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Senate Panel Eyes Joint Employer Liability, As Opponents Get Ready for NLRB Decision

By Chris Opfer

Feb. 5 — Recent efforts by the National Labor Relations Board's general counsel to increase joint employer liability "could destroy" the franchise system as it currently exists, opponents of the move said Feb. 5 during a Senate Committee on Health, Education, Labor and Pensions hearing, while lawmakers and industry groups geared up for a much-anticipated board ruling on the issue.

"The pending decision by the National Labor Relations Board would threaten this very American way of life, knocking the ladder out from under hundreds of thousands of Americans," HELP Committee Chairman Lamar Alexander (R-Tenn.) said during the hearing, referring to the potential impact of expanded liability on franchise businesses and those that rely on contractors to provide workers.

The NLRB is preparing to rule in *Browning-Ferris Industries of California, Inc.,* No. 32-RC-109684, in which the board is expected to decide whether to adopt a more inclusive joint employer liability standard (91 DLR A-7, 5/12/14).

NLRB General Counsel Richard F. Griffin has urged the board to use a "totality of the circumstances" test, rather than the "direct control" standard currently in place. He has said the board should look at whether a franchiser exercises either direct or indirect control over a franchisee and consider the "industrial realities" at play in a particular franchise relationship in determining whether a business is a joint employer (146 DLR AA-1, 7/30/14).

Griffin's office announced in December that it had issued 13 unfair labor practice complaints nationwide against McDonald's USA LLC, alleging the fast food giant is liable as joint employer of workers at certain franchise restaurants throughout the country (244 DLR AA-1, 12/19/14). He was not invited to participate in the hearing, according to a Republican HELP Committee staffer.

CHANGING LABOR MARKET

Democrats and Paul Secunda, director of the Labor and Employment Law Program at the Marquette University Law School in Milwaukee, argued that the NLRB has the authority to interpret the National Labor Relations Act and to ensure that the law reflects the modern workplace, where franchisers often exert significant control over franchisees and their workers without any potential liability.

Ranking member Patty Murray (D-Wash.) said "the labor market has changed dramatically" in the three decades since the joint employer standard was last updated, including through the prevalence of franchise and contract arrangements.

"The parent company of a franchise can dictate pricing and store hours," Murray said. "It can prohibit collective bargaining and it can monitor, in real time, worker hours and staffing levels. And yet, the parent company can put all the liability for poor working conditions and low wages squarely on the shoulders of its franchise owners."

Committee Republicans, a pair of franchise business owners, and management attorney Marshall Babson, on the other hand, said during the hearing that the move would undo decades of settled law and undermine the franchise system by forcing franchisers to take a larger role in franchisee operations.

"There is no support in NLRA jurisprudence for such a broad, sweeping change," said Babson, who is a former board member. "It is up to this committee and, ultimately, to the Congress to adjust the statute if they believe that there have been sufficient economic changes to the business model to warrant such changes."

LOOKING FOR LEGISLATIVE SOLUTION

Sen. Johnny Isakson (R-Ga.), who chairs the HELP Employment and Workplace Safety subcommittee, said he was concerned about unelected NLRB lawyers altering the law on the books.

"Personally, I think it's settled law and we ought to leave it the way it is," Isakson told Bloomberg BNA after the hearing. "But if somebody wants to make a change, you ought to do it through the debate process and the congressional process, not through an attorney at the NLRB."

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out from under hundreds of thousands of Americans," HELP Committee Chairman Alexander (R-Tenn.) said during the hearing.

Should Griffin's move to expand joint employer liability succeed, Isakson said "we may have to legislatively go after the board," including through disapproval resolutions. "We've had resolutions of disapproval before—in fact, I authored some of them—and I'd be willing to do it again," he said.

Meanwhile, industry groups whose members are likely to be impacted by the NLRB's moves are stepping up their efforts to sway Congress into action. The International Franchise Association, the National Council of Chain Restaurants, and the Job Creators Network, a free enterprise organization started by the Home Depot founder Bernie Marcus, are among the groups that have formed a coalition to address the issue in the Capitol.

Rob Green, the NCCR's executive director, told Bloomberg BNA Feb. 5 that the coalition is a "broad based" initiative that will bring together "a lot of different stakeholders."

Although the groups are focusing primarily on "educating" lawmakers about the joint employer issue and its potential impact on the business community, Green said legislation to block the NLRB from expanding joint employer liability would be "very positive."

Green said the NCCR is awaiting the NLRB's ruling in the *Browning-Ferris* case before seeking a specific legislative response from Congress. He and JCN President Alfredo Ortiz said the HELP Committee hearing started an important conversation about the issue.

"We believe that a discussion needs to happen before legislation can happen," Ortiz told Bloomberg BNA Feb. 5

PURPOSE OF LAW DEBATED

Secunda and Babson spent much of the hearing jostling with one another, as well as with various members of the committee, over the potential impact of expanded liability and the NLRB's authority to interpret the law.

Sen. Richard Burr (R-N.C.), in questioning aimed at Secunda, suggested that Griffin is pushing to "reinterpret congressional intent" in order to make it easier for fast food and other workers to organize by allowing all employees of a particular franchise to join together in a single bargaining unit.

Noting that one of the NLRA's stated purposes is to promote collective bargaining, Secunda countered that workers should be able to negotiate with the entity that's actually controlling their employment. "If you can't bring the members who are in charge of the workplace to the bargaining table, you can't change anything," he said.

The parent company of a franchise "can put all the liability for poor working conditions and low wages squarely on the shoulders of its franchise owners," Sen. Murray said.

He and Sen. Elizabeth Warren (D-Mass.) also observed that it was the board, not Congress, that developed the current joint employer standard in *TLI, Inc.,* 271 N.L.R.B. 798, 117 LRRM 1169 (1984), and *Laerco Transportation,* 269 N.L.R.B. 324, 115 LRRM 1226 (1984).

But Babson said the NLRB is bending over backwards to support unions. "It's clear the statute is intended to encourage collective bargaining; it's not intended to guarantee it," Babson said.