August 6, 2025

Via Email
David Fish, Executive Director
Legal and Regulatory Services
New Jersey Department of Labor and Workforce Development
P.O. Box 110
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Re: Comment submitted by the International Franchise Association to the Proposed New Rule N.J.A.C. 12:11

Dear Mr. Fish:

The International Franchise Association ("IFA") appreciates this opportunity to submit its views (the "Comment") to the New Jersey Department of Labor and Workforce Development (the "NJDOL" or "Department") in response to the request for comments regarding the proposed new rule N.J.A.C. 12:11 ("Proposed Rule") that would revise the "ABC Test" as applicable in New Jersey. While we applaud the Department's efforts to bring clarity to the ABC Test, we are concerned about the disparate impact the Proposed Rule would have on franchised businesses. As we explain more fully below, while we trust the Department did not intend to convert franchise relationships into employment relationships, many of the factors the Proposed Rule lists as indicia of an employment relationship are both ubiquitous in franchising and essential to the protection of franchisors' trademarks and the health and welfare of the consumers that choose to patronize franchised businesses. We therefore urge the Department to reconsider the Proposed Rule. IFA welcomes the opportunity to support the Department in developing a rule that brings clarity to the ABC Test while preserving the interests of franchising and the enormous opportunities for growth that franchising continues to provide for the citizens of New Jersey and the State's economy.

About IFA

Founded in 1960, IFA is the oldest and largest trade association devoted to representing the interests of franchising. With a membership that includes franchisors, franchisees, and suppliers, IFA is the only trade association that acts as a voice for franchising on behalf of franchisors *and* franchisees throughout the United States. IFA's mission is to safeguard and enhance the business environment for franchising worldwide. In addition to serving as a resource for franchisors and franchisees, IFA and its members advise public officials across the country about the laws that govern franchising. Through its public-policy programs, it protects, enhances, and promotes franchising on behalf of more than 1,200 franchised brands in more than 300 different industries.

The Impact of Franchising in America and New Jersey

Franchising's impact on the economy cannot be understated. There are an estimated 831,000 franchised establishments operating in the United States, contributing more than $896 billion to the United States economy

and nearly 9 million direct jobs.[1] The impact of franchising in New Jersey is particularly significant. In New Jersey, franchising contributes more than $25 billion to the economy and more than 228,000 direct jobs across the more than 21,500 franchised establishments currently operating.[2] Notably, the New Jersey legislature specifically found (when it passed the New Jersey Franchise Practices Act) that "distribution and sales through franchise arrangements in the State of New Jersey vitally affects the general economy of the State, the public interest and the public welfare." N.J. Rev. Stat. § 56:10-2.

But the numbers tell only part of the story. Franchising touches nearly every aspect of daily life for most Americans, as hundreds of different business models use franchising as a means for distributing goods and services, including: automotive services; business services; children's products and services; cleaning and maintenance services; education, training and staffing; financial services; food and restaurants; health, personal care and fitness; home-based and mobile services home products and services; internet and technology services; retail; senior care and healthcare; sports and recreation; travel and cruise services; hotel and lodging; and many others. Unlike large corporations, the businesses that distribute these goods and services are locally owned and operated small businesses, serving as pillars of their communities that invest in the local and state infrastructure.

Comment on Proposed Rule

1. The Proposed Rule Is Inconsistent with Federal Law Applicable to Franchising and Could Turn Franchise Relationships into Employment Relationships under New Jersey Law

As we noted above, we are confident that the Department does not seek to convert franchise relationships into employment relationships. We are equally confident that any such attempt would be inconsistent with the Unemployment Compensation Law ("UCL")[3], which is not triggered unless there is first a determination that the threshold inquiry had been satisfied – *i.e.*, that the services performed by franchisees constitute employment, which the UCL defines as a "service performed for remuneration under any contracts of hire, written or oral, express or implied." *Carpet Remnant*, 125 N.J. at 581 (quoting N.J.S.A 43:21-19(i)(1)(A)); *accord Gilchrist v. Div. of Emp. Sec., Dep't of Lab. & Indus.*, 48 N.J. Super. 147, 153-54 (App. Div. 1957). Franchising, of course, does not operate this way, as franchisors do not pay their franchisees for providing personal services to the franchisor. [4] Rather, in franchising, the *franchisees* pay fees *to the franchisor* for the right to operate their independent businesses under the franchisor's trademark and brand.

