



American Association of Franchisees & Dealers *The Center for Total Quality FranchisingSM*

P. O. Box 10158
Palm Desert, CA 92255-1058
(619) 209-3775
Direct Line: 619-649-0748
Fax: 866-855-1988
E-mail: rpurvin@aafd.org
Website: www.AAFD.org

February 1, 2020

United States House of Representatives
Washington, D.C. 20515

Re: Franchisee Perspective of Joint Employer Standard

Dear Representative:

On behalf of the American Association of Franchisees and Dealers (“AAFD”) and its franchisee members, we respectfully offer our views and perspective specifically on the joint employer standard that is debated within H.R. 2474, the PRO Act, and without comments on any other aspects of the legislation. The broader 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 40 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 vision of *Total Quality FranchisingSM*. 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.

For the reasons set forth below, AAFD urges the Congress to adopt a joint employer standard that respects NLRB’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.

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

Franchisees respect a franchisor’s ownership and control of its brand and 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 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 bedrocked on the traditional standard based on the 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 of 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 franchisee. Indeed, (in the case of) 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 that could be 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 Congress 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.

In establishing its test for Joint Employment, in advocating for the Browning-Ferris joint employer standard, we urge Congress 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, or 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 14 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 recognizes that the franchisee has a significant equity right in the franchised business.

Conclusion:

The AAFD appreciates the concerns of Congress, 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

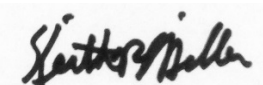
The Center for Total Quality FranchisingSM

agreements and relationships that respect the Franchisee Bill of Rights will provide and meet an appropriate test for, and for that reason, we support the Joint Employer standard outlined in H.R. 2474.

Respectfully submitted,



Robert L. Purvin, Jr,
Chair, Board of Trustees
American Association of Franchisees and Dealers



Keith R. Miller
Director of Public Policy and Engagement, American Association of Franchisees and Dealers
Principal, Franchisee Advocacy Consulting
Subway Franchisee in California