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News and Views for Your Hospitality and Franchise Business

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NLRB Decision Potentially Impacts Hospitality and Other Service Businesses

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In a blatant attempt to make it easier for unions to organize in the long term health care and other service industries, on August 26, 2011, the National Labor Relations Board (NLRB) decided in *Specialty Healthcare and Rehabilitation Center of Mobile* that a bargaining unit consisting of only Certified Nursing Assistants (CNAs) in a non-acute health care facility was an appropriate unit for bargaining.

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Franchisor Liability for Franchisee Actions

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Introduction

In general, actors are not legally responsible for the torts of others. However, in certain situations, an argument can be made that one party exerted sufficient control over another party to incur liability for the second party's actions. In the context of franchisor/franchisee relationships, plaintiffs often attempt to rely on the theory of agency and, in federal employment cases, the single employer theory to attempt to impute vicarious liability to the franchisor.

Courts have typically taken two paths in cases where franchisors have been found liable under an agency theory. First, courts have held that, in certain circumstances, a franchisor can create an actual agency relationship with its franchisee by exerting day-to-day control over the franchisee. The level of operational integration necessary to constitute control of day-to-day operations varies by jurisdiction. However, courts have generally refused to assign liability where the franchisor exerts control solely to protect trademarks or to protect the quality and uniformity of its product.

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Greetings from *Hospitalitas*

Hospitalitas is the Baker Donelson newsletter for our clients and friends in the hospitality industry – hotels, restaurants and their suppliers. It is published several times a year when we believe we can deliver first class, useful information for your business. Please send us your feedback and ideas for topics you would like to know more about. True to our Southern heritage of hospitality, we'll work hard to make each visit with us something special and worth repeating.

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Although the decision dealt only with non-acute health care facilities or nursing homes, the principle will apply across the board to many service industries, including the hospitality industry. Thus, a union could conceivably seek an election in a unit of only housekeepers in a hotel or only food servers in a restaurant, and the NLRB, following this decision, might allow the union to proceed.

In *Specialty Healthcare*, the United Steelworkers of America was seeking to represent a group of CNAs over the employer's objection that all non-professional service and maintenance employees should be included in the unit for the purposes of an NLRB secret ballot election. In rejecting the employer's argument, the NLRB overruled a two-decades-old precedent that had mandated broader units of employees (including service and maintenance employees, cooks and dietary aids), in non-acute health care facilities was the appropriate group of employees to vote in an organizing election. The NLRB ignored the employer's contention and ordered the election to be held only with CNAs.

The NLRB determined that it was only required to decide whether the group which sought to be represented by the union was an appropriate unit, not the most appropriate unit, and that it need only determine if the unit petitioned for by the union was for a clearly identifiable group of employees.

The NLRB gave short shrift to the potential problem of a proliferation of bargaining units in a relatively small employer, demonstrating no regard or sympathy for an employer, which in the same facility or establishment, would be forced to bargain with different unions, or forced to administer several contracts with the same union covering different groups of employees.

Employers need to be aware of the criteria the NLRB will now use to determine whether a stand-alone group of employees is appropriate for an organizing election. Among the critical factors are whether the employees:

- Are organized into separate departments;
- Have distinct skills and training;
- Have distinct job functions and perform distinct work, including the amount and type of job overlap between classifications;
- Whether the jobs are functionally integrated with the employer's other employees;
- Have frequent contact with other employees;
- Interchange with other employees;
- Have distinct terms and conditions of employment (such as pay rates, shifts and work areas); and
- Are separately supervised.

Thus, it is incumbent upon employers, regardless of the industry, to integrate their workforces to the extent practical, keeping in mind the above criteria.

