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DWYER GROUP®
WACO, TEXAS

TESTIMONY BEFORE THE U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

ON BEHALF OF THE INTERNATIONAL FRANCHISE ASSOCIATION

HEARING ENTITLED "REDEFINING JOINT EMPLOYER STANDARDS: BARRIERS TO JOB CREATION AND ENTREPRENEURSHIP"

JULY 12, 2017

Good morning Chairwoman Foxx, Ranking Member Scott, and distinguished members of the Committee. My name is Mary Kennedy Thompson and I am the Chief Operating Officer of the Dwyer Group, a family of service brands with more than 2,800 franchisees worldwide, 2,400 of those here in North America. I appreciate you taking the time to discuss the joint employer standard, an important issue that impacts jobs across the U.S. I am honored to have the opportunity to bring my perspective on the impact the joint employer standard has on franchisors, franchisees and employees.

I appear today on behalf of the International Franchise Association (IFA), the world's oldest and largest organization representing franchising worldwide. IFA works to protect, enhance and promote franchising and the more than 733,000 franchise establishments that support nearly 7.6 million direct jobs, $674.3 billion of economic output for the U.S. economy and 2.5 percent of the Gross Domestic Product (GDP). IFA members include franchise companies in more than 300 different business format categories, individual franchisees and companies that support the industry in marketing, law, technology and business development.

Today, I will tell you about Dwyer Group and franchising generally, and explain why Congress should enact a permanent, legislative solution to the expanding joint employer problem facing locally owned franchise businesses.

MY FRANCHISE BUSINESS STORY

Madam Chair, I have spent more than two decades in franchising, both as a franchisee and a franchisor. Following graduation from college, I served for eight years as an officer in the U.S. Marine Corps, including as the first female platoon commander for my unit. When I returned home to Texas after my time serving in the Marine Corps, I wanted to own my own business, take control of my destiny, but I had no business experience and knew I needed help if I were to make that dream come true.

In 1994, I got my start as a franchisee in the Cookies by Design system, and have grown in franchising ever since. The franchise model empowered me, someone with no business experience, to start my own business with the guidance, resources, and that assistance I needed to be successful. After selling by locations, I went to work at the franchise headquarters and went on to become President of

Cookies by Design. After being recruited to the Dwyer Group, I served for nine years as President of the Mr. Rooter brand within the Dwyer Group where I was also the Vice President for International Relations.

I am here today as the COO of the Dwyer Group, which began in 1981 with just one brand and is now the holding company for 11 service-based franchise organizations in the United States:

- Mr. Rooter,
- Rainbow International,
- Aire Serv,
- Glass Doctor,
- Mr. Appliance,
- Mr. Electric,
- The Grounds Guys,
- Portland Glass,
- Five Star Painting, ProTect Painters
- Molly Maid, and
- Mr. Handyman.

In my role with the Dwyer Group, I help new franchisees under our brands achieve their business-owning dreams – just as I did more than 20 years ago. Our mission is to teach our principles and systems of personal and business success so that all people we touch live happier, more successful lives. I do this by presenting and teaching the franchise system, including how to best run a business, take care of customers, serve the community, and create jobs. We don't employ, hire, or fire our franchisee's employees. It is not the role of a franchisor to get between a franchisee and their employees. Rather, our role is to share with franchisees our knowledge and experience to ensure that our franchisees are doing the best possible job running their franchise to protect our brands.

The Dwyer Group specifically operates with the core values of respect, integrity, and customer-first. We promote women in trade and technical schools by offering scholarships each semester. As a vet, I'm also incredibly proud of our work for veterans. The Dwyer group is the founding company of the Veterans Transition Franchise Initiative, or VetFran. VetFran is an effort by more than 500 IFA member companies to encourage franchise ownership by offering financial incentives to honorably discharged veterans. The VetFran program has led to more than 6,300 veterans becoming franchise business owners since the initiative was launched in 1991. To date, Dwyer Group has given more than $2.5 million dollars in discounts to veterans becoming franchisees in our brands.

