

Minimizing Joint Employer Risk Using the “Deliverables” Methodology

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NLRB's New Joint-Employer Standard

- Issued Oct.10, 2023; Effective Dec. 26, 2023
- The 2023 rule considers the alleged joint employers' authority to control essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any such exercise of control is direct or indirect.
- Essential terms and conditions of employment are defined as:
 1. wages, benefits, and other compensation;
 2. hours of work and scheduling;
 3. the assignment of duties to be performed;
 4. the supervision of the performance of duties;
 5. work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
 6. the tenure of employment, including hiring and discharge; and
 7. working conditions related to the safety and health of employees.

The “Deliverable”

- How do you determine what is arguably allowable control over “The Brand”?
- Answer: The concept of the “Deliverable”
- Deliverable - What is it?
 - Conceptual filter for reviewing franchisor control content
 - Put yourself in the place of the retail customer
 - What comprises their experience and perception when encountering and interacting with the franchisee’s product or service offering?
 - Holistic viewpoint
 - Use when reviewing franchisee controls in any form in any document or policy or procedure
 - Can you draw a straight line from the control to the Deliverable?

The “Deliverable” (cont.)

- Anything directly impacting the “Deliverable,” you should be allowed to control via mandatory operational standards
- Anything not directly impacting the “Deliverable,” should be optional, deleted or “suggested” only
- If you can tie it directly to the customer experience (i.e. the “Brand”), then you have a firm basis to argue that you have the right to control it without undue risk
- Caselaw overview

Shades of Gray

- Easy:
 - Customer safety, service standards, store layout, product selection, uniforms, signage, trademark use and display, approved products, vehicle signage, delivery policy
- Harder:
 - Cash controls, drug testing, grooming standards, background checks, mobile device use, drug and alcohol policies, bookkeeping systems, closing procedures
- The analysis is a spectrum based on fact-specific elements

Examples

- Employee background checks
- Drug and alcohol testing and policies
- Driver's license requirements/restrictions
- Grooming rules: Tattoos, piercing, hair length/style/color
- Education requirements
- Confidentiality requirements
- Staffing levels--number of employees per shift/daypart
 - Speed of service standards
 - HR modules in Enterprise software

Joint Employer Control Points

- Operations Manuals
 - Biggest source of major risks-- Franchise Agreements that say Fr'ee MUST follow Ops Manual
 - What is in your Operations Manuals?
 - Paper manuals—usually old and out-dated —especially regarding HR
 - On-line—often a graveyard of outdated material
 - Flyers, updates, programs, policies, announcements—are they mandatory?
 - What is mandatory vs. suggested guidelines?
 - Review and edit all manuals using Deliverables construct—especially regarding Human Resources
 - Divide mandatory vs. suggested and include disclaimers
 - Courts say control over trademark, product and brand should not result in vicarious liability—employment or otherwise
 - Samples

Practical Tips

- Eliminate/Minimize training of franchisee's non-manager employees
- Communicate only with franchise owner/designated manager
- Eliminate/Minimize unnecessary controls
 - Eliminate most/all employment forms or handbooks unless identified as “suggestion” with explicit disclaimers
- Franchise Agreement Provisions
 - Franchisee has exclusive control over all employment decisions
 - Franchisor has no right or authority to make HR decisions
 - Obey all laws clause, including state and federal labor laws
 - Make sure indemnification clause is expansive

Conclusion

- Joint Employer = Direct or Indirect Control, or Right to Control
- Think about “the brand” and “the deliverable”
- Differentiate between what is required and mere guidelines in Ops manuals
- Review and adjust the Franchise Agreement
- Disclaimers are your friend

Have Questions?

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