TESTIMONY OF CATHERINE MONSON
Chief Executive Officer
FASTSIGNS® International

Before the

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

"Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?"

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Introduction

Chairman Roe, Ranking Member Tierney, and distinguished members of the subcommittee, my name is Catherine Monson. I am Chief Executive Officer of FASTSIGNS® International. I am appearing before you today on behalf of both my company and the International Franchise Association (IFA). Thank you for the invitation to share our views on the issue of joint employer status.

I have been in franchising for over 30 years, working for multiple franchisors, starting with Sir Speedy Printing Centers in 1980. I worked for PIP Printing & Marketing Services and then became CEO of FASTSIGNS in 2009. FASTSIGNS, the sign industry's leading franchise system, founded in 1985, is a sign and visual graphics company that provides comprehensive visual marketing solutions to customers of all sizes across all industries to help them meet their business objectives. Our network of sign centers includes 489 locations in the United States, 26 locations in Canada, plus locations in the United Kingdom, Mexico, Brazil, the Caribbean, Saudi Arabia and Australia, for a total of 555 locations worldwide.

I have been an active member of the IFA for over 20 years, sitting on multiple committees, appearing as a frequent speaker at industry events, and serving for six years on the Board of Directors. The IFA is the oldest and largest trade association in the world devoted to representing the interests of franchising. Its membership includes franchisors, franchisees and suppliers. The IFA's mission is to protect, enhance and promote franchising through government relations, public relations and educational programs on issues that affect franchising. IFA's membership currently spans more than 300 different business lines, including more than 11,000 franchisee, 1,100 franchisor and 575 supplier members nationwide.

I am passionate about franchising. I have seen franchising help thousands of Americans achieve their dream of business ownership. Franchising is a large community of diverse businesses that all operate using the franchise business model to distribute their products or services. Under this model, entrepreneurs own their own businesses and acquire the right to operate those

businesses using the trademarks, products and business strategies of a proven franchise system. In the process, the franchisee also receives the right to use a business plan, which the franchisor has crafted for all of its outlets. This business plan outlines a system of marketing, production and operational standards that maintain brand quality and uniformity. While franchise businesses are very common in the restaurant and hospitality industries, franchising is also popular across numerous other sectors, including health and wellness, child care, education, plumbing, senior care, signage, business services, personal services, retail and automotive.

In the franchising industry, we like to say that franchise owners are in business for themselves, but not by themselves. The franchise arrangement puts the franchisee in a better position than other small businesses by giving him or her access to resources unavailable to those other small businesses, including the uniform operating system. The franchisees run their own separate business, with a separate EIN, and pay all their own taxes. Successful franchisees determine the profitability of their enterprise by executing proven business plans, controlling their operating costs and managing the people who make this system work.

The franchisee creates jobs that provide training and upward mobility for its employees. The employees work for the franchise owner, not for the franchisor brand. The franchisee controls the hiring, firing, discipline, supervision and direction of those employees. The franchisor has no input into the franchisee's labor relations. Franchising creates jobs for millions of Americans and generates trillions of dollars in total sales, and franchising is growing at a faster rate than the economy as a whole. Moreover, many American franchised businesses have become world-renown brands and are a substantial asset to the trade balance of the United States, all without exporting a single job. Franchising is a great American success story, Mr. Chairman.

How the NLRB Plans to Change the Rules

On July 29, 2014, the National Labor Relations Board's General Counsel announced that he had authorized complaints against numerous McDonald's franchisees and McDonald's USA as "joint employers" for alleged unfair labor practices. The NLRB General Counsel's decision to issue complaints against both McDonald's franchisees and the franchisor marks a drastic change in National Labor Relations Board (NLRB) precedent regarding the franchisor/franchisee relationship. The General Counsel is asking the NLRB to impose liability on the franchisor for the labor relations of individual franchisees simply because the franchisor establishes general operational procedures for the franchisees' business, ignoring the fact that the franchisor has no involvement in or control over its franchisees' employment practices.

The NLRB General Counsel's latest move disregards established laws regarding the franchise model. If they are found to be joint employers, franchisors would be liable for individual franchisees' employment practices. Such a rule change could completely upend the franchise model and have devastating consequences for franchising as an economic force in the United States.

In fact, any change in the existing joint employer standard would significantly change the face of American business and impact every level of the supply chain. Multiple businesses and contractual relationships are based on this decades-old standard, which has been endorsed by Congress and the courts. Under the current standard, only legally separate entities that exert a significant and direct degree of control over employees, and their essential terms and conditions of employment, are considered joint employers. Essential terms and conditions of employment are those involving hiring, firing, discipline, supervision and direction of employment.

The General Counsel has yet to release any complaints in the McDonald's cases, or any memorandum or decisions outlining its new approach, so we are uncertain what the new rules might be. However, a look at the General Counsel's Amicus Brief in the pending *Browning-Ferris* case illuminates the underlying rationale behind the complaints. In that brief, the General Counsel asserts that "the Board should abandon its existing joint-employer standard". The General Counsel also asserts that companies may effectively control wages by controlling every other variable in the business. The General Counsel's new standard shifts the analysis away from the day-to-day control over employment conditions to operational control at the system-wide level. Under the new standard, franchisors would be joint employers whenever the franchisor exercises "indirect control" over the franchisee. The focus would be on "industrial realities" that make the franchisor a necessary party to meaningful collective bargaining. The NLRB would find joint employment even though the franchisor plays no role in hiring, firing, or directing the franchisee's employees.

