No-Hire Provisions in McDonald's Franchise Agreements, an Antitrust Violations or Evidence of Joint Employer?

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NO-HIRE PROVISIONS IN MCDONALD’S FRANCHISE AGREEMENTS, AN ANTITRUST VIOLATION OR EVIDENCE OF JOINT EMPLOYER?

BY ANDRELE BRUTUS ST. VAL*

I. INTRODUCTION

In the past few years, there has been a wave of national attention and public campaigns on protecting workers’ rights.1 The overall premise of these movements is that companies are profiting off the backs of workers while providing them with wages that are insufficient to allow them to feed their families, pay their bills, or have a decent standard of living. Recent economic studies have weighed in on the debate, and they suggest that wage stagnation and inequality may be attributable to labor market collusion, and specifically, no-hire agreements.2

Economists and scholars alike assert that large firms with market power are dominating the labor market by restricting workers’ employment choices through restrictive covenants.3 It had been assumed that such covenants, including covenants not to compete or solicit, were typically only present for highly-skilled workers who were able to appropriately assess the cost-benefit of signing such agreements and who would be properly compensated for foregoing their rights. However, recent litigation has shown that restrictive

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3. “As firms have grown in size, they have become capable of dominating local labor markets – a phenomenon referred to as monopsonization – and of using their market power to suppress wages. There is also evidence that some firms have colluded, entering into no-poaching and similar arrangements that restrict workers’ choices among employers.” Id. at 4.

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Covenants are also being used to limit employment opportunities for low-wage, low-skilled workers. A recent study found that over half of major franchises include a no-poach clause in their franchise agreements, including those in the healthcare, automotive, and fast food industries. This practice is particularly prevalent in the fast food franchising industry, which is the largest employer out of all of the various franchising sectors and will be the focus of this article.

In entering into franchise agreements with franchisees, franchisors have included provisions that bar a franchisee (both franchisee and franchisor-operated units) from hiring another franchisee’s employee. These specific forms of non-compete agreements are termed no-poach or no-hire agreements. Economists have found these clauses have a detrimental effect on low-wage employees in the franchising industry. As will be discussed in section II, these provisions do not arise in the same context as typical employee non-compete agreements for highly-skilled workers, although the effects are similar—the employees’ choices in employment are restricted. While fast food employees account for the majority of the workers in the franchising industry, they earn next to the lowest of all the occupations in the U.S. labor force. Besides the low wages, these workers are subject to low workplace standards, often in violation of labor and employment laws.

In late 2017, in what appears to be a concerted plan to challenge the status quo and advocate for better working conditions and employment protections, workers began to challenge no-hire clauses in franchise agreements as violating section 1 of the Sherman Act. Class action lawsuits


5. Fast food establishments employed over 3.5 million workers (both full and part-time) in 2017, followed by a little over 1 million in the Table/Full-Service Restaurants sector, and 636,050 in the Business Services establishment. IHS MARKIT ECONOMICS, FRANCHISE EDUC. & RESEARCH FOUND., FRANCHISE BUSINESS ECONOMIC OUTLOOK FOR 2018, JANUARY FORECAST 19 (2018).

6. No-poach and no-hire agreements are substantially identical; any difference comes from the labeling used by the drafter of the provision. Legally, there is no difference between the two. Both restrictions prohibit the agreeing parties from hiring one another’s employees, regardless of whether the employee voluntarily seeks alternate employment or if the employee is approached or poached. As such, the titles will be used here interchangeably.


were filed against McDonald's, Pizza Hut, and Jimmy John's. The arguments raised in all three complaints were very similar, if not identical. The plaintiffs were all employees of their respective franchises who were unable to secure subsequent employment within the same franchise because of a no-hire provision in the franchise agreement. The plaintiffs challenged the no-hire clauses under federal and state antitrust statutes.

As described below, employers have defended the use of these restrictive covenants in the workplace as a method for protecting their investments into their most valued asset: their employees. They maintain that these provisions ensure that they receive a return on the time, money, and effort they invest in employees. In defending antitrust lawsuits, franchisors have raised similar arguments to no-poach and no-hire agreements. They argue that they are allowed to engage in employee coordination through the use of such agreements since they are in a single enterprise or are part of an intra-brand franchise system with their franchisees. However, this position is contrary to the position franchisors have taken in labor cases concerning joint-employer liability. In those cases, franchisors instead contend that they have no control over their franchisees' employment practices and play no role in the hiring or firing in their franchisees' restaurants.

Viewing these conflicting positions through one lens, this article argues that franchisors are using franchise agreements to set forth and control franchisee employment practices—indeed, in the antitrust case they are advocating that they have the absolute right to do so—while disavowing any liability as joint-employers for labor and employment violations. By taking these conflicting positions, franchisors, and especially those in the fast food industry, can reap the benefits of exercising control while avoiding the liability that results when their franchisees comply with the parameters they set forth. This conflict, while most evident in the franchising context, has implications in the broader discourse for labor reform and worker protections. For example, if, as employers like McDonald's contend, franchisors are in an intra-brand or firm enterprise with their franchisees, then why are franchise employees unable to bargain collectively across franchise locations? While salient, this question will be set aside and

13. The National Labor Relations Board has a presumption in favor of single-plant or single-store units. See Friendly Ice Cream Corp. v. NLRB, 705 F.2d 570, 576 (1st Cir. 1983) ("When considering the
developed in future scholarship.

While the courts have yet to decide whether no-hire provisions in fast food franchise agreements violate antitrust laws, this article posits that no-hire provisions are evidence of franchisors’ control over franchise employee hiring, which along with other evidence from the franchise agreement and relationship supports a finding that franchisors are joint employers with their franchisees. Franchisors should not be allowed to reap the benefits of exercising control over their franchisees and the workers at their franchise locations while avoiding liability as joint employers for the results of such control in labor disputes. Because no one, not even fast food giants in the franchising industry, should have their cake (or fries) and eat it, too.

In section II, I will provide a framework for understanding the antitrust issues in fast food franchising. I will summarize fast food franchising, antitrust law, and no-poach/no-hire agreements. With this framework in mind, I will then discuss in section III pending antitrust lawsuits, specifically highlighting the suit against McDonald’s corporation, the archetypical franchisor and industry leader, and using it as an antitrust case study. I will explore the parties’ respective positions as to the legality of no-hire provisions and cursorily review the district court’s ruling on McDonald’s motion to dismiss. I will also note some of the other federal lawsuits that have been filed challenging no-poach provisions in franchise agreements in other franchising sectors. In section IV, I will present a framework for understanding the National Labor Relations Act’s (NLRA) joint-employment standard and its complicated history, as interpreted by the National Labor Relations Board (NLRB or the Board). Then, in section V, I will present the varying viewpoints as to franchisors’ joint-employer liability, using McDonald’s lawsuits as a case study. With this foundation laid, in section VI, I will explain how franchisors’ position in the antitrust cases conflict with their positions in the labor cases, as highlighted by an analysis of the McDonald’s cases. Finally, I will conclude by proposing a solution to the conflict and suggesting how courts could frame and analyze appropriateness of a single store bargaining unit in a multistore retail operation, the Board is aided by its policy that a single store is presumptively an appropriate unit for bargaining.” (citations omitted); Alaska Statebank v. NLRB, 653 F.2d 1285, 1287 (9th Cir. 1981) (“The Board has adopted, in the retail sales, industrial, insurance, and banking industries, a presumption that a single store, plant, office or branch is an appropriate unit. This presumption has generally received approval by the courts.”); David Madland, How to Promote Sectoral Bargaining in the United States, CTR. FOR AM. PROGRESS ACTION FUND (July 10, 2019, 12:01 AM), <https://www.americanprogressaction.org/issues/economy/reports/2019/07/10/174385/promote-sectoral-bargaining-united-states/> (“The current U.S. labor system is designed to fragment bargaining into small units, typically of workers at individual worksites. U.S. labor law allows for broader-based bargaining, such as with multiple employers, but makes this type of bargaining difficult to achieve.”) (citations omitted). But if, as franchisors argue, the franchise is a single entity, then this would assist in overcoming the Board’s presumption.
II. Framework for Understanding the Antitrust Issue in Franchise Agreements

A. The Sherman Act

Section 1 of the Sherman Act declares "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . to be illegal." While there are several debates over the purpose of the Act, the current and accepted view is set forth below.

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. 15

In the landmark case Standard Oil Co. of New Jersey v. United States, the Supreme Court pronounced that section 1 bars contracts that unreasonably restrain trade. 16 In assessing reasonableness, a provision is classified as either horizontal or vertical. Then, depending on the classification, it is analyzed either under the per se rule or the rule of reason.

A horizontal agreement is an agreement among those at the same functional level, i.e., competitors, to gain anticompetitive results. 17 A classic...
example is price fixing.\textsuperscript{18} Horizontal restraints are generally held to be per se illegal under the Sherman Act.\textsuperscript{19} The per se prohibition applies to restraints that "have manifestly anticompetitive effects and lack . . . any redeeming virtue."\textsuperscript{20} Such agreements are conclusively presumed to be unreasonable with no inquiry into the reason for their use or the harm caused. The rationale for the prohibition is that the restrictions will lead to a decrease in output and limit competition. The Supreme Court has determined that the practice is so inherently destructive that it has no other purpose but to eliminate competition.\textsuperscript{21}

When the restraint is not among competitors but instead those in the same industry at different functional levels, it is a vertical agreement. Typical examples include a parent company and a subsidiary, a buyer and a seller, or a retailer and a manufacturer.\textsuperscript{22} The per se rule does not apply to "restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."\textsuperscript{23} Rather, such restraints are analyzed under the rule of reason.\textsuperscript{24} "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."\textsuperscript{25} The court undertakes a detailed analysis of the agreement, any harm it may cause, and any justifications or legitimate objectives it may achieve.\textsuperscript{26} "[T]he facts peculiar to the business, the history of the restraint, and the reasons why it was imposed" may also be analyzed to determine a
vertical agreement’s competitive effects.\textsuperscript{27}

However, under the rule of reason, the court will forego the detailed market analysis above and use the shortened “quick-look” analysis when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”\textsuperscript{28} Once the anticompetitive effects of the restraint are identified, the burden then shifts to a defendant to “show empirical evidence of procompetitive effects.”\textsuperscript{29}

\textbf{B. The Franchising Model}

The franchise relationship is one in which a lead firm grants the right to operate a business under the franchise brand. In exchange for that right, the other person (or business entity) must pay fees and/or royalties and agree to operate the business in substantial compliance with the franchisor’s operating guidelines. According to some social scientists, franchising is a method of “fissuring,”\textsuperscript{30} whereby a corporate entity increases its wealth by taking what it deems to be nonessential functions outside of the firm and retaining only core properties within the firm. This reduces the firm’s expenses and limits its exposure to liability. In the fast food industry, fissuring occurs through franchising.\textsuperscript{31}