Notwithstanding recent pronouncements about easing regulatory burdens on small business, the NLRB message, especially for the health care and hospitality industries, is quite clear. The bargaining unit of employees petitioned for by the union,

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EVENTS

Join Gene Podesta at DRI's Strictly Hospitality Seminar

Gene Podesta, shareholder and co-chair of Baker Donelson's Hospitality Industry Service Team, will present "Second Verse, Same as the First: The Plaintiffs' Bar's Latest Attempts at Forum Shopping and How to Defeat Them" on Thursday, September 22 at 11:10 a.m. during DRI's Strictly Hospitality Seminar in Scottsdale, Arizona. During this program, Mr. Podesta will explore how modern reservation practices and internet marketing activity have opened the door for plaintiffs' counsel seeking to sue a distant hotel or other hospitality-related entity in fora unrelated to where the incidents occurred. Franchisors and franchisees should be cognizant of the ramifications of personalized internet marketing offers based on initial interest about the brand's products or services, given many courts' practices of allowing parties great leeway in proving jurisdiction. If contacts are sufficient, both parties could be forced to litigate in the jurisdictions where their guests reside or in other unrelated jurisdictions. Learn from Mr. Podesta about how to prevent this scenario from playing out.

Don't Miss Our Gaming Update at The Lodging Conference 2011

Please join Danny McDaniel, shareholder and chair of Baker Donelson's Gaming Industry Service Team, for his panel, "Gaming Update" during The Lodging Conference 2011 on Thursday, September 22, at 4:00 p.m. The panel will discuss the opportunities for expansion and investment in the still vibrant non-traditional gaming markets outside Las Vegas and Atlantic City. Mr. McDaniel will moderate the panel, which includes Greg Guida, principal with the Foundation Gaming Group, and Robert A. LaFleur, managing director of gaming, lodging and leisure equity research with Rodman & Renshaw. Baker Donelson is a proud sponsor of The Lodging Conference 2011.

Join us at the 2011 IAGA International Gaming Conference

Danny McDaniel will also participate on the panel, "The Evolution of a Gaming Advisor – It's No Longer Just a Regulatory Focus" during the International Association of Gaming Advisors (IAGA) International Gaming Conference, on Sunday, October 2 at 11:30 a.m. The panel will address the evolving role of the gaming advisor in regard to regulatory, compliance and licensing matters, financial transactions, international complexities and emerging business models.

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NLRB Decision Potentially Impacts Hospitality and Other Service Businesses, *continued*

if it is readily identifiable as a distinct group, will be deemed appropriate unless the employer can show an overwhelming "community of interest" with other employees in the facility. This is a heavy burden and one not easily overcome by an employer, especially once a petition for an election has been filed with the NLRB.

This ruling portends to be only the beginning of other decisions and regulatory rules we expect to be issued by the NLRB between now and the end of the year when the terms of the pro-union majority on the NLRB expire.

Franchisor Liability for Franchisee Actions, *continued*

Second, some courts have held that franchisors can create an apparent agency relationship with a franchisee. Under this theory, if a plaintiff reasonably and justifiably believes the franchisor controls the operation of the business and relies on that belief to his detriment, the franchisor can be held liable for actions of the franchisee. To prevail, a plaintiff must establish that he selected the franchisee's business *because of* the reputation or expectation of quality of the franchisor.

In addition to agency theory, federal courts in Title VII discrimination and harassment cases have found franchisors vicariously liable through the single employer theory. When a franchisor closely controls the employment decisions of the franchisee, some courts have considered the franchisor and the franchisee to be co-employers. As a co-employer, the franchisor may become liable for the acts of the franchisee's employees.

Agency Theory

The most common method plaintiffs use to attempt to impute vicarious liability on franchisors is agency theory. Agency theory has two branches. The first is actual agency. Under actual agency theory, the principal (the franchisor) is alleged to have exerted enough control over the agent (the franchisee) that the law presumes the agent is acting on behalf of the principal. Traditionally, a franchisor in an actual agency relationship would be liable for *all* the actions of the franchisee by virtue of the agency relationship alone. The central question in determining actual agency is the level of control the franchisor exerts over the franchisee. Courts in most jurisdictions employ the "day-to-day operations" test when examining the franchisor's level of control. Under this test, plaintiffs will need to prove that the franchisor's control is extensive enough to regulate the day-to-day operations of the franchisee in order to show that an actual agency relationship exists.

