Franchise Year in Review

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Lathrop GPM

Introductions

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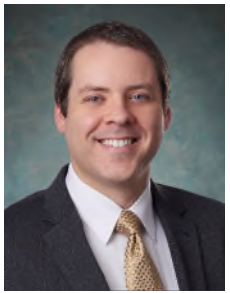

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Topics Overview

- Joint Employer
- Injunctive Relief Granted for Noncompetes
- Forum Selection Clauses
- Arbitration
- COVID-19 and What’s Ahead

Joint Employer

- DOL Final Joint Employer Rule
  - Defines standard for joint employer under Fair Labor Standards Act
  - Courts should evaluate four factors:
    - Whether the company can hire or fire the employee
    - Whether it supervises the employee's work schedule
    - Whether it sets the employee's pay
    - Whether it maintains the employment records
  - Considers only actual control, not right to control
  - Franchise business model does not automatically make joint employer status more likely
- New York v. Scalia, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020)
  - Struck down the above standard, finding that the DOL departed from its previous joint employer standards, that the Rule was contrary to the text of the FLSA, that it ignored established case law, and that it did not properly focus on economic dependence and the cost to workers

Joint Employer

- NLRB Final Joint Employer Rule
  - Defines standard for joint employer under National Labor Relations Act
  - A business must exert "substantial direct and immediate control over one or more essential terms or conditions" of employment.
    - "'Substantial direct and immediate control' means direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. Such control is not 'substantial' if only exercised on a sporadic, isolated, or de minimis basis."
    - The "essential terms and conditions" of employment consist solely of the following enumerated list:
      - Wages
      - Benefits
      - Hours of work
      - Hiring
      - Discharge
      - Discipline
      - Supervision
      - Direction
  - Effective April 27, 2020

Joint Employer

- Salazar v. McDonald's Corp., 944 F.3d 1024 (9th Cir. 2019) (amending 939 F.3d 1051 (9th Cir. 2019))
  - Affirmed summary judgment for McDonald's, finding that it was not a joint employer under three definitions of "to employ" because:
    - McDonald's did not exercise control over plaintiffs' wages, hours, or working conditions
    - McDonald's did not "suffer" or "permit" the employment, despite providing proprietary software which contained default programming that led to the wage and hour violations
    - McDonald's comprehensive franchise system did not give it control over the manner and means of plaintiffs' work
- Cruz v. MM869, Inc., 2020 WL 509109 (E.D. Cal. Jan. 31, 2020)
  - Dismissed ostensible agency claim after *Salazar* case, which held that the definition of employer under California's wage and hour laws only includes entities that actually employed the worker or exerted actual control.

Joint Employer

- DiFlavis v. Choice Hotels Int'l, Inc., 2020 WL 610778 (E.D. Pa. Feb. 6, 2020)
  - Court held Choice was not joint employer under Third Circuit's four-part test because it:
    - Had no authority to hire and fire a franchisee's employees
    - Did not have the authority to promulgate work rules and assignments, or set conditions of employment, such as compensation, benefits, and hours
    - Did not supervise DiFlavis on a day-to-day basis, in spite of its periodic inspections of the hotel, because the inspections were related to brand standards and not supervising the franchisee's employees; and
    - Did not control the records of the franchisee's employees
- Elsayed v. Family Fare, LLC, 2020 WL 780701 (M.D.N.C. Feb. 18, 2020) and 2020 WL 4586788 (M.D.N.C. Aug. 10, 2020)
  - Court originally denied motion for judgment on the pleadings, finding that the degree of control exercised by the franchisor could give rise to a joint-employer relationship
  - Court later granted summary judgment, observing that Family Fare did not have the authority to hire or fire employees of the franchise, and did not control payroll.
    - Also recognized that most courts have not imposed joint employer liability on franchisors, and none have done so in the FLSA context

Joint Employer

- Acharya v. 7-Eleven, Inc., 2019 WL 6830203 (S.D.N.Y. Dec. 13, 2019)
  - FLSA claims against 7-Eleven dismissed for failure to plead the ability to hire, fire, or control work schedule or conditions.

