French Fries, Franchisees, and the FMLA: Understanding the McDonald's Decision and What It May Mean for Expanding Franchisor Joint Liability

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This Note addresses the legal complexities surrounding changes to the interpretation of joint liability following Browning–Ferris Industries*. This issue is exceptionally pressing as joint liability is applied to franchisors in new and unexpected ways. This Note explores the ways liability has expanded, what may happen next, and the potential consequences of these changes. It concludes with recommendations for franchisors to cope with this new area of legal uncertainty.*

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I. Introduction: Employer Liability in the Modern World

Every time we enter a restaurant, a number of things cross our minds. The food, the atmosphere, the prices, but almost never the individual employee behind the counter or the corporation that controls our local coffee shop or neighborhood grocery. In a litigious world, the "man behind the curtain" matters, especially when it comes to lawsuits brought by employees. Whether a worker may sue only a franchisee, or both franchisee and franchisor, for labor code violations is critical in terms of resources and recovery.

This Note sets out to explore franchise joint liability as it existed prior to the recent 2014 changes in the law expanding franchisor liability and the consequences of those changes. It will begin with a brief history of franchise liability for employment violations and the employment acts themselves before discussing the McDonald's franchise decision that altered the interpretation of joint liability. The next Part will address whether this new interpretation will be utilized by federal agencies in defining liability under other employment laws and the consequences for franchisors should that occur. Finally, this Note will recommend a strategy for franchisors to reduce the risks of joint liability through lobbying the legislature and other day-to-day procedures.

II. Background: McTrouble—Joint Liability Shocks the Franchise World

The Family Medical Leave Act[1] (FMLA) is an incredibly significant piece of legislation that impacts a majority of Americans during their working lives.[2] It dictates the type and length of leave employees must receive and under what circumstances they must receive it.[3] However, there are still significant questions about the scope of the Act including the potential liability of franchisors for franchisee FMLA violations, issues with successor liability, and uncertainties about temporary and seasonal workers.[4] While all of these are important topics, this Note seeks to address potential franchisor joint liability because it is a timely and rapidly developing subject with the potential to dramatically expand notions of liability unlike any previous interpretation.[5]

This Part will first conduct an analysis of the FMLA to understand the ambiguities surrounding liability by looking at the history, wording, and traditional application of the Act. Next, it will address the potential expansion of FMLA liability to franchisors. This involves exploring the *Browning–Ferris*[6] decision of the National Labor Relations Board (NLRB) and its recent application of joint liability to corporate franchisors under the Fair

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1. 29 U.S.C. §§ 2601–2654 (1993).

2. Wage and Hour Division (WHD), *Families and Employers in a Changing Economy*, U.S. Dep't of Labor, https://www.dol.gov/whd/fmla/1995report/summary.htm (last visited Sept. 4, 2016).

3. *See* 29 U.S.C. §§ 2601–2654 (discussing the requirements for appropriate leave time in various employment situations; the broad language of the Act means that it applies to a variety of workers).

4. *See FMLA Eligibility: How are the rights of employees handled when the employer undergoes a merger or an acquisition?*, Soc'y For Human Res. Mgmt. (Mar. 25, 2015), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/mergersandfmla.aspx (looking at successor liability); Robert Salasko, *Beware the Legal Risk of Hiring Temps*, Workforce (Oct. 17, 2002), http://www.workforce.com/2002/10/17/beware-the-legal-risks-of-hiring-temps/ (explaining the complications with determining FMLA coverage for temporary employees). For an in-depth look at joint liability of franchisors, see *infra* note 15 and accompanying text (explaining the recent expansion of joint liability).

5. *See* Wiegele, *infra* note 20 (analyzing the widespread consequences of the new joint liability interpretation applying to franchisors).

6. Browning–Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (2015).

Labor Standards Act (FLSA). Finally, this Part will investigate the Department of Labor's push to utilize the NLRB test[7] in enforcing Occupational Health and Safety Administration (OSHA) rules.

A. A Brief History of the FMLA and Franchisors

Congress passed the FMLA in 1993, and since that time, the Act has had a major impact on the American workplace. It addresses a number of issues including mandatory time off for the birth or adoption of a child, the care of a sick family member, an employee's serious medical condition, or certain situations in which a family member in the military is injured.[8] If employers violate the Act, they can be held liable under federal law.[9] Congress constructed the FMLA to provide guidance for employers in the majority of foreseeable situations. However, there are some tricky nuances.[10] These include when successors in ownership of the business must provide leave under the FMLA to the former company's remaining employees, the intricacies of FMLA responsibility during the merger process, and when franchisors are liable for the violations of franchisees.[11]

The law surrounding franchisors has spawned a number of distinct issues including joint liability questions.[12] The basic language of the FMLA handling joint liability seems straightforward: "[w]here two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA."[13] But in reality, this single sentence is highly complicated. Joint employers would hypothetically share liability for any violation. However, the FMLA also contains specific language regarding primary employers: "only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and [for] maintenance of health benefits."[14] A primary employer is the employer who has the most control over day-to-day activities including hiring, firing, and employee positions.[15] Employers and courts have traditionally interpreted this to mean that FMLA liability only applies to the primary

7. The test holds franchisors liable for franchisee violations when they share control over day-to-day factors related to the violations. For example, in the case of the FLSA, control over labor negotiation was sufficient. *Id.* at 11.

8. WHD, *Family and Medical Leave Act*, U.S. DEP'T OF LAB., http://www.dol.gov/whd/FMLA/ (last visited Sept. 4, 2016).

9. WHD, *Fact Sheet #28A: Employee Protections under the Family and Medical Leave Act*, U.S. DEP'T OF LAB. 3 (Sept. 2012), http://www.dol.gov/whd/regs/compliance/whdfs28a.pdf.

10. *See* Salasko, *supra* note 4 (discussing common FMLA problems).

11. *See FMLA Eligibility*, *supra* note 4 (listing relevant factors in determining such liability).

12. *See But What Does the FMLA Mean in the* Real *World?*, POTTER, TRACHTMAN, LOGAN, CARRLE & LOMBARDO (2003) (on file with author) (listing 20 common FMLA ambiguities and further stating: "The bare language of the FMLA raises more questions than it answers . . . . But while the FMLA does not itself provide 'bonanza' [excessive] damages for emotional distress and punitive damages, a failure to comply with the FMLA can still lead to a multi-million dollar verdict. This is because employees who suffer an FMLA violation may join other, related claims in the FMLA lawsuit, all of which will be predicated on the FMLA violation").

13. 29 C.F.R. § 825.106(a) (2013).