The second branch of agency theory is apparent agency. Instead of examining actual control, apparent agency inquiries seek to determine whether a plaintiff reasonably *believes* the franchisor controlled the franchisee. If the plaintiff relied on such a reasonable belief to his or her detriment, a plaintiff may allege that apparent agency exists.

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Join Joel Buckberg at the ABA's 34th Annual Forum on Franchising
Joel Buckberg, of counsel and co-chair of Baker Donelson's Hospitality Industry Service Team, will present "Managing System Impact When Applicable Laws Change" during the Forum on Franchising on Thursday, October 20 at 2:15 p.m. During this program, Mr. Buckberg and fellow speaker Ted P. Pearce will examine how the franchise system, and the respective rights of the parties, can be affected when changes occur to significant applicable laws that may be "baked into" the franchise agreement or other components or practices of the franchise system. The panelists will focus on dealing with traditionally volatile laws, such as the interpretation of non-competition covenants and resale price maintenance restrictions, with sea changes such as health care reform, and with targeted policy changes such as the Kansas prohibition of indemnification. This program will also review tips for drafting franchise agreements to address changes in law that could fundamentally impact the franchise relationship.

Save the Date for the Fall Franchise Business Network Meeting
Join the Mid-South Franchise Community for the Fall 2011 Franchise Business Network lunch meeting on October 25, 2011 at 11:30 a.m. Central, hosted by Baker Donelson. Topics and presenters include:

- Pat Warner and Kerry Thrasher, Waffle House, *Emergency Preparedness Plans*
- David Gevertz, *ADA Title III: Will You Be In Compliance on March 15, 2012*
- Steve Minucci, Tennessee Valley Group, *Selling an Operating Unit*

Presentations will be viewed via video conference in nine locations, including our Birmingham, Alabama; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Knoxville, Memphis and Nashville, Tennessee offices.

Franchisor Liability for Franchisee Actions, *continued*

Actual Agency

For a franchisor to be liable for the torts of its franchisee under actual agency theory, a plaintiff must prove that the franchisor controlled the franchisee's day-to-day operations. The unique nature of the franchise relationship has led courts to construe day-to-day control over a franchisee narrowly. Efforts by a franchisor to protect a trademark do not create an agency relationship, nor do policies and procedures designed to maintain the quality and uniformity of products or experiences. When courts have found agency by actual authority, franchisors have mandated, in detail, the specifics of their franchisees' business operations. Moreover, some courts have narrowed the actual authority test by limiting franchisor liability only to situations where the franchisor had control over the instrumentality of the tort.

In general, efforts to maintain trademarks and ensure product uniformity do not create an agency relationship. The Lanham Act requires that franchisors control their trademarks, and courts have provided leeway to do so without incurring liability. These requirements generally do not exhibit control of the operations of the franchisee sufficient to create agency liability and courts typically dismiss hotel franchisors on summary judgment when this level of control is exhibited. For example, in *Theos & Sons, Inc. v. Mack Trucks, Inc.*, Mack Trucks' insistence that its dealers use only parts supplied by it or a company it recommended did not demonstrate control, but rather reflected "the ordinary desire of manufacturers to set sufficient minimum performance and quality standards to protect the good name of [its] trademark that [it is] allowing another to display." In addition, requiring franchisees to display the franchisor's logo does not create an agency relationship. Franchisors may also specify building design and demand that the franchisee utilize only branded employee uniforms and packaging supplies.