[1] Ashley Rogers, Jin Qi and Khadija Cochinwala, 2025 Franchising Economic Outlook 2-5 (Int'l Franchise Ass'n 2025), https://www.franchise.org/franchising-economic-outlook/.

[2] *Id.* at 31-33.

[3] The Proposed Rule similarly is inconsistent with the Temporary Disability Benefits Law (TDBL), N.J.S.A. 43:21-25 *et seq.*, the Wage and Hour Law (WHL), N.J.S.A. 34:11-56a4 *et seq.*, the Wage Payment Law (WPL), N.J.S.A. 34:11-4.1 *et seq.*, and the Earned Sick Leave Law (ESLL), N.J.S.A. 34:8D-1 *et seq.*

[4] The structure of franchise systems vary widely across the more than 300 industries in which franchised businesses operate, with franchisors in many industries offering franchisees the opportunity to offer and sell products and services to customers under a brand-level relationship—including commercial building cleaning, maintenance, and repair; vehicle maintenance and repair; membership-based health and fitness services; preferred lodging relationships at hotels; and many others—but such customers nonetheless remain the customers of the independent franchised business owners engaged in the offer and sale of such products and services. Similarly, the services provided by franchisors vary widely by industry, including scope of training and professional development, access to technology resources, and administrative functions like tech support and accounting services. While franchisors may perform

However, assuming *arguendo* a trier of fact erred in reaching the ABC Test in analyzing the franchisor-franchisee relationship, we provide comment on our concerns with the NJDOL's attempt to greatly expand the scope of the ABC Test through amendments to Prongs A, B and C.

a. Expansion of Prong A under the Proposed Rule is Inconsistent with Federal Law

The Proposed Rule would expand Prong A of the ABC Test to require a hiring entity to show a worker is free from its direction and control and that the hiring entity has not reserved the right to exercise such control. Proposed Rule 12:11-1.3(a). Further, Proposed Rule 12:11-1.3(f) renders irrelevant the fact that certain controls must be exercised to comply with the law. These changes are incompatible with and fail to account for the fundamental nature of how the franchise model works: a franchisor is *required* under federal law to exert a certain degree of control or oversight over the operations and business practices of its franchisees to protect the franchisor's trademarks as well as the reputation of its brand. These efforts not only protect franchisees' equity in their businesses, but benefit consumers by ensuring that their expectations are met.

There are two main components to every franchise: first, the franchisee receives a license to use the franchisor's operating system. In doing this, the franchisor licenses its franchisees the right to use not only the "product, service and trademark, but the entire business format itself—a marketing strategy and plan, operating manuals and standards, quality control, and continuing two-way communication." LaFontaine and Blair, *The Evolution of Franchising and Franchise Contracts: Evidence from the United States*, 3 Entrepreneurial Bus. L.J. 381, 385 (2009); *accord* Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. Rev. 905, 920-21 (1994) (In business format franchising, "the franchisor provides the franchisee with a business format, or total package, for operating a business."). Franchising has value when this "operating system" is consistently replicated by the independent business owners who purchase the right to use the franchisor's brand, systems and know-how for a period of time in a particular location. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 433 (3d Cir. 1997) (The essence of a successful nationwide fast-food chain is product uniformity and consistency. Uniformity benefits franchisees because customers can purchase pizza from any Domino's store and be certain the pizza will taste exactly like the Domino's pizza with which they are familiar."). When a franchisor's operating system is not properly and consistently replicated, the brand as a whole suffers, impacting every franchised location and the value of every franchisee's investment. *See Ramada Franchise Sys., Inc. v. Jacobcart, Inc.*, No. 3:01-cv-0306D, 2001 WL 540213, at *3 (N.D. Tex. May 17, 2001) ("A bad experience at one location of what is supposed to be a relatively uniform chain may influence the customer to view the entire franchise poorly.").

