

A yellow triangle pointing downwards, located to the left of the 'BLOGS' header.

BLOGS

Vicarious Liability

Massachusetts Supreme Court Rules Modified “Right of Control” Test Applies to Vicarious Liability Claims Against Franchisor

In *Depianti v. Jan-Pro Franchising International, Inc.*, 2013 Mass. Lexis 472 (Mass. June 17, 2013), the Supreme Judicial Court of Massachusetts ruled that in analyzing vicarious liability claims against a franchisor, a modified right of control test should be applied. In addition, the court held that a franchisor can be sued by a franchisee for alleged worker misclassification even if there is no written contract between the franchisor and the franchisee. Jan-Pro operates a multi-tier janitorial services franchise system, in which it enters into agreements with master franchisees who then sell singleunit franchises within their regions. A putative class of unit franchisees sued Jan-Pro, alleging that it was vicariously liable for unfair trade practices by a master franchisee and that they were misclassified as franchisees when they were employees. In reviewing summary judgment motions, the federal district court in Massachusetts had certified to the state’s high court the questions whether a “right of control” test applied to the vicarious liability claims and whether Jan-Pro could be liable for misclassification.

On the first question, the court ruled that the unit franchisees’ claims were subject to a modified right of control test. It observed that vicarious liability is typically imposed when the master has the right to control the agent’s actions, even if actual control is not exercised. The court decided that this test could not be applied strictly in the franchise context, because franchisors must exercise some supervision and control over their franchisees to preserve their trademark rights under the federal Lanham Act. Thus, the court held that a modified “right of control” test applies to franchise relationships and that, under this test, a franchisor may be vicariously liable for a franchisee’s acts only if the franchisor controls or has the right to control the daily conduct or operations of the particular aspect of the franchise’s business relationship that caused the plaintiff’s harm. On the worker misclassification claims, the court held, without ruling on the merits, that the absence of a contract between Jan-Pro and the unit franchisees did not preclude the misclassification claim. It decided that Jan-Pro could not avoid potential liability by establishing a franchise system that potentially misclassified unit franchisees and by causing its master franchisees to contract directly with the unit franchisees.

Related People

Maisa Frank

Partner

Washington, D.C.

202.295.2209

maisa.frank@lathropgpm.com