GRIFFIN AND WEIL ONE YEAR LATER – HAS A CLEARER PICTURE OF THE JOINT EMPLOYER CONUNDRUM COME INTO FOCUS?

Joe Fittante
Larkin Hoffman Daly & Lindgren

Justin Klein
Marks & Klein, LLP

Rochelle Spandorf
Davis Wright Tremaine
Browning-Ferris Industries of California, Inc.

• Old rule
  – Franchisors generally not joint employers, regardless of degree of indirect control retained

• New standard
  – Joint employment possible if control is reserved and exercised indirectly
Freshii Advice Memorandum
13-CA-142297 (Apr. 28, 2015)

• Request for opinion on whether franchisor or development agent were joint employers with franchisee

• No finding of joint employment under either old or new standard

• How helpful is Freshii?
DOL WHD Administrator’s Interpretation
No. 2016-1 (Jan. 20, 2016)

- Expansion of joint employment standard to focus on economic realities of relationship
  - Are workers economically dependent on potential joint employer?
• Seven-factor analysis

1. Level of control over workers
2. Ability to control terms of relationship
3. Length of relationship
4. Nature of the work
5. Importance of work
6. Location of work performance
7. Performance of administrative functions
McDonald’s USA, LLC
02-CA-093893 (Dec. 2014)

• Joint employer litigation ongoing

• Severance of New York proceeding from Chicago and Los Angeles proceedings

• New York proceeding to proceed on joint employer issue. Chicago and Los Angeles hearings to be held in abeyance.
Federal Legislation

• Multiple attempts focused on the NLRB

• None have passed
State Legislation

• Passed in nine states as of 9/7/2016
State Legislation

• Limits joint employer and franchisee-as-employee situations

• State laws amended vary by state

  – Examples: workers compensation, minimum wage/overtime, unemployment insurance, employment discrimination, state occupational safety and health
State Legislation

• Many carve out narrow situations where franchisor could be joint employer (or employer of franchisees)
  – Franchisor agrees to do so in writing
  – Franchisor exercises certain level of control
Franchisor Employment Litigation Decisions in 2016
Motion to Dismiss Stage
Ocampo v. 445 Hospitality LLC
2016 WL 4926204, at *6 (S.D.N.Y. Sept. 15, 2016)

• Issue: were following allegations sufficient to allege joint employment by hotel franchisor in an FLSA and New York Labor Law class action

  (1) mandatory training programs for Hotel employees
  (2) inspection rights
  (3) recordkeeping requirements
  (4) standards, specifications, and policies for “operation, appearance, and service of the Hotel”
Ocampo v. 445 Hospitality LLC

(5) software requirements
(6) unlimited “right to make changes” to the manner in which the Hotel is operated
(7) audits and inspections of the Hotel
(8) inspections of work performed by Hotel employees
(9) right to terminate the Doubletree franchise if QA requirements not met, “which thereby causes the termination of the employees' employment”
Ocampo v. 445 Hospitality LLC

Additional allegation: franchisor aware that Plaintiffs were not paid gratuities owed to them, but “failed to stop the unlawful wage practices and policies that were perpetrated”
Ocampo v. 445 Hospitality LLC

- Motion to dismiss denied

- Court: “The Second Circuit has not yet considered whether a franchisor can qualify as a joint employer. To the Court's knowledge, only four decisions within the Second Circuit have ruled on the issue under the Rule 12(b)(6) standard, all of which found that the plaintiffs pled sufficient facts to survive a motion to dismiss”
Reed v. Friendly’s Ice Cream, LLC

• FLSA and state law class action
• Similar result to Ocampo
• Motion to dismiss denied
• Case settled (awaiting court approval as of 10/3/2016)
Class Certification
**Ochoa v. McDonald’s**

2016 WL 3648550 (N.D. Cal. July 7, 2016)

Issue: can question of whether MCD is liable for its franchisee’s labor violations on an ostensible agency basis be adjudicated on a class-wide basis?
Ochoa v. McDonald’s

Facts according to trial court

• Plaintiffs claim to believe that MCD was their employer
• Plaintiffs alleged common course of conduct
  – Wore McDonald's uniforms
  – Packaged food in McDonald's boxes
  – MCD logo on paystubs, orientation materials, shift schedules and time punch reports
  – Most applied for a job through MCD website
  – Workplace heavily branded with MCD trademarks and name is also informative
Ochoa v. McDonald’s

• Holding: ostensible agency could be adjudicated on a class-wide basis
• McDonald’s has asked the Ninth Circuit to review
• Critical: decision was regarding whether to certify the class, not a decision on the merits finding ostensible agency
Ochoa v. McDonald’s

• Distinguishable?
  – Evidence that franchisee employees do not believe that franchisor was their employer?
  – Or were unjustified or unreasonable in relying on their belief that franchisor was their employer?
Summary Judgment
Wright v. Mountain View Lawn Care, LLC

• Was franchisor liable as a joint employer for discrimination, harassment and retaliation of franchisee’s employee under Title VII (Civil Rights Act)?

