

States with joint-employer shield laws are protecting wealthy corporate franchisers at the expense of franchisees and workers

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As of 2018, at least 18 states have enacted joint-employer shield laws specifically designed to protect one very wealthy special interest group: corporate franchisers.¹ Corporate franchisers are the big companies—like McDonalds, or Marriott, or Carl's Junior—that use the franchise business model, in which oftentimes small-business owners (the franchisees) pay for the rights to use the company's trademarks, services, and products. These state joint-employer laws are intended to shield the corporate owners of the franchise from bearing joint responsibility with their franchisees for complying with minimum wage, overtime, health and safety, and other laws applicable to the employees who work at the franchisee's stores. In simple terms, the joint-employer shield laws preclude applying the joint-employer legal doctrine to hold franchisers jointly responsible for violations of employee rights.

What are joint employers?

When two or more businesses co-determine or share control over a worker's pay, schedule, or job duties, then both of those businesses should be considered employers of that worker, or "joint employers." The joint-employer doctrine is legal principle that is used to determine when two separate businesses that share or combine control over workers should be held accountable as joint employers for complying with employment and labor laws.²

Potential joint-employer liability can arise, for example, in a franchiser-franchisee relationship, or a general contractor-subcontractor relationship, or with a firm that uses workers' from staffing agencies. If both

businesses share or combine control over the workers terms and conditions of employment (such as setting the workers' hours, pay rates, and job duties), the joint-employer doctrine permits both businesses to be held accountable for complying with the laws that protect the workers' basic rights to health, safety, and fair pay. While there are many different ways that joint-employer relationships can arise, the joint-employer statutes popping up in states around the country are intended to reshape this doctrine so that franchisers will be shielded from any responsibility to comply with laws governing the rights of employees working at franchisees' storefronts.

How does the joint-employer doctrine protect employees of franchised businesses?

In 2016, New York Attorney General Eric Schneiderman filed a lawsuit against Domino's Pizza and a number of its franchisees, naming them as joint employers. The lawsuit alleged that Domino's had required its franchisees to use payroll software that systematically undercounted the hours the employees worked at its franchises—resulting in \$565,000 in wages stolen from the workers.³ The attorney general's investigation revealed that “Domino's allegedly urged franchisees to use payroll reports from the company's computer system (called 'PULSE'), even though Domino's knew for years that PULSE under-calculated gross wages.” The investigation also revealed that Domino's corporation “played a role in the hiring, firing, and discipline of workers; pushed an anti-union position on franchisees; and closely monitored employee job performance through onsite and electronic reviews.”⁴

In this situation, going after the Domino's franchisees as sole employers of the underpaid workers would not have been enough to remedy the violations, since it was the corporate franchiser who mandated the way that the workers who cooked and delivered Domino's pizza at the franchisees' stores were paid. Here, it was clear that both the franchisee and corporate franchiser jointly controlled the workers' terms of employment, and the New York attorney general rightly believed the problem could be solved only by naming both the franchisees and franchiser as joint employers in the lawsuit.

Why are the state joint-employer laws that carve-out franchisers bad for workers?

By shielding franchisers from liability, state joint-employer laws popping up around the country would prevent cases like the one against Domino's from happening, leaving small businesses and their workers without meaningful recourse when a corporate franchiser is responsible for the workers' stolen wages. To be clear, there are other types of joint-employer relationships beyond franchises, in which two companies both control aspects of an employee's work. Take subcontracting, for example. The Fourth Circuit Court of Appeals recently held a general contractor and a subcontractor liable as joint employers for failing to pay the contracted workers minimum wage and overtime.⁵ The state joint-employer shield laws that have been enacted in the last few years, however, do not

mention other types of joint employment—only franchises.

All of the 18 state joint-employer laws focus only on protecting franchisers, and contain the following language or something similar: “neither a franchisee nor a franchisee’s employee shall be deemed to be an employee of the franchisor.”⁶ This means that if a franchisee’s employee’s rights to minimum wage or overtime pay are violated, for example, the larger corporate franchiser cannot be held jointly liable for paying the workers their unpaid wages, even in cases where the franchiser was partially responsible for the violation. Only the franchisee can be legally on the hook.

