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Introduction

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SYMPOSIUM ARTICLES
INTRODUCTION

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In the vast arena of American commerce, there are political decisions, regulations, and court decisions that, in compression with volatile economic forces, create a combustible mix across industries. Hints of change, expressions of public policy shifts, and exercise of political might that threaten established principles and market expectations can create instability among participants, often resulting in crippling uncertainty. At the same time, there is persistent tension with calls for policy shifts, advocating to correct perceived unfairness among participants.

The first two Articles contained within this Issue are written by two panelists who presented at the American University Business Law Review's recent symposium, *Hospitality for the Employee: Where Business, Employment, and the Hospitality Industry Intersect*, on March 27, 2015 at Arent Fox LLP. They look at the somewhat stunning evolution, maybe even revolution, in recent decisions on "joint-employer liability," a cornerstone of the important American franchising economic model. The shifting interpretation of what it means to be a joint employer creates a blurry line with bright consequences. That line is the demarcation of actions and consequent liability of a franchisor for the business operations of a franchisee.

Until recent rulings by the National Labor Relations Board ("NLRB"), industries had fairly reasonable certainty of boundaries defining the limits of action by a franchisor. The accepted notion was that to be a joint employer the franchisor must have actually exercised direct control over the employees of the franchisee. Such essential terms of control included hiring, discipline, supervision, wages, scheduling, and work assignments.

In the new rulings, the NLRB has declared that joint-employer status can

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be created by the possession of authority to control essential terms or conditions of employment of the franchisee's employees. More starkly, joint-employer status can be applied even if the franchisor does not actually exercise such authority. As a result, the new analysis includes indirect as well as direct control.

Franchising encapsulates a variety of economic models, but the concept has evolved in a steady progression as a way to bring often disparate participants together and to match idiosyncratic strengths and weaknesses. In hotel operations, a franchisor licenses the intellectual property of the brand name, embedded with operating manuals for guidance, plus standards for maintaining the brand. In fast food operations, the franchisor provides logos and operating manuals, plus furnishes equipment and inventory. Regardless of the type of industry, the franchisor generally seeks to be removed from routine decisions. The franchisor has selected a model so that it is entitled to earn a fee for providing intellectual capital and expertise to the franchisee operating the fundamental business, while at the same time limiting its exposure to legal liability of the operations.

To be sure, there are entrepreneurs able to create a valuable concept for a business, raise funding to develop and launch the idea, and expertly manage the many tasks of operations. To "create a valuable concept" can mean excruciating experimenting and tinkering, finally resulting in intellectual property to protect the business idea. To "raise funds" can mean equity funding and debt, often daunting tasks for a new business. To "expertly manage a business" includes management, marketing, and financial engineering, difficult tasks when a company is thriving and growing. Or, perhaps, the business owner must manage a failing operation, needing clear direction and steady guidance.

Each of these seemingly simple conceptual steps can be wildly difficult in practice, and parties are often not equipped, or do not care, to assume risks better managed by others. An investor, with access to funds and experience in a business, may look for the next idea and ways to expand. At the same time, the entrepreneur, having created a concept, may lack access to financing or lack the ability to manage a thriving business. In reaction to these realities, franchising is a tool to bring the various parties together with complex legal documents detailing the nature of the relationships. By authority of the franchise agreement, the franchisee becomes the principal operator of a business, working in proximity with customers and employees.

Like other areas of business, legal tools and bargaining power have been used to correct abuse, reward success, and mandate government oversight when needed. The fundamental concept of the joint-employer definition is that certain parties should be beyond the reach of liability for issues where they have no real control or authority to act. In the blur of history, regulation, and practice, industries have relied on basic expectations in franchise arrangements regarding exposure to liabilities as a joint employer. Franchisors, in carefully drafted agreements, and in practice, have been mindful to honor these mandates. The legal interpretations, embodied in the laws, reinforced in the courts, and honored in practice, have created these expectations.

We cannot pretend that rules and traditions should remain static or are intended to be inflexible to change. There are constant political pressures from interested parties, plus shifts in response to changes in technology and innovation. The result is a tension, sometimes exquisite and often fierce, between stability and tradition pushing against needs for dramatic change.

The NLRB—by a process mixed with policy, politics, and economics—has upset the known precedents. In sudden and sweeping changes, the NLRB has restated or redefined the liability of the franchisor for actions of the underlying company. By tradition, the franchisor was protected from these notions of liability unless it was a direct participant. Under the proposed rules for indirect or possible control, franchisors could face liability for franchisee actions, *i.e.*, labor unions organizing employee actions for unfair practices.

We cannot comment on rational economics, cannot pass judgment on the exercise of political might, and cannot offer our vision of fairness. For our purposes, we are concerned with the many possible impacts from this stated change by the NLRB.

With the NLRB rulings, there have been screaming responses by franchisors, who are sure to take action aimed at minimizing the impact of these current administrative rulings. It is unclear if the rulings, issued at the administrative level, will be confirmed by the courts or honored by other agencies. It is unclear if the next Presidential administration will confirm these results. And, of course, Congress may enact laws to specifically delineate a new view of joint-employer liability.

If the revisions to joint-employer definitions remain in effect, there will likely be procedural and practical changes in the various franchise communities. For example, the price of franchising may increase as risk of liability increases, or the parties to franchise agreements may begin to seek profound contract modifications in response to the NLRB rulings.

A teaching colleague of mine often says that "everything costs something." It is, of course, a shorthand reminder that, in commerce and in business transactions, decisions and posturing often result in a calculation: weighing the explicit measure of expected cost and the implicit sense of risk judgment in the willingness of a parties in a transaction to raise or lower price. The shift in joint-employer rulings will certainly "cost something."

In the Articles that follow, the authors will explore the reasoning of the recent rulings and offer predictions about whether the rulings will likely stand. If we are indeed in this new era of joint-employer liability, the authors will plot the trajectory for a new understanding of franchising and the relationships among franchisor, franchisee, employees, and, ultimately, the consumer.