14. 29 C.F.R. § 825.106(c). Compare this with the joint liability understanding of the FLSA. *See* 29 C.F.R. § 203 (2011) (giving the definitions of employer and other related terms).

15. 29 C.F.R. § 825.106(c) (explaining factors in determining who would be considered a primary employer; basically, control of day-do-day tasks or supervision of that control with standardized policies and procedures is sufficient); Susan N. Houseman, *9.2 Who Is the Employer? Determining Joint-Employer Status*, U.S. DEP'T OF LAB. (Aug. 1999), http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/staffing/9.2_jointemployer.htm.

employer—the one directly handling leave and medical matters.[16]

The application of joint liability under the FMLA typically proceeds in a fairly routine manner. Courts have largely relied on the integration test set forth in 29 C.F.R. Section 825.104[17] in extending the FMLA to small-scale franchisees with multiple restaurants in limited situations.[18] The test analyzes commonality of management, integration of operations, centralized control of labor relations, and degree of common ownership.[19] None of these factors are dispositive; instead, courts look to the totality of the circumstances when considering the factors.[20] No court has applied this test to a franchisor, and many believe that the primary employer language of 20 C.F.R. Section 825.106 would prevent such application.[21] They have held the primary employer language separates the responsibilities of the parties, making it difficult to claim direct joint control over family medical leave situations.[22] However, this conclusion is less certain in the face of a recent NLRB decision, *Browning–Ferris*.[23] In this case, the Board extended the definition of joint employer dramatically. The Department of Labor's purported attempts to use the decision when applying OSHA[24] furthers the case that liability may be extended under the FMLA.

B. The NLRB Takes on McDonald's

Following the 2012 wage protests, numerous employees filed complaints with the NLRB against individual McDonald's franchisees and the company as a franchisor.[25] Prior to the Board's recent decision, however, McDonald's Corporation was insulated from any liability as a "secondary" (i.e., non-primary) employer.[26] Various courts had determined

16. *See* Rhodes, *infra* note 21 (stating only employers directly involved in the misconduct are held liable).

17. 29 C.F.R. § 825.104 (2013) ("A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include: (i) [c]ommon management; (ii) [i]nterrelation between operations; (iii) [c]entralized control of labor relations; and (iv) [d]egree of common ownership/financial control.").

18. *Id.*; *see generally* Alisa B. Arnoff, *A Survey of Recent Federal Activity Involving Joint Employment Issues*, ABA SEC. OF LAB. AND EMP. L. (Mar. 25, 2010), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_err_009.authcheckdam.pdf (describing what various federal courts did in relevant cases in front of them).

19. Arnoff, *supra* note 18, at 12.

20. Katarina E. Wiegele, *Franchisors and the Specter of Joint Employer Liability for Franchisee Misconduct*, BLOOMBERG: BNA (Sept. 19, 2014), http://www.bna.com/franchisors-specter-joint-n17179895132.

21. *See* Jeffery Rhodes, *Can a franchise chain be held liable for the unlawful employment practice of one location?*, ABLO & OBLON LLP (Jan. 15, 2015), http://www.albo-oblon.com/2015/01/15/can-franchise-chain-held-liable-unlawful-employment-practice-one-location (noting the history of not applying FMLA liability to franchisors).

22. *Id.* (discussing how the requirements of day-to-day employer control over FMLA issues mean that corporate franchisors are effectively precluded from being joint primary employers); *see* 29 C.F.R. § 825.106 (2013) (defining primary employer and their duties).

23. Browning–Ferris Indus. of Cal., Inc., 362 N.L.R.B. 186, 1, 11 (2015).

24. Todd L. Sarver, *The NRLB's Designs to Re-Define Joint Employer*, EMP. ESSENTIALS (Oct. 8, 2014), http://www.sjlaboremploymentblog.com/the-nlrbs-designs-to-re-define-joint-employer/; Sean Higgins, *Alexander alleges 'coordinated effort to change the law' by NLRB, OSHA*, WASH. EXAM'R (Sept. 23, 2015, 7:58 PM), http://www.washingtonexaminer.com/alexander-alleges-coordinated-effort-to-change-the-law-by-nlrb-osha/article/2572723.

25. Jonathan Maze, *National Labor Relations Board denies McDonald's appeal*, NATION'S REST. NEWS (Aug. 18, 2015), http://nrn.com/hr-training/national-relations-labor-board-denies-mcdonald-s-appeal.

26. *See* Sarver, *supra* note 24 (noting the change to applicability of liability to franchisors after the NLRB

that day-to-day company involvement and a formal right to control were distinct matters, and that only having day-to-day control gives an employer FLSA[27] liability.[28] A contractual franchise relationship alone was not enough to extend joint liability to franchisors.[29] A secondary employer under the FMLA and the FLSA is generally understood to be one who does not exercise direct control over day-to-day benefits, labor management, and health leave decisions.[30] In hearing various FMLA and FLSA cases, federal district courts had considered various "operational control factors" as demonstrated by the *Orozco v. Plackis*[31] and *Irizarry v. Catsimatidis*[32] cases.[33] To make the joint employer determination, they considered whether each possible employer: "1) had the power to hire and fire employees; 2) supervised and controlled employee work schedules or conditions of employment; 3) determined the rate and method of payment; [and] 4) maintained employment records."[34]

In a groundbreaking decision in July 2014, the Board's general counsel changed this strict focus on day-to-day operational control when it announced that McDonald's could be liable to employees as a "joint employer" since they have control over labor negotiations through franchise agreements—the disputed issue in these cases.[35] The Board's general counsel requested the new analysis from the Board, asking that joint employer be construed broadly to involve all parties who are essential to meaningful bargaining.[36] This does not appear to be the end of the factors analysis since the control factors were utilized in justifying the expansion.[37] Instead, the NLRB simply evaluated the factors in a more employee friendly manner.[38] The NLRB looked at control very loosely to require liability for what it perceived to be necessary parties (i.e., those with influence over labor relations and policies).[39] Therefore, McDonald's control over labor negotiations was enough for

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decision).

27. 29 C.F.R. § 201 (2011) (creating liability for employers that violate federal labor practices and have control over the day-to-day work of employees as well as control over matters of labor policies in the company).

28. Wiegele, *supra* note 20 (setting forth the day-to-day control element as separate from the ability to obtain overarching control; this has been critical in separating franchisees from franchisor companies).

29. *Id.*

30. *See* 29 C.F.R. § 825.106 (2013) (defining the duties of a primary versus secondary employer under the FMLA).

