

Congress of the United States
Washington, DC 20510

March 5, 2015

The Honorable Richard Griffin, Jr.
General Counsel
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Dear Mr. Griffin:

We are writing with questions about recent comments you made in support of pursuing labor violations against franchisors as joint employers under the National Labor Relations Act (NLRA). Additionally, we have concerns that you intend to pursue labor violations in this manner despite your admission that the legal grounds for doing so may be flawed.

The National Labor Relations Board (NLRB or Board) is currently evaluating whether to change the standard that determines whether an employer is a joint employer for purposes of collective bargaining and labor law violations under the NLRA.¹ On June 26, 2014, you filed an amicus brief urging the Board to “abandon its existing joint-employer standard,” that has been in place for three decades, in favor of a “new standard” that takes “into account the economic and industrial realities of employment relationships.”²

In the brief, you appeared to express frustration that the current joint-employer standard does not allow for meaningful collective bargaining in franchisor-franchisee relationships because franchisors are not at the bargaining table.³ You stated that the current standard “preclud[es] employees from exerting traditional economic pressure on a company that effectively controls many of their working conditions.”⁴ Accordingly, you asked the Board to adopt your view of the law which would effectively ensure franchisors must bargain with employees of the franchisee and are liable for labor violations.

Notwithstanding the concerns we have if the Board does expand its joint-employer standard, we are troubled that you appear to be pursuing joint-employer cases knowing your legal theory is problematic. On July 29, 2014, the NLRB announced that you had authorized complaints

¹ NLRB Press Release, NLRB invites briefs on joint employer standard, May 13, 2014, *available at* <http://www.nlr.gov/news-outreach/news-story/nlr-invites-briefs-joint-employment-standard>.

² Brief of the General Counsel as Amici Curiae, *Browning Ferris Industries* (No. 32-RC-109684) at 2.

³ *See id.*

⁴ *Id.* at 16.

The Honorable Richard Griffin, Jr.

March 5, 2015

Page 2

alleging violations of the NLRA against a franchisor as a joint employer.⁵ Then, on October 24, 2014, at a labor conference entitled, “Zealous Advocacy for Social Change,” you spoke about “law reform efforts” underway at the Board.⁶ During your presentation, you discussed the joint-employer issue and singled out franchisor-franchisee relationships. You stated, “in that area we have a problem, legally, for our theory” to hold franchisors as joint employers.⁷ Despite this admission, only months later on December 19, 2014, you issued complaints against a franchisor as a joint employer.⁸

We are also concerned that your October 24 remarks pointed to research conducted by Dr. David Weil, Department of Labor Wage and Hour Division Administrator, that argues for an expansion of joint-employer relationships for purposes of liability in labor law.⁹ NLRB’s *ex parte* rules prohibit communications relevant to the merits of an unfair labor practice proceeding between the general counsel and third parties.¹⁰ Therefore, if you are communicating with Dr. Weil or other third parties about pending NLRB complaints it could be inappropriate.

To better understand your comments and whether you are appropriately pursuing joint employer cases, please answer the following questions and provide the information requested by March 19, 2015.

1. Did any developments occur in the law between your comments on October 24, 2014, and the filing of complaints on December 19, 2014, that named a franchisor as a joint employer?
 - a. If not, please explain your comments made at the October 24, 2014, labor conference.
2. Produce all documents and communications between the Office of General Counsel and the Board referring or relating to the joint employer standard from November 4, 2013, to present.
3. Produce all documents and communications between the Office of General Counsel and any other federal agency about the joint employer standard from November 4, 2013, to present.

If you have any questions about this request, please have your staff contact Kristin Nelson, HELP Committee Senior Oversight & Investigations Counsel, at (202) 224-6770, Caroline

⁵ NLRB Press Release, NLRB Office of General Counsel Authorizes Complaints Against McDonald’s Franchisees and Determines McDonald’s, USA, LLC is a Joint employer, July 29, 2014, *available at* <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds>.

