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Transcript: Implications of NLRB Joint Employer Ruling w/ Labor Law Expert

Government Regulations

On Friday February 2, we hosted a conference call with Orly Lobel, Director of the CELP Program at University of San Diego to discuss the status of the NLRB ruling on the definition of joint employment and implications for franchisors. Key takeaways are below; a full transcript can be found inside the report.

NLRB ruling expands definition of joint employer

The October 2023 ruling is set to go into effect at the end of February 2024, and expands the definition of who can be considered a joint employer as it pertains to the National Labor Relations Act. The new rule includes a company that has some form of indirect or reserved control over any of seven categories: wages, hours and schedule, assignment of work, supervision, methods of work performance, hiring and firing, and health and safety. Previously, the definition required substantial and direct control over the essential terms of employment. This expanded definition of employer would pertain to the restriction on retaliating against employees who attempt to unionize and the requirement to bargain with unions.

Implications for franchisors and franchisees

Risks to franchisors include increased risk of litigation and associated costs as they are more likely to be named in lawsuits pertaining to union violations. However, the fines that result from such suits are often minimal to large franchisees. The bigger financial costs are likely to be on the side of franchisees, who may receive less support from franchisors in terms of training, materials and supports which could be construed as indirect control over the workplace. This requirement may benefit larger franchisees who are better equipped to handle the increased cost and is more likely to negatively impact smaller operators on the margins.

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Sara Senatore: I'm Sara Senator, BofA Senior Analyst covering restaurants. I'm on the call with Alex Perry, BofA's Analyst for leisure brands and retailers, and Mel Nunez who covers soft-lines retail with BofA's Senior Analyst, Lorraine Hutchinson. We are of course very pleased to be joined by our expert speaker, Orly Lobel, the Warren Distinguished professor and Director for the Center for Employment and Labor Policy Program at the University of San Diego.

Orly also currently serves as a consultant senior academic advisor at Fiverr. She is an expert in employment law, intellectual property law, patents, trade secrets, antitrust, copyright, trademark, regulatory, and administrative law among many other disciplines. And she is the author of several critically acclaimed and award-winning books and has been named one of the top minds in research and one of the most cited legal scholars in the country. So thank you so much, Orly, for joining us and sharing your deep expertise.

Orly Lobel: It's my pleasure. Thank you for having me.

Sara Senatore: So let me ask you then, Orly, if we could just start, what is the joint employer rule?

Orly Lobel: Yeah, so everybody's talking about this question of joint employer, what's happening, is also bubbling up with a separate question of employee classification. So the joint employer rule should not be confused with this question of who is an employee versus who is an independent contractor. It's a separate question about once there is an employee, is there more - are there more than one employer? So can there be kind of a triangular relationship where there is the employer that's there at the branch and you kind of see them visibly, but is there also another employer that's more remote?

And I know that we're going to talk about the context of franchises, but it's not just in the context of franchises. It could be subcontractors. It can be all kinds of contract work and kind of chain of production questions of we have company B, we know already that there is a relationship of employment with company A and its workers, but does company B also have an employer responsibility?

Sara Senatore: Great, thank you. And I'll - please, Alex, go ahead.

Alex Perry: Thanks a lot, Orly. I just wanted to ask more specifically, what is the most recent ruling by the NLRB and how is it different or not from prior rulings?

Orly Lobel: Yes, so it is very different and that's why there's everybody, from my friends and the attorneys who represent their big corporations are kind of frantically learning it and the chamber of commerce is suing and we can talk about all of that. And Alex, - I think we should go back to some of the history but first I'll say about the new ruling because there's been a lot of this kind of flip flop. And - at least in the past, I would say 20 years, we've had this kind of roller coaster back and forth and it's very, of course, political and dependent on administrations.

But the most recent is that on October 26th, 2023, a much anticipated new NLRB ruling came down that changed the previous 2020 Trump-era rule to say that now we have a much broader definition of finding a joint employer status. So finding that a more remote company B can be deemed also an employer for the purposes of labor law. And

that's also significant. We should talk about what - when you find joint employer status, the question is for what legislative purposes - regulatory purpose? But this here of course is everything that's covered under the National Labor Relations Act, which the National Labor Relations Board has authority over.

