Fifth Circuit: Franchisor Not An "Employer" Under FLSA

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In a continuing line of cases where plaintiffs are seeking to have franchisors held to be "employers" under the FLSA, along with the respective franchisee at issue, the Fifth Circuit recently delivered a victory for franchisors.

In *Benjamin Orozco v. Craig Plackis*, Case No. 13-50632 (5th Cir. 7/3/14), the Fifth Circuit Court of Appeals reversed a jury verdict and award for damages for alleged violations of the FLSA (alleged failure to pay overtime and minimum wage violations) against the defendant franchisor and in favor of the franchisee's former employee. In determining whether or not the franchisor was an "employer" under the FLSA, the Court utilized the economic reality test: (1) did the franchisor possess the power to hire and fire the employees; (2) did the franchisor supervise and control employee work schedules; (3) did the franchisor determine the rate and method of payment; and (4) did the franchisor maintain the employment records at issue. While no one factor is dispositive, courts employ these factors to determine "those who have operating control over employees within companies" and thus render "them individually liable for FLSA violations committed by the companies." [citation omitted]

As to the fourth element, there was no question that the franchisor did not maintain the personnel records of its franchisee employees.

However, as to the first and second elements of the economic reality test (ability to hire and fire and control of work schedule), there was evidence that the franchisor met with the franchisee at issue and offered some "advice" as to more effective scheduling and competitive pay rates after which the franchisee changed the employee's work schedule and rate of pay. The Fifth Circuit was not persuaded by this meeting though and found the franchisor was simply offering "advice" which the franchisee could either accept or disregard.

Indeed, the plaintiff employee also introduced email evidence to show that the franchisor offered its suggestions on how to improve the overall profitability of their restaurants, suggested changes to menu items, amongst other business suggestions, in an attempt to demonstrate that the franchisor exerted control over the franchisee at issue. Again, the Firth Circuit concluded that these e-mails amounted to nothing more than "advice" that one would expect a franchisor to provide its franchisees, which ultimately the franchisee was able to accept or reject.

Based on the reasoning set forth above, the Firth Circuit also concluded that the plaintiff employee failed the third element - determination of the rate of pay. Again, the evidence simply demonstrated that the franchisor was aware of the plaintiff's rate of pay and offered general business advice on competitive wages but that the franchisee was the one who ultimately determined the wage rate.

While the above was a victory for franchisors, franchisors should be wary when specifically offering input as to franchisee employees' work schedules, rates of pay, and the other factors attendant to the economic reality test. Indeed, other circuits have held opposite the Fifth Circuit and suggested that this so-called "advice" can be construed as mandatory as opposed to mere business improvement suggestions.

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