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The Honorable R. Alexander Acosta  
Secretary of Labor  
c/o Ms. Jeanne Klinefelter Wilson, Deputy Assistant Secretary  
Office of Regulations and Interpretations,  
Employee Benefits Security Administration  
United States Department of Labor  
200 Constitution Avenue N.W., Rm N-5655  
Washington, DC 20210

**RE: RIN 1210–AB85, Comments, *Definition of Employer under Section 3(5) of ERISA—Association Health Plans 29 CFR 2510 (January 5, 2018)***

Dear Mr. Secretary:

The International Franchise Association (“IFA”) submits these comments to the Proposed Rule “Definition of ‘Employer’ Under Section 3(5) of ERISA—Association Health Plans” 29 C.F.R. Part 2510, which was published by the Department of Labor (the “Department” or “DOL”) on January 5, 2018 (the “Proposed Rule”). The Proposed Rule provides a framework for the conditions that a group of employers must satisfy to meet the definition “employer” under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) for sponsoring a group health plan through the formation of Association Health Plans (“AHPs”). The Proposed Rule was issued as directed by Executive Order 13813, *Promoting Healthcare Choice and Competition Across the United States*, which seeks to significantly expand access to more affordable health care options for millions of Americans (the “Executive Order”).<sup>1</sup>

The IFA is an international organization of franchise companies. The IFA’s mission is to protect, enhance, and promote the franchise business model. The IFA works through its government relations and public policy, media relations, and educational programs to further the interests of more than 733,000 franchise establishments in the United States that support nearly 7.6 million direct jobs. The IFA’s members operate in all 50 states and share common goals and interests specific to franchising. Most franchises are small businesses, without human resources departments or in-house legal counsel. They rely upon information and support provided by the IFA.

The IFA applauds the Executive Order and the Department’s issuance of the Proposed Rule expanding the definition of “employer” under Section 3(5) of ERISA to allow for increased access to AHPs. As accurately noted in the Executive Order, “large employers often are able to obtain better terms on health insurance for their employees than small employers because of their larger pools of insurable individuals across which they can spread risk and administrative costs.” Small businesses, such as franchises, bear a larger financial and administrative burden when providing quality benefits for their employees than large employers. Indeed, franchises have historically struggled to provide quality employee benefits to employees given the constraints of the small market rules, the financial expense and administrative

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<sup>1</sup> 82 Fed. Reg. 48385.

burdens. If businesses engaged in franchising are able to form AHPs pursuant to the Proposed Rule, millions of Americans franchisee employees will gain access to quality health care coverage.

Franchising uses economies of scale to help small business owners deliver affordable services and products to their customers through efficient and established distribution channels, communication protocols, and common business practices. The structure and experience of the franchise model makes it uniquely suited to implement and manage quality AHPs. Franchises can effectively utilize AHPs through their intra-band structures, vertical distribution models and regionally among multiple small business brands or through the IFA to maximize the impact of the Executive Order.

The IFA welcomes the opportunity to “give America’s franchise job creators and their employees access to high quality, less expensive health coverage, creating greater flexibility and cost containment in providing healthcare coverage.”

### **Summary of Comments**

1. Expanded access to AHPs provides a workable, efficient solution to the high costs and administrative burdens which currently prohibit small businesses from providing affordable quality health insurance to millions of American workers.
2. The Employee Benefit Security Administration (“EBSA”) under the Department has jurisdiction and authority to interpret Title I of ERISA. The Department has been directed to propose regulations or revise guidance to expand access to health coverage by allowing more employers to form AHPs.
3. To meet the policy goals of ERISA and the Executive Order, the definition of “commonality of interest” should be interpreted broadly to include the franchise business model.
4. The IFA supports the adoption of a safe-harbor provision in the final rule clarifying that the establishment and participation in an AHP maintained pursuant to DOL regulations does not create or imply joint employer liability.
5. The Department should clarify that AHPs will be considered the “employer” for purposes of sponsoring a single large group health plan and will not be considered multiple employer welfare arrangements (“MEWAs”) subject to state MEWA requirements; or in the alternative the Department should use its authority under ERISA Section 514(b)(6) to pre-empt state regulation of MEWAs for AHPs.
6. The IFA recognizes and supports the need for non-discrimination requirements applicable to AHPs to prevent stacking of risk pools which could undermine the affordability and accessibility of health coverage for those who need it most and recognizes the need for the Proposed Rule’s non-discrimination requirements for AHPs.