Franchisors attempt to make sure this does not happen by "impos[ing] comprehensive and meticulous standards for marketing [their] trademarked brand and operating [their] franchises in a uniform way." *Salazar v. McDonald's Corp.*, 944 F.3d 1024 (9th Cir. 2019) "Policing the use of the brand, through quality, marketing, and operational standards, is necessary to maintaining its value and continued primary function as a beacon to consumers indicating the source of particular goods or the quality of a particular store." *Patel v. 7-Eleven, Inc.*, 494 Mass. 562, 569 (2024). In fact, the development and maintenance of these standards is so inherent in franchising that it is incorporated into the statutory definition of what a "franchise" is. *See* 16 C.F.R. § 436.1(h)(2) (defining a "franchise" as a commercial relationship in which "[t]he franchisor will exert or has authority to exert *a significant degree of control over the franchisee's method of operation*") (emphasis added).

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administrative functions—such as client invoicing and fee collection on behalf of franchisees—these activities do not alter the fundamental structure of the franchising relationship.

Second, every franchisee receives a license to use their franchisors' trademarks. *See* N.J. Rev. Stat. § 56:10-3 (2024) (defining a franchise as "a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic"); *accord Susser v. Carvel Corp.*, 206 F. Supp. 636 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964) ("The cornerstone of a franchise system must be the trademark or trade name of the product."). This license requires that franchisors implement and enforce standards to preserve the consistency and quality of the products and services their franchisees are offering. In fact, a franchisor has a legal obligation to "[p]olic[e] the use of the brand, through quality, marketing, and operational standards, [which] is necessary to maintaining its value and continued primary function as a beacon to consumers indicating the source of particular goods or the quality of a particular store." *Patel v. 7-Eleven, Inc.*, 240 N.E.3d 765 (Mass. 2024); *accord Depianti v. Jan-Pro Franchising Intern., Inc*., 465 Mass. 607, 615 (2013); *Doeblers' Pennsylvania Hybrids, Inc. v. Doebler*, 442 F.3d 812, 823 (3rd Cir. 2006) (courts have "long imposed upon trademark licensors a duty to oversee the quality of licensees' products"). The failure to do so "can result in dilution of the brand and eventually a determination that the brand has been abandoned under Federal law." *Patel*, 240 N.E.3d 765.

The Proposed Rule fails to account for this reality in several ways and treats features that are virtually ubiquitous in franchising as indicia of an employment relationship. For example, the Proposed Rule looks at "[w]hether the putative employer requires the individual to use specific tools, supplies, or materials," whether "the putative employer requires the individual to wear a uniform or to don or display a specific logo," whether "the putative employer limits the individual's performance of services for other parties, such as by limiting the individual's geographic area or potential clientele," and whether the putative employer provides training. Yet virtually every franchise relationship has these features. Franchisors may, for example, designate the equipment and supplies used by franchisees to ensure product consistency, and because franchise relationships require franchisees to display the franchisor's marks, those that work in franchised businesses must typically wear attire which bears the franchisor's marks. In addition, part of the way franchisors maintain consistency is by providing or making training materials available. *See McDonald's Corp. v. Miller*, 1994 WL 507822, at *7 (D.N.J. 1994) (noting that the franchise agreement provided that "completion of all training to McDonald's satisfaction would be mandatory" to obtain a franchise and that the training program could take up to two years); *Red Roof Franchising LLC, Inc. v. AA Hospitality Northshore LLC*, 937 F. Supp. 2d 537, 554 (D.N.J. 2013) (franchise agreement provided that, "[i]n addition to its initial Manager training program and Owner's Orientation program, Franchisor may require Franchisee and its employees to attend other training courses"); *Otiogiakhi v. AAMCO Transmissions, Inc.*, 2011 WL 5825953, at *1 (D.N.J. Nov. 17, 2011) ("[u]nder to the Franchise Agreement, Otiogiakhi was provided access to ATI's proprietary system of doing business [and] attended ATI training classes where he was given in-depth instruction on how to operate an AAMCO Transmission Center").