Of course, having the joint-employer doctrine available in wage and hour enforcement does not mean that the corporate franchiser should be liable every time a worker is underpaid at a McDonalds, or a Marriott, or a Carl’s Junior. In some situations, holding only the franchisee accountable would be reasonable when it was solely the franchisee who caused the worker to be underpaid. However, as the Domino’s Pizza example showed, there are certain situations in which it would be fair to also hold the corporate franchiser accountable as a joint employer because the franchiser participated in, was complicit with, or encouraged the franchisee’s wage and hour violations.

What states have joint-employer shield laws?

The 18 states with laws carving out franchisers from joint-employer responsibility as of January 2018 are Alabama, Arizona, Arkansas, Georgia, Indiana, Kentucky, Louisiana, Michigan, New Hampshire, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Wisconsin, and Wyoming.⁷

States such as Missouri and Virginia are considering joint-employer laws that would leave corporate franchisers such as Subway, Domino’s, and Hardees unaccountable to state enforcement agencies for unlawful employment conditions that so many Missouri and Virginian workers might face.

Why is the small-business argument false?

Those who support limiting the ability to use joint-employer standards to bring the big corporate name to the table in employment violation enforcement actions have rallied around the message that it would help small business owners, specifically the franchisees.⁸ In fact, the International Franchise Association has spent considerable effort lobbying Congress for the deceptively named “Save the Small Business Act” that would do to the nation what the state laws are doing in the states.

The argument that policymakers can improve the standing of small business franchise owners by prohibiting joint-employer standards is misleading. These laws have no impact on franchisee liability. Franchisees are already considered employers under state and federal labor and employment laws because they directly hire and control employees. The joint-employer standard is about whether franchisers may also face liability when workers bearing a uniform with the corporate name go underpaid or face discrimination at work.

In fact, a closer look at joint-employer standards reveals that they actually help small businesses, and their employees, by aligning the economic interests of franchisers and franchisees. If powerful corporate franchisers know they are on the hook as joint employers for their franchisees' labor and employment law violations, then they will have a powerful incentive to make sure those costly violations cease. This helps the small-business owners operating the franchises. If corporate franchisors knew they too could be found liable for costly labor and employment law violations, they would have less incentive to pressure their franchisees to cut corners.

An example of the incentive for franchisers to help franchisees comply with wage and hour laws can be found in the efforts of the U.S. Department of Labor to work with Subway restaurants. From 2012 to 2015, the Department of Labor's Wage and Hour Division completed over 800 compliance actions against Subway franchisees for wage and hour violations, resulting in more than \$2 million in back wages for more than 6,000 workers.⁹ Yet the corporate franchiser, Doctor's Associates, Inc. (doing business as Subway, Inc.) raked in over \$1.1 billion in revenues each year during 2013, 2014, and 2015, according to its franchise disclosure document.¹⁰

Because the wage and hour violations were so widespread at Subway franchisee restaurants, in 2016 the Department of Labor sought to bring the Subway corporate franchiser to the table. In this case the department and the Subway franchiser signed a voluntary agreement to help Subway franchisees comply with employees' rights under the Fair Labor Standards Act (FLSA).¹¹ As Subway said in the agreement, it "recognizes value in collaborating with the United States Department of Labor, Wage and Hour division . . . to encourage FLSA compliance by its franchisees."¹²

What is the bottom line?

In conclusion, having the ability for labor law enforcement agencies to hold franchisers accountable as joint employers with their franchisees when both entities are responsible for labor and employment violations produces positive outcomes for small business owners and employees. This shared accountability helps ensure that good jobs are being created by the franchising model, and that franchise employees—our neighbors, classmates, and family members—will be paid fairly for their labor.

Abolishing the joint-employer liability rules through state law, though, only serves to insulate franchisers from sharing the risks of business, which is not fair to small businesses and certainly does not help employees.