31. Orozco v. Plackis, 757 F.3d 445 (5th Cir. 2014).

32. Irizarry v. Catsimatatidis, 772 F.3d 99 (2d Cir. 2013).

33. Wiegele, *supra* note 20 (discussing *Orozco* and *Irizarry* as they apply to understanding operational control).

34. *Id.* (finding courts using operational control factors in various FLSA cases; note that all of the listed factors involve direct day-to-day interaction with employees and hands on management, traditionally defining features of control for liability purposes).

35. *See* Ashley Kasarjian & Gerard Morales, *General Counsel of the NLRB Opens the Door for Franchisors to be Liable for the Actions of their Franchisees*, JD SUPRA BUS. ADVISOR (July 31, 2014), http://www.jdsupra.com/legalnews/general-counsel-of-the-nlrb-opens-the-do-89316/ (discussing the board decision).

36. Brief of the General Counsel of the National Labor Relations Board as Amici Curiae Supporting Neither Party at 16, Browning–Ferris Indus. of Cal. Inc., 362 N.L.R.B. No. 186 Case 32-RC-109684 (2014) (Case 32-RC-109684), http://apps.nlrb.gov/link/document.aspx/09031d45817b1e83.

37. Alexia Elejalde-Ruiz, *Why should McDonald's be a joint employer? NLRB starts to provide answers*, CHI. TRIB. (Mar. 10, 2016), http://www.chicagotribune.com/business/ct-mcdonalds-labor-case-0311-biz-20160310-story.html.

38. Brief of the General Counsel, *supra* note 36, at 18–20.

39. Kasarjian & Morales, *supra* note 35 (explaining the NLRB decision and its attempt to capture parties

joint liability under the FLSA.[40] The NLRB had previously signaled its intent to broaden joint liability in an amicus curie brief filed in *Browning–Ferris Industries of California, Inc*.[41] Franchisors can now be subject to hundreds of employee FLSA violation claims along with the individual franchisees being sued.[42]

Much to the dismay of the restaurant industry, the Board denied McDonald's appeal in August 2015.[43] McDonald's challenged this decision in a trial before an administrative law judge in March 2016.[44] Since this decision, those in franchise-heavy industries have been concerned about liability expansion into other areas the government deems "necessary."[45] Now franchisors are heavily lobbying Congress, and many suspect new legislation that circumvents the NLRB decision may be forthcoming.[46] Others think that the Supreme Court may consider the McDonald's or *Browning–Ferris* case.[47]

C. OSHA Follows Suit: Liability Expansion by the Department of Labor

While less concrete than the changes to FLSA enforcement, legal scholars have noted a shift in the Department of Labor's OSHA enforcement since the NLRB decision.[48] Attorney James Curtis expands on this: "a number of ongoing inspections show that OSHA seems intent on using the NLRB decision to expand liability to franchisors when franchisees have been found to have violated the act."[49] Their sources largely rely on a "leaked to the media . . . internal memorandum prepared by the U.S. Department of Labor's Office of the Solicitor (SOL) analyzing whether OSHA may hold both a franchisor and franchisee jointly liable for violations of the Occupational Safety and Health Act of 1970 (OSH Act)."[50] The memo focuses on questions an investigator should ask and materials they should rely upon in determining joint liability.[51] These include franchise

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with control over labor policies in franchise relationships when assigning liability).

40. *Id.*

41. Brief of the General Counsel, *supra* note 36, at 16.

42. NLRB Off. of Pub. Aff., *NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer*, NAT'L LAB. REL. BOARD (July 29, 2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds ("If the parties cannot reach settlement in these cases, complaints will issue and McDonald's, USA, LLC will be named as a joint employer respondent. The National Labor Relations Board Office of the General Counsel has had 181 cases involving McDonald's filed since November 2012.").

43. Maze, *supra* note 25.

44. Jacob Gershman, *McDonald's Joint-Employer Dispute Heads to Trial*, WALL ST. J. (Mar. 9, 2016), http://blogs.wsj.com/law/2016/03/09/mcdonalds-joint-employer-dispute-heads-to-trial/.

45. Higgins, *supra* note 24.

46. *See* Hoover, *infra* note 120 (stating that, because of the power of the restaurant lobby as well as other franchisor heavy industries, there is tremendous pressure in Congress for a legislative reversal of the NLRB). Legislation has been proposed this term that would invalidate the ruling and prevent franchisors from having joint liability for franchisee labor violations. *See id.* (discussing the proposed Protecting Local Businesses Act).

47. Maze, *supra* note 25.

48. Joanne Deschenaux, *NLRB's New Joint Employer Test May Impact OSHA*, SOC. FOR HUMAN RES. MGMT. (Sept. 21, 2015), http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/osha-joint-employer.aspx; Higgins, *supra* note 24.

49. Deschenaux, *supra* note 48.

50. John F. Martin, *OSHA testing joint enterprise theory in wake of NLRB ruling*, LEXOLOGY (Sept. 9, 2015), http://www.lexology.com/library/detail.aspx?g=006869d5-8a94-48d3-8fdb-da22ed7fb6f5.

51. *Id.* (explaining the directives of the leaked memorandum asking OSHA investigators to inquire into franchisor policies to determine the potential to exercise control in workplace safety).

agreements, company policy documents, and the like.[52] The Department of Labor has adopted and molded the NLRB test to fit OSHA objectives by focusing on "not just the authority you exert, but how much power you potentially have" when determining joint liability.[53]

Clearly, a franchisor company has the ability to assert a great deal of power over franchise operations—including over policies controlling when franchisee employees are granted family leave—making FMLA violations a logical target for expanded liability. The Department of Labor's use of the NLRB standard may make the Department more likely to consider this definition relevant in understanding and applying the FMLA. This is especially significant because the OSHA definitions of employer and joint liability are very similar to the common understanding of the FMLA definitions.[54] Some suggest the Department of Labor is looking for ways to expand their jurisdiction and that the move to increase OSHA liability is just one available avenue to achieve this.[55] If this is the case, we will see movement to expand the understanding of the FMLA to franchisors' joint liability next, as the FMLA is one of the other major regulatory schemes the Department of Labor oversees.[56]

The examples of changes to the interpretation of the FLSA and OSHA illustrate the very real possibility of FMLA franchisor liability.[57] Shifting understanding of legislative definitions is a possibility when dealing with various federal agencies whether they are reasonable or simply a power grab. A more detailed analysis of the FMLA, FLSA, and OSHA in this Note will allow the reader to explore both the possibility of expanded franchisor liability and the consequences of this change. This potential liability expansion is incredibly significant due to the reliance on the franchise business model across the United States.[58] An expansion of franchisor liability could impact countless employees and corporations across the country, making this NLRB decision crucial to understanding

52. *Id.* (outlining some examples of materials that may be relied upon to determine franchisor control in day-to-day franchise matters).