- Stewart v. Chick-fil-A, 2020 WL 264578 (S.D. Cal. Jan. 17, 2020)
  - Pro se discrimination claims against franchisee and Chick-fil-A dismissed for failure to allege that the franchisor exercised day-to-day control over the details of employment sufficient to be a joint employer.

- Mardis v. Jackson Hewitt Tax Service, Inc., 2019 WL 7207551 (D.N.J. Dec. 26, 2019)
  - Oklahoma law enacted in response to *Browning-Ferris*, which expressly states that a "franchisor shall not be considered the employer of a franchisee or a franchisee's employee's," does not apply retroactively. Thus, any claims arising before the law's enactment could proceed.

Injunctive Relief Granted for Noncompetes

- JTH Tax, Inc. v. Magnotte, 2020 WL 127949 (E.D. Mich. Jan. 10, 2020) – Court granted injunction enforcing post-termination noncompetition and nonsolicitation covenants
  - Liberty Tax franchisee was terminated in 2018 after significant defaults, but by 2019, owners had opened a competing tax preparation service in restricted territory.
    - Owners failed to return Liberty Tax Operations Manual and client information after termination
    - Competing business actively solicited customers of former Liberty Tax franchisee
  - Court reasoned that defendant had gained improper competitive advantage, and would not be harmed because injunction merely required compliance with their contractual committments
- JTH Tax LLC v. McHugh, 2020 WL 1689731 (W.D. Wash. Apr. 7, 2020) – Similarly granted injunction enfocing post-termination covenants, concluding that they were reasonably limited in time and geography
  - Noncompete was not barred by Washington anti-noncompete law
  - Court declined to enforce contractual bond waiver and required bond of $100,000

Injunctive Relief Granted for Noncompetes

- Little Caesar Enters., Inc. v. Miramar Quick Serv. Rest. Corp., 2020 WL 4516289 (6th Cir. June 25, 2020) – Appellate court affirmed preliminary injunction against holdover franchisee, rejecting argument that termination was "retaliatory" or that termination had to be justified by "clear and convincing" evidence franchise agreement was breached
- AmeriSpec, LLC v. Sutko Real Estate Servs., Inc., 2020 WL 3923584 (W.D. Tenn. July 10, 2020) – Court enjoins non-signatory from violating post-termination noncompete
  - Two days after franchisee signed mutual termination agreement, his son announced he had created a new competing business
  - Son and father were "in active concert or participation," because son had previously handled day-to-day activities of terminated franchise, and evidence suggested new company was a mere continuation of the old one.

Injunctive Relief Denied for Noncompetes

- Interim Healthcare, Inc. v. Interim Healthcare of Se. La. Inc., 2020 WL 3078531 (S.D. Fla. June 10, 2020) – Court granted injunctive relief for trademark infringement, but denied the injunction as to post-termination noncompete
  - Defendants operated interim franchises in Louisiana after original franchisee had its charter revoked, but franchisor never had them sign a new franchise agreement
  - Defendants "held themselves out as the successors of [original franchisee] and . . . Performed under, and enjoyed the benefits of" original agreement, but applicable law required covenant be set forth in writing and signed by party against whom it is enforced
- JTH Tax LLC v. White, 2020 WL 3643691 (W.D. Tex. July 8, 2020) – Court granted injunctive relief regarding trademark usage and post-termination obligation to return franchise manuals and customer information, but not non-compete
  - Court concluded Liberty Tax likely to succeed on breach of contract claim, it did not see irreparable harm because damages would be sufficient to remedy the injury, and forcing former franchisee out of tax preparation business proved greater hardship