A franchisor can also issue and enforce guidelines to control the quality and uniformity of its products without incurring agency liability—so long as the franchisee maintains sufficient authority to implement those standards. For instance, issuing an operation manual does not, in and of itself, create an agency relationship if the purpose of the manual is to ensure quality standards. Operation manuals with detailed requirements should take care not to specify exactly *how* a franchisee implements those requirements. In addition, franchisors may reserve the right to inspect the franchisee's operations for compliance with brand standards and may retain the authority to revoke the franchise for failure to comply. A franchisor's reservation of the right to inspect, monitor or evaluate the franchisee's compliance with its standards and to terminate the franchise for noncompliance has not been held to be the equivalent of retaining day-to-day supervisory control of the franchisee's business operations as a matter of law.

Some courts have found, however, that in certain instances a franchisor's actions can extend beyond protecting its product to influencing the day-to-day operations of the franchisee's business. This line can be uncertain, and facts that fail to create an agency relationship in one jurisdiction may provide a jury question in another. The result tends to turn on the detail of the mandatory requirements the franchisor places on the franchisee. As one court explained, the narrow line between non-agency and agency is "the distinction between *recommendations* and *requirements*."

Discussing two cases in which franchisors incurred liability will provide clarity. In a case involving Hilton Hotels, the court determined that the franchisor controlled the daily operation of its franchisees by specifying minute details in an operation manual:

> [The manual regulates] identification, advertising, front office procedures, cleaning and inspection service for guest rooms and public areas, minimum guest room standards, food purchasing and preparation standards, requirements for minimum supplies of "brand name" goods, staff procedures and standards for soliciting and booking group meetings, functions and room reservations, accounting, insurance, engineering and maintenance, and numerous other details of operation.

These details led the court to hold that Hilton determined the exact manner in which the franchisee could conduct business. Likewise, a court held that Domino's Pizza created an agency relationship with its franchisee by publishing an operation manual that was "a veritable bible for overseeing a Domino's operation" and "literally [left] nothing to chance."

When examining actual agency in the context of franchises, some courts have narrowed the scope of liability with the instrumentality test. Under this test, a franchisor is only liable for the torts of its franchisee if it exerted control over the area of operations that caused the tort.

Some recent cases illustrate the instrumentality test. In *Hong Wu v. Dunkin' Donuts*, decided by a federal court under New York law, Dunkin' Donuts was not held liable for a late-night

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Franchisor Liability for Franchisee Actions, *continued*

robbery and battery at a franchisee's store. The franchisor did not mandate how the store should be secured, so it had no control over the instrumentality that caused the tort. In Wisconsin, a work release prisoner killed himself and two other people after walking off his job at an Arby's franchise, but the franchisor was not liable for the deaths because its franchise agreement gave sole control of employee supervision to the franchisee. In Kentucky, a businessman sued Papa John's International for defamation after a driver employed by the local franchisee made false accusations. Papa John's was not vicariously liable because the franchisor had no control over how the driver conducted his deliveries.

Apparent Agency

Under the theory of apparent agency, plaintiffs will argue that a franchisor can create an agency relationship even if it does not control the franchisee's day-to-day operations. The test for determining apparent agency requires that the plaintiff show a justifiable belief that the franchisor operates the franchise and a justified detrimental reliance on that belief. The detrimental reliance portion of apparent agency has proven the most difficult element for a plaintiff to establish. When plaintiffs have made successful apparent agency claims, the cases generally turn on the positive reputation of the franchisor.

To establish vicarious liability through apparent agency, a plaintiff must generally demonstrate four elements. Not all courts explicitly recognize each of the four elements, but most analyses of apparent agency follow a similar path. To prove apparent agency, (1) a plaintiff must establish an actual belief that the franchisor controls the operations of the franchised store; (2) the belief must be justified; (3) the plaintiff must rely on that belief to his detriment; and (4) the plaintiff's reliance on that belief must be justified. In short, the elements

of apparent agency provide vicarious liability to the franchisor only when a plaintiff justifiably changes his position *because of* his belief that the franchisor controlled the operation of the franchise.