Similarly, Section 12:11-1.3(c)(2)(i)(c) of the Proposed Rule states that one of the factors to consider when deciding whether a hiring entity controls a worker is whether the hiring entity requires the worker to use a digital application "primarily or unilaterally controlled" by the hiring entity. But most franchisors make significant use of digital information technology. A 2025 survey found that 63% percent of franchise executives plan to leverage technology to increase revenues and cut costs in 2025, and 75% of franchisors expect to increase their capital spending on technology and innovation.[5]

[5] Meme Moy, "Franchisors are Doubling Down on Technology Investment in 2025," (Mar. 17, 2025), https://frandata.com/franchisors_are_doubling_down_on_technology/#:~:text=In%202025%2C%2075%25%20of%20franchisors,to%20boost%20their%20technology%20investments.

Franchisors offer their franchisees optional access to digital applications for many purposes, including so that franchisees may create and manage work schedules for their employees, train their employees to deliver products or services according to brand standards, manage the point-of-sale system in their businesses, and offer delivery or take-out services to customers of their businesses. Franchisors separately may utilize digital applications across the franchise system to offer loyalty benefits to customers and manage menu items to deliver a customer experience consistent with the brand's reputation. The use of digital applications across a franchise system is integral to brand protection consistency and ensuring that franchised businesses remain competitive with their non-franchised counterparts. The Proposed Rule's finding that the use of such digital applications is an indication of control would significantly and discriminately impact franchised businesses. The modern economy simply does not support this result.

In sum, the expansive interpretation set forth in Prong A of the Proposed Rule could create a presumption that many franchisees are misclassified employees. Franchisors would then be in the unenvious position of exerting no control or oversight – and thereby risking abandoning their trademarks under federal law – or continuing to exercise control or oversight and risking a finding that their franchisees are misclassified employees. Either result will have a materially detrimental effect on the continued viability of franchising in New Jersey.

b. Expansion of Prong B Could Destroy Service Industry Franchised Businesses

Prong B of the New Jersey ABC Test requires a putative employer to demonstrate either (i) that the work performed by a worker is outside the putative employer's usual course of business, *or* (ii) that the work is performed outside the places of business of the putative employer's enterprise. Many franchisors operate company-owned stores. There are several reasons for this, including that franchise systems evolve from company-owned stores (which is where a franchisor can test its concept before it begins franchising) and that company-owned stores give franchisors the opportunity to test new innovations before they are rolled out to the franchise system. To the extent this fact is deemed to support the notion that franchisors and franchisees are engaged in the same court of business (and it should not be),[6] franchisors faced with a claim that a franchisee is an employee will need to rely on the second component of prong B—i.e., that the franchisee's work is performed outside the places of business of the franchisor.

The Proposed Rule will make it difficult (if not impossible) for service industry franchised businesses in New Jersey to satisfy Prong B, as such business often lack a physical address. This includes home healthcare and senior care; mobile residential services like painting, plumbing, roofing, blinds installation, home decorating, lawncare and landscaping; supplemental children's education programs provided on-site at schools and recreational facilities; pet sitting and walking services; technology repair and maintenance services; personal wellness services like in-home IV therapy and massage; and a myriad of others, few of which maintain physical

[6] We note that Section 12:11-1.4 of the Proposed Rule provides that a "putative employer's usual course of business may include activities that the putative employer regularly engages in to generate revenue or develop, produce, sell, market, or provide goods or services," and that an "entity may have more than one usual course of business." To the extent applied to franchised businesses, the former statement would stifle development and shift the risk of failure to franchisees, as franchisors would be disincentivized to develop goods and services in company-owned stores before they are distributed to franchisees. The latter statement, we submit, is plainly inconsistent with the language of the UCL, which refers to the putative employer's usual *course* of business.

addresses but all of which nonetheless operate as independent businesses owned by franchisees who employ their own employees to perform the services offered to their customers. Excluding thousands of service industry franchised businesses from operating in New Jersey merely because neither they nor their franchisor maintains a physical business address was not the intent of the New Jersey State Legislature and is not supported by the NJDOL's own precedent.

c. The Proposed Revisions to Prong C are Inconsistent with Franchising

Under existing law, the fact that the parties' agreement provides that someone is an independent contractor is relevant, but not dispositive. In addressing the weight to be given to such an agreement, Proposed Bill 12:11-1.6 lists factors to be considered, including: whether the putative employer is the primary drafter of the agreement; whether the terms of the agreement are negotiable; whether the putative employer reserves the right to unilaterally modify the terms of the agreement; and whether the putative employer can terminate the agreement at any time during its term. Because of the need for uniformity and the fact that franchise systems must be able to adapt over time to meet competitive changes, very few franchise systems will satisfy these criteria. The effect of this would be to render irrelevant the parties' agreement that their relationship is one between independent contractors.