In business format franchising, which is the leading franchising format in the fast food industry,\textsuperscript{32} the franchisor contracts with other business ventures or individuals to operate restaurants using the franchise name and business model and process. The franchise agreement encapsulates the terms and conditions for operating the franchise restaurant. Typical provisions include a grant of franchise, advertising, training, and quality control.\textsuperscript{33} A

\begin{itemize}
\item[28.] Cal. Dental Ass’n v. F.T.C., 526 U.S. 756, 770 (1999) (reviewing the history of cases applying the “quick-look” analysis.).
\item[29.] Id. at 776 n.12.
\item[30.] See generally DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014). Other methods include subcontracting and outsourcing.
\item[31.] See Brian Callaci, \textit{Vertical Dis-Integration and the Creation of a New Business Form: Franchising 1960-1980} (Univ. of Mass.-Amherst, Dep’t of Econ. Working Paper, 2018) (providing an institutional and historical examination of franchising through the studying of the “concrete struggles franchisors undertook to establish their unique business form”).
\item[32.] Elmore, supra note 7, at 913.
\end{itemize}
no-hire clause, also known as "no-poaching" or "no-switching" clause, in which the franchisee agrees not to hire the employees of another franchisee within the same franchise brand, is also common in a franchise agreement. Once a provision is incorporated into the franchise agreement, it is contained in all of the franchisor’s franchise agreements. Franchise agreements tend to be standard, and generally the same core provisions are used with all franchisees so as to promote equitable treatment and uniformity. It binds all the franchisees since they must abide by its terms or risk being ousted from the brand, and it affects their employees.

However, the terms of a franchise agreement are typically unknown to the employees. They will only learn of a no-hire restriction, if at all, when they attempt to obtain another position with a different franchise within the franchise brand. This type of restriction reduces employment choices and forces employees to choose one of two options. They can remain at the current location or they can leave the franchise family altogether and start all over with another franchise brand or in another industry.

While overall little is known about the use of such covenants in the workplace and of their effects on the labor market, a study of the largest national franchisors (those with over 500 franchises) conducted by economists Allen B. Krueger and Orley Ashenfelter found that “58 percent of major franchise chains include ‘noncompetitive [(or no-hire)] clauses’ in their franchise contract that restrict the recruitment and hiring of workers currently employed (and in some cases extending for a period after employment) by other units affiliated with the franchisor.” Of particular relevance, the study found that 80 percent of restaurants in the quick-service or fast-food industry contained such restrictions. Although the economists acknowledge that data on a no-hire agreement’s impact on workers’ pay and mobility within a franchise is unavailable, they ultimately concluded that the agreements may limit workers’ job opportunities and might explain why wage growth has stagnated.

Employment opportunities are adversely affected by the no-hire

34. See David K. Haase & Darren M. Mungerson, Agreements Between Employers Not to Hire Each Other’s Employees: When Are they Enforceable?, 21 LAB. LAW. 277 (2006) (explaining the different analysis courts use to scrutinize no-poach agreements); see also, Krueger & Ashenfelter, supra note 4, at 24 tbl. 1b (noting that 80 percent of restaurants in the quick-service or fast-food industry contain no-hire or no-poach clauses).
37. Id. at 24 tbl. 1b.
38. Id. at 21-22; see also Krueger & Posner, supra note 2.
agreements in part due to the effect on employees' bargaining power. They remove the employees’ ability to leverage the training received at one franchise location to advocate for better pay at another. The sources of employees’ power stems from the training in the franchisor’s unique policies, procedures, and proprietary technology, which are standard throughout the franchise. Employees can leverage that power against the prospective employer in the same franchise brand to ask for better wages, since training costs would be minimal, or none, at a new location. With retraining a non-issue, employees are in a stronger competitive position to negotiate their pay rate with the new franchisee. And the current franchisee, faced with the possibility of losing the investment it has in trained employees and of having to spend more money to train replacements, would be motivated to increase employees’ pay. However, because of the no-hire agreement signed and assented to by all franchisees, employees cannot leverage their training, and mobility within the franchise is severely restricted.

By removing the option of gaining alternate employment within the same franchise, no-hire agreements substantially weaken the employees’ power within the labor market. The employees are not only unable to use the training to gain better pay within the franchise brand, but the franchisor-specific training provides no additional procompetitive benefit with another franchisor in the fast food industry, since the employees will need to be retrained on a new franchisor’s unique system. This allows franchisees to continue to offer their workers a lower base wage because those employees cannot work for another franchise that would offer higher pay based on their prior experience. Thus, similar to the effects of noncompete agreements,

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39. "Bargaining power is defined as the ability to influence negotiations to gain a larger share of the benefits of the bargain. A party’s bargaining power is determined by his or her alternatives and the party’s ability to resist agreement relative to the other party to the agreement." KENNETH G. DAU-SCHMIDT ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 357 (5th ed. 2016).

40. See Krueger & Ashenfelter, supra at note 4, at 17 ("[R]estricting workers' outside options will shift the share of the net returns from training in the direction of employers.”).

41. See e.g., Eric Rosenbaum, Panera Is Losing Nearly 100% of Its Workers Every Year as Fast-Food Turnover Crisis Worsens, CNBC (Aug. 29, 2019), <https://www.cnbc.com/2019/08/29/fast-food-restaurants-in-america-are-losing-100percent-of-workers-every-year.html> (noting that a 2013 survey "put the cost of fast-food turnover at $1,600 per worker, and that was at a time when turnover was significantly lower. The turnover cost estimates have kept going up. The cost per employee now is estimated by the National Restaurant Association at $2,000 per employee").

42. Meaning, an employee who works at McDonald’s will not gain any additional benefits over employees in the labor market by taking his or her training at McDonald’s and working at Burger King. Each franchisor in the franchising sector has its own unique and uniform system, in which each employee must be trained.

which are entered into directly by the employer with the employee, no-hire agreements diminish employees’ bargaining power and employment mobility, which then leads to suppressed wages. However, unlike with noncompete agreements, the employees are not a party to the franchising contract that contains the no-hire agreement.

C. No-Poach/No-Hire Agreements

In its simplest form, a no-poaching covenant is an agreement, either in writing or orally, between two or more companies not to compete for each other’s employees, such as by not soliciting them during their employment or not hiring them for a period of time after the termination of their employment.


A restrictive covenant is frequently included in an employment contract to govern the employee’s conduct on the termination of the employment relationship. Such covenants are intended to prevent employees from competitively using information or contacts acquired through the employment governed by the contract. Richard E. Kaye, Cause of Action to Enforce Noncompetition Covenant in Employment, in 36 CAUSES OF ACTION 2d 103 (2008); see also Michelle L. Evans, Enforceability of Covenant Not to Compete, 104 AM. JUR. PROOF OF FACTS 3d 393 (2008) (“When a new employee and/or consultant is hired by a company, the company will generally require that the new employee and/or consultant sign an agreement containing a covenant not to compete. The covenant will typically prevent the employee and/or consultant from creating or working for or with a competitor company within a certain geographic area and within a certain time period after termination of the relationship with the company.”).

See OFFICE OF ECON. POLICY, supra note 43, at 20-21 (explaining that “[a]s workers progress through their careers, switching jobs is more difficult in states that stringently enforce non-competes. Given that job switching is generally associated with substantial wage increases, this increased difficulty of switching would reduce wage growth over time”).


Id.; see also Michael Lindsay et al., Employers Beware: The DOJ and FTC Confirm that Naked Wage-Fixing and “No-Poaching” Agreements Are Per Se Antitrust Violations, ANTITRUST SOURCE, Dec. 2016, at 1 n.2 (“No-poaching agreements are also called no-hire, no-interference, non-solicitation, or no-switching agreements, depending on the circumstances.”).
a specific action. However, unlike other types of restrictive covenants in the employment context, when the aforementioned restrictions are found in franchise agreements, they place limitations not only on the franchisees but also on franchise employees without their knowledge. These covenants are not between franchisee and franchisee or franchisee and employees but are solely between each individual franchisee and the franchisor. Yet, implicit in the no-poach agreement is a promise between all the franchisees that they will abide by the restriction and that the franchise employees are bound by them. All franchisees within the franchise are aware of their required compliance with the provision and of their ability to compel adherence by another franchisee. Although this article primarily focuses on no-hire provisions, since that is the named provision in the various franchise litigation suits challenging such terms, the general arguments apply equally to no-poach agreements as well.

D. Policy Reactions to No-Hire Clauses

Because of the negative effects that no-hire agreements have on wages and the economy, in October of 2016 the Department of Justice (DOJ)

48. Covenants not to compete in a business setting, as opposed to the sale of a business, concerning employment are generally entered into by the employer and the employee with the employee's full knowledge and consent and are typically limited in time, space, and location. See Jean Murray, What Is a Restrictive Covenant in Business Law?, THE BALANCE SMALL BUS. (Feb. 12, 2019), <https://www.thebalancesmb.com/what-is-a-restrictive-covenant-in-business-law-398201>.

49. Graphically, the relationship will look like the following:

50. As will be seen below, most of the no-hire provisions in fast food franchise litigations do not distinguish managers from rank-and-file workers. They generally apply equally to every member of the franchise workforce. As such, unless specifically indicated otherwise, any mention of employees applies to all workers in the franchise restaurant.

51. Because no-poach agreements apply to all franchises, regardless if they are franchisee-owned or franchisor-operated, I will not differentiate between the two, and the use of "franchisee" applies to both unless otherwise indicated.
Antitrust Division and the Federal Trade Commission (FTC) jointly issued an \textit{Antitrust Guidance for Human Resource Professionals (2016 Guidance)}, announcing their intention to “criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other’s employees.”\textsuperscript{52} They explained that like price-fixing and market allocation, which have been prosecuted as “hardcore cartel conduct, no-poach/no-hire agreements irremediably eliminate competition.”\textsuperscript{53} The DOJ and FTC’s position is that these agreements are per se illegal under antitrust law, and specifically section 1 of the Sherman Act.