53. Deschenaux, *supra* note 48 (quoting an interview with Patty Ogden, Attorney at Barnes and Thornburg).

54. *See* Letter from James G. Maddux, Director, Directorate of Construction, Occ. Safety & Health Admin. to Allen L. Clapp, President, Clapp Research Associates (July 20, 2012), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28742 (discussing the definition of "multi-employer workplaces" and how this potentially allows for OSHA citations to be issued to multiple employers for the same violation). This is significant because both the FMLA and OSHA have provisions in their authorizing acts discussing primary employer liability, making joint liability harder to assign under the FMLA than the FLSA. *Id.* Since OSHA has increasingly relied upon a more expansive liability interpretation, it would be far easier for the FMLA to follow suit.

55. Martin, *supra* note 50.

56. Melissa Gonzalez Boyce, *Why the Expanding Joint Employer Standard Could Create Liability*, XPERTHR (Oct. 21, 2015), http://www.xperthr.com/blog/2015/10/21/expanding-joint-employer-standard-create-liability ("[E]mployers should be aware that if courts and other agencies, including the Department of Labor (DOL), begin adopting the NLRB's new joint employer test, employers could face . . . joint and several liability under many other laws that currently use the common law test to determine joint employer status. For example, an employer that doesn't exercise control over an employee but merely reserves the right to do so may be at risk of being found to be a joint employer under the FLSA, FMLA, Title VII and the ADEA.").

57. *Id.* (explaining the concern that an expanded liability interpretation will spread to various agencies).

58. Julie Jargon, *McDonald's Ruling Sets Ominous Tone for Franchisers*, WALL ST. J. (July 29, 2014, 7:40 PM), http://www.wsj.com/articles/nlrb-decision-could-make-mcdonalds-liable-for-labor-practices-of-franchisees-1406660591 ("[T]his decision changes the rules for thousands of small businesses, and goes against decades of established law regarding the franchise model in the U.S.").

evolving franchise law.[59]

III. ANALYSIS: NO MORE DOLLAR MENU—EXPANDING LIABILITY AND ITS SIGNIFICANT COSTS

A. Why the NLRB Decision May Influence FMLA Franchisor Liability

The FMLA may well be the next step in the government pattern of broadly interpreting joint liability as it applies to franchisors. This is true for three main reasons. First, the courts could easily extend the logic of the FMLA integration test;[60] second, the FLSA, OSHA, and the FMLA share definitions that could be legally interpreted similarly;[61] and finally, the Department of Labor may emulate the NLRB in processing violations.[62] These rationales will be explored respectively below.

1. A Simple Extension of the Logic of the Integration Test?

When interpreting the FMLA integration test under 29 C.F.R. Section 825.104, the court considers the following factors: "(i) [c]ommon management; (ii) [i]nterrelation between operations; (iii) [c]entralized control of labor relations; and (iv) [d]egree of common ownership/financial control."[63] None of the factors are dispositive; they instead provide a framework for joint liability analysis.[64] These factors, particularly centralized control of labor relations, are exactly what the NLRB considered in expanding liability to franchisors.[65] Citing the standard control of labor relations, the Board stated that the overarching company is equally liable for purported violations because they control the direction of labor negotiations and policy.[66] The similarity of the Board's labor control analysis to the third factor of centralized control in the commonly used FMLA integration test could weigh heavily in a Department of Labor attempt to expand FMLA liability to franchisors.[67]

It would not be a significant stretch to expand this integration factor analysis into determinations of FMLA liability.[68] Courts could be consistent in upholding the logic of past decisions while finding franchisor liability by focusing on the labor relations factor of

59. *See* Daley, *infra* note 106 (discussing the impact of liability expansion to franchisors on the economy).

60. *See* 29 C.F.R. § 825.104(c)(2) (2013) (outlining the statutory factors to consider with the integration test); Rubinstein, *infra* note 73 (discussing real possibilities of expanding liability based on the logic of the integration test).

61. *See infra* note 72 and accompanying text (providing an outline of the similar statutory language).

62. *See* Skoning, *infra* note 88 (exploring the power hungry nature of federal bureaucratic agencies).

63. 29 C.F.R. § 825.104(c)(2). Multiple courts have applied the integration test to various cases. *See* Pearson v. Component Tech. Corp., 247 F.3d 471, 486 (3d Cir. 2001) (applying the integration test); Hukill v. Auto Care Inc., 192 F.3d 437, 444 (4th Cir. 1999); Hajela v. ING Groep, N.V., 582 F. Supp. 2d 227, 236–37 (D. Conn. 2008); Sandoval v. City of Boulder, 388 F.3d 1312, 1322 (10th Cir. 2004); Int'l Bhd. of Teamsters v. Am. Delivery Serv., 50 F.3d 770, 775 (9th Cir. 1995).

64. 29 C.F.R. § 825.104 (noting the inability of one factor to control in the integration test).

65. Kasarjian & Morales, *supra* note 35.

66. *See id.* (describing the rationale behind holding the McDonald's Corporation jointly liable: since the corporation determines the overall scheme of labor management, they are responsible for rights violations).

67. *See id.* (suggesting expansion of this joint liability analysis is a logical step).

68. *See* Rubinstein, *infra* note 73 (analyzing circuit split in which the Third Circuit agrees that "FMLA's similarity to the FLSA indicates that Congress intended for courts to treat the FMLA the same as the FLSA").

the integration test.[69] Since none of the factors alone are controlling, this would not settle the question of joint liability.[70] However, this in conjunction with the support of the Department of Labor may very well be enough to extend franchisor joint liability to the FMLA. Many courts have not supported this theory of FMLA liability in the past due to other language in the Act[71] that will be explored below. However, the policy supporting shared liability for shared authority, outlined by the integration factors test, is well supported.

2. Similar Definitions

The FMLA shares a great deal of its liability defining provisions with the FLSA, which makes much of the NLRB's interpretation relevant to both Acts.[72] Despite being regulated by two different agencies, this similarity could be powerful support for those seeking FMLA joint liability.[73] This is especially true if the Department of Labor is willing to reevaluate its interpretation in light of the NLRB decision, as suggested by their application of the NLRB decision to another program they administer: the Occupational Safety and Health Administration. The courts have noted the substantial overlap in the two Acts, finding precedential value interpreting one and applying it to the other.[74] While similar definitions alone are not sufficient to create FMLA joint liability, in the hands of power seeking bureaucratic agencies, the NLRB definition becomes a significant tool.[75]

3. Power Hungry, Politicized Bureaucrats

Some critics have argued that the NLRB is simply attempting a power grab with their recent franchise liability decision.[76] Some also believe the Department of Labor will decide to follow suit, seeking to expand its own authority.[77] Additionally, scholars postulate that increasing union influence was what altered the views of the NLRB.[78] Clearly some of

69. *See generally* Cousin v. Sofono, Inc., 238 F. Supp. 2d 357 (D. Mass. 2003) (holding that the integration test theory for franchisors was sufficient to defeat a summary judgment motion).