⁶ See Labor Law Conference Agenda, Zealous Advocacy for Social Change, Oct. 23-24, 2014, *available at* <http://law.wvu.edu/laborconference2014>; *see also* <http://wvulaw.mediasite.com/Mediasite/Play/31e143f0990647558b0268e9086ca3e41d?catalog=7e011120-398b-494f-8ce8-9e0aa870d371>.

⁷ See <http://wvulaw.mediasite.com/Mediasite/Play/31e143f0990647558b0268e9086ca3e41d?catalog=7e011120-398b-494f-8ce8-9e0aa870d371>.

⁸ NLRB Press Release, NLRB Office of General Counsel Issues Consolidated Complaints Against McDonald’s Franchisees and their Franchisor McDonald’s, USA, LLC as Joint Employers, Dec. 19, 2014, *available at* <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-consolidated-complaints-against>.

⁹ See David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press 2014).

¹⁰ See 29 C.F.R. 102.126.

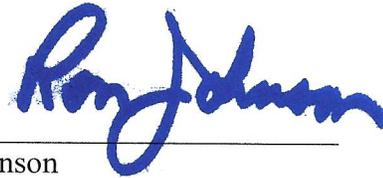
The Honorable Richard Griffin, Jr.
March 5, 2015
Page 3

Ingram, HSGAC Committee Counsel, at (202) 224-4751, or Marvin Kaplan, Workforce Policy Counsel, at (202) 225-4527. Thank you for your attention to this matter.

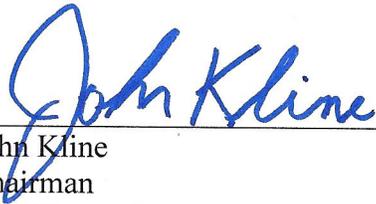
Sincerely,



Lamar Alexander
Chairman
U.S. Senate Committee on Health,
Education, Labor and Pensions



Ron Johnson
Chairman
U.S. Senate Committee on Homeland
Security and Governmental Affairs



John Kline
Chairman
U.S. House Committee on Education and the Workforce

cc: The Honorable Patty Murray
Ranking Minority Member
U.S. Senate Committee on Health, Education, Labor and Pensions

The Honorable Thomas R. Carper
Ranking Minority Member
U.S. Senate Committee on Homeland Security and Governmental Affairs

The Honorable Robert "Bobby" Scott
Ranking Minority Member
U.S. House Committee on Education and the Workforce

Enclosure

Instructions for Responding to a Committee Request
Committee on Homeland Security and Governmental Affairs
United States Senate
114th Congress

A. Responding to a Request for Documents

1. In complying with the Committee's request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data, or information should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should be read also to include the alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e. CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic form should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - a. The production should consist of single page Tagged Image Files (".tif"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - b. Document numbers in the load file should match document Bates numbers and .tif file names.
 - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - d. All electronic documents produced should include the following fields of metadata specific to each document:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

Instructions for Responding to a Committee Request

- e. Alternatively, if the production cannot be made in .tif format, all documents derived from word processing programs, email applications, instant message logs, spreadsheets, and wherever else practicable should be produced in text searchable Portable Document Format (".pdf") format. Spreadsheets should also be provided in their native form. Audio and video files should be produced in their native format, although picture files associated with email or word processing programs should be produced in .pdf format along with the document it is contained in or to which it is attached.
 - f. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), consult with the Committee staff to determine the appropriate format in which to produce the information.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
 7. Documents produced in response to the request should be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
 8. When producing documents, identify the paragraph in the Committee's schedule to which the documents respond.
 9. Do not refuse to produce documents on the basis that any other person or entity also possesses non-identical or identical copies of the same documents.
 10. This request is continuing in nature and applies to any newly discovered information. Any record, document, compilation of data or information not produced because it has not been located or discovered by the return date, should be produced immediately upon subsequent location or discovery.
 11. All documents should be Bates-stamped sequentially and produced sequentially. Each page should bear a unique Bates number.
 12. Two sets of documents should be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 346 of the Dirksen Senate Office Building.
 13. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.