The Joint 2016 \textit{Guidance} further provided that “if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects.”\textsuperscript{54} Appearing to clarify this point in the 2016 \textit{Guidance}, on March 7, 2019, the DOJ filed a Statement of Interest in three then-pending lawsuits that alleged antitrust violations based on no-poach agreements in the fast food franchising sector.\textsuperscript{55} Plaintiffs were former employees who sued their former employers—three fast food franchisors Carl’s Jr, Auntie Anne’s, and Arby’s—and their franchisees, alleging that the defendants conspired to keep the costs of wages down by restricting competition in the labor market so they could increase their profits.\textsuperscript{56} In what appears to be a retraction of its prior position, the DOJ stated that most no-poach/no-hire agreements are subject to the rule of reason.\textsuperscript{57} This appears to contradict the 2016 \textit{Guidance}, in which the DOJ propounded that in the franchising context, no-poach agreements are per se illegal.\textsuperscript{58} It differentiated between naked no-poach restrictions that warrant per se treatment and typical no-hire agreements, advocating that standard no-hire agreements are vertical agreements “because the franchisor and the franchisee normally conduct business at different levels of the market structure.”\textsuperscript{59} The DOJ warned, however, that “[b]ecause franchisees are not

\textsuperscript{53} Id.
\textsuperscript{54} Id. at 3.
\textsuperscript{56} Complaint at 7, Stigar, No. 2:18-cv-00244; First Amended Complaint at 7, Richmond v. Bergey Pullman Inc., No. 2:15-cv-00246 (E.D. Wash. dismissed Apr. 18, 2019); Complaint at 6-7, Harris v. CJ Star, LLC, No. 2:15-cv-00247 (E.D. Wash. dismissed Apr. 23, 2019).
\textsuperscript{57} Corrected Statement of Interest at 11, Stigar, No. 2:18-cv-00244.
\textsuperscript{58} See 2016 GUIDANCE, supra note 52, at 3 (“Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws.”).
\textsuperscript{59} Corrected Statement of Interest at 11, Stigar, No. 2:18-cv-00244.
usually corporate divisions or wholly owned subsidiaries of their franchisors, a court must not presume that they should be treated as a single entity under Copperweld.\textsuperscript{60} The DOJ clarified that "Copperweld and American Needle are the relevant authority in considering whether a franchisee and franchisor should be treated as a single entity under the antitrust laws."\textsuperscript{61} It noted that if there exists "direct competition between a franchisor and its franchisees to hire employees with similar skills, a no-poach agreement between them is correctly characterized as horizontal and, if not ancillary to any legitimate and procompetitive joint venture, would be per se unlawful."\textsuperscript{62} It asserted that courts "should evaluate how the alleged business relationship operates in practice with respect to the entities' economic interests."\textsuperscript{63}

On November 21, 2017, Senators Cory Booker of New Jersey and Elizabeth Warren of Massachusetts submitted a joint letter to then-United States Attorney General Jeff Sessions expressing their concerns about the no-poaching, or no-hiring, practice.\textsuperscript{64} In the letter, Senators Booker and Warren noted how the "collusion between franchisee corporations and their subunits . . . may be suppressing workers' wages and job mobility."\textsuperscript{65} While applauding the DOJ's 2016 Guidance on no-poach agreements, they requested that Attorney General Sessions answer several questions so they could better understand the DOJ's efforts to combat the proliferation of such provisions in franchise agreements.\textsuperscript{66} It does not appear that Mr. Sessions ever answered the senators' questions.

On March 1, 2018, the two senators introduced the End Employer Collusion Act.\textsuperscript{67} An identical bill was introduced in the House of Representatives by Representative Keith Ellison from Minnesota.\textsuperscript{68} The bills are aimed at ending no-hire agreements and would allow civil suits for actual and punitive damages. They also would give the FTC the power to enforce the bill. The bill was not enacted.\textsuperscript{69}

\begin{itemize}
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id. at 7.
\item \textsuperscript{62} Id. at 13.
\item \textsuperscript{63} Id. at 7.
\item \textsuperscript{65} Id. at 1.
\item \textsuperscript{66} Id. at 2-3.
\item \textsuperscript{69} See H.R. 5632 (115th): End Employer Collusion Act, GovTrack, <https://www.govtrack.us/congress/bills/115/hr5632> (last visited Feb. 16, 2020). In 2015, a slightly similar bill, the Mobility and Opportunity for Vulnerable Employees Act (MOVE Act), S. 1504, 114th Cong. (2015),
\end{itemize}
Following the lead of the DOJ, FTC, and Senators Booker and Warren, ten states looked into laws to end no-hire clauses. The attorneys general of these states asked leading fast food franchisors for information and documents relating to no-hire provisions in their franchise agreements.

Thus, it is evident that with direct competitors in the same industry, like McDonald's and Burger King, no-poach and no-hire agreements violate antitrust law. However, the question is whether no-hire agreements within a franchise are different. Courts have yet to rule on the validity of no-hire agreements in fast food franchising agreements. As of the date of this article, the lawsuits are either pending or have settled out of court.

III. ANTITRUST CASE STUDY: DESLANDES V. MCDONALD'S

With the basic antitrust framework in mind, we can look to Deslanes


72. For example, the DOJ's investigation of antitrust violations in the technology industry, See, e.g., United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1034 (N.D. Cal. 2013) ("Plaintiffs filed the instant actions against eBay, alleging that eBay entered into a no-solicitation/no-hire agreement with Intuit in violation of Section 1 of the Sherman Act."); United States v. Lucasfilm, Inc., No. CIV.A. 10-02220 RBW, 2011 WL 2636850, at *1 (D.D.C. June 3, 2011) ("The alleged anticompetitive agreement had three components: (1) that [Lucasfilm and Pixar (the firms)] not cold call each other's employees; (2) that the firms notify each other when making an offer to an employee of the other firm; and (3) that the firm making the offer to the other firm's employee not counteroffer above its original offer.' Compl. ¶ 16. The United States claims this is a per se violation of Section One of the Sherman Act, 15 U.S.C. § 1 (2006), because it eliminated significant forms of competition to attract digital animators and, overall, substantially diminished competition to the detriment of affected employees who likely were deprived of competitively important information and access to better job opportunities."); United States v. Adobe Sys., Inc., No. 10 CV 1629, 2011 WL 10883994, at *2 (D.D.C. Mar. 18, 2011) (involving Adobe, Apple, Google, Intel, Intuit, and Pixar).

73. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) ("Restraints that are per se unlawful include horizontal agreements among competitors to fix prices, or to divide markets.") (citations omitted).

v. McDonald’s, which provides an illustration of the antitrust-labor law conflict in franchising. While the focus on this case study will be the suit against McDonald’s by Leinani Deslandes, it will also briefly discuss other suits brought against franchisors Pizza Hut and Jimmy John’s. An analysis of Deslandes, and particularly McDonald’s arguments as to why its no-hire clause does not violate antitrust law, is critical in understanding how its antitrust position conflicts with its position in the joint-employer cases.

McDonald’s Corporation is considered the prototypical franchisor in the fast-food industry. McDonald’s USA, LLC, is a wholly-owned subsidiary of McDonald’s Corporation, and together, the two serve as franchisors of thousands of McDonald’s franchises. McDonald’s has the highest share of the fast food market. In 2015, it had a 17 percent share of the market, with Yum! Brands, the owner of Taco Bell, KFC, Pizza Hut, and more, at second place with 10.8 percent. In 2019, it was found to have the highest name brand value of any fast-food brand. McDonald’s success is due largely to its franchising model. Over 90 percent of its restaurants are franchisee owned and operated. All of its franchise agreements contain no-hire provisions. Arguing in support of its no-hire provisions, McDonald’s has maintained that as a corporation that operates in an intrabrand-franchise system with its franchisees, it is allowed to engage in coordination through

76. Hereinafter, any reference to McDonald’s is to both McDonald’s USA, LLC and McDonald’s Corporation as franchisor and not to any individual restaurant or franchisee, unless otherwise indicated.
81. In Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977), the Supreme Court defined intrabrand competition as “the competition between the distributors wholesale or retail of the product of a particular manufacturer.” This argument appears to be akin to the “now-defunct doctrine known as the ‘intraenterprise conspiracy doctrine,’ [that] once treated cooperation between legally separate entities as necessarily covered by § 1.” Am. Needle, Inc. v. Nat’l Football League, 560 U.S. 183, 192 (2010).
the use of no-hire clauses in its franchise agreements.  

A. Deslandes v. McDonald’s

1. Facts and Procedural History

Deslandes, like the other plaintiffs who have challenged the use of no-hire provisions in franchise agreements, is a former employee of a franchisee-owned McDonald’s who claimed that she was prevented from gaining subsequent employment with a franchisor-operated McDonald’s because of the no-hire provisions in the company’s franchise agreement. The McDonald’s no-hire clause at issue, as found in the complaint and in the franchise agreement attached to the complaint, was as follows:

Interference With Employment Relations of Others. During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald’s, any of its subsidiaries, or by any person who is at the time operating a McDonald’s restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [] shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.

Although the employees are affected by the no-hire clause, the franchise agreement does not contain a notice provision under which either the franchisor or the franchisee would inform the employee of the restrictions. At all times during employment, the employee is typically unaware of the agreement entered between the franchisor and the franchisee, despite its dire effect on his or her employment options.

Deslandes began her employment with the McDonald’s franchisee location at the entry level and worked her way up to department manager, hoping to become a general manager. She maintained that she applied to attend a week-long training program that would entitle her to become eligible for the general manager position but that her supervisors canceled her attendance upon learning she was pregnant. She also alleged that the franchisee failed to pay her for overtime hours worked. She contended that

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82. See infra text accompanying note 104.
84. Id. at 15-16.
85. Id. at 16.
86. Id.
because of the working conditions, overtime violations, and adverse action based on her pregnancy, she sought employment at a corporate location nearby. She wanted better pay and improvement in the quality of her work environment.\(87\)

Deslandes was not even interviewed for the position.\(88\) She asserted that despite her qualifications, she was denied the opportunity solely due to the no-hire provision. She stated that she was informed that as a current McDonald’s employee, she could not be hired, let alone interviewed, for the position.\(89\) The franchisee with whom she was employed would have had to sign a release for her to become eligible for consideration. According to Deslandes, the franchisee refused to sign the release because she was too valuable an employee.\(90\) Deslandes remained at the franchisee location until she could no longer work there.\(91\) She argued that the job refusal at the corporate location denied her the opportunity for better pay and job growth. She subsequently took a lower-paying job at a Hobby Lobby.\(92\)

The crux of Deslandes’s complaint was that McDonald’s colluded with its franchisees, including franchisor-operated franchises, to suppress employee wages by contracting to not hire or solicit each other’s employees.\(93\) She claimed that because employees earn below a living wage and their skills are valuable only to other McDonald’s restaurants, the no-hire clause minimizes employees’ bargaining power within the McDonald’s franchise and restricts employee mobility and competition for workers.\(94\)