About the author

Marni von Wilpert is associate labor counsel supporting EPI's Perkins Project on Worker Rights and Wages, a policy response team tracking the wage and employment policies coming out of the White House, both houses of Congress, and the courts. Von Wilpert came to EPI in 2017 from the National Labor Relations Board, where she was an attorney in the Appellate and Supreme Court Litigation Branch from 2014–2017. Before coming to

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Endnotes

1. Christine Pulfrey, “[Blurry, Evolving Joint-Employment Guidance Tough for Employers to Navigate, Experts Say](#),” Bloomberg BNA Payroll Decision Support Network (fee-based subscription service), May 17, 2017.
2. The federal government has its own ability to enforce labor and employment laws against joint employers. For example, the Department of Labor and the National Labor Relations Board (NLRB)—two distinct agencies with separate responsibilities to enforce protections for working people—both have their own joint-employer standards. Although many of the state joint-employer shield laws purport to protect corporate franchisers from liability for labor law violations that occur at their franchises, these laws are likely preempted by the National Labor Relations Act (NLRA). For a discussion on joint-employer liability under the NLRA, see Celine McNicholas and Marni von Wilpert, *The Joint Employer Standard and the National Labor Relations Board: What Is at Stake for Workers*, Economic Policy Institute, May 31, 2017 and Marni von Wilpert, “[NLRB Reverses Browning-Ferris, Makes It Harder for Workers to Bargain with Their Employers](#),” *Working Economics* (Economic Policy Institute blog), December 15, 2017. The Occupational Safety and Health Administration (OSHA) also has its own joint-employer enforcement policies, especially for protecting temporary workers assigned to work dangerous jobs. See U.S. Department of Labor Occupational Safety and Health Administration, “[Protecting Temporary Workers](#),” accessed February 2018.
3. Attorney General Eric T. Schneiderman, “[A.G. Schneiderman Announces Lawsuit Seeking to Hold Domino’s and Its Franchisees Liable for Systemic Wage Theft](#),” press release, May 24, 2016.
4. Attorney General Eric T. Schneiderman, “[A.G. Schneiderman Announces Lawsuit Seeking to Hold Domino’s and Its Franchisees Liable for Systemic Wage Theft](#),” press release, May 24, 2016.
5. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017).
6. See, for example, [Kentucky SB151](#), Ky. Rev. Stat. Ann. § 337.010 (2017).
7. Virginia also passed a joint-employer bill in 2017, [H.B. 1394](#), but failed to override the governor’s veto.
8. Tom MacArthur and Henry Cueller, “[Congress Must Stop Harmful NLRB Joint Employer Rule](#),” opinion column, *The Hill*, April 10, 2017.
9. Ben Penn, “[Subway, DOL Compliance Deal a New Template for Franchises?](#)” *Labor & Employment on Bloomberg Law*, August 2, 2016.
10. Leslie Patton, “[Subway Revenue Drops as It Closes Hundreds of U.S. Restaurants](#),” *Bloomberg*, May 3, 2016; Mike Rothman, “[RE: F-1229: Doctor’s Associates Inc. Subway Sandwich Shops](#),” letter to Amy Thomas, Minnesota Department of Commerce Legal Department, May 2, 2016.
11. Suzanne Greco, CEO, Subway; Dr. David Weil, Administrator, U.S. Department of Labor Wage and Hour Division; Patricia Davidson, Deputy Administrator, U.S. Department of Labor Wage and Hour Division, “[Voluntary Agreement between the U.S. Department of Labor’s Wage and Hour Division](#)

and Subway,” July 26, 2016.

12. Suzanne Greco, CEO, Subway; Dr. David Weil, Administrator, U.S. Department of Labor Wage and Hour Division; Patricia Davidson, Deputy Administrator, U.S. Department of Labor Wage and Hour Division, “[Voluntary Agreement between the U.S. Department of Labor’s Wage and Hour Division and Subway](#),” July 26, 2016.