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‘New day’ for joint employer litigation

BY BETH EWEN

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A complaint against Domino’s landed in U.S. District Court in New York on April 4, and it takes the joint employer battle to an entirely new level. The complaint, called Kucher v. Domino’s, essentially indicts the franchisor as jointly responsible for franchisees’ employees because it is, well, a franchisor.

“It’s a new day in terms of the legal standard” for joint employer, “and this complaint illustrates what the new day will look like,” says Shelley Spandorf, an attorney with Davis Wright Tremaine in Los Angeles and an expert on joint employer issues. “It’s very worrisome because the complaint is alleging things that every franchisor does. It’s more than anything an indictment of franchise relationships.”

David Gottlieb is the attorney at Wigdor LLP in New York representing the plaintiff, a former Domino’s employee named Riad Kucher, and pressing to make the case a class action.

Kucher worked at five different Domino's restaurants owned and operated by Robert Cookston, a New York-based franchisee, from November 2014 through January 2016. The complaint alleges Kucher and other employees were routinely made to work 20 hours a week off the clock and were not paid overtime compensation for hours in excess of 40 per week. Cookston could not be reached for comment.

Kucher "had volumes of additional wages withheld, and was ultimately fired for the stated reason that he was complaining about wages being withheld," the complaint states.

Back in the day, this would have been a case pressed against the franchisee. That was before the National Labor Relations Board made its first declaration

in July 2014 that it would consider McDonald's a joint employer with its franchisees in multiple wage-and-hour claims around the country. Those cases are ongoing. Other pronouncements, in court cases, at the Department of Labor and from the NLRB, have followed, further muddying the waters.

Today, Gottlieb is hitting hard against the franchisor, and is determined Domino's corporate should be made to shoulder the blame for the alleged wrong-doing.

"There is an extensive history of non-compliance by an array of franchisees throughout New York state," said Gottlieb in an interview. "Domino's is well aware of these issues, and can't continue to throw their hands in the air and say they have no responsibility."

In the complaint, Gottlieb outlined what he called numerous cases in New York that have been decided in favor of plaintiffs.

"In just the last few years, Domino's franchisees have been required to pay nearly $3 million following numerous probes by the New York state Attorney General's Office, and multiple federal class action lawsuits, all involving allegations of unlawful pay practices and mistreatment of employees," the complaint said.

Then he aims his dagger right at the heart of the business model itself. "This has happened time and time again, and the time has come for it to stop. Domino's cannot continue to hide behind its franchise model—which allows it to reap massive revenues

totaling almost $2,000,000,000 per year—and disclaim any responsibility for the conduct of its franchisees, while it is well aware that it flouts the law and mistreats its employees."

Note the use of all those zeros to dramatize $2 billion in revenue—Gottlieb makes a particularly well-crafted argument that points to the overall issue fueling the joint employer disputes, not to mention the nationwide protests over the minimum wage. Because of shifts in the U.S. economy, with fewer and fewer people working directly for employers, all subcontracting and outsourcing relationships are under scrutiny and franchising has been swept up in the mix.

People like Richard Griffin, general counsel of the NLRB, and Dr. David Weil, head of the Department of Labor's wage and hour division, have made very clear they think it's wrong when employers are benefitting from the work but they're not responsible for the workers. Both men said just that at the American Bar Association's annual Forum on Franchising last fall.

Far from being wild-eyed villains as former International Franchise Association execs had portrayed them, Weil and Griffin made cogent, measured points about a fissured economy that can let employers off the hook, so no one can be found who is responsible for following labor laws.

Domino's didn't respond to requests for comment. Gottlieb expects Domino's to argue they are not a joint employer and thus ask the judge to remove them from the case. That may be a hard argument to make in light of the changing standard for joint employer.

Spandorf of Davis Wright Tremaine points out this is merely a complaint and hadn't yet gotten a hearing in the early days of April. She also thinks it would be "remarkable" if Domino's was said to be a joint employer now, when in Patterson v. Domino's in 2014 the California Supreme Court examined Domino's practices and found it was not a joint employer. Then again, the standard has changed since then, from direct control to indirect.

"This has a different feel to it than the McDonald's cases," which seem to center around

labor scheduling software, says Spandorf. For cases like that, she can recommend something tangible to her clients, such as making sure they talk to software vendors and turn off any features related to labor.

But how would she advise clients to defend against complaints like Kucher v. Domino's? "You can't" defend against it, she says. "It's not illegal to be a franchisor. That's why this complaint seems like a different challenge to the franchise world."

Gottlieb knows the area of law is confused and confusing—he agreed with my word, "malleable," in describing the state of the standard—and so thinks it's the right time to pounce.

"Everyone is watching to see what's going to happen with any case that is challenging the model and challenging the joint employer status," he said.

"There's a lot of room for interpretation. There's a lot of room for arguments. There's a lot of room for good lawyering." And there's a lot of room for more expensive headaches at franchise headquarters.

Beth Ewen is editor-in-chief of Franchise Times, and writes the Continental Franchise Review® column in each issue. Send interesting legal and public policy cases to bewen@franchisetimes.com.