And so for that purpose, the new rule broadens the definition of who may be deemed an employer. And the rule is that even a company that has some form of control that is indirect or reserved, even if it has not ever actually been exercised. And this is really important, this is the indirect and reserved rule, that's very different from the previous direct and immediate control rule. So any kind of indirect impact on one of seven categories of how - that pertains in some way to how people work. And so the seven categories are, wages, hours and schedule, assignment of work, supervision, the fifth is the methods of performing the work. That's the more tricky one that we can talk about hiring and firing. And the seventh aspect is health and safety.

So any kind of indirect or reserved control, and reserved control can be contractually like a franchisor says, I have some say over how health and safety standards are preserved at the workplace or the production space, can then be a finding that this company B, the corporation, is also an employer. So applying the joint employer doctrine here.

Sara Senatore: Orly, can I ask first to just put in terms that maybe our listeners are most familiar with or maybe to sort of offer something more concrete? I cover restaurants, many of which are franchisors. Alex covers gyms that do that. Mel's team covers some services that are franchisors too. Speaking for restaurants, there are huge binders that franchisees get that cover a number of the topics that you're talking about. This has always been the case, and to some extent, it has to be the case because the whole point of franchising is to have consistency. You have different operators that you have consistency across brands.

So things like methods of performing work, to your point, that was a tricky one. But clearly, there are cooking procedures that have to be followed for different menu items, and health and safety. Every restaurant not only gets checked by the local health agencies, but it certainly has to be subject to the franchisors who do their own evaluations or spot checks or anonymous secret shoppers, things like that. So I wanted to ask a couple of things on this. One is you mentioned the seven criteria and you said that's different. Well, let me say, what is the difference? Is it the reserve piece? Is it the relationship now that is different from previous rulings? Or is it the number of criteria that apply, so the indirect versus and reserve rule, is that what's distinguishing? Or is it that it used to be that joint employers had to have some influence on only three of the seven that now are looked at?

Orly Lobel: I think the part that is the most worrisome for the franchise relationship and that's most different is the indirect and reserved versus what the rule was. Substantial direct and immediate control over the essential terms of employment was the previous rule. So you could say that the essential terms of employment are perhaps narrower than the seven broad categories that I described. But it really is the fact, and exactly like you described, that indirect and reserved is also alluding to the contractual terms where, and again, exactly like you described a franchise, the whole basis of the relationship is to have consistency, to have quality service, quality control, to have consumer trust.

So there is, in the world - in the policy world, in the scholarly world, there's a lot of this debate about how do you really reconcile these two aspects of labor law and these liabilities pertaining to work relations versus these needs that come from trademark law? From the ability of a brand to franchise, to have that contractual relationship that does not mean ownership and does not mean the kind of sub-supervision that is physical. How do these two come together? I will say that even - and I think it's

interesting for all of us to think from kind of an economic perspective about this in the debate.

And again, well, I think we'll talk more about this now and we might have questions about it, but there's also, I've been kind of hearing a lot of this discontent that there's some irony here where there is, on the one hand, a big push by the federal government right now to revamp our antitrust laws to tackle concentration in markets. And the franchise model is a lot about the whole kind of resonance and its effects is to be about not concentrating ownership and allowing these contractual relationships to create a lot of micro-enterprises, entrepreneurship, small entry, new entry of smaller businesses. And again, this is kind of an intention with all of that where basically the NLRB is now telling us that, again, for the - and I will say narrow purposes of labor law responsibility and duties. We can suddenly see the headquarters, the big corporation, the brand just by virtue of these contractual requirements on maintaining safety, maintaining standards, maintaining quality performance, and methods instructions as an employer.

Sara Senatore: And it's really interesting and it raises, in my mind, probably a separate conversation or one that I have to think about, which is, does fundamentally, if that changes, does it still make sense to have franchises? To some extent, maybe the answer is yes, because part of what they also do is franchising - allocate - they use their own capital to grow. So there's still value for the franchise or from that perspective and of course the sort of incentive alignments that happen when you have skin in the game, if you will. But it is a very different - and I think we'll get to that later in your perspective on perhaps what the financial implications are.

But one question I do have is, again, and I don't want to belabor this, but I am trying to figure out this indirectly, I guess, can you give us an example in the case of let's say, I don't know, hiring and firing or wages, what would indirect look like versus substantial and direct? So indirect is, oh, we have a policy that says you have to have X number of people staffed for the peak hours and direct would be you pay them this and we tell you who you can hire and fire. Is that sort of the nuance, or the maybe not nuance, that kind of the bright line between indirect and then direct and substantial? We're trying to figure out how much this changes the extent to which there can be, - can have influence from a franchisor.