Even if a plaintiff attempting to show apparent agency reasonably believes that the franchisor operates a franchise, the plaintiff may fail because he can not show that he detrimentally relied on that belief. For example, in *Wood v. Shell Oil*, the plaintiff claimed an apparent agency relationship between Shell Oil and a local franchise. The Alabama Supreme Court denied that claim, finding "[no] evidence that [the plaintiff] did business with Parker Shell because of a desire to do business with a more responsible party (i.e., Shell Oil)." Similarly, in *Little v. Howard Johnson*, a Michigan case, a plaintiff sued Howard Johnson after slipping on ice outside a restaurant located at a franchisee's hotel. The plaintiff could not prove apparent agency because "[no] evidence was presented which indicated that plaintiff justifiably expected that the walkway would be free of ice and snow because she believed that defendant operated the restaurant."

When a plaintiff successfully raises a question of apparent agency, the case generally involves evidence demonstrating reliance on the franchisor's reputation. In *Crinkley v. Holiday Inn*, a guest who was robbed and assaulted during her hotel stay testified that she chose Holiday Inn because she thought it would be a "good place to stay" based on her previous visits to the chain. Her reliance on Holiday Inn's national reputation was enough to send the case to the jury. Likewise in *Billops v. Magness Construction Co.*, discussed previously, a plaintiff chose to hold an event in the ballroom of a Hilton Hotel franchise. In a deposition, the plaintiff stated: "the attitude of the personnel at that point, it so alarmed me that it broke my heart because I put a lot of faith and trust into the Hilton, because it was a major hotel. . . ." In *Allen v. Choice Hotels International Inc.*, a Mississippi Appellate Court found that a lobby plaque identifying the hotel as a

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Franchisor Liability for Franchisee Actions, *continued*

franchised location was sufficient to negate any belief by the public that customers were doing business with Choice Hotels and, therefore, refused to find a principal-agent relationship pursuant to apparent agency. In addition, the United States District Court for the District of South Carolina held that "Choice's national advertisements and [the franchisee's] usage of the Comfort Inn® mark and name, when coupled with notice at the registration desk and the elevator that Choice did not run and operate the hotel and did not constitute a representation for purposes of establishing apparent agency."

Apparent agency demands that a plaintiff justifiably believe that the franchisor operates the franchise and that the plaintiff detrimentally relied on that belief. If a customer identifies a franchise only with the franchisor and patronizes that location because of the franchisor's good reputation, a court may find the existence of an apparent agency relationship.

Single Employer Liability

Title VII of the Civil Rights Act of 1964 provides protection for employees against discrimination and sexual harassment. Actions under Title VII may include a claim against the franchisor. In Title VII cases, many federal courts use the single employer test. This test was intended to be less stringent than agency theory to allow greater access to Title VII remedies against the franchisor. Under the single employer test, if a parent company controls the "day-to-day employment decisions" of a subsidiary, then some courts have held that the parent and the subsidiary employ workers together. As co-employers, they may share in liability for Title VII violations by employees.

As with the agency test, whether a franchisor becomes liable for federal discrimination and harassment claims depends on the level of control the franchisor exerts over the franchisee. For example, in *Alberter v. McDonald's Corp.*, McDonald's provided employment policies in its business manuals, but these polices were optional. The franchisee made the ultimate decision about employment procedures, so McDonald's was not found liable for Title VII claims. On the other hand, in *Miller v. D.F. Zee's, Inc.*, Denny's Inc. became liable for the sexual harassment claims of its franchisee's employees because the court found that Denny's exerted "the right to control [its] franchisees in the precise parts of the franchisee's business that allegedly resulted in plaintiffs' injuries – training and discipline of employees."

Direct Liability

Some plaintiffs will attempt to assert direct liability claims against franchisors. Plaintiffs will allege that a franchisor that assumes or maintains responsibility over a particular aspect of the franchise business cannot avoid responsibility just because it is involved in a franchise relationship. Some courts have imposed liability on franchisors for injuries or violations that occur in areas where it is clear that the franchisor maintains or has assumed responsibility. Thus, if the franchisor voluntarily assumes responsibility for some aspect of the franchise operations, it may also be responsible if it is negligent in doing so. These cases do not involve vicarious liability per se because the franchisor is held liable for its own conduct, albeit stemming from a franchised business. In these situations, the franchisor is being exposed to liability on two different theories of recovery. A franchisor may be subject to liability based on vicarious liability for the actions of its franchisee but may also be separately responsible for its own negligence for voluntarily assumed responsibilities.

