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By [Ben Penn](#)

Dec. 12 — Labor Secretary-designate Andrew Puzder is facing criticism for wage violations at his fast-food chains, raising questions about whether it's legitimate to blame a corporate executive for franchisee actions.

Puzder is the chief executive officer of CKE Restaurants Inc. Democrats, worker advocates and other opponents of President-elect Donald Trump's pick have repeatedly mentioned that 60 percent of DOL Wage and Hour Division investigations at his Hardee's and Carl's Jr. stores uncovered Fair Labor Standards Act violations.

That statistic, from a September Bloomberg BNA analysis of WHD enforcement data, is based on about 60 investigations of CKE-affiliated establishments since the start of the Obama administration. That is among the lowest levels of scrutiny in the fast-food industry as a share of overall stores. And no FLSA violations were found within the handful of cases at corporate-owned stores.

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However, a review of the database that extends to the George W. Bush administration shows that the brands' largest overall FLSA settlement was for \$58,000, involving overtime violations from 2004 through 2006. The Labor Department told Bloomberg BNA that this investigation was at corporate-owned stores. Investigators found that the company failed to include bonuses in the regular rate of pay when calculating the time-and-a-half wages for hourly assistant managers. Still, that appears to be the only instance, at least captured in the database, in which the DOL found CKE out of compliance.

Franchisees Under Company Banner

Puzder is expected to respond that CKE doesn't exert control over the Hardee's and Carl's Jr. networks, which are now 94 percent franchised. Faced with accusations about the FLSA at his confirmation hearings, he would likely counter that he can't be held responsible for the actions of independent business owners.

That line of reasoning may not pass muster, Wilma Liebman told Bloomberg BNA. Liebman was President Barack Obama's National Labor Relations Board chairman from 2009 to 2011.

"I don't know what the relationship is and how much control they exercise or how much right to control they retain, but I think the counterargument that can be made is that there are some legal theories for holding lead entities responsible under the law even though they're not technically an employer," she said.

The DOL and NLRB in the past few years have taken an expanded view of whether corporations are joint employers and share liability with franchisees or subcontractors. There is at present no evidence that either agency has ever deemed CKE a joint employer.

But that may not protect Puzder from questions about whether he fostered a corporate tone of compliance with wage and hour laws.

"These franchisees are doing business under the banner of his company," Joseph Sellers, partner at Cohen Milstein Sellers & Toll PLLC in Washington, told Bloomberg BNA Dec. 12. "That may not be enough to create joint liability, but it certainly creates in the customer's mind the expectation that these are restaurants of that franchisor company."

Sellers has represented fast-food employees in lawsuits alleging McDonald's Corp. is jointly liable with franchisees for minimum wage and overtime violations.

Puzder may also deflect these criticisms by stating he was reluctant to offer too much advice to franchisees on the FLSA out of fear that the DOL or NLRB could use it as evidence of a joint employer relationship.

“If a franchisor starts getting very involved in how the franchisee behaves towards their employees, they will be increasing the chances they will be found liable,” Francine Lafontaine, a franchising researcher and senior associate dean at the University of Michigan’s Ross School of Business, told Bloomberg BNA Dec. 12. “So we’ve really put franchisors in a very strange position on this issue.”

Puzder Motivated to Comply

Puzder could be asked at his confirmation hearings whether he could’ve done more to prevent the violations at Hardee’s and Carl’s Jr. franchisees. Like any fast-food CEO, he is motivated to operate a brand whose franchisees obey wage laws, regardless of his legal responsibility, John Gordon, a veteran franchising consultant, told Bloomberg BNA Dec. 12.

“The franchisor might not have to pay the” penalty from an FLSA violation, “but that doesn’t mean that they shouldn’t be interested in being a high-quality employer,” said Gordon, principal of Pacific Management Consulting Group. “Andy will affirm this—if you don’t run a good people shop, then ultimately you’re going to fail. You’re not going to get good employees and you’re going to turn good employees over fast.”

Carl’s Jr. and Hardee’s units were subjected to a relatively small number of WHD audits from an agency that targets cases at workplaces likely to yield a high return on investment, such as fast-food restaurants. This indicates Puzder is running a fairly clean shop, Gordon said. Plus, Gordon’s decades of experience tracking the quick-service industry lead him to suspect CKE’s brands have a higher wage-and-hour compliance level than competitors.

“Because Hardee’s and Carl’s Jr. are older brands and relatively more established and not going through a tremendous amount of economic travail, I would expect there to be less problems,” said Gordon, who used to analyze CKE when it was publicly traded. The company went private in 2010.

Confirmation Preview

The fact that Hardee’s and Carl’s Jr. ran afoul of the FLSA fewer times than competitors probably won’t matter to Democrats and unions seeking to derail his appointment. Critics say a CEO of a company paying low wages who opposes a meaningful minimum wage hike isn’t fit to run the agency charged with promoting employee welfare.

The Hardee's and Carl's Jr. track record with the FLSA and other statutes that the DOL enforces is seen as fair game for senators tasked with weighing the merits of his appointment. One way Puzder could choose to shield himself from accusations would be to point out the relatively low incidence of violations compared with other brands.

"If I were representing him, I'd say, 'Make sure that you've got the good stats around what the company-owned stores were doing and be prepared to explain that CKE takes every step possible to ensure that it complies with the laws and pays its employees fairly,'" Brett Bartlett, co-chairman of Seyfarth Shaw LLP's national wage-and-hour litigation practice group, told Bloomberg BNA Dec. 12. "Looking at the overall scope of the relatively immaterial back wages that were paid on average to employees, that doesn't signify a business that's choosing not to comply with the law."

Bartlett, who represents quick-service restaurant franchisees, was referring to a Bloomberg BNA finding that when the WHD investigated Hardee's or Carl's Jr., the stores agreed to pay an average of \$2,000. That's among the lowest totals out of the 20 largest fast-food companies. The largest average was \$13,000 per audit.

The 60 percent violation rate was actually the third-best compliance record among the 20 companies surveyed. Some of the violations didn't lead to a monetary penalty and rather pertained to record-keeping errors or failure to display a minimum wage poster.

The WHD says that its public enforcement database doesn't illustrate a company's overall compliance rate. The agency conducts strategic investigations in places where the data suggest a likelihood of violations. It also responds to employee complaints. The division's database doesn't cover state and local government enforcement actions or private litigation.

Can Conclusions Be Drawn?

Puzder's potential to face inquiries over franchise wage-and-hour abuse brings to light the merits of drawing conclusions based on a nonrepresentative sample of data.

Further, without knowing the true extent of what brought about the violation, applying blame to Puzder or his franchisees is open to debate.

"A lot of problems arise not even from the real franchisee but from the individual store manager who didn't know what they were doing at the time," Joseph Godwin, a franchisee and franchiser restaurant consultant for FLSA practices at F&H Solutions Group, told Bloomberg BNA Dec. 12. "I think it's hard to draw a direct line to say that it's corporate's fault every time they have a wage-hour violation."

"I think that you can find a violation in practically every company around; it's just a matter of whether it's a practice or policy," Godwin said.

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