Orly Lobel: Yeah, absolutely. And it's useful perhaps to talk about how this is not new. As I mentioned, this has been a back and forth, what world are we in? And so to your question, it's not like I have to imagine this application because it's new. We've actually lived for some years in this new world with the new rule. And actually, I also think that it's useful to talk about the fact that the rule has not been yet - it hasn't taken effect. Well, we'll talk about whether it will take effect and the battles around it, but just to say just a little bit of the history, this rule is quite similar to a previous rule, a previous - it actually wasn't promulgated as a rule. The NLRB has both the ability to directly draft a rule and it can also rule on a case and change the law in that way.

So the previous one was in 2015, the Browning decision where a very similar rule of indirect control was the joint employer rule. So we actually, again, that helps your question because we actually saw how courts suddenly looked differently at some of the indirect decisions or requirements that a franchisor had over its franchisees. So for example, there are lots of moments where a franchisor actually cares about even hiring and firing. Especially today with social media, there have been multiple incidents where, for example, an employee who flips burgers at McDonald's is rude to a customer in a way that is very embarrassing. They can be discriminatory, there's incidences of hate speech, they can be rude, there was a particular incident of I think a service pet and a rude employee.

And all of these things might be filmed and they get viral very quickly. And that's a moment where the headquarters cares about what the franchisee does and acts quickly to terminate that employee. That reserved control and actual exercise control can be and has been used when we are in this world of the Browning-Ferris in 2015, post that. But now in the new rule that was just given to us that is a showing of indirect control on termination, on hiring and firing. That means that we have a joint employer status.

Even more than that, you mentioned all these big booklets of guidance, those are, again, have been brought in as evidence of indirect and reserve control. If it's about processes, safety, even guidelines about speech and sexual harassment, all these training that are very efficient in these big franchise relationships that the franchisor provides all these printed materials. Those have been brought in as evidence of this indirect reserve control.

Sara Senatore: Okay, so it very - to your point, we don't have to speculate those big binders. Standard operating procedures have actually been a part of this conversation very directly. So thank you, that's very helpful. Let me pause and turn over to -

Orly Lobel: Maybe just to say something about those binders, those are actually being raised when the restaurant association is talking about the effects. Because we will talk about the effects later, but I'll just say that this is an example where there are responses where in this world we can say the franchiser might decide not to have those big training binders. They're actually brought up a lot that the franchisees say, well, we'll lose all the - we had during that world of in 2015, there were these shifts where the franchisors were saying we can't supplement these binders anymore. And there have been these just empirical findings that more franchisees had to print their own. So that can be an effect. And again, we'll talk about this, that it's not like anything is automatic now. Their response is to how the franchisor starts thinking about less of those control - indirect control moments.

Alex Perry: Great. Thanks, Orly. This has all been incredibly helpful. I just wanted to ask, how would the measure that was passed by the House and Biden's perspective veto change the likelihood that it will go into effect?

Orly Lobel: Yes, so that's an interesting development, not just about this rule but we've been seeing more of this where the legislator has been using this power under the Congressional Review Act to vote resolutions to block agency rules. And indeed, as you say, so we got the new rule in October 26 - on October 26th, 2023. It was set to take effect in December 2023. That's a bit of a short - it's a typical notice and comment timeline but when something is very controversial, it's also typical that it gets extended. So several things happen. One is the lawsuit that - in federal court by the Chamber of Commerce that said that the rule should be invalidated because it's arbitrary and capricious. So that's going on.

But the lawsuit actually extended, by consent, the NLRB, and the Chamber of Commerce agreed that now the new rule is set to take effect February 26, 2024. So this is less than a month from now. And then in parallel, in January 2024, the House passed this congressional resolution to block the rule and now it needs to get the same vote in Congress. So that's where we're heading. However, President Biden has the power to veto this blocking of the rule if it's passed also by Congress and he has already vowed to veto the rule. And we've seen, again, this is kind of something that's not just about joint employers, it's been the characterization of a lot of these more controversial legislations

or rulemaking and then the agency versus legislator back and forth. And President Biden has vetoed these kinds of resolutions.