• Was franchisor liable for franchisor wrongdoing under single, integrated employer theory or apparent agency theory?

• HELD: No on all counts! Summary judgment for franchisor:
  – Not joint employer
  – Not single integrated employer
  – No apparent agency
Facts re joint employer

• No authority to hire and fire
• No provision of human resources management services
• Franchisee supervised and disciplined employees
• No training of franchisee employees
• Franchisor did not furnish equipment or maintain personnel records
• Different duties of franchisee’s employees and franchisor’s employees
• Employment forms stated franchisee was independently owned and operated and separate from franchisor
Wright v. Mountain View Lawn Care, LLC

Facts re single integrated employer theory

• employee wore uniform with franchisor’s name and used trucks with the franchisor’s logo
• no authority to hire or fire employee
• no supervision or disciplining of employee
• no furnishing of equipment used or the place of work
• no possession of employee’s personnel records
• no training of employee
• no provision of human resources management services to the franchisee
Facts re apparent agency

• Employee wore uniform with franchisor’s name and used trucks with the franchisor’s logo

• Forms stated that the franchisee was an independently owned and operated enterprise and was a separate and distinct entity from the franchisor

• Employee did not accept job because she believed she was working for the franchisor

• Personnel records either listed “Franchisee dba Franchisor Brand” as the employer or stated at the bottom: “This U.S. Lawns 'Franchise' is an independently owned and operated enterprise and is a separate and distinct entity from Franchisor”
Uninsured Employers' Fund v. Crowder
2016 WL 2605624 (Ky. May 5, 2016)

• Appeal of decision by Workers’ Compensation Board (included fact-finding)

• Issue: Did the franchisor for Quiznos ("QFA") have up-the-ladder liability for workers’ compensation benefits for a franchisee’s assistant manager?

• Law: To have up-the–ladder liability, the franchisee’s work would have had to have been a “regular or recurrent part of the work” of the franchisor
Uninsured Employers' Fund v. Crowder

• Facts
  – Franchisee’s work was making and selling sandwiches
  – QFA’s business was granting and overseeing franchise agreements
  – QFA did not operate any Quiznos restaurants

• Holding
  – No up-the-ladder liability for workers compensation benefits
  – Franchisee’s work not a “regular or recurrent part of the work” of franchisor
Numerous franchisors are defending joint employment litigation today in different forums
IS THIS THE END OF FRANCHISING?

Franchising

“It was a good run.”

April 1, 1852 – August 27, 2015
IS THERE A PATH FORWARD?
FRANCHISOR PRACTICE POINTERS

• Talk the talk. Walk the walk.

• Practice vigilance
  – Random checks on franchisees
  – Random checks on field personnel

• Pick your battles
  – What is important to your client’s system?
• Franchisors are being told, “Hands off!”
• Franchisees are saying, “Why’d I sign up?”
• Franchisees need to be diligent in managing their businesses like big businesses
  - Hire qualified professionals
  - Get educated on operations issues that are “hands off”
  - Work with franchisee associations and organizations
  - Challenge your franchisor to be an ally
CHANGES IN OPERATIONS

• Training
  – Limit to owners and managers
  – Institute a train the trainer program
  – Require certification by franchisee of provision of training to employees
  – Limit training to ensure standardized product/service/customer experience
  – Training should not be used in lieu of a Notice of Default
ADDRESSING FRANCHISEE EMPLOYEE ISSUES

• Provide lists of human resource professionals
• Use the FAC to generate employment forms
• Recommendations not requirements
• Use of labor scheduling software
• Pass on résumés without comment
• Direct franchisee to counsel if organizing at unit level
MAINTAIN SEPARATION IN OPERATIONS

- Employee paychecks refer to franchisee, not Brand
- Contracts in name of franchisee
- Emphasize independent ownership and operation
- Franchisee employee business cards refer to franchisee entity
FDD CHANGES

• Item 11
  – Training provided to Owner/Manager
  – Disclose purpose of training
    • To protect the brand and trademarks, not to control operations
FRANCHISE AGREEMENT MODIFICATIONS

• Delete language implying control over franchisee’s employees
  – Language regarding franchisor approval of employees
  – Language related to qualifications of employees
• Add language addressing franchisee responsibility for employees

(b) **Staffing** – You are solely responsible for the day to day operation of your Franchised Business and its employees. You will be solely responsible for recruiting and hiring the persons you employ to operate the Franchised Business. You are responsible for their training, wages, taxes, benefits, safety, schedules, work conditions, assignments, discipline, and termination. At no time will you or your employees be deemed employees of ABC Franchise System.
FRANCHISE AGREEMENT MODIFICATIONS

• Add language addressing *Ochoa*

  (b) Employment Notices – Franchisee shall post a notice on the employee bulletin board clearly visible to employees at the Restaurant, notifying all employees of their employer and clearly stating that neither Franchisor nor its affiliates are the employer of the employees.
FRANCHISE AGREEMENT MODIFICATIONS