70. *See* Pearson v. Component Tech. Corp., 247 F.3d 471, 486 (3d Cir. 2001) (holding that none of the factors are dispositive, but must be viewed in the totality).

71. *See* Order for Summary Judgement at 4, Vaught v. Chaudhry's Inv. Group Inc. (May 7, 2010) (Civ. Ac. No. 09-2585-KHV), https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2009cv2585-21 (holding no joint liability for a franchisor under the FMLA because the allegation that defendant is a "covered employee" does not permit the court to infer more than the mere possibility of liability).

72. *See* 29 C.F.R. §§ 825.106(a)–(b) (2013) (defining employer liability as: "(a) [w]here two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under [the] FMLA . . . (b) . . . [a] determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality"); 29 U.S.C. §§ 201–219 (1938), *amended by* Act of Dec. 16, 2014, 29 U.S.C. § 203 (defining FLSA liability).

73. Yuval Rubinstein, *The Deepening Circuit Split On Whether The FMLA Permits Individual Liability Against Supervisors For Public Agencies*, ROSE LEGAL ADVOC. P.C. (Feb. 8, 2012) https://roselegaladvocates.wordpress.com/2012/02/08/the-deepening-circuit-split-on-whether-the-fmla-permits-individual-liability-against-supervisors-for-public-agencies/.

74. *Id.* (noting the precedential value of FLSA interpretations in deciding FMLA questions).

75. Kasarjian & Morales, *supra* note 35.

76. *See* Skoning, *infra* note 88 (discussing the need for courts to reign in the NLRB's increasing authority).

77. *See* Sarver, *supra* note 24 (discussing how the Department of Labor may attempt expansion in joint liability of franchisors).

78. *Id.*

these considerations also apply to the FMLA. How well these apply will be the subject of this Section. The internal politics of the Department of Labor and NRLB are distinct.[79] However, there is some argument that the nature of each agency's political climate could lead to further joint liability expansion.[80]

The NLRB is a highly political body and has been increasingly politicized during the course of the Obama Administration.[81] In the eyes of large industries and congressional leaders, the Board has made several unpopular moves within the past few years.[82] McDonald's could easily fall in line as the latest unpopular NLRB decision.[83] The statement of former chairman William Gould best explains the general posture of the NLRB: "regulatory agencies must adjudicate their policies independent of the other branches."[84] The NLRB believes its role is as an independent adjudicator, and it has never been afraid to tangle with Congress.[85] The NLRB's decisions have not made the agency any friends on Capitol Hill and have even resulted in a Supreme Court decision holding President Obama's recess appointments to the Board unconstitutional.[86]

The internal politics of the Department of Labor are somewhat harder to study. Certainly, the Department of Labor is far less upfront about its perception of itself as a distinct political entity.[87] Pundits and lawyers alike accuse the agency of carrying out its own jurisdiction-expanding agenda, especially in light of the Department's adoption of the NLRB decision when investigating and punishing OSHA violations.[88] There appears to be far less political strife within the Department of Labor. However, like for most federal agencies, the pressure to expand is always present, especially when resources and political influence are on the line.[89] With the NLRB taking the political heat for the expansion of franchisor liability, adoption of the joint liability standard is incredibly low risk and has the potential to lead to great gains for the Department of Labor in terms of power and jurisdiction.[90] While it is impossible to know the true motives of the Department, the way

79. *See generally* Stein, *infra* note 84 (discussing the internal politics of the NLRB); Skoning, *infra* note 88 (studying federal agencies including the Department of Labor and their politics).

80. *See* Higgins, *supra* note 24 (exploring the power grabs of the NLRB and Department of Labor through joint liability).

81. William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1520 (2015).

82. *See id.* (discussing the string of unpopular NLRB decisions and tensions with Congress during the Obama Administration including the failed appointment of former union attorney Craig Becker and over 20 hearings by the House regarding the activities of the NLRB).

83. *See* Higgins, *supra* note 24 (noting malcontent with the NLRB's attempt to change the law significantly through the McDonald's decision).

84. Michael Ashley Stein, Book Note, *Hardball, Politics and the NLRB*, 22 BERKELEY J. EMP. & LAB. L. 507, 508 (2001) (reviewing WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR (analyzing the various perspectives of the agency's role by influential NLRB leaders).

85. Gould, *supra* note 81, at 1506.

86. *See id.* at 1524 (discussing the highly political nature of the board and the decisions it makes and citing *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)).

87. *See* Skoning, *infra* note 88 (noting the self-perceptions of federal agencies).

88. Gerald D. Skoning, *Federal Agencies Exceeding Their Authority, Over and Over Again*, THE AM. SPECTATOR (Jan. 19, 2015, 6:00 AM), http://spectator.org/articles/61519/federal-agencies-exceeding-their-authority-over-and-over-again; *see* Martin, *supra* note 50 (explaining the Department of Labor's application of the NLRB joint liability standard to OSHA).

89. Skoning, *supra* note 88.

90. *See* Higgins, *supra* note 24 (noting the NLRB power grab and subsequent, noticeably more quiet, adoption by the Department of Labor for OSHA investigations).

they quickly molded the McDonald's test to fit OSHA violations combined with the general reputation of these agencies as power hungry opportunists should not be taken lightly.[91]

It seems likely in light of the shared integration test factors, similar definitions, and the power-centered nature of bureaucracy that expanded FMLA liability will occur based on the NLRB's joint employer standard. The Department of Labor's application of the standard to OSHA indicates a willingness to push the traditional boundaries of franchisor liability given the opportunity.[92] What this expansion may mean is the subject of the next Part of this Note.

B. The Impact of Expanding FMLA Liability

If the Department of Labor and courts read the FMLA to impose liability on franchisors along with franchisees, there would be significant consequences for corporations.[93] If the recent FLSA suits against McDonald's are any indication, there could be a flood of litigation against franchisors for various claims against individual franchisees.[94] Leaving the obvious potential gains for employees aside, this Part will focus on the question of whether this expansion will benefit or hurt franchisees and franchisors.