To overcome the veto, there needs to be a two-thirds majority vote, which is unlikely. So my final answer on that is that I don't think that the rule will be actually blocked because of a very high likelihood of a veto by President Biden as long as we have this administration in place.

Sara Senatore: So actually I want to ask - I want to shift a little bit to enforcement, but I did want to ask, you mentioned that this is sort of the pendulum has swung and it seems to be largely, not surprisingly, maybe based on the political leanings of the administration, but does this also mean that if a different administration came in, it could reverse?

Orly Lobel: Absolutely. So the NLRB, the National Labor Relations Board is a judicial forum but it's also a political forum. And you have these terms and they rotate. So once there is a new administration, there is some lag with the replacement of who the panels - who rotates out, who rotates in. But that's why we've been seeing this pendulum. It's exactly, on so many issues and on this issue as well, we had the 2015 NLRB decision and then in 2020, we had the Trump administration NLRB rule, and now the 2023 rule. So it's kind of every few years depending on the administration. It can absolutely change, they're not bound by the President.

Sara Senatore: But it seems like it would make it very difficult for a business to operate under that kind of lack of visibility or continuity. So I imagine that presents some challenges. I mean, the franchising model has been around for a very long time so maybe it's simply as straightforward as it just takes a very long time for these things to move through the system. And so by the time something happens, the new administration's in place, but it does strike me that those constant swings, it just makes planning I would think, very difficult to do. I don't know if that's one of the arguments that maybe franchisors are making.

But I am curious on that question. How - let's turn a little bit to enforcement. So if the rule - it sounds like you think the rule will go into effect, I guess how will franchisors be evaluated? Do they just kind of keep operating business as usual until somebody sues them or is there some kind of evaluation process that every major company goes through? I'm just trying to figure out on the day that it goes into effect is it all of a sudden the world of the franchisor and franchisee will turn upside down?

Orly Lobel: So no, the world does not turn upside down, but I think that this is the key question where you're saying how do we deal with all these changes with uncertainty? And of course, it is part of the amicus by the Chamber of Commerce - the lawsuit, by the Chamber of Commerce, all the amicus by the restaurant franchisee associations. There is of course a lot of this kind of outcry, how do we deal with the uncertainty? It's not only the uncertainty because of the flip-flop but their claim is also, as we've discussed, that this new rule just presents much more uncertainty because a lot of different things can become indirect and reserved.

So I think it's very important to put everything that we just talked about in perspective. I've emphasized this a couple of times since we started our call, but I think it's important to say it even more directly, this is a rule only about labor law not about employment law. People who are not directly in the field, sometimes I teach employment law and I ask the first question, the first day of class, my students, my law students, what's the

difference between employment and labor law? And it's not always clear to everybody what the difference is. So the employment laws are really the broader set of laws because it's everything that's not labor law, which is just, the National Labor Relations Act, just requirements pertaining to the right of workers to engage in concerted activity, to have a unionization drive, and to then engage in collective bargaining.

I'm not trying to diminish its significance but it's a much kind of more narrow set of rules versus all the different things that come from the Fair Labor Standards Act. All the state laws about wage and hour, overtime, all the Title VII record regulations, everything about privacy and speech and whistleblowing and duties of loyalty, and competition, trade secrets, whatever. A whole world of employment law. That's not - this is the joint employer rule in this case that we're talking about. It's not that you can't find a joint employer rule in these other contexts but what the NLRB has the power to do in broadening who is an employer. This definition of who's employer is only pertaining to the requirement to not retaliate against an employee that is trying to get together with other employees and organize and form a union. And if this is a unionized - already unionized workplace, the requirement to bargain with them.

So that's one thing, it's a narrow set of requirements. Secondly, it's - even when there's a finding of a joint employer. Remember that the franchisee is still the primary employer and what the NRB rule is telling us that if there is a finding of a joint employer for the purposes that - the types of things that are being controlled indirectly or there's reserve control over them, then again, if there is unionization, the headquarters needs to be at the bargaining table.

There's some uncertainty about what that means. I've been talking to attorneys that represent these big restaurant franchisors and have been representing them in a lot of these cases, there's kind of an uncertainty on what does that mean just on the areas that they've controlled. Because the terms and conditions of employment, and as everybody on this call knows, bargaining is a complicated thing and one area impacts the other areas of how to put together to negotiate and what to agree on. So there's some kind of uncertainty. But the bottom line is I strongly feel that definitely the sky is not falling the - because we've been in the two different kinds of camps on the spectrum of how much the franchisor is shielded versus how much they are at some risk of being found a joint employer.