## Specific Comments

- 1. Expanded access to AHPs provides a workable, efficient solution to the high costs and administrative burdens which currently prohibit small businesses from providing affordable, quality health coverage to millions of American workers.**

While employer-sponsored coverage remains the most common source of healthcare coverage in the United States, a smaller proportion of people are covered by employers than a decade ago.<sup>2</sup> Moreover, small and large firms vary substantially on health insurance offer rates and costs. Small firms are less likely to offer coverage, and there are important differences in the health benefits that they do offer. Workers at small firms are responsible for paying both a larger share of family premiums as well as higher cost sharing than workers in large firms.<sup>3</sup>

In recent years, studies have shown that smaller employers have been providing less coverage. For instance, for the period between 2008 and 2015:<sup>4</sup>

- The number of employers with fewer than 10 employees and which provide health coverage dropped from 35.6 % to 22.7% (36% decline);
- The number of employers with 10-24 employees and which provide health coverage dropped from 66.1% to 48.9% (26% decline); and
- The number of employers with 25-99 employees and which provide health coverage dropped from 81.3% to 73.5% (10% decline).

Small group market rules under the Affordable Care Act (the “ACA”) make it more difficult for small businesses to provide affordable health insurance without the purchasing power of a large group. This is because insurance companies charge higher rates for smaller risk pools.

In order to measure the impact of the expense and administrative challenges faced by franchisee employers in providing health care coverage to their employees, the IFA conducted a member survey of both franchisors and franchisees regarding these issues. There were 216 franchisee employer responses from across the United States and 115 franchisor employer responses.

With respect to the 216 franchisee respondents:

- 65% do not provide any health coverage at all for their employees;
- Only 35% provide health coverage;
- 92% of respondents that do not provide health coverage refrain from doing so due to the cost burden;
- 35% indicated that administrative burdens factored into the decision not to provide health coverage;
- 70% of franchisee respondents that provide health coverage characterize it as a significant financial burden;

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<sup>2</sup> Michelle Long, Matthew Rae, and Gary Claxton, *A Comparison of the Availability and Cost of Coverage for Workers in Small Firms and Large Firms: Update from the 2015 Employer Health Benefits Survey*, Kaiser Family Foundation (Feb. 5, 2016).

<sup>3</sup> Michelle Long, Matthew Rae, Gary Claxton and Anthony Damico, *Trends in Employer-Sponsored Insurance Offer and Coverage Rates, 1999-2014*, Kaiser Family Foundation (Mar. 21, 2016).

<sup>4</sup> Fronstin, Paul, *Fewer Small Employers Offering Health Coverage, Large Employers Hold Steady*, EBRI Notes Vol. 37, No. 8 (July 2016).

- 97% believe providing health coverage will make their franchisee business more competitive;
- 100% of respondents indicated they would provide health coverage to their employees if they could provide coverage through an AHP;
- 61% of the survey respondents would provide health coverage to their employees through an AHP if there is no risk of joint employer liability across the AHP employer members; and
- 78% of franchisees would provide health coverage if it was supported through their franchisors.

Eighty-six percent (86%) of the franchisee respondents employ less than 20 employees and 9% between 21 and 50 employees. Only 4% employ more than 50 employees.

With respect to the franchisor respondents:

- 72% reported that their franchisees do not provide health coverage;
- Only 27% reported that their franchisees are able to provide health coverage;
- Of those respondents whose franchisees do not provide health coverage, 94% refrain from doing so due to the cost burden and 44% report the administrative burden as a factor;
- Of the 27% of respondents whose franchisee employers are able to provide health coverage 75% characterize it as a significant burden to their franchisee employers;
- 99% of the franchisor respondents believe providing health coverage will make their franchisee employers more competitive; and
- 99% of the franchisor respondents would help facilitate coverage for their franchisees' employees through an AHP if there was no risk of joint employer liability.

Eight-two percent (82%) of the franchisor respondents have franchisee employers that employ less than 20 employees and 11% have franchisee employers with between 21 and 50 employees. Only 5% have franchisee employees that employ more than 50 employees.