1. The Good: Employer Benefits of Joint Liability Expansion

There are a few possible benefits stemming from expanding franchisor liability to cover FMLA violations. First, making large franchisors liable to employees may encourage stricter compliance with the FMLA and may take away potential abuse of discretion at the individual management level.[95] While a top down structure is not always beneficial in corporations, in this case, it would limit the individual managerial capacity to violate the law and lead to more effective internal FMLA enforcement within companies.[96] If this were the case, there could be a reduced number of employment cases being handled by the courts which would conserve judicial resources and save corporations money in legal fees and settlements.[97]

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91. *See* Michael Uhlmann, *A Note on Administrative Agencies*, THE HERITAGE FOUND., http://www.heritage.org/constitution/#!/articles/2/essays/101/a-note-on-administrative-agencies (last visited Sept. 4, 2016) (exploring the broad scope of administrative powers and the lack of clear accountability to any branch of government).

92. *See* Higgins *supra* note 24 (noting bureaucratic attempts to expand power); Martin, *supra* note 50 (discussing the application of the NLRB decision to OSHA).

93. *See* Daley, *infra* note 106 (discussing some consequences of expanded franchisor liability).

94. *See* NLRB Off. of Pub. Aff., *supra* note 42 (explaining the various FLSA suits against McDonald's; over 40 are currently pending).

95. *See generally* Gary R. Wheeler, *Guiding an Employer through the FMLA Leave Process*, http://www.laboremploymentlaw.org/blog/wp-content/uploads/2014/01/Guidance-on-Implementing-FMLA-Toolkit-Article-1972078-1-2.pdf (last visited Sept. 4, 2016) (explaining the importance of procedures and a formulaic approach in FMLA leave management).

96. *See Labor Law Litigation: Who Will the WHD Target in FY 2013?*, ATTENDANCE ON DEMAND, INC. 2 (2015), https://www.attendanceondemand.com/resources/whitepapers/LaborLawLitigation.pdf (noting the importance of oversight to achieving FMLA compliance; if individual managers are subject to more stringent franchisor policies and direct oversight, they have less freedom to make potentially discriminatory judgment calls).

97. *See* Inc. Staff, *How to Reduce Employment Practices Liability Claims*, INC. (Dec. 28, 2010), http://www.inc.com/guides/2010/12/how-to-reduce-employment-liability-claims.html (noting that consistent company policies, handbooks, trainings, and ethics policies reduce claims and lawsuits).

An additional benefit could be more coherent company-wide policies and possible large-scale negotiations on family leave benefit packages.[98] As of now, that can only be done at the individual employee level.[99] Limiting the number of transactions and negotiations in which the company or its franchisees must engage conserves overall company resources.[100] Larger scale negotiations could create a consistent framework for employees and employers in obtaining FMLA required leave and protections which would lead to a more efficient workplace.[101]

2. The Bad and Possibly Ugly: Costs of Joint Liability Expansion

Franchisors are understandably reluctant to adopt this joint liability approach. One pressing concern is that liability could have a chilling effect on the franchisee business model.[102] The franchise model operates on the premise of day-to-day independence which is a critical incentive for both corporations and individual franchisees.[103] This has two major implications.

First, for franchisees, there would be more extensive oversight of daily business and far more top down policies.[104] This may discourage franchisee initiative to individualize and improve their business for fear of being rebuffed at the corporate level.[105] Additionally, this may remove the incentive to operate a franchise in the first place as a wave of top down policies can be burdensome, confusing, and resource intensive for individual owners to implement.[106]

For franchisors, not only would this type of control take extensive resources and expose them to legal liability, but it would essentially remove any incentive to use a franchisee model rather than a typical investor capital structure.[107] If franchisees are

98. *See* Danny Ertel, *Turning Negotiation into a Corporate Capability*, HARV. BUS. REV. (May–June 1999), https://hbr.org/1999/05/turning-negotiation-into-a-corporate-capability ("Companies that have successfully built a negotiation capability . . . have put a companywide negotiation infrastructure in place, ensuring that negotiators' priorities remain tightly linked to the company's priorities.").

99. *See* Noam Scheiber & Stephanie Strom, *Labor Board Ruling Eases Way for Fast-Food Unions' Efforts*, N.Y. TIMES (Aug. 27, 2015), http://www.nytimes.com/2015/08/28/business/labor-board-says-franchise-workers-can-bargain-with-parent-company.html?_r=0 (discussing the possibility of opening negotiations with corporations rather than simply individual franchisees).

100. *See* David A. Lax & James K. Sebenius, *Deal Making 2.0: A Guide to Complex Negotiations*, HARV. BUS. REV. (Nov. 2012), https://hbr.org/2012/11/deal-making-20-a-guide-to-complex-negotiations (explaining how organized campaigns can create more effective large-scale deals).

101. *See id.* (analyzing strategies for a coherent negotiation framework to create overall greater success).

102. *See* James D. Woods & Chris Johnson, *How Changes in Joint Employer Liability Could Impact Franchisors & Franchisees: An Economic Perspective*, FRANCHISING WORLD (Mar. 16, 2015), http://franchisingworld.com/how-changes-in-joint-employer-liability-could-impact-franchisors-franchisees-an-economic-perspective/ ("These factors could combine to produce a chilling effect on the industry as a whole: prohibiting or dissuading prospective franchisees from buying into the model; prompting current franchisees to opt out; and/or discouraging start-up businesses from adopting the franchise model from the outset.").

103. *See id.* (discussing disincentives for individual franchisees as their independence and profit dries up as well as increasing oversight costs for franchisors).

104. *Id.*

105. *Id.*

106. *Id.*; *see also* Jason Daley, *The Legal Issues that Could Change Franchising Forever*, ENTREPRENEUR (Jan. 8, 2015), http://www.entrepreneur.com/article/240709 (analyzing the costs of expanded franchisor liability to franchisees).

107. Kasarjian & Morales, *supra* note 35.

subject to all the consequences of traditional outright ownership, and franchisors must create an ever-increasing number of company-wide regulations, franchisors may be reluctant to continue contracts with franchisees.[108] Some critics even argue that, to avoid being deemed a joint employer, companies will attempt to limit influence in day-to-day operations because joint liability "disincentivizes franchisors from attempting to ensure a higher quality of service, product, or experience to those patronizing or interacting with franchisees."[109] All of these factors would make it less likely that they would be considered joint employers.[110]

With the American economy's reliance on the franchise model, some foresee dire consequences, such as economic downturn and decreased investment, as a result of the NLRB decision.[111] The decision to expand joint liability to franchisors (at the time just a proposal by general counsel) "is undermining the franchise business model. It must be rejected before it does irreparable harm and before it does damage to the economy."[112] If these predictions are accurate, an organized response by corporations would limit the influence of the NLRB decision and its application to joint liability under the FMLA and other acts.[113]

IV. RECOMMENDATION: PURSUING LEGISLATIVE AND COMPANY LEVEL SOLUTIONS

Franchisor liability is a reality after the NLRB decision. This liability may even be expanding to unrelated acts such as the FMLA.[114] This Part will address what businesses can do to 1) influence the law and 2) handle possible liability concerns while they lobby for change. Both of these factors are critical for continued success of the franchise model in light of expanded joint liability.