2. Impact of the Proposed Rule on Franchises in New Jersey

IFA and its members are deeply concerned about the adoption of the Proposed Rule. If adopted, the Proposed Rule poses a threat to the more than 21,000 franchised small businesses operating in New Jersey that are responsible for more than 228,000 direct jobs and deliver more than $25 billion to the New Jersey economy. If franchisors or franchisees decide to leave the state, or simply decide to curtail future franchising, it would have a significant, adverse impact on the state's economy, the workers and consumers served by franchised businesses in the state, and the competition supported by those franchised businesses.

3. The Proposed Rule is Impermissible under New Jersey Law

The New Jersey Constitution establishes that the power to create, amend and repeal laws in New Jersey rests solely with the New Jersey State Legislature, which consists of the General Assembly and the State Senate. The NJDOL cannot draft or enact laws independently. (N.J.S.A. 52:11-27).

We respectfully submit that the NJDOL's Proposed Rule violates this prohibition, as it goes far beyond clarifying the existing ABC Test. Instead, the Proposed Rule effectively seeks to amend the ABC Test in violation of the New Jersey Constitution and the New Jersey Administrative Procedure Act (N.J.S.A. 52:14B-4). Recent history proves this. As you will no doubt recall, the New Jersey State Legislature sought to make similar changes to the ABC Test in 2019 under Senate Bill 4204, which proposed expanding the scope of prongs B and C of the ABC Test. While Senate Bill 4204 failed to pass in the 2019 legislative session, the fact that the State's prior efforts to amend prongs B and C went through the legislative process (and not a NJDOL rulemaking process) confirm that the authority to make such changes to the ABC Test rests squarely with the New Jersey State Legislature. The Department lacks the authority to do what it is now seeking to accomplish through a rulemaking process.

We encourage the Department to focus its efforts on clarification of the ABC Test and to leave substantive amendments to the ABC Test to the New Jersey Legislature to effect through the legislative process.

4. Unintended Consequences of the Proposed Rule

By expanding the scope of the ABC Test, the Proposed Rule emboldens plaintiffs to pursue franchisors as deep-pocket defendants in a wide variety of legal actions, including personal injury claims arising from accidents or misconduct involving franchisee personnel, including auto accidents, premises liability claims, negligence claims, and harassment or assault claims. This is particularly problematic because franchisors are not involved in hiring, supervision, or operational control of their franchisees' employees. The Proposed Rule provides litigants a new avenue to bypass the independent business structure of the franchise model and seek damages from franchisors, even when liability is tenuous or nonexistent.

Additionally, the Proposed Rule dilutes the franchisee's status as an independent business owner, instead casting them as quasi-employees of the franchisor, destroying the equity they built in their franchised businesses and the autonomy they sought as entrepreneurs when deciding to invest in a franchise opportunity. The diminution in value of franchised businesses means a reduced market for franchise resales and depressed prices of existing franchised businesses for sale due to fewer willing buyers.

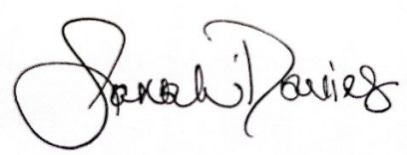
Given the potentially disastrous impact adoption of the Proposed Rule would have on franchising in New Jersey, IFA urges the Department to withdraw the Proposed Rule.

Thank you for the opportunity to submit our views, and for considering our perspective.

Respectfully submitted,

INTERNATIONAL FRANCHISE ASSOCIATION

By and through its member companies



Sarah Davies, General Counsel