Instructions for Responding to a Committee Request

14. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
15. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
16. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents which would be responsive as if the date or other descriptive detail were correct.
17. In the event a complete response requires the production of classified information, provide as much information in unclassified form as possible in your response and send all classified information under separate cover via the Office of Senate Security.
18. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

B. Responding to Interrogatories or a Request for Information

1. In complying with the Committee's request, answer truthfully and completely. Persons that knowingly provide false testimony could be subject to criminal prosecution for perjury or for making false statements. Persons that knowingly withhold requested information could be subject to proceedings for contempt of Congress. If you are unable to answer an interrogatory or information request fully, provide as much information as possible and explain why your answer is incomplete.
2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should be read also to include the alternative identification.
3. Your response to the Committee's interrogatories or information requests should be made in writing and should be signed by you, your counsel, or a duly authorized designee.

Instructions for Responding to a Committee Request

4. When responding to interrogatories or information requests, respond to each paragraph in the Committee's schedule separately. Clearly identify the paragraph in the Committee's schedule to which the information responds.
5. Where knowledge, information, or facts are requested, the request encompasses knowledge, information or facts in your possession, custody, or control, or in the possession, custody, or control of your staff, agents, employees, representatives, and any other person who has possession, custody, or control of your proprietary knowledge, information, or facts.
6. Do not refuse to provide knowledge, information, or facts on the basis that any other person or entity also possesses the same knowledge, information, or facts.
7. The request is continuing in nature and applies to any newly discovered knowledge, information, or facts. Any knowledge, information, or facts not provided because it was not known by the return date, should be provided immediately upon subsequent discovery.
8. Two sets of responses should be delivered, one set to the Majority Staff and one set to the Minority Staff. When responses are provided to the Committee, copies should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 346 of the Dirksen Senate Office Building.
9. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.
10. In the event that knowledge, information, or facts are withheld on the basis of privilege, provide a privilege log containing the following information: (a) the privilege asserted; (b) the general subject matter of the knowledge, information, or facts withheld; (c) the source of the knowledge, information, or facts withheld; (d) the paragraph in the Committee's request to which the knowledge, information, or facts are responsive; and (e) each individual to whom the knowledge, information, or facts have been disclosed.
11. If a date or other descriptive detail set forth in this request is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, provide the information that would be responsive as if the date or other descriptive detail was correct.
12. In the event a complete response requires the transmission of classified information, provide as much information in unclassified form as possible in your response and send all classified information under separate cover via the Office of Senate Security.
13. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.

Instructions for Responding to a Committee Request

C. Definitions

1. The term “document” in the request or the instructions means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” in the request or the instructions means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in meetings, by telephone, mail, telex, facsimile, email (desktop or mobile device), computer, text message, instant message, MMS or SMS message, regular mail, telexes, discussions, releases, delivery, or otherwise.
3. The terms “and” and “or” in the request or the instructions should be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” in the request or the instructions mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, businesses or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify” in the request or the instructions, when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; and (b) the individual’s business address and phone number.

Instructions for Responding to a Committee Request

6. The terms “referring” or “relating” in the request or the instructions, when used separately or collectively, with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” in the request or the instructions means agent, borrowed employee, casual employee, consultant, contractor, de fact employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee or subcontractor.
8. The terms “you” and “your” in the request or the instructions refer to yourself; your firm, corporation, partnership, association, department, or other legal or government entity, including all subsidiaries, divisions, branches, or other units thereof; and all members, officers, employees, agents, contractors, and all other individuals acting or purporting to act on your behalf, including all present and former members, officers, employees, agents, contractors, and all other individuals exercising or purporting to exercise discretion, make policy, and/or decisions.

#