A. If You Don't Like It, Fix It: Lobbying and Judicial Strategies for Addressing Franchise Liability

In the American tradition, those who do not like an interpretation of the law can lobby the legislature or pursue judicial avenues.[115] Both of these options are open to franchisors

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108. *See* Mark Siebert, *Should you sell Franchises or Build a Chain?*, ENTREPRENEUR (Jan. 30, 2007), http://www.entrepreneur.com/article/173750 (stating that the advantages of franchising include low liability and corporate oversight).

109. Martin A. Levinson, *Money for Nothing: Problems with Holding Franchisors Liable for the Negligence of Franchisees*, GA. DEF. LAW. ASS'N. L.J. (2015), http://www.hptylaw.com/media/article/139_Franchisor%20Liability%20Aritcle%20-%202015_GDLA_Law_Journal.pdf (emphasis omitted) (examining the consequences of expanding liability to franchisors in similar situations of vicarious liability).

110. *See* 29 C.F.R. § 825.106 (2013) (defining joint employer coverage).

111. *See* Siebert, *supra* note 108 (discussing the downsides of high liability).

112. *See* Daley, *supra* note 106 (discussing the possible consequences to the economy of the adoption of joint liability).

113. Hoover, *infra* note 120.

114. *Supra* Part III.

115. *See* Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of* Chevron *and* Brand X, 89 B.U. L. REV. 189, 191 (2009) (explaining the power of judicial review of NLRB policymaking interpretations and decisions); Steven Strauss, *Here's Everything You've Always Wanted to Know About Lobbying For Your Business*, BUS. INSIDER (Nov. 25, 2011, 2:07 PM), http://www.businessinsider.com/everything-you-always-wanted-to-know-about-lobbying-2011-11 (discussing the importance of a lobbying strategy).

and can be pursued simultaneously.[116] This Section first will analyze options for lobbying and the successes this strategy has yielded so far and next will address judicial strategies for altering the NLRB ruling before it can be applied to FMLA liability.

1. Lobbying the Legislature

Numerous industries that operate under the franchise model have a strong lobbying presence in Congress.[117] Using this already present resource, franchisors could lobby for legislation circumventing the NLRB decision and clarifying franchisor joint liability.[118] Considering franchisors' existing political clout, this strategy is one that the industry can easily implement.[119]

Some franchisors and franchise owners have already attempted this lobbying strategy.[120] Legislators, including Senator Lamar Alexander and Representative John Kline, have taken a strong stand against the NLRB liability extension, arguing, "[t]he board's effort to redefine the idea of what it means to be an employer will wreak havoc on families and small businesses across the country."[121] As of September 2015, a number of Republican senators had proposed and supported the Protecting Local Business Opportunity Act, which would overturn the NLRB ruling by restoring the definition of Joint Employer under the National Labor Relations Act.[122] Senator Lamar "Alexander . . . said 43 senators have signed on as cosponsors of the Protecting Local Business Act, but 'we need Democratic support as well.'"[123] The biggest hurdle to this strategy is finding bipartisan support with Republican senators urging business owners to contact and lobby their Democratic representatives.[124] As of this writing, the bill has been read and is being considered by committees in the House and Senate.[125] With the influence the restaurant lobbyists and business franchisors around the country have on both parties, legislatively altering the understanding of joint liability is not an insurmountable hurdle even in an era

116. *See* Maze, *supra* note 25 (noting the lobbying and judicial review seeking approaches).

117. Tess VandenDolder, *What the Franchise Lobby Has to do with the Fast Food Strikes and Minimum Wage Fight*, DCINNO (Sept. 10, 2014, 4:52 PM), http://dcinno.streetwise.co/2014/09/10/what-the-franchise-lobby-has-to-do-with-the-fast-food-strikes-and-minimum-wage-fight/ (discussing the strong presence of franchise industry lobbyists).

118. *See* Hoover, *infra* note 120 (explaining the powerful lobbying against the NLRB decision, its expansive interpretation, and its effectiveness thus far).

119. VandenDolder, *supra* note 117.

120. Kent Hoover, *Franchise owners lobby Congress to roll back NLRB's 'joint employer' ruling*, THE BUS. JS. (Sept. 30, 2015, 11:47 AM), http://www.bizjournals.com/bizjournals/washingtonbureau/2015/09/franchise-owners-lobby-congress-to-roll-back-nlrbs.html.

121. Tim Devaney, *Republicans take aim at NLRB's 'joint employer' ruling*, THE HILL (Sept. 9, 2015, 4:27 PM), http://thehill.com/regulation/legislation/253116-gop-legislation-targets-joint-employer-ruling.

122. *See* Hoover, *supra* note 120 (explaining the purpose and motives behind proposing the Protecting Local Business Act).

123. *Id.*

124. *See id.* (noting the bill's current weakness: lack of bipartisan support).

125. Protecting Local Business Opportunity Act, H.R. 3459, 114th Congress (as reported by House Comm. On Education and the Workforce, Dec. 1, 2015), https://www.congress.gov/bill/114th-congress/house-bill/3459 (last visited Sept. 4, 2016); Protecting Local Business Opportunity Act, S. 2015, 114th Congress (as reported by S. Comm. On Health, Education, Labor, and Pensions, Sept. 9 2015), https://www.congress.gov/bill/114th-congress/senate-bill/2015/related-bills (last visited Sept. 4, 2016).

of partisan politics.[126]

2. The Judicial Route

Another option for change is for franchisors—particularly McDonald's since the NLRB ruling centered on them—to pursue judicial review of the NLRB decision and subsequent expansions.[127] McDonald's already challenged the ruling in front of administrative law judge Lauren Esposito, asking for an explanation of the determination that it is a joint employer.[128] She denied that request.[129] A 3–2 National Labor Relations Board affirmed the denial.[130] Esposito is reviewing the case again, this time over a due process claim. McDonald's argues it was denied a fair hearing and a detailed explanation of the joint liability decision.[131]