Forum Selection Clauses

- Purugganan v. AFC Franchising, LLC, 2020 WL 2494718 (D. Conn. May 13, 2020) – Court rules successor in interest cannot take advantage of venue provision that refers to its predecessor's principal place of business
  - Provision stated that any dispute must be brought in the "state or judicial district in which we have our principal place of business."
  - Court concluded the "we" and "our" referred specifically to the predecessor in interest, and did not put Master Developer on notice that the required forum might change if assigned by the franchisor
- Sweet Charlie's Franchising v. Sweet Moo's Rolled Ice Cream, 2020 WL 3405769 (E.D. Pa. June 19, 2020) – Court transferred lawsuit to Delaware pursuant to forum selection clause, even though some defendants not party to that agreement
  - Lawsuit filed in Philadelphia, Defendant requested transfer to Tennessee, but court concluded that contractual choice of Delaware as exclusive forum was more efficient

Forum Selection Clauses / Choice of Law

- Lakeside Surfaces, Inc. v. Cambria Co., 2020 WL 1227047 (W.D. Mich. Mar. 13, 2020) – Court concluded that Michigan law did not invalidate forum selection clause in franchise agreement
  - Parties agreed that Minnesota law, not Michigan law, would govern contract
  - Franchisee would not be prejudiced by application of Minnesota law because it was likely the Minnesota Franchise Act would apply even though franchisee not based in Minnesota
- ACD Distrib. LLC v. Wizards of the Coast, LLC, 2020 WL 3266196 (W.D. Wash. June 17, 2020) – Court held that Wisconsin Fair Dealership Law would not apply when parties agreed contract would be governed by the laws of the State of Washington
  - Washington law did not provide distributor with the same protection against failures to renew
  - Distributor could not demonstrate, however, that Wisconsin had a materially greater interest in its law applying to the dispute, especially in light of parties' agreement in the contract that Washington law would apply

Arbitration

- Richardson v. Coverall N. Am. Inc., 2020 WL 2028523 (3rd Cir. Apr. 28, 2020) –Coverall franchisees required to submit employee misclassification claims against a subfranchisor to arbitration
  - Rejected argument that plaintiffs should not be bound by arbitration clause because they were an unsophisticated party
  - Franchisor was not a party to the agreement between franchisee and subfranchisor, more fact finding was required to determine whether it could invoke the arbitration agreement as a non-signatory
    - Bille v. Coverall N. Am. Inc., 2020 WL 1185251 (D. Conn. Mar. 11, 2020) – district court did grant stay to compel employees to arbitrate misclassification claim against franchisor
- Blanton v. Domino's Pizza Franchising LLC, 2020 WL 3263002 (6th Cir. June 17, 2020) – Court compels arbitration in anti-poaching class action
  - Domino's not a party to employment agreements with arbitration clause, but question of whether non-signatory could enforce the agreement was for the arbitrator
  - Court affirmed that incorporation of AAA Rules into arbitration agreement provides "clear and unmistakable" evidence that parties agreed to arbitration the question of arbitrability

Arbitration

- Soliman v. Subway Franchisee Advertising Fund Trust Ltd., 2020 WL 161328 (D. Conn. Mar. 5, 2020) – Court denies motion to compel TCPA class action brought by Subway Customers
  - Lawsuit based on customer continuing to receive text messages after signing up for initial promotion
  - Plaintiff received neither a reasonable and conspicuous notice of terms requiring arbitration, nor did customer unambiguously manifest assent to those terms

COVID-19 and What's Ahead

- Lathrop GPM COVID-19 Client Resource Center: https://www.lathropgpm.com/services-practices-14208.html
  - Webinar: Preparing for Franchisee Bankruptcies in a COVID-19 World: https://www.lathropgpm.com/newsroom-events-72523.html
  - Four Key Takeaways from the NASAA & Washington Commentaries on COVID-19 Disclosures: https://www.lathropgpm.com/newsletter-72573.html

- What's Ahead
  - Forbearance agreements coming due as businesses reopen, potential increase in terminations as forbearance arrangements end
  - Potential increase in bankruptcies
  - Backlog of court cases will move forward
  - Next COVID relief package
  - Incoming administration may affect regulatory and enforcement priorities

Questions?

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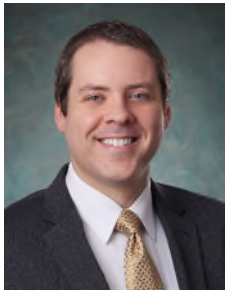

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