Franchising operates in just about every industry – automotive, commercial and residential services, early childhood education, fitness clubs, restaurants, lodging, real estate and more. The growth in franchise businesses continues to outpace growth in traditional businesses.[1] Franchises allow consumers to have a consistent experience at a trusted, national brand while also knowing the local owner personally.

Franchising is an interdependent relationship in which the franchisor licenses to the franchisee the right to use its trademarks, intellectual property, and business and operating plans in exchange for a fee. Through this system, both parties win. The franchisor can expand more effectively than through corporate ownership, and the franchisee is able to be his or her own boss while using a proven operating system. We like to say that franchising allows you to be in business for yourself, but not by yourself.

The system works through mutual dependence that requires close collaboration between the franchisor and franchisee. I've been on both sides of the relationship, and I can tell you that communication and trust are critical for success. We provide resources to help our franchises address some of their most pressing challenges. Recruiting and hiring good people, for example, is an enormous challenge for franchises, many of which are small, fewer than 10 employees. Franchisors like ours have historically been able to provide assistance in identifying good people and helping effectively train those workers. Franchisees get the valuable experience of running their own business, while having the franchisor's assistance to provide the resources and support they need.

HOW JOINT EMPLOYMENT LIABILITY POSES A BARRIER TO JOB CREATION AND ENTREPRENEURSHIP

The franchisor-franchisee relationship has been deeply harmed by the new joint employer standards that have developed under the National Labor Relations Act (NLRA), Fair Labor Standards Act (FLSA) and other statutes. These evolving standards have negatively impacted our ability to help franchisees grow and bring jobs and economic opportunity to their communities.

[1] Ben Gitis, "The NLRB's New Joint Employer Standard, Unions, and the Franchise Business Model," American Action Forum, April 26, 2017. https://www.americanactionforum.org/research/nlrbs-new-joint-employer-standard-unions-franchise-business-model/

From 1984 and 2015, franchises operated under the joint employer standard determined by the NLRB in the *TLI, Inc.* and *Laerco Transportation* decisions based on "direct" control. This standard allowed franchisors to provide valuable information, best practices and other resources to franchisees discussed above, while still giving them the independence to conduct the business under our prescribed methods.

With the new standard created by the NLRB's August 2015 *Browning-Ferris (BFI)* decision, any business with direct, "indirect," or even a "reserved" right to control – whether that right is exercised or not – may be considered a joint employer. Such a broad, unpredictable standard ties the hands of franchisors who want to provide the very valuable services to their franchisees discussed above. We want to protect our brands and serve our franchisees by helping them hire and train the best people and have the resources they need to succeed.

Today brand companies may be held liable for the employment and labor actions of franchisees or third-party subcontractors over which they have no direct control. To limit this liability risk, prime companies may be compelled to exercise more control over their franchisees, and local franchise owners may forfeit operational control of the stores, clubs or restaurants they built. Even worse, unlimited joint employment liability threatens future franchise development as brands choose to grow only their corporate owned stores that they can operate.

Making matters more confusing for franchise businesses, other federal agencies have sought to capitalize on the NLRB's expanded joint employment definition in statutes under their jurisdictions. In 2016, the Occupational Safety and Health Administration and the Wage and Hour Division at the U.S. Department of Labor released administrative directives expanding joint employer liability. Furthermore, the Equal Employment Opportunity Commission filed a brief in support of the NLRB's new standard in the federal court appeal of *BFI.*

With new joint employment liability standards developing under multiple federal statutes, the impact has already been affecting franchises. According to a June 2016 report, franchise businesses have faced more operational and legal costs, decreased business valuations, less employment-related assistance from

franchisors, less growth and fewer jobs as consequences of the new joint employer policy.[2]

Indeed, franchisors like Dwyer Group have been forced to back-off in providing traditional support to franchisees – all out of fear we will be considered a joint employer. Franchisors are cutting back on giving training to technicians, helping franchisees find new employees, and providing point of sale software to franchises. These have been resources that help attract entrepreneurs to franchising and grow franchises across the country. Franchises are small businesses that have on average 7-10 employees, and they need all the help they can get with recruiting, training, and having a blueprint for operating their business successfully. While we consider our company an educational organization whose job it is to educate our franchisees in best business practices, the new joint employment standards have changed how we train, who we train, and made it considerably harder for us to best support our franchisees.