We know that things continue and we can talk about this. And I think there's a lot of knowledgeable people on the call that can also chime in, but my analysis is that there are going to be some costs. But the costs are - and I've looked at some past numbers and I think, first of all, for the strongest franchisors, these are quite small costs of, yes, increased naming and litigation when there's, let's say in one place there was some labor distributor or unfair labor practice of firing somebody who tried to organize those. So it's harder to get out of the litigation and just kind of a summary judgment. So there are some costs of litigation that are increased but they're not so robust that it really, with the biggest franchisors, has a big effect.

And I think there's a lot of analysis by leading economists that the bigger costs are on the franchisees. So this relates to what I was talking about before that there are some behaviors that may well change by the franchisors of providing less training, giving less materials, giving less support in some areas like sexual harassment, like safety, and also just maybe choosing the stronger franchisees. So more concentration on the franchisee side where a franchisee can have several of the restaurants expanding to several more locations versus the smallest at the margins at the limit - marginal franchisees that will be pushed out.

So what I'm saying is that it's not that it doesn't affect the model and how franchisors will think about it, but at the end of the day, I think it's part of something that they're used to that is a cost-benefit analysis that a lot of it is just kind of the cost of doing business at different places. I will also emphasize because of what I said before, there's

lots and lots of moving parts on this because there is also - there can be responsibilities on the employment side, there are state legislations. There have been things that are happening - that have been happening actually here in California.

So I don't know if the audience knows or remembers that I'm in California. The whole franchising model has been also looked at recently in California with legislation that was actually attempting, in 2023, to impose a joint liability for employment violation specifically on the franchising industry, and that didn't pass. So there's always kind of, just like with the gig economy, there's always a lot of things to look at but they have been doing that for at least the past 15 years.

Sara Senatore: So, okay, there's a lot of ground in there and I want to ask a few questions as follow-ups. But that's very helpful context, so thank you for that. But it sounded to me, I mean, that was one of the questions I was going to ask and I think you answered it, which was, it makes sense to me that franchisors wouldn't want this, but I was trying to figure out why franchisees would object. And it sounds like because essentially they have to bear the burden more of these - of developing or I guess more of these practices or things like training, things like that. So it seems like, again, the idea of a franchise system is in some sort of very specific balance in terms of responsibilities and this just shifts more to the franchisees.

So is that the right read, that franchisees, essentially this is not costless to them either because by virtue of the change in the rule, franchisors can't feel like - they can't provide as much support otherwise they risk being considered a joint employer. And as you say, you run the risk of a bias towards bigger franchisees by the franchisor for that very reason. Better-capitalized or better-funded franchisees may have the financial resources to essentially do some of the, I'll call it training that previously might've been done by the franchisor.

Orly Lobel: Yes. So I think that's absolutely right. 100% that's something that they worry about. At the same time, it's not the only - I think that another thing, in the end of the day, we're talking about law and abiding by the law and we know that the reality of the restaurant industry, the low wage work industries, in general, the service industries, any workplace, there's always going to be some violations. And we know that most of the time the litigation is really the tip of the iceberg and we don't see all of the things that could have been a claim or could have been a lawsuit.

So I think there's also a sense that if there is a broader joint employer definition, and you can name in litigation this brand name that's a deep pocket, that's very recognizable, that can then pay if there's a win, then the franchisees themselves will be sued more often. Because it's just going to be more worth it for the plaintiff's attorneys if there was a small violation that otherwise would just not be, if the only defendant in the case is Joe Schmoe who can't defend themselves, can't then pay it, it's just not going to be lucrative. Here, suddenly you're more exposed, you become more visible as a small franchisee because you have the bigger defendant added.

So there is, in some ways, it's kind of like this chilling effect against violations. It can strengthen the practice, just the legality in every one of the smaller places. And that can be associated, again, with costs just of abiding by the law, not engaging in unfair practices of not allowing somebody to circulate a flyer by the SEIU, things like that. There is - and again, I do think that what we're talking about is labor law but there's also - it becomes more part of a bigger drive where there are - most recently there was findings by the Department of Labor that some of these franchisees are using child labor and that's not under labor law, that's under the Fair Labor Standards Act. So what I categorize as employment law.