Since brand standardization is the key to each franchise system, the General Counsel's proposed standard makes franchisors and franchisees particularly susceptible to joint employer findings. Virtually all franchisors prescribe operational procedures and requirements in their franchise agreements to preserve the quality and consistency of the products and services offered by franchisees and to maintain the value of their trademarks. However, the franchisor leaves the day-to-day management of the franchisees' businesses to the individual small business owners themselves. Under each franchise agreement, the franchisee is solely responsible for hiring and firing its own employees, training them, paying their wages, and setting their work schedules and work assignments.

The General Counsel is asking the NLRB to adopt a test such that any form of operational control or standardization will automatically trigger joint employment liability. In addition, franchising is heavily regulated under federal and state law. The controls required and anticipated by these regulations will automatically force the franchise model into the proposed new joint employer standard.

The General Counsel asserts that, prior to 1984, the NLRB consistently found joint employment where one entity exercised direct **or** indirect control over terms and conditions of employment of another entity's employees. With all due respect, the General Counsel is wrong. In cases dating back over forty years, the Board has never treated franchisees and franchisors as joint employers. These cases have involved several different franchise concepts – restaurants, retail,

automotive, and others – and have focused on different areas of the relationship between franchisees and franchisors. In each case, the Board has consistently and unambiguously ruled that the limited control exerted by franchisors for the purpose of brand maintenance does not sustain a finding of joint employment. A joint employer finding is justified only when the franchisor is in a position to control the franchisee's labor relations. The General Counsel's attempt to use operational control as the main factor for finding joint employment clearly changes decades of precedent for franchisors and franchisees.

How the NLRB's Joint Employer Standard Will Change Franchise Operations

Right now, the old joint employer standard continues to be the law. It is up to the five members of the NLRB itself to make any official change. But the General Counsel's decision to issue a complaint against one of the country's leading franchisors puts all franchise businesses on notice. If the NLRB adopts the General Counsel's proposed rule, the NLRB will inject itself into complex business relationships that are completely unrelated to labor relations. Doing so casts doubt on its status as a neutral enforcer of the law.

When joint employer status is established, both entities may be liable for the other's unfair labor practices, including unlawful discipline or discharge of employees under the National Labor Relations Act (NLRA). Faced with potential liability for their franchisees' employment decisions, franchisors may be forced to exercise operational control over all the employment and human resource decisions of franchisees, undermining the franchise business model. Franchisees are owner-operators with a financial stake in the business. Without the ability to decide to hire and fire those employees who work for them, and oversee employee performance, there is less incentive for the franchisee to participate in the business model. This increased franchisor control would significantly disrupt the franchise relationship. Franchisors too would have less incentive to participate in the business model going-forward if they were responsible for areas of operation historically reserved to and exercised by their franchisees.

A new joint employer standard may make it easier for unions to organize multiple franchisees of a single franchisor. A new joint employer standard will increase the likelihood of union "corporate campaigns" against national franchisors and pressure franchisees to organize. As in the McDonald's case, union agents and community representatives engaged in corporate campaigns often use the NLRB complaint process as a weapon against employers. Individual franchisees will be involved in a long, expensive legal battle for neutrality. Franchisees cover their own operational expenses, including their legal bills. These small businesses cannot bear the cost of these fights and will be forced out of business. If the franchisor is forced to increase its control over franchisees' employment conditions given its ultimate joint employer responsibility for the franchisees' employees, the franchisor could face increased liability under other statutes.

On August 28th, in *Patterson v. Domino's Pizza,* the California Supreme Court rejected a new agency standard for vicarious liability because it was the franchisee, not the franchisor, which

exerted exclusive control over the employees' employment conditions. The court rejected the idea that the imposition and enforcement of a uniform marketing and operational plan automatically saddle the franchisor with liability for the franchisee's employees. The court will impose liability only if the franchisor retained the employer's traditional rights of general control over day-to-day hiring, direction, supervision, discipline, and discharge of the franchisee's employees. Since there was no evidence of this day-to-day control, the court dismissed the claims against the franchisor.

Under the proposed new standard, franchisors would need to amend their franchise agreements to limit the operational control the General Counsel now would find to be dispositive of joint employer status. To avoid potential coverage under the operational test, franchisors must reduce involvement with franchisees on the local level, avoid training franchisee employees on brand standards, avoid enforcing operational requirements, avoid standardized employee handbooks and loosen rules regarding franchisee termination. All of these changes would negatively impact brand quality and uniformity and significantly undermine the entire franchise model. In addition, the changes would remove the positive operational tools and support the franchise model provides to individual business owners.

The new rules could dampen franchising efforts and economic growth. Franchise businesses are adding jobs faster than the rest of the private sector. With the current standard in place, franchise jobs are expected to increase 2.6% in 2014, or by 221,000 new jobs. With the current standard in place, the demand for franchise units is expected to expand by 12% this year. However, if franchisor and franchisee liability increases under new joint employment rules, those new jobs may evaporate. Because of the unanticipated high costs to franchisors and franchisees, franchisors will stop selling franchises and franchisees will stop buying. Without the franchise model, individual entrepreneurs would be deprived of the opportunity to own their own business, franchisors would be denied the opportunity to expand their business, and millions of jobs will be lost.

The cumulative cost of additional liabilities and litigation that a new joint employer standard would bring could force many franchisors out of business. Franchise growth would halt, and product quality would suffer without the franchisor's mechanisms to maintain brand standards. Local franchisees would suffer, as would the hundreds of thousands of workers they employ. This "domino effect" demonstrates that the repercussions of revising the joint employer standard are grave, and they are far-reaching.

Conclusion

Mr. Chairman, thank you again for allowing me to share FASTSIGNS' and IFA's views on the joint employer issue. FASTSIGNS and IFA believe that the NLRB General Counsel's new joint employer standard would have a devastating effect on the franchising industry, entrepreneurship and franchise jobs.

I would be happy to answer any questions you may have.