Deslandes’s federal antitrust argument\(95\) centered on the per se unlawfulness of horizontal agreements. She asserted that the franchise agreement and the franchise disclosure document specifically provide that franchisees (regardless of ownership) are competitors and that the franchise agreement precludes the franchisee from being an agent of the corporation,  

\(87.\) Id. at 16-17.
\(88.\) Id. at 17.
\(89.\) Id.
\(90.\) Id. at 17-18.
\(91.\) Id. at 18, 28.
\(93.\) Amended Class Action Complaint at 3, Deslandes, No. 17-cv-04857.
\(94.\) Id. at 5.
\(95.\) Deslandes also alleged violation of state statutes, which are of little relevance to the issue addressed in this article and will not be discussed. In Count II of the amended complaint, Deslandes claimed that McDonald’s, in violation of the Illinois Antitrust Act, 740 ILCS 10/1, et seq., “engaged in predatory and anticompetitive behavior to not solicit restaurant-based employees and/or managers from other McDonald’s restaurants.” Id. at 33. In Count III, she alleged that McDonald’s “actions to restrain trade and fix the total compensation of the Class Members constitutes unfair competition and unlawful, unfair, and fraudulent business acts and practices in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, et seq.” Id. at 36.
identifying them instead as independent contractors.\(^{96}\) She also asserted that McDonald’s no-hire clause does not serve the interests of the corporation, the restaurants, the employees, or the customers but instead restricts competition, suppresses wages, and restraints trade.\(^ {97}\) According to Deslandes, employment with a competitor outside of the franchise is not a reasonable employment substitute because the skills and knowledge she attained all related to McDonald’s proprietary systems, applications, and procedures that are nontransferable to other brands in the industry.\(^ {98}\)

Deslandes alleged that even though the franchise agreement containing the no-hire clause was organized and policed by McDonald’s, the no-hire clause itself operates between fast food restaurants at the same distribution level.\(^ {99}\) As such, it is a horizontal restraint that is not subject to the rule of reason. She asserted that when employers agree to reduce competition for employees, they are engaging in price fixing, to which the per se rule of illegality applies.\(^ {100}\)

Defendant McDonald’s Corporation answered the complaint, denying Deslandes’s allegations, and moved to dismiss the action.\(^ {101}\) At the core of the parties’ argument over whether the court should summarily dismiss the action was whether the no-hire clause was a horizontal or vertical restraint. While McDonald’s argued that the no-hire clause is a vertical restraint, Deslandes maintained that the provision is a horizontal restriction.\(^ {102}\)

McDonald’s argued that Deslandes failed to state a Sherman Act claim under either the per se rule or the rule of reason. More specifically, it argued that Deslandes failed to allege the existence of a horizontal agreement to suppress wages or failed to establish that the per se prohibition applies to restraints in the franchise context.\(^ {103}\) It asserted that because franchise agreements are between a franchisor and franchisee—not between direct competitors—they are vertical agreements to which per se liability cannot attach.\(^ {104}\) It contended that such vertical restraints are subject to the rule of

\(^{96}\) Id. at 19.
\(^{97}\) Id. at 36-37.
\(^{98}\) Id. at 27.
\(^{99}\) Id. at 24-25.
\(^{100}\) See id. at 6.
\(^{103}\) Defendant’s Memorandum in Support of their Motion to Dismiss Plaintiff’s First Amended Complaint at 8-11, Deslandes, No. 17-cv-04857.
\(^{104}\) Id. at 11.
reason, the elements of which plaintiff also failed to plead. It therefore requested that the court dismiss the complaint with prejudice.

In addition to arguing that the no-hire clause is a vertical restraint, McDonald’s also asserted that it was in an intrabrand franchise system with its franchisees, which, according to it, “fosters coordination and reduces competition within the McDonald’s system.” This is a critical assertion by McDonald’s. As discussed below, this assertion directly conflicts with the position it has taken in joint-employer cases. This admission lends itself to a finding that McDonald’s exercises control over franchise employees.

Deslandes, quoting language from McDonald’s brief in a separate case before the Ninth Circuit Court of Appeals, Salazar v. McDonald’s Corporation, countered that McDonald’s has denied that it engages in any labor and employment coordination with its franchisees. She argued that because McDonald’s does not manage the franchisee’s employment practices and specifically disavowed that it does, it therefore follows that McDonald’s is not engaged in an intrabrand system with the franchisees that would justify the use of no-hire agreements as an allowable method of employment coordination.

McDonald’s asserted that its position in Salazar was irrelevant to the underlying proceedings since the underlying action does not involve a joint employer. McDonald’s fails to acknowledge that its intrabrand argument contradicts the position it took in Salazar—that it was not a joint employer because it plays no role in the franchisee’s ability to make employment decisions. By asserting that it can lawfully place no-hire provisions in the franchise agreements, it is arguably conceding that it controls an aspect of its franchisees’ hiring decisions.

2. Court’s Ruling

The District Court, Judge Jorge L. Alonso presiding, denied

105. Id. at 15-19.
106. Defendant’s Reply in Support of their Motion to Dismiss Plaintiff’s First Amended Complaint at 1, Deslandes v. McDonalds, No. 17-cv-04857 (N.D. Ill. filed Dec. 11, 2017).
107. 944 F.3d 1024 (9th Cir. 2019) (considering whether McDonald’s was a joint employer of franchisee’s employees for purposes of the California Labor Code).
108. Plaintiffs Sur-Reply in Opposition to Defendants’ Motion to Dismiss at 2, Deslandes v. McDonalds, No. 17-cv-04857 (N.D. Ill. filed Feb. 13, 2018) ("[T]he franchise operator, not McDonald’s, exclusively controls all aspects of [restaurant employees’] employment — from hiring and firing, to setting and paying wages, to scheduling, supervision, and discipline." (quoting Brief for Defendants Appellees McDonald’s Corp. et al., at 1, Salazar, 944 F.3d 1024) (9th Cir. 2019) (No. 17-15673) (emphasis in original and bold added in sur-reply)).
109. Id. at 4-5.
110. Defendant’s Response to Plaintiff’s Sur-Reply in Opposition to Defendant’s Motion to Dismiss at 1-2, Deslandes v. McDonalds, No. 17-cv-04857 (N.D. Ill. filed Feb. 16, 2018).
McDonald's motion to dismiss as to plaintiff's claim of a Sherman Act violation in Count I and granted the motion as to the state law violations in Counts II and III. The court identified the case as involving "a restraint affecting competition in the supply of an input (labor) for a final product." The court found that Deslandes alleged a horizontal trade restraint while also agreeing with McDonald's that the restraint contained vertical elements. It explained that "McDonald's, by including the no-hire provision in its agreement with franchisees, was protecting its own restaurants (i.e., itself) from horizontal competition for employees." The court further found, however, that the no-hire restraint was only ancillary to the franchise agreement — as evidenced by McDonald's continued use of franchise agreements that do not contain such limitations — and as such, could not be per se unlawful. It stated that "[a] restraint is ancillary if it promoted enterprise and productivity when it was adopted." It explained that "[e]ach time McDonald's entered a franchise agreement, it increased output of burgers and fries, which is to say the agreement was output enhancing and thus procompetitive." The court essentially found that because the no-hire provision was ancillary to McDonald's franchise agreement, the provision could not be deemed per se unlawful but had to be reviewed under the quick-look analysis.

The court analyzed whether Deslandes had stated a claim under the quick-look analysis and concluded that she had. It explained that "[e]ven a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate." The court addressed McDonald's assertion that the no-hire clause had procompetitive benefits, i.e., promoting interbrand competition. In rejecting McDonald's interbrand argument, the court explained:

[T]his case is not about competition for the sale of hamburgers to consumers. It is about competition for employees, and, in the market for employees, the McDonald's franchisees and [corporate franchisees] within a locale are direct, horizontal, competitors. . . . [T]hey are alleged to have

112. Id. at *7.
113. Id. at *11.
114. Id. at *13.
115. Id. at *7 (citation and quotation omitted).
116. Id.
117. Id.
118. Id.
119. Id.
120. Id. at *8.
divided the market for employees by prohibiting restaurants from hiring each other’s current or former (for the prior six months, anyway) employees. In the employment market, the various McDonald’s stores are competing brands. Dividing the market does not promote intrabrand competition for employees; it stifles interbrand competition.\(^\text{121}\)

The court also found that the no-hire provision does not promote intrabrand competition because it “is not limited to management employees who had received expensive training at Hamburger University,”\(^\text{122}\) applies to all employees (even those at the entry level), and is not “limited to a reasonable period of time (say six months) after the employee had received the expensive training at Hamburger University.”\(^\text{123}\) It noted that an employer’s fear of losing trained employees is insufficient to justify the use of a no-hire agreement. It specifically noted that to encourage employees to stay, employers can pay higher wages and contract directly with employees as to terms of employment.\(^\text{124}\) Notably, as explored further within this article, the court did not address Deslandes’s assertion that McDonald’s was taking conflicting positions. The action is still pending in the district court.

3. Discussion

After the commencement of the suit, McDonald’s and other franchisors stated that they would remove the no-hire clause from future franchise agreements.\(^\text{125}\) In an agreement with Attorney General (AG) Bob Ferguson of Washington State, McDonald’s agreed to remove no-hire clauses in its franchise agreements with franchisees in Washington State within sixty days.\(^\text{126}\) While McDonald’s agreed with AG Ferguson not to enforce the no-hire provisions nationally, it did not consent to removing the clauses in all of its existing franchise agreements. It simply promised to not have the

\(^{121}\) Id.

\(^{122}\) Id. According to Rob Lauber, Senior VP and Chief Learning Officer for McDonald’s Corporation, “[c]osts for executing the programs at Hamburger University are shared between McDonald’s and its franchisees. As such, there are no costs for participants.” David A. Tomar, *Hamburger University: A McDonald’s College Education*, *The Quad Mag.*., <https://thebestschools.org/magazine/mcdonalds-hamburger-university/> (last visited Feb. 16, 2020).

\(^{123}\) Deslandes, No. 17-cv-04857, 2018 WL 3105955, at *8.

\(^{124}\) Id.

\(^{125}\) Abrams, *supra* note 70.

provision in any agreements entered into with new franchisees. Therefore, the agreement does not affect any franchisees who are currently operating under existing franchise agreements that contain the no-hire provision. These franchise agreements, on average, have a twenty-year lifespan. Thus, the issue is not moot and remains viable until at least 2037. Also, as previously mentioned, resolution of this issue has broad implications and affects a large class of workers. Moreover, it is unclear under what authority AG Ferguson can enforce violations that occur in another state or how he will learn of such violations.