But again here there was - the McDonald's were named and McDonald's and Burger King and some others said, we're going to be much more on top of things of telling franchisees that they absolutely can't unlawfully employ minors - children unlawfully. And so, again, that's kind of intention, they do want to do it. And you see this - actually, this just happened very recently this year. I think this was already in 2024 after the rule came out by the NLRB. And you see this decision by the franchisors still wanting to say, we actually care about the franchisees not doing unlawful things and we're not going to be afraid just because of that finding.

So I do think that's kind of a piece of evidence that these really strong franchisors, they know how to deal with these things they complain about. They don't like the rule, of course, they don't like the rule. Of course, they're going to fight it politically, legislatively. They're looking at the next elections, this is all part of the game. But they're not scared then to say, we actually don't allow our franchisees to employ minors.

Mel Nunez: That's really helpful context, Orly. Thank you. This is Mel from the Softlines team. I'm curious if you think there are any different implications between the franchisees that offer products like a restaurant versus the ones that offer services like a European Wax Center.

Orly Lobel: Yeah, that's a really interesting question. So in general, the law doesn't differentiate and each franchise has its different set of standards, their industry standards. In general, those kinds of franchises can see exactly the same kinds of dilemmas, questions, lawsuits. So when the NLRB new rule came out, it was definitely talked about as the McDonald's and the Amazons of the world that should be worried. So again, it's both the product and the delivery services that can be a part of it, such as how Amazon uses contractor packing and warehouse delivery companies, it can be janitorial contracts, and it can also be waxing services.

Sara Senatore: This is Sara. I guess I was just thinking what Mel was asking, to me, sort of services maybe have more, maybe this is the wrong interpretation, but I guess more rules, if you will, in the sense of there's perhaps less - if I'm selling, I think there's an auto parts retailer that franchises NAPA. If I'm selling those products, the same products, there may be just tighter - looser rules about how that happens. And maybe just less risk around if the processes aren't followed to a T at European Wax, bad things can happen if the processes aren't followed to a T at NAPA Auto parts, maybe perhaps there's a - there are fewer implications. Nobody's going to get sick, going to get probably physically hurt, they're just going to buy the same product they were going to buy anyway and maybe just not have a good experience. So it seems to me some of it maybe depends on how closely the process has to be monitored or followed.

Orly Lobel: I agree with that, I think it's correct. It's not necessarily always falling in the classification of service versus product because food has a lot of safety regulations as well. So it says that, as you described how regulated the industry is in other ways, how much consumers can distinguish between the kind of product and service that they get. So the fast food industry is - you get the product of the pizza, but you're also getting a service. Like I described, the brand cares about how the interaction happens, there's the face-to-face there with the customer. So they don't want the employees to be rude and discriminatory and things like that.

But I think that overall, yes, there is a spectrum of how much it's face to face, how much is serving the end customers versus a more B2B just selling of a product. Like there can be things that are completely online and there's much less of that risk. So, I mean, this is a good point to make that I am sometimes asked, well, the joint employer decision or rule has been handed out, what happens tomorrow when it comes into effect? Is it automatic that we know now? Do we know in this new world that a particular franchisor or a particular brand is liable? And the answer is clearly no. It still is very much subject to litigation on the facts. It's still all these multifactors and an analysis of, well, what actually happened. So it kind of helps the court. It guides the courts but it's still then a question of a finding by the court on the particular circumstances of what is this relationship.

And I have to plug this, I've been having this conversation about joint employers but it's very similar. And we can have a whole different hour, I hope we will. Some points about the gig economy and who is an employee to begin with. So very similar to when Prop 22 here in California and other of these kinds of changes happen, the question then is what happens the next day? Well, the answer is Uber continues to fight under this new broader definition of who is an employee.

Alex Perry: Thanks, Orly. I just wanted to switch gears a bit here. I wanted to ask from your perspective, what are the financial implications for franchisors? Would you expect increased compliance and legal costs? Do you anticipate franchisors having to bulk up on their legal staff? Just wanted to get more color on what you think the financial implications may be.

Orly Lobel: Yes, I think that there - each of the franchisors is having long conversations with their longtime defense firms and in-house councils and the ones that they have on retainer outside councils in their labor and employment teams. They might be changing some of their practices on how they instruct, what materials they deliver, and they are expecting to get more lawsuits. But again - and they also might make decisions, as we discussed, about how to expand.

