Insight

NLRB Leaving Some Presents for McDonald's Franchises

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The National Labor Relations Board (NLRB) has apparently decided to mark the end of 2014 by dramatically changing its own precedent regarding franchised businesses. On Friday, the Board announced that it has issued 13 complaints involving 78 labor practice charges against McDonald's. These charges are notable because they frame McDonald's and McDonald's franchisees as "joint-employers," when NLRB itself has long considered them as separate legal entities. This shift could have serious ramifications not only for McDonald's, but also for franchises in general.

The NLRB Regional offices that issued the complaints include: Manhattan, Philadelphia, Detroit, Atlanta, Chicago, St. Louis, Kansas City, New Orleans, Minneapolis, San Francisco, Indianapolis, Phoenix, and Los Angeles. Administrative law judges (ALJs) will hold a set of 3 regional hearings in New York City, Chicago, and Los Angeles in order to expedite the process. Initial rounds of litigation begin on March 30, 2015. The unsuccessful side of any of these proceedings can appeal to the full NLRB.

This announcement marks an escalation of an increasingly activist, rather than impartial adjudicator, NLRB. In fact, they are even breaking from long-established precedent. As the American Action Forum (AAF) has previously noted:

> As for the current debate, since 1984 U.S. businesses have operated under a relationship that held any firm as a joint-employer only if it exercised direct control of employees in another business. For example, hiring, firing, and supervision constituted direct control. Even before the 1980s, the NLRB has long established that franchisors are not joint-employers because all interactions with franchisees are aimed to preserve the franchise brand, not tell franchisees how to manage their workers.

The timing of the McDonald's complaints is particularly interesting as the NLRB's ruling in the Browning-Ferris case is expected soon. In that case, the NLRB's General Counsel office seeks to reverse the definition of joint-employment and hold firms as joint-employers if they simply exert indirect influence of employees in another business. This definition of a joint-employer is naturally vague and will only create confusion and uncertainty in the franchise industry.

NLRB's primary aim is to open these franchise businesses to unionization. This is problematic because under a franchise structure, although the franchisee uses a national brand, they generally operate as an independent business making their own management decisions. Operations on such a scale do not rise to the level of necessitating the sort of collective bargaining issues NLRB typically regulates.

Beyond the regulatory overreach of NLRB's actions are the practical consequences. These actions threaten to open franchises up to further regulatory scrutiny down the road that could affect their overall growth. In addition, only half of the regions will see adjudication in this first round, thus, those outside of the major regions will have to operate under a cloud of regulatory uncertainty going forward. For perspective, this is one of fastest

growing parts of the nation's economy – adding 25,000 jobs just last month – but now must operate under new regulatory scrutiny and legal liability.

Between this action and their recent rule on Representation Case Procedures, NLRB looks to have regained some regulatory zeal heading into 2015. However, reversing decades of precedent and adding new layers of regulation to what are essentially small businesses will doubtless have a significant impact on the nation's economy.