Manchu ministers served as front-men for their Japanese vice ministers, who made all the decisions."[25] "Despite the claims to independence, there is no question that the real power behind it [Manchukuo] was the Japanese Army," so Western historians characterized it "as a 'puppet state.'"[26] Likewise, some franchisors claimed they were merely "assisting" and "guiding" franchisees. But like the Japanese in Manchukuo, these franchisors were dominating the franchisees.

> Like franchisors and franchisees, franchise employees will have more freedom to organize to better their benefits, wages, and working conditions. Thus, the redefined joint employer standard will promote more balanced power among franchising's three parties.

The redefined joint employer standard helps right a serious wrong

The authors ask, "Given this reality, where is the actual wrong that must be righted by the NLRB?" The wrongs are these: Franchisor control without responsibility and franchisee responsibility without control. Franchise employees working long hours, unable to earn a decent living, and forced to rely on food stamps and other public assistance at taxpayers' expense. Franchise employees being unable to organize to better their conditions, while franchisors and franchisees can.

The U.S. Chamber of Commerce, International Franchising Association, many franchisors, and some franchisees condemn the new joint employer standard because it promotes union organizing among franchise employees.[27] Some franchisors would respond to successful union organizing by instituting wholesale firings of franchise employees and replacing them with kiosks and robots. A leading example of this is a statement by Andrew Puzder, former CEO of Hardee's and Carl's Jr. and President Trump's unsuccessful nominee as secretary of labor: "'[Robots and kiosks are] always polite, they always upsell, they never take a vacation, they never show up late, there's never a slip-and-fall, or an age, sex, or race discrimination case[.]'"[28] Wendy's CEO Todd Penegor told some investors that "mandated wage hikes will cause [the] company to pursue other innovative avenues that could lead to fewer jobs for low-skill workers."[29]

Franchisors have freedom to organize to promote their interests through the International Franchising Association and U.S. Chamber of Commerce. But franchisees have limited freedom to do so through the International Franchising Association and franchisor-approved franchisee associations. Some franchisees have joined the American Franchisee Association, which has an anonymous membership category for franchisees fearing franchisor retaliation.[30]

Like franchisors and franchisees, franchise employees need to organize to promote their interests. In many franchise business lines, unionizing to combat starvation wages, almost nonexistent benefits, and bad working conditions has become imperative. Most fast-food employees are no longer teenagers, students, and housewives able to live on part-time work at low wages. They are family breadwinners needing full-time work at fair wages and benefits. Often, they must work two or three jobs to make ends meet.[31]

Few franchise employees get any benefits. "[M]any of them work in jobs that pay wages so low that their paychecks do not generate enough income to provide for life's basic necessities."[32] At least half need government assistance to survive. "And roughly one-fifth of workers' families are below the poverty line. That adds up to some $7 billion in welfare payments each year—essentially enabling fast-food megachains to subsidize ultra-low wages with public benefits."[33] Most fast-food positions are dead-end jobs.

Accordingly, the NLRB needed to right the wrong of millions of franchise employees living in poverty and being unable to organize to better their atrocious working conditions, with franchisors denying any responsibility for these conditions while sometimes controlling franchisees' employment decisions. If the franchise model depends on maintaining these horrendous conditions, it must go. A fair and balanced franchise model can then arise.

The redefined joint employer standard will not destroy franchising. Rather, it will improve franchising. Franchisors will be less likely to decide employment issues. Franchisees will have more freedom to do so. Franchisors will no longer have control without responsibility. Franchisees will no longer have responsibility without control. Like franchisors and franchisees, franchise employees will have more freedom to organize to better their benefits, wages, and working conditions. Thus, the redefined joint employer standard will promote more balanced power among franchising's three parties. ■

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