So the very abstract economic model about franchisees and decisions about franchisor-franchisee expansion is that the franchise model is a very good one because it can expand faster than if you had actual control and ownership and you had to put the capital for every new local venue that you're opening. And so it expands faster, more broadly, and once it expands, it strengthens the whole brand, the recognizability of it. So it's these compounded effects. So that's a basic economic model. And of course, you're going to see reports about how, well, maybe there's going to be some more hesitancy about some - approving some franchisees that can't deal with some things. And there's going to be more of that naming and lawsuits.

So I'm kind of hesitating about how to predict some of these effects - economic effects because this is so politicized. You will see in the kind of popular media, a lot of these, oh, it will totally disrupt the franchisor's decisions and the franchise model. It will slow it down. And there are economists out there that I think are very politicized. Like there's the kind of the Bird Report, who is the economist of the Chamber of Commerce, that, as I said, is suing in federal court saying that this new rule is unlawful. That has given us in 2015 - after the - post-2015 rule that was similar, gave us these numbers of how there

was lots, in the hundreds of thousands, of jobs losses because of slowing down of the expansion and loss in billions.

I think that's a very politicized number and I think that there's a consensus by economists that the bigger, I think, costs will be on, as I said, in the margins at marginal franchisees, that the stronger brands actually, and this is always true with any kind of regulation, they will be better equipped to weather all of these changes. It will be part of the cost of doing business. And I don't think that'll be - these are extreme effects economically.

Sara Senatore: Orly, in the last call of five minutes that we have, so you mentioned there's maybe some hyperbole around the implications for the economy. Can you just help us mention what the cost of what violations or what penalties might look like? So are there ways to think about if there is some kind of violation, these are the biggest penalties we've ever seen or this is how it's measured? So just so we have a kind of sense of if worse comes to worst and something like this happens to franchisors, what are we talking about?

Orly Lobel: Yeah, there's been really small penalties, and a lot of times it's kind of notorious that labor law, the National Labor Relations Act is not that strong a lot. That's why we have so low unionization rates to begin with, which is less than 7% of the market. So it's - we see like fines can be, recently with the labor - the child labor thing, it was $60,000 in fines. And some violations with some maybe unfair labor practices, it can be also in the tens of thousands. Settlements on bigger issues, the wage and hour settlements are bigger, there can be in the millions. But again, we're not talking right now about Wage and Hour. This is just, again, we expect that companies are in compliance with the law. The franchisees are expected to pay minimum wage depending on the locality, and there are such great variances on what those are. And that's always been something that the franchisors know how to calculate within the cost and it's part of the contract that they have to abide by. The franchisees have to pay those costs.

So if you were asking me about just abiding by the law, then having to pay the minimum wages and the social security and all that, those are real costs. Those are - sometimes we calculate that they increase by 30%, whatever is not calculated, as if you're classifying somebody as a non-employee at all. But here we're talking about assuming that all the franchisees are paying minimum wages, then just the labor law costs of violations, like retaliation stuff, are not big penalties.

If there is a big unionization drive, which is the ultimate goal, that takes a long time. The big dream, you could ask me, which is not what you asked me but I think we should kind of put it as the outer limit of costs. If there was this big unionization drive of all the franchise locations of every place in a big chain, and somehow there would be a finding years down the road now, this doesn't happen quickly that McDonald's has to negotiate with all of them together as one big unit and elevate everybody under one collective bargain - collectively bargained agreement, all of the hourly wages and a lot of different kind of requirements. And those are real costs, but again, this is not something that - this is something that the service union dreams of, has been dreaming of for decades, but I just don't see it happening anytime soon.

Sara Senatore: Got it. That is, yes, a helpful perspective. And it sounds like, to your point, these things are - maybe take a long time coming. And even for better or for worse, when there have been violations in the past, the costs just tend not to be the magnitude - relative to some of the companies I cover, it tends to be relatively modest.

So again, very helpful perspective and context that we've gotten from you over the past hour. So Orly, thank you so much for joining us. This has been incredibly helpful. And again, we very much appreciate your insights.

Orly Lobel: Thank you. It's my pleasure.

Sara Senatore: All right, have a great rest of the day.

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