Franchises are not the only business model threatened by the new standards. Research from the American Action Forum in April 2017 projected that the new joint employer standard could result in 1.7 million fewer jobs in the entire private sector and 500,000 fewer jobs in the leisure and hospitality industry alone[3]. It is imperative that the locally-owned businesses created by the franchise system remain open and continue to operate with the full support of their brand. The system gives entrepreneurs a leg up because they can rely on the proven-to-work tools that we as franchisors give them, and that system is currently in jeopardy.

In February, 51 organizations that represent millions of workers in the United States signed a letter[4] urging Congress to consider legislative action restoring the common-sense definition of joint employer. The contract and franchise business community is populated by many small business owners who are now expected to navigate increased regulation without guidance from the NLRB and there is fear in

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[2] International Franchise Association and U.S. Chamber of Commerce. "Main Street in Jeopardy: The Expanding Joint Employer Threat to Small Businesses." June 2017. https://www.uschamber.com/report/main-street-jeopardy-the-expanding-joint-employer-threat-small-businesses

3 Ben Gitis, "The NLRB's New Joint Employer Standard, Unions, and the Franchise Business Model," American Action Forum, April 26, 2017. https://www.americanactionforum.org/research/nlrbs-new-joint-employer-standard-unions-franchise-business-model/

[4] Letter to Chairs Foxx, Walberg, and Byrne and Ranking Members Scott, Sablan, and Takano, February 14, 2017. http://sbecouncil.org/2017/02/14/coalition-letter-to-the-u-s-house-on-joint-employer-and-need-for-permanent-fix/

the industry over assuming liability for another employer's actions. Employers are seeing joint employer related litigation growing immensely, with more companies targeted in each passing week. According to the NLRB case database, the NLRB filed 418 joint employer unfair labor practices against both franchise and non-franchise businesses since the BFI decision on August 27, 2015 through July 7, 2017. That's a trend that is affecting far more business systems than *Browning-Ferris*.

Furthermore, the doctrine of nearly unlimited joint employment liability has expanded beyond the NLRB to other federal statutes. One of the most worrisome legal developments was the Fourth Circuit's January 2017 decision in *Hall v. DirecTV* involving the FLSA. In this case, the court deviated from the criteria for vertical joint employment that had previously been used by other appeals courts[5]. The Fourth Circuit's new test for establishing joint employer status requires no direct relationship with an employee to be held liable for workplace violations. The court's holding deepened the circuit court split over the appropriate joint employer test under the FLSA and several other relevant statutes. The IFA, along with the American Hotel and Lodging Association, Asian American Hotel Owners Association, Coalition of Franchisee Associations, and the Restaurant Law Center filed a joint amicus brief[6] in support of DirecTV's pursuit of U.S. Supreme Court review of this decision that highlighted the stress on the franchise business format of numerous circuit court joint employment standards.

While the legal landscape becomes more complex, we have been pleased to see members of Congress from both parties recently support franchise businesses. Last Congress, 117 Democrats and Republicans cosponsored then-Chairman John Kline's *Protecting Local Business Opportunity Act* (H.R. 3459). In April 2017, 53 Democrats and Republicans signed a letter urging the U.S. House Labor Appropriations Subcommittee to halt the expansion of joint employment liability at agencies under the subcommittee's jurisdiction. And in May 2017, thirteen congressional Democrats sent a letter[7] to the NLRB asking for clarity in the Freshii Development case.

