American Association of Franchisees & Dealers
The Center for Total Quality Franchising℠

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December 7, 2022

Lauren McFerran
Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

Re: AAFD Comments on Proposed Joint Employer Rule (87 Fed. Reg. 54641)

Dear Chairman McFerran and Ms. Rothschild:

On behalf of the American Association of Franchisees and Dealers ("AAFD") and its franchisee members, we respectfully offer our views and perspective on the September 7, 2022 National Labor Relations Board proposed rule that would expand the joint employer definition under the National Labor Relations Act. The joint employer debate is critical to the long-term equity ownership question of the franchised businesses.

AAFD is the oldest and largest national not for profit trade association advocating the rights and interests of franchisees and independent dealer networks. The AAFD supports more than 60 independent franchisee associations and trademark specific chapters, representing thousands of franchisee operated business outlets. Since our establishment in 1992, the AAFD has focused on its mission to define, identify and promote collaborative franchise cultures that respect the legitimate interests of both franchisors and franchisees, cultures we describe as embracing our vison of *Total Quality Franchising*®. The AAFD came into existence in response to a franchising community that has been evolving towards increasingly one-sided and controlling franchise agreements and cultures whereby franchisee equity and business ownership has been continually eroding such that many modern franchise systems have lost all vestiges of business ownership.

Interestingly, instructively and importantly, we make special note that the very issues that inspired the formation of the AAFD have also given rise to the Joint Employer doctrine.

For the reasons set forth below, AAFD urges the NLRB to adopt a joint employer standard that respects NRLB's decision in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), and reaffirmed by the Court of Appeals for the DC Circuit, yet takes into account the unique relationships between the franchisees and franchisor needed to protect the brand.

Franchisor Community Misdirection Regarding the Definition and Foundation of Joint Employment Status.

Franchisees respect a franchisor's ownership and control of its brand and a legitimate right to enforce system standards to protect the brand, and franchisees depend and rely on the list of benefits and support services from their franchisor. We do not believe that the many services franchisors historically provide to franchisees, and which have been disingenuously withdrawn under the 'guise' of the joint employer threat are, or should be, the focus of the joint employment standard.

Rather, the 'test' of joint employer status should be determined based upon the amount of economic control a franchisor ***directly or indirectly*** exerts by use of the franchise agreement, operations manual, or other means, over its franchisees and which negatively impact and eviscerate a franchisee's equity ownership in the franchised business.

We have specifically been asked to comment on the added economic burden placed on franchisees when their franchisor backs away from services in order to avoid Joint Employer attribution. It should be no surprise from our firm contention that franchisors unduly focus their arguments on matters of control on their legitimate interests (and we contend duties) to control and protect *brand standards.* As part of the franchisor's playbook to insulate itself from *joint employer* classification is to withdraw franchisee support of human resource services, placing an added economic burden on its franchisees. The AAFD contends that a franchisor's withdrawal of such services is a canard, indeed an integral part of the strategy to misdirect attention from the real issues and is intended to secure franchisee opposition to the *joint employer* doctrine. Stated simply, in the franchising context, a franchisor's provision of human resources to its franchisees should play a negligible role in determining whether the *joint employer doctrine* should apply to a franchisor's undue control over its franchisee's equity.

We contend that the human resources services traditionally provided by a franchisor are appropriate for the protection of any brand's important standards of service, products and reputation that are properly a part of *brand standards.* That said, we recognize that the joint employer doctrine is built upon the traditional evaluation of master/servant and employer/employee characteristics that we believe distract from the real issues of control to subvert and diminish franchisee equity interests. We believe that much of the franchisor community is engaging in the art of misdirection in its arguments, tending to avert attention from the real economic basis for its opposition to the Browning-Ferris joint employer standard which is a bedrock of the traditional common law standard which incorporates both reserved and exercised control. The real concerns are the right to assert economic control, not the enforcement of legitimate brand standards, and include:

1. The claim that all the goodwill of the franchised business belongs to the franchisor, without any recognition of equity ownership by the franchisee whose capital and sweat equity are a major component of a franchise unit's existence and success.
2. Control over the ownership of the franchise location whereby the franchisor owns or controls the real estate which is leased or sublet to the franchisee impacting the franchisee's ownership of the business.
3. Abusive control or ownership of the assets of the business, such that a franchisee is little more than a sharecropper running the business for the benefit of the franchisor. Indeed, regarding McDonalds, it should be noted that McDonalds no longer refers to 'franchisees' in its agreements. In full claim of ownership, a McDonald's licensee is referred to legally as an 'operator' of a business that McDonald's fully owns.
4. *The exercise of abusive control over the suppliers and supply chain of the of the operation.* Far and beyond the enforcement of necessary system standards, many franchisors dictate sole sources of supply for the purpose of marking up the goods and services being purchased by franchisees, and regardless of the connection to the brand or brand standards. Franchisors now dictate where to buy insurance, process and control customer payments, and even business supplies, as well as dictating the source of brand related commodities–all of which could be potentially purchased at lower cost from competitive sources.
5. Control over the cost of labor by setting hours of operation that are not realistic for a particular franchise unit.