- Add language addressing DOL Interpretive Statement

(a) Employment Matters – Franchisee’s employees are not Franchisor’s agents or employees and Franchisor is not a joint employer of these individuals. Franchisee is solely responsible for performing all administrative functions at the Franchised Center, including payroll and providing workers’ compensation insurance. Franchisee acknowledges that it is not economically dependent on Franchisor, and that Franchisor does not provide facilities, equipment or house or transport Franchisee’s employees or directly provide to Franchisee’s employees tools or materials required for Franchisee’s employees to perform services for Franchisee.
FRANCHISE AGREEMENT MODIFICATIONS

• Modify system standards language

(a) Compliance with System Standards –

Franchisee shall comply with all standards, specifications, and procedures contained in the Confidential Manual(s), as amended from time to time.
FRANCHISE AGREEMENT MODIFICATIONS

• Modify system standards language

(a) Compliance with System Standards –

Franchisee shall comply with all mandatory standards, specifications, and procedures contained in the Confidential Manual(s), as amended from time to time; provided, however, the foregoing shall not require Franchisee to comply with any personnel policies or procedures Franchisor may make available to Franchisee for its optional use. Franchisee acknowledges that the Confidential Manuals are designed to protect Franchisor’s standards and systems, and the Trademarks, and not to control the day-to-day operation of the business.
FRANCHISE AGREEMENT MODIFICATIONS

• Modify franchisee control language

(b) Franchisee Control – Franchisee acknowledges that it is responsible for the day-to-day operation of its Hotel, including hiring, setting the conditions of employment, supervision, discipline and termination of all personnel, purchases (or leases) and maintenance of equipment and supplies, preparing Franchisee’s own marketing plans and funding and implementing those plans, maintenance of employment records, and daily maintenance, safety, security and the achievement of compliance with the System of Operation. Franchisor’s ability to approve certain matters, to inspect the Hotel and its operations and to enforce its rights, exists only to the extent necessary to protect its interest in the System of Operation and the Trademarks. Neither the retention nor the exercise of these rights is for the purpose of establishing any control, or the duty to take control, over those matters that are clearly reserved to Franchisee.
FRANCHISE AGREEMENT MODIFICATIONS

• Modify independent contractor identification language

You will conspicuously identify yourself in all your dealings with third parties as the owner of your Franchised Business pursuant to a franchise agreement with us.
FRANCHISE AGREEMENT MODIFICATIONS

• Modify independent contractor identification language

You will conspicuously identify yourself in all your dealings with third parties as the owner of your Franchised Business pursuant to a franchise agreement with us. (a) Evidence of Relationship – Franchisee shall hold itself out to the public as an independent contractor by, without limitation: (i) clearly identifying itself in all dealings with third parties, including its employees, as a franchised, independently owned and operated entity, including on all public records, checks, stationery, contracts, receipts, marketing materials, envelopes, letterhead, business cards, employment applications, and other employment documents, invoices and other communications, electronic or otherwise; and (ii) displaying a sign in the reception area of the Franchised Center so as to be clearly visible to the general public indicating that the Franchised Center is independently owned and operated as a franchised business.
MANUAL MODIFICATIONS

• Review to confirm each requirement necessary to maintain goodwill of brand.

• Delete or cast as recommendations only employment standards – hiring, firing, conditions of employment

• Add disclaimer that any employment related forms are examples only
• Manual Disclaimer

These Brand Standards are designed to protect the System and the trademarks associated with the System. Franchisee at all times will remain responsible for the operation of the outlet.
MANUAL MODIFICATIONS

• Manual Disclaimer

These Brand Standards are designed to protect the System and the trademarks associated with the System, and not to control the day-to-day operation of the outlet. Franchisee at all times will remain responsible for the operation of the outlet, and all activities occurring at the outlet. Franchisee must hire, train, discipline, and otherwise be solely responsible for the outlet’s employees. Franchisor is not responsible for, and does not direct or control the conduct of, any outlet employee.
IS THIS THE END OF FRANCHISING....FOR FRANCHISEES?
NOT SO FAST..... BUT

• Overcoming the mentality of: “What have you done for me lately”
• Does “for yourself – not by yourself” still exist?
• Keep franchisees engaged
  – Train
  – Convention
  – Third party providers
  – Independent franchisee associations
• Educate franchisees on where and how to find answers
INEVITABLE SIDE EFFECTS

• INCREASED COSTS
  – Insurance
  – Professional fees
  – Due diligence costs
  – Litigation

• Tension between franchisee and franchisor

• Mistakes
OTHER SIDE EFFECTS TO CONSIDER

• Unionization
• Indemnification Claims
  – Slowed growth and development
• Decrease in mom and pop franchisees as a result of increased administration and costs
• Consolidation
• Stronger IFAs and FACs
QUESTIONS?