Conclusion

To avoid incurring vicarious liability, franchisors must take care not to exert too much control over their franchisees. Under actual agency theory, a franchisor may risk becoming vicariously liable for the torts of its franchisee by controlling the franchisee's daily operations. Likewise, the single employer test used by federal courts in Title VII cases may impute vicarious liability when the franchisor controls the franchisee's employment practices. In addition, even if the franchisor does not maintain control over the franchise, a franchisor may become liable through apparent agency. Under apparent agency theory, a plaintiff can attempt to establish vicarious liability by demonstrating her justifiable belief that the franchisor operated the franchise and her detrimental reliance on that belief. Finally, some plaintiffs will attempt to bring actions for direct liability for things a franchisor controlled and did so negligently.

IRS Auditing Update: Agents Now Want Full Data Copies of QuickBooks

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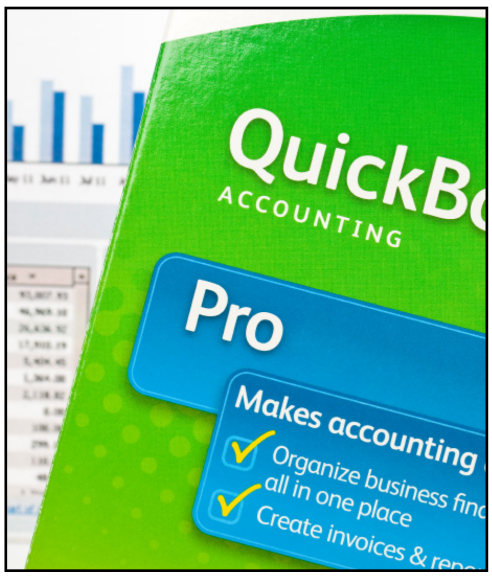
In 2010, the Internal Revenue Service (IRS) began training approximately 1,100 Revenue Agents in the use of QuickBooks. In addition, the Service began routinely asking for the full data copy of the software from business owners, telling the owners that such requests had become standard operating procedure. The Service chose to train revenue agents in the use of QuickBooks because nearly 85 percent of small business owners use QuickBooks for their accounting and bookkeeping needs. Many franchisors also require franchisees to use QuickBooks as their general ledger, with a custom template or chart of accounts prescribed by the franchisor to facilitate reporting and benchmarking.

Background – Closing the Tax Gap

In a study performed in 2001, Treasury determined that the difference between what should be collected in revenue, as opposed to what was actually being collected in revenue (tax gap) was greatest in the non-farm small business sector. According to this study, the compliance rate was only 43 percent among small business owners. Closing the small business tax gap, estimated by the Treasury's study at $109 billion per year, has been identified as a top priority by IRS officials. IRS demands for the full data file create legitimate taxpayer concerns and are viewed by critics as being well outside the historical scope of the tax audit process.

Formerly, upon receipt of an audit letter, the taxpayer and its tax advisor would collect the necessary support and provide documentation in response to specific issues (i.e., there was a defined request and a specific response). Generally, the consensus among most tax professionals has always been to provide information specifically requested unless that information is outside the proper scope of the Service's administrative summons authority. The primary concern with the Service's more recent full data file request focuses on certain data frequently stored in the QuickBooks file that is clearly (at least in the opinion of many practitioners) outside the boundaries of what the IRS can compel a taxpayer to produce.