Legal scholars note that this decision, and any subsequent review by the NLRB, is likely to be a lengthy process.[132] Only after this process could McDonald's take the issue to the court system; some think they may successfully argue the due process claim all the way to the Supreme Court.[133] This strategy is less ideal than the lobbying approach because it is far more time consuming and leaves liability in flux while awaiting further court determinations.[134] Additionally, there are no guarantees of a favorable ruling.[135] Finally, only McDonald's has the appropriate standing to bring suit under the NLRB decision as it exists currently.[136] Related litigation for those in the industry to follow is the *Browning–Ferris* appeal currently being heard by the D.C. Circuit.[137] The outcome of this appeal may also alter the joint employer landscape.[138] Relying on a judicial resolution alone will be a slow process with a great deal of uncertainty in the interim.[139] A concurrent approach with lobbying efforts is not harmful and could be a more efficient way of effecting change. This Note advises concerned businesses to focus primarily on lobbying efforts and managing liability on a day-to-day level. However, those in the franchise industry should be aware of the ongoing McDonald's and *Browning–Ferris* litigation as it may have broad implications

126. Hoover, *supra* note 120.

127. *See* Maze, *supra* note 25 (explaining the possible judicial review route following NLRB's McDonald's decision).

128. *See id.* (outlining the procedural posture of the case).

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Maze, *supra* note 25 (outlining the lengthy decision review process before it would reach the court system).

133. *Id.*

134. *See id.* (quoting Michael Lolito, a San Francisco based attorney who chairs the Workplace Policy Institute at the labor law firm Littler, as noting the current state of ambiguity: "[w]hat the labor board has done with the McDonald's saga, and what it continues to do with the McDonald's saga is, 'Guess what? We aren't telling you what the rules are'").

135. *Id.*

136. *Id.*

137. Thomson Reuters, *Browning–Ferris fights joint employment ruling*, BUS. INSURANCE (Jun. 8, 2016 10:50 AM), http://www.businessinsurance.com/article/20160608/NEWS06/160609804.

138. *Id.*

139. *See* Maze, *supra* note 25 (providing statement of attorney Michael Lotito: "This trial is going to make War and Peace look like Cliff's Notes . . . . This is just a really, really long saga. And from the business perspective, it is difficult because it is upsetting existing business relationships. Businesses are very adept at complying with the rules of the road, once you tell them what the rules are.").

on the continuing validity of the NLRB decision.[140]

B. Managing Liability in the Post-McDonald's World

Businesses should not ignore the implications of the NLRB decision and the expansion of joint liability, even if they do not partake in the larger scale strategies to change the law. This Section will provide a few possible suggestions to navigate the uncertainty of franchisor joint liability under the FLSA, OSHA, and potentially the FMLA. These suggestions may operate as short-term fixes—nothing will replace either legislative or judicial clarification of joint liability. With the current state of uncertainty, these suggestions should be taken as possible tools rather than as foolproof methods.

The clear approach to the current situation in franchisor liability is to carry on with current policies as though the law has not changed.[141] Administrative interpretation of joint liability is in flux, but the concrete language of both the FLSA and the FMLA remains unaltered.[142] Companies can continue business as usual by dictating some overarching policies but leaving franchisees to identify and handle individual employee issues.[143] In our case, this could include FMLA leave determinations and compliance with the Act's mandates. This strategy would be efficient because this is the structure already in place, meaning there is no need to promulgate new protocols or increase oversight.[144] It also prevents the company from assuming any additional characteristics of control over day-to-day decisions which is a major factor in the joint liability analysis.[145]

The potential danger to this approach is liability under the FLSA, the FMLA, or other labor acts that had not applied to franchisors prior to the NLRB interpretation.[146] Along with any litigation, companies incur legal costs, settlements, and possibly regulatory agency penalties.[147] However, given the state of the joint liability debate, it is the best alternative for a franchisor for now.

V. CONCLUSION: JOINT LIABILITY GOING FORWARD

There have been dramatic changes to franchisor liability since the NLRB applied the logic of *Browning–Ferris* concretely to McDonald's. This interpretation of the NLRB

140. *See id.* (explaining the possible Supreme Court review of the NLRB joint liability interpretation).

141. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (1938) (describing existing definitions of FLSA and FMLA joint liability); 29 C.F.R. § 825.106 (2013).

142. *See* 29 U.S.C. §§ 201–219 (showing that these definitions have been consistent since their inception in the twentieth century); 29 C.F.R. § 825.106.

143. *See* Gary R. Duvall, *Practical Steps to Reduce Risk under the New NLRB Joint Employer Ruling; and to Reduce Other Vicarious Liability Risks*, DORSEY (Sept. 28, 2015), https://www.dorsey.com/newsresources/publications/newsletters/2015/09/franchise_distribution_law_newsletter (explaining that, to reduce liability, "[s]upport is better than control; [i]nformation, especially third party information is better than control; and [c]ontrols should be coupled with franchisee enforcement against employees").

144. *See id.* (noting that old policies should simply be revised to limit control over employees); *see also* Annette A. Idalski & Sara E. Hamilton, *Avoiding joint employment liability: The control factor*, INSIDE COUNS. (Feb. 27, 2015), http://www.insidecounsel.com/2015/02/27/avoiding-joint-employment-liability-the-control-fa (stating that franchisors should not exercise direct control over working conditions or hiring/firing practices).

145. Idalski & Hamilton, *supra* note 144.

146. *See* Maze, *supra* note 25 (noting the risk of liability under the NLRB decision).

147. *See* 29 C.F.R. § 825.400 (2013) (describing the right of action for FMLA violations and penalties).

makes franchisors jointly liable for labor law violations of the FLSA. It has also been utilized by the Department of Labor in OSHA, and the definition may be further expanded to the FMLA. Expansion to the FMLA is especially likely given the similar liability requirements under both Acts, the similarity of the FMLA integration test to the new FLSA understanding, and the internal politics of both bureaucracies. This Note offers franchisors ideas for reform of this new standard, most promisingly, lobbying. Finally, it provides strategies to avoid liability in day-to-day operations in the interim.

Ultimately, the fluid state of joint liability law will be clarified either by the legislature or courts.[148] The purpose of this Note has been to provide a background of the law, explain the recent changes, and provide an understanding of the consequences of those changes for franchisors. Ideally, it provides some insights and helpful suggestions for handling the new legal framework of joint liability in the short-term. Once the law is clarified by the legislature or courts (likely reverting to its pre-McDonald's, zero franchisor liability state) it will be business as usual for franchises in America.

148. *See* Hoover, *supra* note 120 (explaining the proposed Protecting Local Businesses Act); *see also* Maze, *supra* note 25 (discussing how the issue may be resolved at the Supreme Court level).