

## 6 hot issues facing the franchise industry in 2016



Scott N. Opincar | Monday, February 8, 2016

As we begin 2016, we look to identify the major hot issues facing franchise businesses in the upcoming year. Those in the franchise industry should consider each of these potential legal pitfalls and ensure they have plans in place to face any of these issues.

### **The Active National Labor Relations Board (NLRB)**

#### **Joint employer liability**

One of the hottest topics surrounding the law of franchise businesses on the horizon right now is the NLRB's recent overhaul of the joint employer standard. We have extensively reported on this evolving issue in the past. However, to summarize, the NLRB recently issued a decision in *Browning-Ferris Industries of California, Inc.*, which vastly expanded the long-standing standard of who is considered to be a joint employer under the National Labor Relations Act.

The reason this is particularly significant for those in the franchise business, is that where a franchisor and franchisee would not have before been considered to be joint employers of the employees of any particular franchise location, they may now be considered joint employers. The NLRB expanded the standard from the old standard, which required an ability to directly and immediately control essential terms and conditions of employment, to now only requiring an alleged ability or even retaining a right to control, directly or indirectly, the essential terms and conditions of employment.

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The potential ramifications of franchisors and franchisees being found to be joint employers are:

- Franchisors being subjected to increased liability for the acts between franchisees and their employees;
- Ability of franchise employees to organize and unionize; and
- Opening franchisees up to required compliance, which they may not have previously been subjected to as small businesses.

Those in the industry can limit this risk by carefully drafting their franchise agreements, employee handbooks, and various policies to carefully define these relationships and limit the applicability of joint employment.

### **NLRB targets policies**

The NLRB has also become increasingly more aggressive in targeting workplace policies for potential infringement of employee's rights to engage in various protected conduct, such as the right to engage in concerted activity or collective action to address concerns over wages, hours, and working conditions. The NLRB is targeting various policies including social media policies, policies regarding contact with the media, confidentiality policies, and policies governing employee communications. The NLRB has been finding companies guilty of violating these employee rights when they discipline or terminate employees in lines with their policies, but the NLRB considers the underlying activity to be protected.

Similarly, those in the franchise industry can address these concerns by having policies which are carefully drafted to avoid requiring any discipline of employees for activities considered to be protected.

### **Changes to pay standards**

#### **Minimum wage**

While the federal minimum wage has not changed in over five years, this country is nonetheless seeing a lot of movement in minimum wage rates at the state and local levels. The potential consequences of violating minimum wage laws can be particularly costly, but are also avoidable. Franchise businesses simply need to take care in staying on top of the changing minimum wage laws, and ensure that they are paying what they are currently required to pay under relevant applicable law.

#### **Overtime**

The Department of Labor issued proposed regulations, which revise overtime exemptions available to executive, administrative, and professional employees, making more employees subject to the availability of overtime pay. These proposed regulations are expected to become finalized towards the end of the 2016 summer. Most importantly of note, the proposed regulations will significantly raise the minimum salary of those who can be exempt from overtime pay from the current annual salary of \$23,660 to \$50,000.

Franchise businesses can anticipate this change and focus on reclassifying their existing employees and hiring more part-time employees to help their businesses absorb the impact of this upcoming change.

### **Proper training of franchise supervisors**

#### **Paid sick leave**

Similar to minimum wage laws, paid sick leave is an area where the law is currently in flux. Paid sick leave requirements vary widely by region, thus requiring franchise businesses to pay careful attention that they are enforcing the applicable rules for their location. This includes providing training to franchise location

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supervisors on the legal requirements at a specific franchise location. Furthermore, providing paid sick leave across the board at franchise businesses may help reduce employee turnover and absenteeism, and improve employee satisfaction.

### **Employee accommodations and leave**

Employee requests for leave and for reasonable accommodations are typically required by law to be allowed. However, this presents a particular challenge in the franchise industry as franchise locations often lack sophisticated HR staff that are well versed in these requirements. Thus, franchise business owners should take care to properly train their supervisory staff to be well versed in these areas and know what they are legally required to provide to employees.

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