Small Business Software

<u>Income and Expenses Versus Customer Information.</u> QuickBooks software is used by most small businesses perhaps because it is possibly the best accounting software for the price. The rub is that unlike the more sophisticated accounting software used by larger companies, access cannot be restricted when QuickBooks is provided to an IRS agent. The more sophisticated accounting software enables the company to limit and control the flow of information to the IRS agent by printing specific reports, or providing an electronic copy that permits access only to the items open in the audit. However, QuickBooks allows the agent unfettered access to the full accounting and financial history of the company since the implementation of the software for any tax years that have not been condensed to summary reports without the original entry and worksheet data. In addition to the full disclosure on the financial and accounting side, such software provides the agent with unlimited access to sensitive customer and vendor information that is beyond the scope of the audit's authority.

For the same reasons, franchisors prefer to specify QuickBooks so their "desk audits" of franchisees can access the raw data of the general ledger. The cat and mouse game of revenue underreporting is thus harder to play. Conversely, solid, accurate data on expenses will assist the franchisor and franchisee in developing strategies for improving underperformance and spotting issues before the franchisee enters dire financial straits.

<u>Data-Mining.</u> The Service desires to have the data in electronic form in order to more quickly and efficiently mine the data by producing specified reports. The primary purpose driving the Service's initiative appears to be increased efficiency during the audit process. The Service states in its Frequently Asked Questions and Answers section on accounting software, dated April 18, 2011, that the electronic records will be requested in a majority of cases and the software will generally permit further corroboration of a taxpayer's tax returns through "drilling down" to underlying data and the generation of various reports without needlessly expending the agent's time requesting

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IRS Auditing Update: Agents Now Want Full Data Copies of QuickBooks, *continued*

documents, or the taxpayer's time filling such requests.

AICPA Input. The American Institute of Certified Public Accountants (AICPA) addressed the concerns of small business owners in a letter dated March 29, 2011, to the IRS. In that letter, the AICPA suggested that small businesses using QuickBooks should be able to provide a redacted electronic copy, similar to the ability of larger companies with more sophisticated accounting software, which would permit the company to provide only the relevant data. Unfortunately, this offer was rejected by the IRS.

Service's Position and Pertinent Law

Frequently Asked Questions and Answers. The IRS has addressed various issues in its Q&A regarding the recent requests for electronic records, and confirmed that agents will typically request the QuickBooks data file in the initial stages of the audit. The Service points to § 6001 of the Internal Revenue Code as its statutory authority for requesting electronic files and makes clear that if a "customer" (the IRS euphemism for the taxpayer under audit) refuses to voluntarily comply with the request, then the Service has the right to issue a summons for the information and/or disallow the items reported. Additionally, the Service states that if a taxpayer's representative refuses to provide the backup file, the representative could be in violation of Circular 230, an IRS publication issued several years ago that addresses and regulates the practice of attorneys, accountants and others before the Service.

In addressing whether a taxpayer could provide only the data for the tax year(s) under examination, the Service (consistent with its response to the AICPA) states that such a file would not satisfy "the requirements or the needs of the IRS" and that the file would not "meet the requirements of the Information Document Request or a summons and the taxpayer's representative could be in violation of Circular 230."

Pertinent Law. The two sections of the Internal Revenue Code relied upon by the IRS include §§ 6001 and 7602.

- § 6001 mandates that taxpayers must maintain appropriate records to substantiate tax returns.
- § 7602 permits the IRS to examine relevant records for the purpose of ascertaining the correctness of any return.

In *United States v. Rouse*, pending before the U.S. District Court in Tampa, Florida, the court addressed an IRS summons to a small business owner for the production of an electronic copy of the taxpayer's QuickBooks software. The taxpayer refused to comply with a December 2010 summons. In response to the taxpayer's refusal, in April 2011 the court entered an Order to Show Cause as to why taxpayer should not be compelled to comply with the summons, and directed the parties to appear before the court in June 2011.