The Solution to the Joint Employer Dilemma

We join the industry in urging the NLRB to recognize the legitimacy of protecting brand standards, and to place its definition of *joint employment* on the real matter of 'who owns the franchised business equity.' The debate around joint employer is critical because it includes the broader debate beyond the impact of labor practices and also includes the question on who has control over the day-to-day business practices and who owns the equity in the business. We recognize that to refocus the inquiry of joint employer attribution in franchising may require some legislative revisions to the definition of 'control' to the control of equity (which is not a question in the typical master servant discussion). **However, we believe that our solution to provide a franchisor exemption is completely consistent with the premise of the NLRA, and within the authority of the NLRB.**

In establishing its test for Joint Employment, and advocating for the Browning-Ferris joint employer standard, we urge the NLRB to focus on minimum equity concerns:

1. The right to grow the business and manage its costs of operations, including the management and control of labor, goods, products and services purchased for operations.
2. The right to stay in business, to sell the business, or to transfer the business to heirs.
3. The right to manage the business finances, especially the right of the franchisor to pull funds from the franchisee's bank accounts, or whether the franchisee has the power over its own checkbook.
4. The very important, albeit sensitive, right to control the cost of supplies and suppliers. A significant promise of franchising is the power of volume purchasing, but the ability of a franchisor to dictate suppliers is fraught with the potential for abuse. A key inquiry to determine whether a franchisor has

crossed the line of control over the business is whether the franchisee's interests are respected and protected where a franchisor reserves significant control over the franchisee's source of supplies.

5. Similarly, the control over the marketing budget is critical to a successful franchise system. A franchisor may control most of the marketing fund, but a line is crossed when a franchisee retains no ability to influence and direct its marketing dollars.

Quite simply, the solution to the joint employer 'threat' for franchise systems is to recognize franchisee equity ownership to franchisees in a sufficient amount that the franchisee is deemed to be the 'owner' rather than a mere 'operator' of the franchised business.

The AAFD's Franchisee Bill of Rights Provides the Appropriate Tests for Excessive Control

We submit the Franchisee Bill of Rights (attached), as appropriate criteria to measure and test whether a franchisor has crossed the line of excessive control. The Franchisee Bill of Rights provide fourteen indicia of a franchise system that respects the equity interests of franchisees.

It is instructive to note that the Franchisee Bill of Rights actually recognize, even require, a franchisor to provide and support brand standards. Providing the expected 'control' over brand standards should not be the determinative criteria for joint employer. We urge the focus on relative equity: the determination of whether the agreement and relationship fairly recognize that the franchisee has a significant equity right in the franchised business.

Proposal to Create a Franchisor Exemption from Joint Employer attribution for Franchise Systems that Recognize an independent franchisee association and offer a collectively bargained franchise agreement

The comparison of franchisee associations to labor unions is inevitable and appropriate. Owners of franchised small businesses organize for reasons that are similar to the reasons that employees form unions: to collectively bargain the rights and benefits of agreements of their engagement to provide services to their franchisor or employer. At its core, the National Labor Relations Act that established the NLRB was enacted to establish the right of employee groups to organize, and the NLRA recognizes important exemptions for companies that recognize unions and have a collectively bargained employment agreement that is ratified by a majority of union members and employees.

AAFD urges that a franchisor that has recognized an independent owners association and has embraced a collectively bargained franchise agreement that has been ratified by a majority of franchisees should also be exempt from the consequences and penalties arising from being determined to be the 'joint employer' of a franchisee's employees. In this regard, it should be noted that the AAFD has established an accreditation for franchisors that meet these tests which we label as our "Fair Franchising Seal." To date, 19 brands have been accredited by the AAFD, all of which have franchise agreements that recognize franchisee rights and equity interests while reaffirming the franchisor's essential interest in protecting its brand standards. In essence, just as recognized in the NLRA, where the agreement defining rights and obligations has been collectively

bargained, the reasons behind the purpose of the law have been met by the marketplace effectively doing its job!

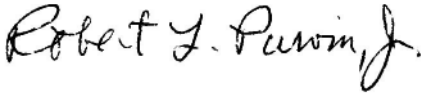
Cooperation with the Federal Trade Commission

We also urge the NLRB to work closely with the Federal Trade Commission on defining aspects of the relationship that exceed normal control in a brand. The franchise industry has many unique attributes, and the FTC is the federal agency most engaged with oversight of the industry. Many items, such as uniforms and training, which are critical to the existence of the brand, are immaterial to the employment relationship, and should not create joint employer status.

Conclusion:

The AAFD appreciates the concerns of the NLRB, with respect to creating an appropriate 'test' for when a franchise system has crossed a line and become the 'joint employer' of a franchisee's *putative* employees. We believe that many franchisors exercise so much control over the franchised business that the franchisee retains limited if any equity ownership, or control over, in the franchised business. In such circumstances it is appropriate to deem the franchisor as the joint (and sometimes even the sole) employer of the franchised business employees. But we also believe that the establishment, support and enforcement of brand standards are not the appropriate target of any control test. Rather, the inquiry should be focused on the economic rights of business ownership that is promised and expected in a franchise relationship. Fair and balanced franchise agreements and relationships that respect the Franchisee Bill of Rights will provide and meet an appropriate test for determining joint employer status.

Respectfully submitted,



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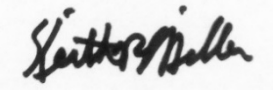

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