A Fresh Look at the Workplace Rules for Franchisors

Author : Joseph Seiner

Date : April 29, 2019

Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 **Geo. Wash. L. Rev.** 59 (2018).

An often forgotten area of employment law is the role played by millions of employees working for franchise stores across the country. In his new paper, *Franchise Regulation for the Fissured Economy*, Professor Andrew Elmore tackles this important area of the workplace, addressing the current standards that govern these workers. Professor Elmore notes the very serious problem of noncompliance in this area with basic employment law, and explains some of the causes that have resulted in this problem.

The franchisee/franchisor relationship is relatively straightforward, as franchisors generally license trademarks to the franchisees. Problematically, in the workplace context, the courts (as a general matter) have failed to consider franchisees as joint employers, which has done little to discourage individual stores from taking unlawful employment actions. While the existing scholarship has focused on the problem of addressing employment law issues arising from subcontractors under the joint employer doctrine, Professor Elmore's piece takes a different approach. His work proposes that, with respect to franchisors, we should not look to the traditional joint employer test to enhance compliance with employment law. This test does not fit neatly with the construct of most franchise relationships, as the definition of control is currently applied far too narrowly to reach many of the individual stores. In light of this consideration, liability standards must be considered that identify the more unique role franchisors play in the current economy.

More specifically, Professor Elmore looks to other existing theories in the law that could hold franchisors liable for workplace violations. The existing law recognizes apparent agency and misrepresentation theories that could be applied to franchisor relationships. Professor Elmore notes that apparent agency could be used to enhance compliance where franchisors use an internal branding model that creates the perception of franchisor control over regulating employment issues in the stores. Available under the common law as well as certain state statutes, this theory of liability for employment law noncompliance could more specifically address this franchisor-type relationship.

Additionally, Professor Elmore notes that where franchisors adopt business tools or policies that tend to encourage employment law noncompliance, the franchisor may be liable under a misrepresentation theory. Franchisors could thus face liability under this theory if they have not taken reasonable measures to assure that their policies are adopted and applied by individual stores in a way that would not result in workplace violations. Looking at "the dependence and loyalty of franchisees," the Article considers the "unique incentives in franchising" which can promote workplace wrongs (P. 145). The misrepresentation theory arises from state fraud and franchise laws, and could be directly implicated in the employment context.

Taken together, Professor Elmore sees substantial promise for promoting compliance with workplace laws through a more robust application of apparent agency and misrepresentation theory to franchise relationships. As he discusses, these theories "complement the joint employer test by accounting for the control, dependency, and loyalty measures that franchisors use to protect their brand in franchise stores, including in ways that can encourage employment law violations" (P. 145).

Professor Elmore's paper is an important and superb piece for several reasons. First, workers who are employed as part of a franchise relationship often face uncertainty when pursuing employment protections. This group – which consists of almost ten million workers – can find themselves left behind when attempting to avail themselves of these

basic workplace rights. Professor Elmore takes this problem head on, addressing how the franchise relationship impacts millions of everyday workers. Much of the existing scholarship tackles the more traditional working relationships in our economy, sidestepping this important group of employees. Second, this piece explains the inherent weaknesses of the control test that is so important to the question of the joint employer relationship. Professor Elmore identifies why this often-used test just simply is not a good fit – as currently interpreted – for the franchise economy. The Courts have applied "a narrow right to control test that excludes evidence of the indirect and remote measures that franchisors use to control franchise stores" (P. 105).

Finally, and perhaps most importantly, Professor Elmore looks beyond the traditional control test to other areas of existing law – agency and misrepresentation theories – that can be used to enhance workplace compliance for franchise relationships. Professor Elmore's solution is particularly creative as it does not suggest a new legal theory or propose new statutory law that is unlikely to be adopted. Rather, Professor Elmore has identified practical ways of working within our existing legal confines to promote compliance with workplace laws for a wide swath of workers that are part of a franchise relationship.

Going forward, the courts should consider applying these theories to franchisors in a broadened way to help enhance the workplace protections of all workers in our economy. As Professor Elmore notes, "lawmaking can elaborate these doctrines to make them more effective in encouraging employment law compliance in franchise stores, particularly in jurisdictions in which these theories are limited by heightened reliance requirements" (P. 106). This creative solution to an existing workplace problem represents an innovative approach that could be broadly adopted. The courts, scholars and lawmakers should examine further the possibility of approaching franchisor liability in the way set forth by this groundbreaking paper.

Cite as: Joseph Seiner, *A Fresh Look at the Workplace Rules for Franchisors*, JOTWELL (April 29, 2019) (reviewing Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 **Geo. Wash. L. Rev.** 59 (2018)), https://worklaw.jotwell.com/a-fresh-look-at-the-workplace-rules-for-franchisors/.