In the *Rouse* case, the U.S. Magistrate Judge relied upon a 1964 United States Supreme Court decision in *U.S. v. Powell* and held in a Report and Recommendation dated June 27, 2011, that "[i]n order to establish a prima facie case for enforcement, the government must show:

(1) That the investigation will be conducted pursuant to a legitimate purpose;
(2) That the inquiry may be relevant to that purpose;
(3) That the information sought is not already within the IRS' possession; and
(4) That the administrative steps required by the Internal Revenue Code have been followed."

Interestingly, the taxpayer in *Rouse* did not attack the third requirement by arguing that the same information could be provided to the revenue agent in hard copy form and that the entire data file was not necessary. Instead, the court was presented with the relatively narrow issue of whether § 7602 applied. The taxpayer argued that a request for an electronic copy was outside the scope of § 7602. In response, the Magistrate Judge held that under a plain reading of § 7602, which, in relevant part, states that the IRS may "examine any books, papers, records, or other data," that the term "other data" includes electronic backup files in that case. This holding is arguably consistent with the Service's Rev. Proc. 98-25, in which the IRS states that the requirements of § 6001 that apply to hard copy records also apply to electronic records.

Is This The End? While some commentators have suggested that the Service is now entitled to electronic copies of accounting software, these commentators may overstate the scope of the decision of the Magistrate Judge in the *Rouse* case. Other courts may determine that the IRS has overstepped its statutory summons authority. Either way, unless and until the issue is settled in favor of the taxpayer, the overall scope of the IRS audit has increased exponentially, both increasing the cost of audit defense and providing an opportunity for zealous and aggressive IRS agents to overstep boundaries.

Connecticut Continues Crack Down on Call-Arounds

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In April 2010, the Connecticut Attorney General entered into a settlement with La Quinta whereby the hotel chain agreed to stop participating in call-arounds, which the Attorney General has described as a "wide spread and long-standing" practice in the hotel and hospitality industry which facilitates illegal price fixing among hotels. Recently, the Attorney General announced the settlement of another claim of call-around price fixing, this time against McSam Hotel Group, LLC, Metro Ten Hotel, LLC and Jamsan Hotel Management, Inc., which own or manage two Holiday Inn Express and one Homewood Suites hotels in Hartford and Waterbury, Connecticut. Under the settlement agreement, the companies agreed to stop call-arounds at hotels they own or operate, both in Connecticut and elsewhere, and pay a civil penalty totaling $50,000. The companies continue to deny any wrongdoing.

Call-arounds are a practice whereby a hotel contacts its local competition and "shares, collects and exchanges information which is not otherwise available to the public" concerning room rates and occupancy rates solely for the purpose of illegally fixing room rates. By engaging in call-arounds, a hotel is able to fix its rates at a level that does not needlessly undercut its local competitors; in the case of the Holiday Inn Express in Waterbury the Attorney General alleged specific instances of the hotel raising rates on certain guest rooms after learning through call-arounds that its competitors were near or at full occupancy. According to the Attorney General, the Waterbury Holiday Inn Express engaged in call-arounds from the beginning of 2007 until sometime in June of 2008.

The settlement with McSam, Metro Ten and Jamsan is very similar to the agreement the Connecticut Attorney General entered into with La Quinta in 2010, except that La Quinta was not required to pay a penalty (because, according to the Attorney General's press release, of La Quinta's "cooperation early in the investigation"). Importantly, too, the recent settlement makes it clear that the issue with the hotel information exchange is that the information shared was non-public. The La Quinta agreement was written more broadly (though not necessarily interpreted any differently) than the McSam/Metro Ten/Jamsan Settlement, possibly allowing criticism that the earlier agreement as written was unworkable in that it attempted to curtail exchange of information otherwise available to the public, and so available via industry resources, internet searches, blind calls and the like.

It is interesting that more state attorneys general have not followed Connecticut's lead in addressing call-arounds. Although, now that it is clear that the unfair trade element of the practice is the exchange of non-public information (allowing for tacit, if not express, collusion,) the practice of call-arounds may invite greater scrutiny. In any event, it is always a good idea to think twice before exchanging any non-public information with a competitor.