B. Other Lawsuits

After Deslandes commenced her suit against McDonald’s, Kristen Ion sued Pizza Hut, LLC, and Sylas Butler filed against Jimmy John’s. Like Deslandes, they alleged that the no-hire clauses in the defendants’ franchise agreements violated Section 1 of the Sherman Act and state laws. They maintained that the provisions restricted competition, suppressed wages, and restrained trade.

The no-hire agreements involved in the Pizza Huts and Jimmy John’s actions differed slightly from the McDonald’s agreement in Deslandes. For example, Pizza Hut’s no-hire clause applied only to managers who had worked at Pizza Hut locations for the previous six months in managerial positions. Jimmy John’s franchise agreement included not only a no-hire clause preventing franchisees from hiring each other’s employees, but also a clause making all current and future franchisees third-party beneficiaries with the right to enforce the no-hire provision. Jimmy John’s agreement further provided franchisees, separate from the franchise agreement, with a noncompete agreement for use with all restaurant employees. The noncompete agreement was a contractual relationship between the franchisee and the employee. It was not, however, a notice to the employee

127. See id. (stating that McDonalds “announced it would no longer include these clauses in contracts with new franchisees” and that its agreement with the Washington Attorney General “requires McDonald’s to remove no-poach language in its contracts with Washington state locations within 60 days”).


131. Complaint at 15, Ion, No. 17-cv-00788; Complaint at 2, Butler, No. 18-cv-00133.

132. Complaint at 23-72, Ion, No. 17-cv-00788; Complaint at 38-45, Butler, No. 18-cv-00133.

133. Complaint at 2, Ion, No. 17-cv-00788.

134. Complaint at 85, Butler, No. 18-cv-00133.

135. Id. at 21-22.
as a third party to the no-hire clause.

Like McDonald's, defendants Pizza Hut and Jimmy John's moved to dismiss the complaints,\(^{136}\) alleging that the plaintiffs had failed to state Sherman Act claims under the per se rule or the rule of reason.\(^{137}\) More specifically, they contended that Ion and Butler failed to allege the existence of horizontal agreements.\(^{138}\) The suit against Pizza Hut was voluntarily dismissed before the court ruled on the motion to dismiss or addressed any of the substantive issues before it.\(^{139}\)

In the case against Jimmy John's, \textit{Butler}, the district court issued an order granting in part and denying in part Jimmy John's motion to dismiss.\(^{140}\) The court had found that Butler stated a plausible Sherman Act violation under the hub-and-spoke conspiracy theory.\(^{141}\) The court found the effect of the no-hire agreement to be "(1) a horizontal boycott of certain employees; and (2) a horizontal price-fixing scheme to suppress the price of labor for said employees - just as Butler has pled."\(^{142}\) The state claims were dismissed. Like \textit{Deslandes}, \textit{Butler} is still pending.

\textbf{IV. FRAMEWORK FOR UNDERSTANDING NLRB'S JOINT-EMPLOYER STANDARD}

This section explores the NLRB's current joint employment standard, starting with the \textit{Browning-Ferris} saga and the Board's proposed rule. Analyzing the NLRB's current, albeit uncertain, joint employment standard will set the foundation for understanding how McDonald's intraprise system argument in \textit{Deslandes} directly contradicts its position in the joint employer litigation.

\begin{footnotes}
\item[136] Motion to Dismiss Plaintiff's Complaint under Federal Rule of Civil Procedure 12(b)(6), Ion v. Pizza Hut, LLC, No. 17-cv-00788 (E.D. Tex. Jan. 11, 2018); Defendants' Memorandum in Support of their Motion to Dismiss Plaintiff's Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Butler v. Jimmy John's Franchise LLC, No. 18-cv-00133 (S.D. Ill. filed Mar. 21, 2018).
\item[137] Motion to Dismiss at 6-21, \textit{Ion}, No. 17-cv-00788; Memorandum in Support of Motion to Dismiss at 7-18, \textit{Butler}, No. 18-cv-00133.
\item[138] Motion to dismiss at 3-18, \textit{Ion}, No. 17-cv-00788; Memorandum in Support of Motion to Dismiss at 12-14, \textit{Butler}, No. 18-cv-00133.
\item[141] The court explained the theory as follows: Jimmy John's corporate enters into a franchise agreement with each franchisee, which contains the no-hire provision. The franchisees tacitly agree amongst each other to enforce the no-hire provision through austere enforcement of the employee non-compete contracts. And most damningly, the franchise agreements give the franchisees a contractual right to enforce the no-hire agreements directly against each other through the third-party beneficiary provision. Id. at 796.
\item[142] Id.
\end{footnotes}
A. The Browning-Ferris Saga: 2015 Browning-Ferris and Hy-Brand

For over thirty years, the NLRB narrowly interpreted the definition of “joint employer” under the National Labor Relations Act (NLRA).143 The central element in determining whether an employer was a joint employer was “whether a putative joint employer’s control over employment matters is direct and immediate.”144 To establish joint-employer status, “there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.”145 Then, in 2015, under the leadership of Chairman Mark Pearce, the Board revisited and overruled the longstanding joint-employer standard and reinstated the standard from NLRB v. Browning-Ferris Industries of Pennsylvania Inc.146

Under the new standard, “two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.’”147 The Board stated that it was returning to the “traditional test” in Browning-Ferris and that it would “no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a ‘limited and routine’ manner.”148 It announced that

[i]n determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint

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144. TLI, Inc., 271 N.L.R.B. at 798 (citation omitted).


146. Id. at 1600 (quoting Browning-Ferris Indus. of Pa., Inc., 691 F.2d at 1123). Although the two cases involve Browning-Ferris Industries, one in California and the other in Pennsylvania, I have not found any reasons in the cases themselves or supporting literature explaining the coincidence in names and the thirty-three-year difference.

147. Id. at 1612-14.
employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.\textsuperscript{149}

The Board explained that essential terms and conditions of employment not only included the then-current “‘matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction’”\textsuperscript{150} but also included “‘wages and hours, as reflected in the [NLRA]’” and other factors, such as “‘dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance.’”\textsuperscript{151} It reaffirmed that the common-law concept of control informed its standard, as well as “the actual exercise of control, whether direct or indirect.”\textsuperscript{152}

With this new “traditional” standard in mind, the Board examined the case before it. BFI Newby Island Recyclery (BFI) owned and operated a recycling facility.\textsuperscript{153} Leadpoint Business Services (Leadpoint) served as a work agency and provided people to work at BFI. The two companies had entered into a temporary labor services agreement that controlled their relationship.\textsuperscript{154} The issue addressed by the Board was whether BFI was a joint employer of the workers provided to it by Leadpoint.\textsuperscript{155}

The plant’s drivers and loaders [at the facility] were employed directly by BFI and were represented by the Teamsters. Several hundred sorters, screen cleaners, and housekeepers who also worked at the facility wished to join the union. The problem: they were employed not by BFI but by Leadpoint, a subcontractor. . . . Under the BFI-Leadpoint arrangement, BFI and Leadpoint jointly decided many of the terms and conditions of the Leadpoint workers, but only Leadpoint exercised direct and immediate control.\textsuperscript{156}

The Union subsequently petitioned to represent the workers, bringing the matter before the Board. Applying the newly announced “traditional”

\textsuperscript{149} Id. at 1600.
150. Id. at 1600 n.5 (quoting TLI, Inc., 271 N.L.R.B. at 798).
151. Id. at 1613 (citations omitted).
152. Id. at 1623 (citations omitted)
153. Id. at 1600.
154. Id. at 1600-01.
155. Id. at 1599.
joint-employment standard, the Board found that "BFI's role in sharing and codetermining the terms and conditions of employment establishes that it is a joint employer with Leadpoint." The Board examined the parties' agreement and concluded that

BFI is an employer under common-law principles, and the facts demonstrate that it shares or codetermines those matters governing the essential terms and conditions of employment for the Leadpoint employees. In many relevant respects, its right to control is indisputable. Moreover, it has exercised that control, both directly and indirectly. Finding joint-employer status here is consistent with common-law principles, and it serves the purposes of the National Labor Relations Act.

Subsequently, in *Hy-Brand Industrial Contractors, Ltd.*, a new Board majority "overrule[d] Browning-Ferris and restore[d] to the joint-employer standard that existed prior to that decision." It found that the "Browning-Ferris standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations." The Board returned to the pre-Browning-Ferris standard as enunciated in *TLI, Inc.* and concluded that joint-employer status turns on "whether joint control is exercised (rather than merely reserved), whether such control has a 'direct and immediate' impact on employment terms (rather than a merely indirect impact), and whether such control is not merely 'limited and routine'" Thereafter, on February 26, 2018, the Board issued an order vacating its decision in *Hybrand*, again returning to the 2015 Browning-Ferris standard.

**B. NLRB's Proposed Rule**

Seeking to return to the pre-Browning-Ferris standard, on September

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158. *Id.* at 1616.
160. *Id.* at 2.
161. *Id.* at 34.
14, 2018, the Board published in the Federal Register a Notice of Proposed Rulemaking as to the standard for determining joint-employer status.\(^{163}\)

Under the proposed rule, an employer may be considered a joint employer of a separate employer’s employees only if the two employers share or codetermine the employees’ essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees’ essential terms and conditions of employment in a manner that is not limited and routine.\(^{164}\)

The Board accepted written comments on the proposed rule until January 28, 2019, extending the time for comment three times.\(^{165}\)

\textbf{C. The Browning-Ferris Appeal}

During the comment period, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in the \textit{Browning-Ferris}\(^{166}\) saga. The court affirmed “the Board’s determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis.”\(^{167}\) It confirmed that “the common-law analysis of joint-employer status can factor in both (i) an employer’s authorized but unexercised forms of control, and (ii) an employer’s indirect control over employees’ terms and conditions of employment.”\(^{168}\) The court, however, also found that the Board incorrectly applied the indirect control test.\(^{169}\)

The court explained that the Board had failed to differentiate between indirect control factors that are relevant to employer status (matters involving essential terms and conditions of employment) and the typical terms of contracting (including objectives, basic ground rules, and

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\(^{166}\) Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018).

\(^{167}\) Id. at 1222.

\(^{168}\) Id. at 1209 (citation omitted).

\(^{169}\) Id. at 1222-23.
expectations for a third-party contractor). Ultimately, the court remanded the matter to the Board to articulate the boundaries of indirect control sufficient to establish a joint employment relationship and did not determine joint-employment liability.

