

MCDONALD'S DEAL LEAVES STATUS QUO ON JOINT-EMPLOYER TEST

By [Steven Gutierrez](#)

Republished with permission, this article first appeared in [Law360](#), March 30, 2018.

On March 20, 2018, the National Labor Relations Board announced that franchisor McDonald's USA LLC agreed to settle numerous high-profile labor disputes over whether it is a joint employer with its franchisees. Although the settlement has not yet been approved by the administrative law judge overseeing the litigation, McDonald's and its franchisees negotiated settlement agreements with the NLRB and the charging parties to resolve alleged unfair labor practice charges without admitting liability or wrongdoing. In doing so, McDonald's avoids prolonged litigation and a potentially adverse decision that would have had sweeping ramifications for franchisors and their franchisees nationwide.



Steven Gutierrez

Protracted Litigation Over Joint-Employer Status

In 2012, over 200 complaints were filed by McDonald's employees against the company alleging that they had been subject to retaliation after participating in the 2012 Black Friday strike which sought to raise the minimum wage to \$15 per hour. Specifically, the workers alleged that they had experienced discipline and interrogations, and had their hours reduced in response to engaging in efforts to improve their pay and working conditions.

In 2014, former NLRB General Counsel Richard Griffin approved filing dozens of unfair labor practice complaints against the larger franchisor, McDonald's USA, under a theory that McDonald's USA is a joint employer of the employees of McDonald's franchises. By pursuing the franchisor, the 2014 NLRB signaled that it was attempting to hold the larger, nationwide entity responsible for treatment of its franchisees' employees.

McDonald's, along with many restaurant, industry and employer groups, vigorously objected to the charges, arguing that a franchisor is not a joint employer with its franchisees and therefore, cannot be held liable for any labor law violations made by a franchisee. The joint-employer test at the time was based on whether the putative employer exercises direct control over the employees and McDonald's argued that it did not exercise such control over its franchisees' employees.

In 2015, the NLRB issued its controversial decision in *Browning-Ferris Industries* that significantly broadened the joint-employer test. In *Browning-Ferris*, the NLRB ruled that an entity could be deemed a joint employer if it reserved contractual authority over some essential terms and conditions of employment, allowing it to have indirect control over the employees. Under that expanded test, McDonald's faced higher scrutiny from the NLRB as to whether it was a joint employer and whether it retained some indirect control over the employees of its franchisees.

Due to changes in the makeup of the NLRB under the Trump administration, as well as a new NLRB general counsel, the NLRB has sought to reverse *Browning-Ferris Industries* and return to the former joint-employer test that required direct and immediate control. In December 2017, the NLRB overturned

Browning-Ferris in its Hy-Brand decision, only to have to vacate Hy-Brand in February 2018 because new board member William Emanuel should not have participated in that decision. As a result, the 2015 Browning-Ferris joint-employer test is still the standard used to determine joint-employer status under the National Labor Relations Act.

Settlement Leaves The Status Quo on Joint-Employer Status — For Now

By settling these cases, both McDonald's and the current NLRB avoid having to litigate and have a judge rule on whether franchisors like McDonald's can be deemed a joint employer under the current Browning-Ferris test. Although the current board continues to seek to overturn Browning-Ferris, the McDonald's settlement will push the issue down the road to another day.

According to the NLRB's March 20, 2018, announcement, the settlement will provide a full remedy for the employees who filed charges against McDonald's, including 100 percent of back pay for the alleged discriminatees. The settlement also will avoid years of potential additional litigation.

Congress Looking To Pass Statutory Joint-Employer Definition

In July 2017, a bill, H.R. 3441, was introduced in the [U.S. House of Representatives](#) that would amend the NLRA and the Fair Labor Standards Act to define which persons and entities may be considered joint employers. Called the "Save Local Business Act," the bill would add the following definition to both the NLRA and the FLSA to essentially codify the pre-Browning-Ferris joint-employer test:

"A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline."

On Nov. 7, 2017, the House passed this act on a vote of 242-181. It was sent to the Senate which has yet to take action on the bill. According to the [U.S. Chamber of Commerce](#), a coalition of businesses and trade associations is urging the Senate to pass the bill in order to bring a legislative solution to the joint-employer issue. If the Senate were to pass this amendment, the bill likely would be signed into law by the president.

Employer Considerations On Joint-Employer Status

With the joint-employer standards under various employment laws in flux, businesses face an uncertain future over potential obligations and liability as joint employers. Under the current broad Browning-Ferris test, franchisors, staffing companies and other entities who have some contractual authority or obligations related to employees of a second entity need to use caution to ensure that the second entity complies with the NLRA. Moreover, entities with reserved contractual control or indirect control of another entity's employees need to realize that they may be found to be a joint employer under the NLRA. This could open the door to liability for labor law violations as well as union organization and collective bargaining obligations related to joint employees.

Employers who may be subject to joint-employer status should examine their contracts with their staffing agencies, subcontractors, franchisees and other affiliated entities. To help avoid joint-employer status, look to refrain from retaining contractual control over the hiring and firing of those workers as well as avoiding setting pay, benefits and policies or exercising day-to-day supervision. In addition to analyzing contractual language, employers also must be careful that supervisors and on-site personnel do not treat these workers as direct employees, rather than as the employees of the staffing agency, franchisee or subcontractor. Finally, as long as employers comply with the NLRA and applicable employment laws, the issue of joint-employer status rarely comes into play. Consequently, having compliant policies and making lawful employment decisions will go a long way in avoiding liability without regard to potential joint-employer status.

Steven M. Gutierrez is a partner in the labor and employment practice at [Holland & Hart LLP](#) in Denver.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.