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[5] Colin Dougherty, Evan Tager, Miriam Nemetz, and Matthew Waring, Petition for a Writ of Certiorari, June 5, 2017. http://hr.cch.com/eld/16-1449_DirecTV-Hall.pdf

[6] Amicus Curiae brief of American Hotel & Lodging Association, Asian American Hotel Owners Association, Coalition of Franchisee Associations, International Franchise Associations, and Restaurant Law Center in Support of Petitioners, July 5, 2017. http://franchise.org/sites/default/files/34802%20pdf%20OConnell-c1-c1.pdf

[7] Letter to Barry Kearny, Associate General Counsel, Division of Advice, National Labor Relations Board. May 8, 2017. http://src.bna.com/oH1

Madam Chair, let me explain further the NLRB's involvement in this Freshii franchise matter. The Freshii case arose in 2015 when the NLRB released an advice memorandum[8] stating that Freshii, a franchisor, was not a joint employer with Nutritionality, one of its franchisees in Chicago. Three months later the NLRB revised its joint employer standard for all businesses through its BFI decision, but certain advocates continued to reference the now-obsolete Freshii memo as somehow helpful to someone trying to run their business.

The letter sent by the thirteen members of Congress asked the reasonable questions of (1) whether the Freshii memo can be used as a blueprint for all franchise systems to comply with the NLRA, notwithstanding the joint employer standard established in the BFI decision, and (2) how much flexibility will franchisors have to implement, articulate, and enforce brand standards before they are deemed to cross the line into the forbidden areas of "indirect", "unexercised" or "potential" control for joint employer purposes? In letters[9] dated June 27, 2017, to each of the 13 Members of Congress, NLRB General Counsel Richard Griffin declined to answer either question, and stated only that "the memorandum speaks for itself" and "should be read in light of subsequent developments, including the Board's decision in Browning-Ferris Industries."

This type of unnecessary bureaucratic confusion is extremely challenging for business owners to navigate. The NLRB created the joint employer mess, but clearly doesn't care to help any business owner comply with its new policy. An uncertain regulatory environment does not provide an attractive investment opportunity for either franchisor or franchisee in our business format. What's worse, the new joint employer standard has shaken the trusted relationship between franchisor and franchisee. Congress must act now to restore that partnership and enable the franchise system that fosters small business growth and job creation.

[8] National Labor Relations Board Office of the General Counsel, "Advice Memorandum," April 28, 2015. https://www.nlrb.gov/case/13-CA-134294

[9] Letters to The Honorable Ami Bera, J. Luis Correa, Jim Costa, Henry Cuellar, Vicente Gonzalez, Josh Gottheimer, Daniel W. Lipinski, Scott Peters, Collin Peterson, Jacky Rosen, Bobby Rush, Kurt Schrader, Kyrsten Sinema from Richard F. Griffin, Jr., General Counsel, National Labor Relations Board. June 27, 2017.

CONGRESS MUST PASS LEGISLATION THAT DEFINES JOINT EMPLOYERS

More than two decades ago I started my own business in Texas with two employees after serving in the Marine Corps for eight years. Within four years I had more than 30 employees and three locations. I was like so many other Americans today – I had no business experience, just a dream and desire to run my own business. The support and resources I received from the franchise model made that dream possible. And it's disappointing and sad to see that the kind of support I was given that led me to grow successful businesses, is being pulled away because of these new and unfair standards.

The confusion and uncertainty around joint employers is frustrating, but I am optimistic. I would like to applaud the members of this body that are working to address the joint employer challenge to franchising. The fact that this hearing is occurring makes me hopeful that Congress can act to fix these standards and move back to a system that encourages the economic growth franchises have been proven to generate. I hope that my testimony has offered some insight into opportunities offered by the franchising model – and the barriers and challenges that the NLRB's joint employer standards rulemaking has created for the small business owners across the country. A legislative fix is essential; we need Congress to act immediately to provide a clear, common sense definition of what constitutes a joint employer. We want to continue to live our mission and to teach our principles and systems of personal and business success so that all the people we touch live happier, more successful lives. The American in me believes all of you do too.

Thank you for inviting me to be here today and I look forward to answering any questions you may have.