It is unclear how the court's ruling will affect the Board's ongoing deliberations and proposed rule. The majority in the Browning-Ferris appeal explained that it accepted the appeal, despite the Board's pending rulemaking, because Congress has vested the courts, and not the Board, with the authority to define "employer." It stated that "[t]he Board's rulemaking . . . must color within the common-law lines identified by the judiciary," thus implying that any rule announced by the Board would have to comply with the Browning-Ferris appeal decision. However, Senior Judge Randolph, in his dissent, disagreed with the majority and instead asserted that the majority "neglect[ed] the judiciary’s responsibility to avoid interfering with an agency’s ongoing rulemaking proceedings." The joint-employer issue will likely be addressed by the Supreme Court. With a conservative majority on the Court, a Supreme Court decision may not bode well for workers.

**D. Reactions to the Board's Proposed Joint-Employer Rule**

On March 14, 2019, after the close of the final time for comment, Representatives Bobby Scott and Frederica Wilson issued a letter to Board Chairman John Ring, raising concerns about the Board's plan to outsource the task of reviewing the nearly 29,000 public comments. Representatives Scott and Wilson specifically questioned whether outsourcing a regulatory task was the best use of the Board's resources since it has qualified professional staff who are accustomed to such reviews and whether

170. Id. at 1219-20.
171. Id. at 1223.
172. Id. at 1208.
173. Id. at 1227.
175. Id. ([The Court's] analysis and [dicta in *Harris v. Quinn*, 573 U.S. 616 (2014),] may provide some grounding for it to overturn the NLRB's *Browning-Ferris* joint-employment test as well. If the Court sticks to its unworkably narrow standard, it would have enormous practical effects of pushing millions of workers outside the protections of labor law, while providing yet another incentive to subject workers to an unnecessarily complicated workplace arrangement.").
contracting with a private company created an appearance of a conflict of interest.177

Chairman Ring responded to Representatives Scott and Wilson’s letter, seeking to allay their concerns and explaining the Board’s plans to review the comments.178 He explained that the Board would use temporary support, which would be overseen by NLRB staff, to sort and code the comments to prepare for substantive review. He further explained that the work conducted by temporary staff would involve no substantive or deliberate review of the comments.179

As of the time of this article, the Board has not published the final version of the joint-employer rule. But it is clear that under the current Board, the pre-Browning-Ferris standard as stated in TLI will become the standard once again.

In an attempt to clarify the joint-employment standard in franchising, on August 1, 2019, Senator Angus King (I-Maine), along with co-sponsors James Lankford (R-Oklahoma), John Cornyn (R-Texas), Kyrsten Sinema (D-Arizona), Joe Manchin (D-West Virginia), Mike Braun (R-Indiana), and Kevin Cramer (R-North Dakota), sponsored the Trademark Licensing Protection Act of 2019.180 “The bill would amend existing trademark law to allow franchises to license their brands without requiring them to participate in collective bargaining or be held responsible for wage and labor violations committed by a franchisee.”181 The proposed amendment seemingly seeks to define joint employer, albeit through trademark law.182 However, Skopos Lab predicts there is only a three percent chance of the bill passing. Also, it is contemplated that the DOL’s new joint-employer rule,183 defining joint

177. Id. at 1-2.
179. Id. at 1-2.
182. Trademark Licensing Protection Act of 2019, S. 2439, 116th Cong. (stating that the purpose of bill is “[t]o amend the Trademark Act of 1946 to provide that the licensing of a mark for use by a related company may not be construed as establishing an employment relationship between the owner of the mark, or an authorizing person, and either that related company or the employees of that related company, and for other purposes.”).
employer under the Fair Labor Standard Act (FLSA), will further affect the
NLRB’s rulemaking. A discussion of the DOL’s rule and decisions,
however, is beyond the scope of this article.

V. JOINT-EMPLOYER CASE STUDY: SALAZAR V. MCDONALD’S

A. Lawsuits against McDonald’s

The Board’s new joint-employment standard in Browning-Ferris came
about during the “Fight for $15” campaign, organized by the Service
Employees International Union (SEIU). Fight for $15 is comprised of
“fast-food workers, home health aides, child care teachers, airport workers,
adjunct professors, retail employees – and underpaid workers
everywhere.” It seeks to raise the minimum wage to $15 an hour and to
secure the right to form a union in various low-wage industries. Its primary
strategy has been to hold multi-city rallies and coordinated nationwide
strikes.

“While the legal arguments [in Browning-Ferris] were still pending
before the NLRB in Washington, organizers and workers... filed numerous
unfair labor practice charges against both McDonald’s and franchise owners,
claiming that workers faced retaliation for participating in Fight for $15
activity.” SEIU argued that McDonald’s was a joint employer under the

rule>.

Following a path similar to the NLRB, in 2017 the DOL withdrew its 2016
guidance, and most recently, on April 9, 2019, issued a proposed rule to revise
joint-employment regulations under the FLSA. The DOL proposed a four-factor
test that would analyze whether the putative joint employer actually exercises the
power to: (1) hire or fire an employee; (2) supervise and control an employee’s
work schedules or employment conditions; (3) determine an employee’s rate and
method of pay; and (4) maintain a worker’s employment records. Significantly, as
with the NLRB’s proposed standard, this change would remove the threat of
businesses being deemed joint employers solely because they have the right to
control a worker.

Christopher D. Durham & Meredith Grant, The Current State of Joint Employment Standards, QSR MAG.

184. “The unsettled nature of the joint employment standard under the NLRA is further
complicated by the fact that there have been a number of significant, and not entirely consistent, decisions
regarding the joint employment concept under the FLSA.” Tess Hardy, Big Brands, Big Responsibilities?
An Examination of Franchisor Accountability for Employment Contraventions in the United States,
Canada, and Australia, 40 COMP. LAB. L. & POL’Y J. 285, 310 (2019).


186. Id.

187. For Workers, FIGHT FOR $15, <https://fightfor15.org/for-workers/> (last visited Feb. 16,
2020); see also Steven Greenhouse, How to Get Low-Wage Workers Into the Middle Class, THE
minimum-wage/401540/>.

188. Andrias, supra note 156, at 60.
then-existing, narrow standard.

The charges resulted in the NLRB’s General Counsel issuing consolidated complaints against McDonald’s on December 19, 2014.\textsuperscript{189}

The complaints allege that McDonald’s USA, LLC and certain franchisees violated the rights of employees working at McDonald’s restaurants at various locations around the country by, among other things, making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, including participating in nationwide fast food worker protests about their terms and conditions of employment during the past two years.\textsuperscript{190}

The cases against McDonald’s were consolidated and proceeded before an Administrative Law Judge (ALJ). The case commenced in 2015 and has involved lengthy litigation replete with evidentiary hearings and motions.\textsuperscript{191} On March 19, 2018, General Counsel and McDonald’s presented “30 informal agreements, each addressing the allegations against one franchisee, and executed by that franchisee and McDonald’s. The agreements were to serve as a ‘template’ for the settlement of other McDonald’s cases which had not been consolidated”\textsuperscript{192} as part of the underlying case. After setting forth its rationale in a well-reasoned opinion that recited the lengthy history of the case, the ALJ found that approval of the settlement agreement was not warranted “[g]iven the size and import of this case, the resources expended in the hearing presentations, the terms of the proposed settlement, and the distinct possibility of additional litigation.”\textsuperscript{193}

At this juncture, “McDonald’s and the NLRB General Counsel are faced with three options: to abandon the settlement negotiations and resume the trial; to forge a settlement agreement on new terms; or to appeal the decision to the NLRB.”\textsuperscript{194} Should the matter be appealed to the NLRB, “it may well be that the fate of the test case against McDonald’s – and the

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\textsuperscript{190} Id.

\textsuperscript{191} Docket Activity, McDonalds USA, LLC, Case No. 02-CA-093893, NLRB, <https://www.nlrb.gov/case/02-CA-093893> (last visited Feb. 16, 2020).


\textsuperscript{193} Order Denying Motions to Approve Settlement Agreements at 40, McDonalds USA, LLC, Case Nos. 02-CA-093893, et al.

\textsuperscript{194} Hardy, supra note 184, at 310.
expansiveness or otherwise of the joint employment standard which is applied – will ultimately turn on the political constitution of the Board.”\(^{195}\)

The matter remains pending.

### B. Salazar v. McDonald’s

In 2016, while the consolidated case against McDonald’s was proceeding, Plaintiffs Guadalupe Salazar, Judith Zarate, and Genoveva Lopez – employees at a franchisee-owned and -operated McDonald’s restaurant – sued McDonald’s and the franchisee in the U.S. District Court for the Northern District of California.\(^{196}\) Plaintiffs claimed, among other things, that the franchisee and McDonald’s failed to pay them in compliance with the California Labor Code.\(^{197}\) They sought to hold McDonald’s liable under a joint-employer theory.\(^{198}\) Plaintiffs settled with the franchisee and agreed to dismiss the case against it.\(^{199}\) Immediately after the claims were dismissed against the franchisee, McDonald’s moved for summary judgment.\(^{200}\)

In its motion for summary judgment “McDonald[’s] assert[ed] it [did] not employ the workers because it [did] not retain or exert direct or indirect control over their hiring, firing, wages, or working conditions.”\(^{201}\) Plaintiffs, however, maintained that “McDonald[’s] contractual and economic power, coupled with its regular monitoring of [the franchisee’s] compliance with its standards, enable[d] McDonald[’s] to maintain operational control over all relevant workplace conditions.”\(^{202}\)

Applying California law, the court granted the motion in part and denied it in part. Viewing the evidence in the light most favorable to plaintiffs, the court agreed with McDonald’s that it did not “retain or exert direct or indirect control over plaintiffs’ hiring, firing, wages, hours, or material working conditions. Nor did McDonald[’s] suffer or permit plaintiffs to work, engage in an actual agency relationship, participate in a conspiracy, or aid and abet the alleged wage and hour violations.”\(^{203}\) The court did, however, find that “a jury could reasonably find McDonald[’s] to be a joint employer by virtue

\(^{195}\) Id.
\(^{197}\) Id.
\(^{198}\) Id.
\(^{199}\) Id. at *2.
\(^{200}\) Id.
\(^{201}\) Id. at *3.
\(^{202}\) Id.
\(^{203}\) Id. at *14.
of an ostensible agency relationship."\textsuperscript{204} "Ostensible agency exists where (1) the person dealing with the agent does so with reasonable belief in the agent’s authority; (2) that belief is ‘generated by some act or neglect of the principal sought to be charged,’ and (3) the relying party is not negligent."\textsuperscript{205}

McDonald’s subsequently moved for summary judgment for a second time, arguing that the California Labor Code’s employer definition does not include ostensible agency.\textsuperscript{206} The court agreed and rejected plaintiff’s assertion that McDonald’s was liable for the labor code violations under the ostensible agency theory.\textsuperscript{207} Judgment was entered for McDonald’s on all counts.\textsuperscript{208} Plaintiffs appealed.

