

# Franchisors – Are you at risk of joint employer status in Canada?

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A finding of joint employer status, where a franchisor is found to be the joint or co-employer of its franchisees' employees, is arguably the most significant threat to the franchise business model today. We have already seen an increased risk of joint employer status in the United States with the initial ruling of the National Labor Relations Board involving McDonald's Corporation, and the shifting legal landscape on joint employer issues in Canada appears to be headed in the same direction.

## 1. Am I at risk of being considered a joint employer with my franchisees?

Ask yourself, as a part of your business model do you

- Have any direct or indirect corporate affiliation with your franchisees?
- Set the cost of your franchisees' supplies?
- Set the price of your franchisees' products and services?
- Run training programs for your franchisees' employees?
- Set incentives or awards programs for top performing employees of your franchisees?
- Require your franchisees to obtain your approval in hiring employees or sub-contractors?
- Set the hours of work or employee timetables at your franchises?
- Require your franchisees to use a specific scheduling tool or software program?
- Support your franchisees in their on-site maintenance of accounting and business records?

If you answered "yes" to any one or more of the above questions, you could be at risk of being considered a joint employer with one or more of your franchisees.

## 2. Why do I need to be concerned about being a joint employer?

If you are found to be the joint employer of your franchisees' employees, whether under the current legal test in Canada, which is ultimately a fact-based inquiry into the control of your franchisees' day-to-day operations, or under the new proposed amendments to the *Employment Standards Act 2000* (ESA) or the *Labour Relations Act, 1995* (LRA), the consequences could be significant to your current business model.

Direct and indirect impacts on your business may include the following:

- increased liability in respect of your franchisees' commitments to their employees, including liability for

- wages, salaries, overtime, vacation pay and benefits
- termination notice and pay in lieu of notice
- severance pay and employment-related premiums
- payroll taxes
- increased costs and operational burden to ensure your business is compliant with statutory labour and employment obligations and internal policies and practices
- changes to the economics and incentives in your franchise business model as you try to flow through these increased costs and operational burden to your franchisees, and they, in turn, experience a loss of autonomy over the operation of their independent businesses
- increased risk that employees of your franchisees will become unionized

### 3. Why do I need to be concerned with this issue now?

The landscape of the Canadian workplace is changing. In particular, public interest groups are lobbying for better protections for non-standard workers, including part-time retail workers. These efforts have resulted in the proposed protectionist amendments to the ESA and the LRA. These proposed amendments include a recommendation to deem a franchisor the joint employer of its franchisees' employees for certain statutory purposes.

### 4. What can I do to mitigate my risk internally?

To best protect your franchise system, and mitigate your risk of being found to be a joint employer, the time to take action is now. Osler has developed a streamlined audit process to assess your franchise system's exposure to joint employer claims through a review of your key agreements, policies and operational practices. Our fully integrated team of national franchise, labour and employment and risk advisory experts are uniquely positioned to help you avoid, and if necessary defend, these business critical claims.

Contact any member of the [Osler Franchise Team](#) so we can help you navigate the new joint employer landscape in Canada.