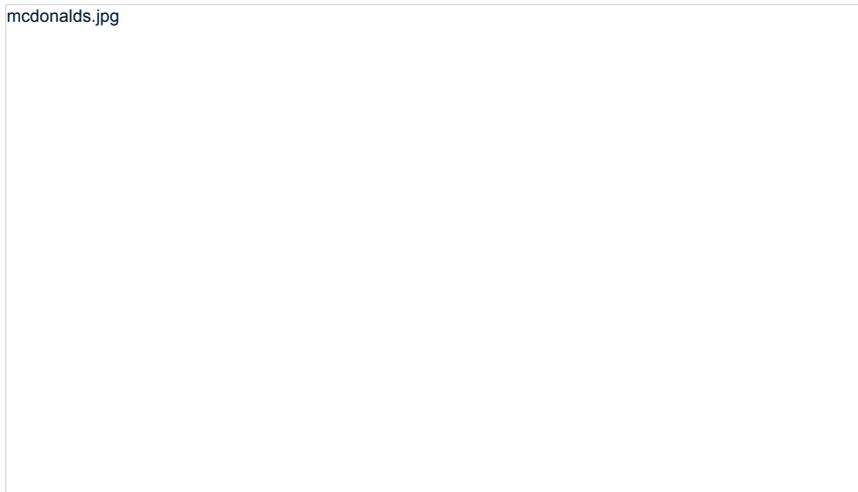




Although National Labor Relations Board General Counsel Richard Griffin has yet to provide any written report or memorandum explaining the basis for his recommendation that McDonald's could be treated as a joint employer with franchisees, he has now spoken publicly on the issue.



In a presentation at the West Virginia University College of Law, Mr. Griffin reviewed the history of the "joint employer doctrine" and the use by the NLRB of what he called the "Traditional Test" from 1935 to 1985. Under this less stringent test, the NLRB based its determination on whether the potential joint employer has the a direct or indirect "right to control" the terms and conditions of employment. It was not necessary that the control was actually used, only that the contractual relationship gave the potential joint employer had the legal right to exercise control. He also explained that even before 1985, there was an exception to this for franchisors as the NLRB would not find a franchisor a joint employer if its indirect control was the result of the franchisor acting to protect its brand.

Mr. Griffin explained that this standard was altered in 1984 when the NLRB began requiring that the potential joint employer have a direct and immediate impact on meaningful conditions and terms of employment and that this control has to be actual, as opposed to potential, and he espoused a return to the earlier standard.

While he claimed that he does not want to overturn the earlier cases where franchisors were found not to be joint employers because they were acting to protect their brands, he believes that the newer cases involve actions that go beyond brand protection. He noted that new technologies enable franchisors to instantaneously monitor everything happening at the franchisee, including financial information, such as labor costs, and enables a franchisor to determine when employees should be sent home. In his view, this type of involvement in and impact upon employee hours and other conditions of employment goes beyond brand protection and in such situations the franchisor should be a joint employer.

However, the technology used by franchisors is designed to protect their brands by ensuring that the franchisees in the system operate uniformly and profitably. Moreover, there is a fine line between using technology to establish and assist in compliance with recommended good practices and unilaterally controlling employment terms and conditions.



STEPHEN GROSS

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