In plaintiffs’ brief on appeal, they alleged that the district court erred in finding that, as a matter of law, McDonald’s could not be a joint employer under the labor code.\textsuperscript{209} McDonald’s filed an answer brief, in which it argued that the district court properly granted summary judgment.\textsuperscript{210} Of particular relevance here, it asserted that “the franchise operator, not McDonald’s, exclusively controls all aspects of plaintiffs’ employment – from hiring and firing, to setting and paying wages, to scheduling, supervision, and discipline.”\textsuperscript{211} Throughout its argument on appeal, McDonald’s reiterated that it does not exercise control in plaintiff’s working conditions and highlighted that it has no involvement in the hiring or firing of the franchisee’s employee.\textsuperscript{212} Pointedly, it maintained that its “business manuals (referenced in the [a]greements) vest authority over hiring and firing workers, setting wages and hours, and telling workers when and where to report to work exclusively in the franchisee.”\textsuperscript{213}

McDonald’s acknowledged in its answer brief that the McDonald’s system, as established and enforced via the franchise agreement “ensures protection of McDonald’s brand, including the physical appearance of the building and processes necessary to ‘prepare a unified product.’”\textsuperscript{214} Despite
the acknowledgment, it argued that the agreement "says nothing about what level of 'control' McDonald's exercises over plaintiffs, nor contradicts the understanding elsewhere in the [a]greements that '[franchisee] and McDonald's are not and do not intend to be . . . joint employers in any way." It also asserted that "[i]t is entirely consistent with [state law] (and the franchising model generally) for a franchisor to encourage franchisees to adopt the brand's best practices. But [it maintained] that [this] cannot create a joint employer relationship in the absence of actual franchisor control over wages, hours, or working conditions." 

VI. THE CONFLICT

Having now explored the proper antitrust and labor law framework, in this section, I will address the conflicting views taken by McDonald's in the antitrust case, Deslandes, and in the joint-employer case, Salazar. I argue that franchisors like McDonald's should not be able to assert control over their franchisees and their franchisees' employees in some situations and then disavow it in others.

A. Deslandes and Salazar, the Tension Explored

McDonald's position in the Deslandes antitrust case, like most franchisors, is that it is in an intrabrand franchise system with its franchisees and as such, it can engage in coordination by using no-hire agreements. This position conflicts with McDonald's assertion in Salazar that it plays no part in franchise employees' terms and conditions of employment because no-hire agreements directly control franchise employees' hiring.

The problem with McDonald's position in the antitrust case is best illustrated by its citation to Williams v. Nevada in support of its assertion that the no-hire agreements fulfill the economic purpose of preventing franchises from raiding one another's employees. McDonald's reliance on Williams is misplaced and actually works against it. In Williams, the court analyzed whether a franchisor and its franchisee could conspire to violate

215. Id. at 44.
216. Id. at 46.
218. Brief for Defendants-Appellees McDonald's Corp. et al. at 8-10, Salazar, 944 F.3d 1044 (9th Cir. 2019) (No. 17-15673).
220. Defendants' Motion to Dismiss Plaintiff's First Amended Complaint at 8 and 11, Deslandes, No. 17-cv-04857, (N.D. Ill. filed Oct. 2, 2017).
Section 1 of the Sherman Act by agreeing not to hire each other's managers via a "no-switching" provision in a franchise agreement. Although the court ultimately found the franchisor and the franchisee to be a single enterprise and incapable of conspiring, it did not focus its analysis on the benefits provided by the "no-switching" clause as asserted by McDonald's.

Besides a few minor differences, the facts in Williams are similar to the facts in Deslandes. The plaintiff desired to work at a different franchise location but was denied the opportunity due to the provision in the franchise agreement. The plaintiff sued, alleging violation of Section 1 of the Sherman Act.

In addressing the Section 1 violation, the court in Williams held that competition does not exist between a fast-food franchisor and franchisee, reasoning:

In a fast-food franchise the franchisor does everything to promote a uniform, non-competitive environment between the franchises: Each franchise serves substantially the same products; the products are served to the public in the same manner; the franchisor develops products and services for all franchises; the employees dress alike; the decor of each franchise is similar; the franchises are advertised as a single enterprise with a single logo; and the franchisor contracts with each franchise for exclusivity within a certain geographic area to minimize competition between the franchises.

Most notably, the Williams court found that based on a review of the franchise agreement, the franchisor exercised plenary control over the franchise operation. The court explained that

221. Williams, 794 F. Supp. at 1030-32.
222. Id. at 1032.
223. The plaintiff in Williams was a manager at a Jack-in-the-Box franchise restaurant in Las Vegas. Id. at 1029. The restaurant was operated under a franchise agreement entered between the defendants, the franchisee and the franchisor. Id. Like the McDonald's franchise agreement in Deslander, the Jack-in-the-Box franchise agreement contained a provision whereby all of the franchisees agreed to not hire each other's employees. However, the Jack-in-the-Box provision was limited to only the hiring of managers who had worked for another franchisee within the prior six months. Id. Plaintiff wished to relocate and work for a new Jack-in-the-Box franchise that was opening in Arizona. Although he was offered the manager position at the new location, he was not hired because his employer refused to waive enforcement of the no switching provision. Id. Plaintiff subsequently commenced an action against the employer franchisee and the franchisor, alleging, among other claims, that the "no-switching" clause violated section 1 of the Sherman Act. Id.
224. Id. at 1031.
225. Id. at 1032.
[i]n the twenty-four page franchise agreement, [the franchisor] sets operating policies dictating things such as the restaurant’s hours of operation, the type of equipment that can be used by the restaurant, that the franchisee carry insurance that is approved by [the franchisor] and even how far the owner of the franchise may live away from the restaurant. The agreement goes even farther in allowing Foodmaker to micro-manage the restaurant by requiring that Fischer comply with all of the specifications contained in detailed manuals supplied by Foodmaker. 226

Rather than outright rely on Williams and assert that it functions like a single entity with its franchisees and it is, as such, immune from section 1 liability, McDonald’s tiptoed around the argument; it argued that it is in a franchise system with its franchisee and can engage in intrabrand cooperation. Had McDonald’s raised the single-entity argument in Deslandes, it would likely result in a finding that it exercises complete control over franchise operations, including control over franchise employees’ working conditions. This is what occurred when it raised such an argument in Abbouds’ McDonald’s, LLC v. McDonald’s Corp. 227

In Abbouds’, plaintiff, a McDonald’s franchisee, alleged that McDonald’s illegally conspired with other franchisees to prevent it from purchasing other restaurants in the Seattle area in violation of section 1. 228 McDonald’s moved for summary disposition, arguing that “it is impossible under law for franchisees and franchisors to conspire in restraint of trade because they are considered to be a single economic entity [and, as such, that] [p]laintiff has no antitrust standing.” 229 Relying on Williams and its factors as to the franchisor’s role, the court found plaintiff lacked standing and there was no conspiracy.

McDonald’s franchise system argument is a contrivance that stands at the precipice of a single-enterprise assertion. It appears that McDonald’s does not allege a single enterprise like it did in Abbouds’ because doing so would require the court to focus on “whether there is a conspiracy between ‘separate economic actors pursuing separate economic interests,’ such that the agreement ‘deprives the marketplace of independent centers of

226. Id.
228. Id.
229. Id. at *3.
decisionmaking.\textsuperscript{230} The court would also apply the \textit{Williams} factors to decide whether McDonald's and its franchisees are in a common enterprise and find that it controls its franchises and franchise employees.\textsuperscript{231} While the single-entity argument could aid McDonald's in avoiding antitrust liability, it would open it up to a finding that it is a joint employer with its franchisee. A finding that McDonald's is a single entity with its franchisees would reasonably lead to the conclusion that McDonald's exercises control over its franchisees, which was a key finding in \textit{Williams}. This would directly contradict the position McDonald's has taken in the joint-employer litigations.

In \textit{Salazar}, McDonald's completely disavowed any role in the franchisee's operations. On appeal, it specifically stated that it played no role in the hiring of franchise workers.\textsuperscript{232} It further recognized and acknowledged that it has a McDonald's system that is established and enforced via the franchise agreement,\textsuperscript{233} but it fell just short of labeling it an intrabrand system. McDonald's assertions in its brief in \textit{Salazar} wholly failed to acknowledge, let alone discuss, the existence of the no-hire clause, which at the time the franchisee signed the agreement in 2010 was in all of McDonald's franchise agreements.\textsuperscript{234}

\textbf{B. Importing Intrabrand Assertion from Antitrust into Labor Law Joint Employer}

Franchisors like McDonald's should not be able to assert control over their franchisees and franchise employees and then disavow it. The intrabrand franchise-system argument from the antitrust lawsuits, and whatever other terms used by franchisors to argue that they can lawfully engage in coordination with their franchisees, should be brought before the court in the joint-employer cases. More specifically, the no-hire agreements should be highlighted as a key factor in demonstrating how franchisors exercise direct control over franchise employees. This direct control, when coupled with the indirect control exercised or reserved in the franchise agreement, helps to establish joint-employer liability.

Although the state of the joint-employment standard is in flux, as of

\textbf{\textsuperscript{231} See e.g., Abboud's, No. CV04-1895P, 2005 WL 2656591.}
\textbf{\textsuperscript{232} Brief for Defendants-Appellees McDonald's Corp. et al. at 1, 6, 8-10, 13-15, 22-23, and 25, Salazar v. McDonald's Corp., 944 F.3d 1044 (9th Cir. 2019) (No. 17-15673).}
\textbf{\textsuperscript{233} Id. at 43.}
September 2019 the rule pronounced by the Board in Browning-Ferris, and affirmed on appeal, is the current standard. The Browning-Ferris appeal court held that besides direct control, indirect control that pertains to the essential terms and conditions of the workers’ employment can be a factor in determining joint employment. The two most relevant factors in assessing an employer’s indirect control over the franchise employees are “(i) an employer’s authorized but unexercised forms of control, and (ii) an employer’s indirect control over employees’ terms and conditions of employment.”235

The intrabrand enterprise argument raised by McDonald’s supports a finding of direct control over franchise employees. Through the no-hire clause in the franchise agreement, franchisors dictate the hiring terms for franchise employees and control the franchisees’ hiring capabilities. Franchisors could argue that no-hire clauses are part of its efforts to promote brand uniformity within the franchise, which is the core of the intrabrand system and single entity argument in antitrust and does not relate to labor conditions. However, such an argument would be unsupported by the facts. No-hire provisions “clearly restrict job qualifications for franchisee employees and franchisees’ freedom in their hiring decisions.”236 They do not relate to the franchise product or the sale of hamburgers to the consumers and do not promote competition within the franchise for employees but rather restrict it. No-hire clauses strictly control a franchisee’s ability to hire employees.

