

# 'Joint-employer' status could rattle the franchise industry

U.S. rulings cause a stir in Canada, which has an estimated 1,300 brands

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An emerging change in employment law called "joint employer status" could be a game-changer for the Canadian franchise industry, lawyers say.

Unions and other employee advocates are arguing that the relationship between franchisees and franchisors is so close that both should be considered "joint employers" of a franchisees' employees.

"We have already seen an increased risk of joint employer status in the United States and the shifting legal landscape on joint employer issues in Canada appears to be headed in the same direction," says Andraya Frith of Osler, Hoskin & Harcourt LLP in Toronto.

Franchises are based on brand uniformity and consistency of customer experience. The joint employer question arises because franchisors impose certain controls on franchisees, including rules on employees and employment.

"If joint employment arrives anywhere in this country, it will be a game-changer," says David Shaw of Blake, Cassels & Graydon LLP in Toronto.

Joint employer status could expose franchisors to employees' claims under employment and labour laws, collective agreements, wrongful dismissal suits, wage and overtime class actions and human rights claims — to name just a few.

Larry Weinberg of Cassels, Brock & Blackwell LLP goes so far as to call the threat an "existential" one.

"The unions are pushing very hard to say franchisors should be joint employers, on the theory that franchising itself is some kind of sham created just to defeat unionization," he says. "But it's not and if these changes come, people aren't

going to be franchising anymore."

The economic implications are significant. After the U.S., Canada has the second-largest franchise industry in the world, with an estimated 1,300 franchise brands and more than 78,000 franchise units. These employ more than one million Canadians or seven per cent of the workforce. Franchising is particularly significant in Ontario, which boasts 56 per cent of the country's franchise headquarters and 65 per cent of its outlets.

The prospect of joint employment in the industry is most acute

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in Ontario, where the government is considering changes to the Employment Standards Act and Labour Relations Act. Proposed amendments to these laws include a recommendation to deem a franchisor the joint employer of its franchisees' employees for certain purposes.

Jennifer Dolman, also with Osler, says the control issue is key to whether a joint employment relationship exists. "If franchisors start exercising too much control over the nitty-gritty of employment practices, particularly hiring and firing, they could be creating a risk that they'll be characterized as joint employers."

The issue gained prominence in the industry about 18 months ago, when the National Labor Relations Board in the U.S. suggested, in a case involving McDonald's USA LLC, that the test for joint employment be altered.

Historically, the test required the actual exercise of control over employees or conditions of employment. Under the new test, franchisors could be liable as joint employers of their franchisees' staff if the franchise agreement was drafted to include or imply control over employment, regardless of whether the franchisor in fact exercised such control. The NLRB reiterated its position in August 2015 in a case involving Browning-Ferris Industries.

These U.S. decisions may not be binding in Canada, but they are causing quite a stir in Canadian franchising circles.

"The idea behind franchising is to grow with partners who are independent contractors and invest their own capital," says Stéphane Teasdale of Dentons Canada LLP in Montreal. "Making the franchisor a joint employer annuls that concept because it means the franchisor becomes invested in the business of the individual franchisee."

Aggravating the problem is the absence of a bright line in the law as to the degree of control required to trigger a finding of joint employment.

"Franchisors have to be careful not to cross over the line, but the line is not definable," says Susan Friedman of DLA Piper Canada LLP in Toronto.

For their part, franchise lawyers are taking a cautious, preventive approach.

"We've been advising some of our clients to scale back on some of the areas in their operations manuals and practices that touch on employment issues," says Helen Fotinos of McCarthy Tétrault LLP in Toronto. *Financial Post*



The issue of joint employer status gained prominence when the National Labor Relations Board in the U.S. suggested, in a case involving McDonald's USA LLC, that the test for joint employment be altered. The question arises because franchisors impose certain controls on franchisees. TOMOHIRO OHSUMI/BLOOMBERG