This factor alone may be insufficient to find franchisors liable as joint employers for the labor violations of its franchisees. McDonald’s could argue that it controls its franchise products (such as prices of the hamburgers, store layout and location, and recipes) as seen by the consumer, but it does not control labor conditions because it does not directly employ franchise workers, or set their wages or their working conditions.237 But when the evidence of direct control through no-hire clauses is coupled with evidence from the franchise agreement of indirect control over the franchise agreement, the franchisor may be liable for the labor violations of its franchisees.

235. Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195, 1209 (D.C. Cir. 2019).
237. McDonald’s can argue that any specific requirements placed on in-store workers are due solely to the discretion of individual franchisees. But even if McDonald’s does not impose detailed requirements via the confidential Operations & Training Manual that is incorporated into every franchise agreement, its field inspectors — “Business Consultants” who conduct three different levels of review and “Mystery Shoppers” who engage in test transactions — evaluate franchisees at a much higher level of granularity than can be found in the requirements publicly acknowledged by McDonald’s and analyzed by courts.

employees' terms and conditions of employment, as is currently allowed under *Browning-Ferris*, it amounts to a showing of a joint employer.

Franchise agreements incorporate policies and standards to which the franchisees and, most importantly, franchise employees must strictly adhere. As explained by Professor Andrew Elmore, franchisors exert control "by supervising store operations through comprehensive operational standards that franchisees, their managers, and employees must meet, and by monitoring those standards in franchise stores."

According to Professor Elmore, "the franchise relationship is often misunderstood by the judiciary as an arms-length relationship when, in fact, it is frequently characterized by ongoing dependence." By using the franchise agreement as a cover, franchisors are able to characterize supervisory control as "operational" or "quality" control.

For example, a review of McDonald's most recent franchise agreement shows it not only exerts control over the franchisees through the no-hire clause, but essentially dictates the franchisees' terms and conditions of employment. The agreement provides specific standards and policies to further uniformity in the "McDonald's System." It lists comprehensive operating guidelines. It obligates franchisees to use only McDonald's advertising and promotional materials and spend at least 4 percent of gross sales on advertisements. It also requires that managers attend Hamburger University, "the international training center for the McDonald's system." It further designates the hours of operation for all locations.

Moreover,

like many franchisors, McDonald's often facilitates the hiring process for franchisees by listing, describing, and processing employment positions via a centrally-managed

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238. Elmore, *supra* note 7, at 918.
240. Id. at 80 (explaining how fast food franchisors are able to defeat joint-employment claims by characterizing supervisory control as quality control).
242. Id. ¶ 12.
243. Id. ¶ 12(b) & (c); see also Acevedo, *supra* note 237, at 52 (explaining how McDonald's exercises considerable oversight over its franchisees and franchise employees "via its inspections, its manuals and flyers, and nearly two thousand hours of uncompensated pre-approval training for aspiring franchisees").
244. EXHIBIT B: FRANCHISE AGREEMENT (TRADITIONAL), *supra* note 241, ¶ 5.
245. Id. ¶ 6.
246. Id. ¶ 12(g).
website. Once they are hired, McDonald’s software schedules and occasionally tracks workers in real-time. These actions allow McDonald’s to invisibly encourage uniform behaviors.247

While these factors seemingly only affect the product market, they are in fact a cover for the franchisors to create an ongoing dependence and exercise indirect control over franchise employees’ terms and conditions of employment. These aspects of control and coordination, while arguably permissible and allowable under antitrust, lend themselves to a determination of joint-employer status for franchisors.

A recent study by Professor Kati L. Griffith of “forty-four contracts between the top fifty fast-food franchisors and their franchisees in 2016” suggests that “some franchisors may exert considerable influence over the managers at their franchised stores, who in turn influence front-line workers.”248 She suggests that through using contractual restrictions in franchise agreements, franchisee managers are serving as “intermediaries between franchisors and front-line workers such that, in some cases, franchisors are joint employers (along with the franchisee) of front-line workers.”249 Under her new “intermediary” theory of joint employment, franchise agreements should be reviewed for their control over the terms and conditions of franchise employees by using franchise managers as intermediaries to accomplish such control, whether direct or indirect.250

Thus, in determining fast food franchisors’ liability as joint-employers, franchisors’ intrabrand argument, which arguably entails a concession that they exercise control over the franchisee’s employment and personnel matters (mainly hiring) should also be considered. The terms of the franchise agreement, with the understanding that franchisors desire to engage in coordination by way of no-hire clauses, should be given special attention.251

247. Acevedo, supra note 237, at 50.
248. Griffith, supra note 236, at 173.
249. Id. at 173-74.
250. Unlike franchisees, franchisees’ managers do not have an ownership interest in the franchise. Nonetheless, franchisees’ managers do have influence over front-line workers at franchised stores. If the franchisor influences the franchisees’ supervisory managers and those managers influence the franchisees’ front-line employees, it follows that the franchisor affects the franchisees’ front-line employees.

Id. at 186.
251. While the franchisors’ assertions in different cases cannot be used against them as a judicial or conclusive admission to find that it is a joint-employer or that it violated the Sherman Act, they nonetheless can be admitted as evidentiary admissions. Leon v. FedEx Ground Package Sys., Inc., 163 F Supp. 3d 1050, 1071 (D.N.M. 2016) (explaining that the Tenth Circuit permitted “the defendant to introduce the plaintiff’s prior inconsistent pleadings, noting that [t]he ancillary complaint is factually inconsistent with the position plaintiff’s pursued in this case and therefore constitutes an admission against
Doing so will help to establish unanimity as to how to characterize the franchise terms.252

C. The Uber Analogy

The franchisors’ antitrust-labor law tension is a part of the broader coordination issue in antitrust law debate currently explored by scholars. The coordination problem is also prevalent in on-demand, online platforms and is exemplified by Uber. Fast food franchisors and on-demand platform employers, like McDonald’s and Uber, raise parallel arguments in seeking to coordinate yet disavow liability – they argue that they are simply facilitators connecting two independent actors and do not play a role in the labor conditions for the workers that sell the end product.

As examined by Professor Sanjukta Paul, Uber physically and economically coordinates the selling of services through its Uber app by setting prices for the services rendered by its Uber drivers. In doing so, it benefits from the nonenforcement of price-fixing regulations of antitrust law, while simultaneously benefiting from the enforcement of price-fixing laws to prevent Uber drivers from organizing to bargain for better working conditions.253 Using an existing antitrust paradigm – namely price-fixing – Uber is able to set prices for the services that the drivers provide, which increases Uber’s profits as well as the costs to consumers, while denying the drivers who provide the services the ability to collectively bargain about payments.254 The result is that different price-fixing standards are applied to Uber. Uber is implicitly allowed to use different norms when it deals in the labor market (Uber bargaining with Uber drivers) and in the consumer market (Uber bargaining with Uber riders).255 “This is paradoxical, for it implies that Uber is entitled to derive an economic benefit from a premium interest pursuant to Fed. R. Evid. 801(d)(2)” (citation and internal quotations omitted)). But see Martel v. Stafford, 992 F.2d 1244, 1248 (1st Cir. 1993) (“Unlike, say, factual allegations in trial court pleadings, statements contained in briefs submitted by a party's attorney in one case cannot routinely be used in another case as evidentiary admissions of the party.”). They can be presented to the court, and if the court so chooses, the franchisor will have an opportunity to address the assertions. See e.g., Leon, 163 F Supp. 3d at 1071; see also In re Apolin, 108 B.R. 253, 259 (Bankr. E.D. Cal. 1989) (“Evidentiary admissions, unlike judicial admissions, are mere evidence, are not conclusive, and may be contradicted by other evidence.”).

252. See Estate of Anderson v. Denny’s Inc., 987 F. Supp. 2d 1113, 1155 (D.N.M. 2013) (explaining that “there is not a consensus among even those few courts on how to characterize similar facts [and terms in the franchise agreement], as one court may interpret a fact as giving the franchisor control over daily operations, while another court may interpret that same fact as simply protecting a trademark”).


254. Id. at 238-39.

255. Id.
from coordination in the price of ride services, at the expense of Uber riders, while Uber drivers are not entitled to benefit from the premium.\(^{256}\)

The Uber paradox highlighted by Professor Paul is yet another example of the existing conflicts in antitrust law. It is similar to the antitrust-labor tension explored in this article, discussing how franchisors can use different price-fixing norms in the labor market, controlling the franchise employees’ employment conditions and, in the consumer market, the franchise products that reach the consumer. The “Uber problem”\(^ {257}\) is an indication of broader issues plaguing present-day workers: addressing how labor law can protect workers, especially the most vulnerable, in a fissured workplace.

VII. CONCLUSION

By exercising control over franchise employees to restrict their movement, but then disavowing that it is exercising such control, franchisors like McDonald’s are engaging in corporate manipulation and using franchise agreements as both a sword and a shield. Because they need not address the admissions they have made to the courts, they are having their cake and eating it too – to the detriment of low-wage, unskilled workers who are simply trying to find ways to better their economic conditions. Franchisors should not be able to assert control over their franchisees and their employees and then disavow that control.\(^ {258}\) Thus, when courts analyze whether franchisors are joint employers, franchisors’ assertions in antitrust litigation as to no-hire agreements should be considered because they are evidence of direct control and support a finding of joint-employment liability.

\(^{256}\) Id. at 239.

\(^{257}\) See Sanjukta Paul, Fissuring and the Firm Exemption, 82 LAW & CONTEMP. PROBS. 65, 72 (2019) ("[T]he Uber problem is a more brazen version of the franchising problem, and it creates a more obvious conflict under existing antitrust law.").

\(^{258}\) It appears that McDonald’s and the franchisees recognize the problems with the current system and are exploring ways to address the challenges posed by the current franchise regime. See Gary Occhiogrosso, McDonald’s Franchisees Meet to Find a Seat at the Table, FORBES (Oct. 15, 2018), <https://www.forbes.com/sites/garyocchiogrosso/2018/10/15/mcdonalds-franchisees-meet-to-find-a-seat-at-the-table/#6ffecfe6986> (explaining that the franchisees’ “National Owners Meeting” with McDonald’s “indicates that McDonald’s franchisees are considering using their unified voice to have a more significant say in decisions that affect their bottom line”).