As the data from this survey demonstrates, small franchisee employers and their franchisor partners overwhelmingly want to provide health coverage to the franchisee employees. However, the small franchisee employers disproportionately do not provide health coverage due to the financial expense and administrative burdens. AHPs will provide a workable solution to the high cost of coverage and administrative challenges, but both franchisees and franchisor employers are concerned about the risk of joint employer liability inherent in the AHP structure.

**2. The Employee Benefit Security Administration (“EBSA”) under the Department has jurisdiction and authority to interpret Title I of ERISA. The Department has been directed to propose regulations or revise guidance to expand access to health coverage by allowing more employers to form AHPs.**

In the United States, more half of all Americans receive health insurance coverage through their employers. ERISA provides the regulatory framework governing employer-sponsored benefits, such as health insurance and retirement benefits. The purpose of ERISA is to “protect ... the interests of participants in employee benefits and the beneficiaries by setting out substantive regulatory requirements for employee benefit plans...”<sup>5</sup> The Supreme Court has reiterated the statutory authority

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<sup>5</sup> 29 U.S.C. § 1001(b).

of ERISA with respect to employee benefit regulation.<sup>6</sup>

The Executive Order directs the DOL to consider issuing regulations that will expand access to more affordable health coverage by permitting more employers to form AHPs. The Secretary has been specifically directed to consider expanding the conditions that a group of employers must satisfy to act as an “employer” under ERISA Section 3(5) for purposes of sponsoring a group health plan by reconsidering the “commonality-of-interest” requirements under current Departmental guidance.

In the case of statutory and regulatory provisions like those involved here, the DOL has the authority to supersede its previous interpretations, as articulated in non-binding advisory opinions, to address marketplace developments and new policy and regulatory issues.<sup>7</sup>

The IFA urges the Department to use its inherent authority under ERISA as directed by the President to provide a consistent regulatory framework that will promote access to AHPs for small businesses and their employees nationwide.

**3. In order to meet the policy goals of ERISA and the Executive Order, the definition of “commonality of interest” should be interpreted broadly to include the franchise business model.**

ERISA’s current definition of “employer” includes: “any person acting directly as an employer; or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.”<sup>8</sup>

In order for a group or association of employers to act for an employer in relation to an employee benefit plan, court cases and advisory opinions have imposed two broad requirements. First, the group of employers that establishes and maintains the plan must be a “bona fide” association of employers “tied by a common economic or representation interest, unrelated to the provision of benefits,”<sup>9</sup> thus establishing the “commonality of interest” requirement. Second, the employer-members of the organization that sponsors the plan must exercise control, either directly or indirectly, both in form and in substance, over the plan.<sup>10</sup> The AHP structure, as outlined in the Proposed Rule, provides the employer-members of the AHP will exercise control over the form and substance of the plan. Therefore, our analysis focuses on the commonality of interest requirement necessary for an association or group of employers to sponsor a health plan.

Courts have consistently rejected the contention that heterogeneous businesses that share nothing more than a common size and a high regard for the “entrepreneurial spirit” enjoy a commonality of interest.<sup>11</sup>

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<sup>6</sup> “ERISA is a comprehensive federal law designed to promote the interests of employees and their beneficiaries in employee benefit plans.” *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 90 (1983).

<sup>7</sup> See, generally, *Perez v. Mortgage Bankers Assn*, 135 S. Ct. 1199 (2015).

<sup>8</sup> 29 U.S.C. 1002(5).

<sup>9</sup> *Wisconsin Educ. Ass’n Trust v. Iowa State Bd.*, 804 F.2d 1059, 1063 (8th Cir. 1986).

<sup>10</sup> See DOL Op. No. 96–25A (“[I]t is the Department’s view that the employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and substance, to act as a bona fide employer group or association with respect to the program.”).

<sup>11</sup> See, e.g., *Moideen v. Gillespie*, 55 F.3d 1478, 1481 (9th Cir. 1995) (no commonality of interest where membership limited to employers with fewer than 500 employees); *Gruber v. Hubbard Bert Karle Weber, Inc.*, 159 F.3d 780, 788 (no commonality of interest where members included diverse groups such as tool and die makers, a beer distributor and a manufacturer of airplane engine parts, and the only common interest was that the members employed fewer than 225 employees); *International Ass’n of*

The IFA recognizes the Department's current interpretation and application of the definition of "employer" under ERISA Section 3(5) requires groups of employers to be part of a "bona fide association" to sponsor health plans. These interpretations have been part of the Department's effort to prevent the establishment of plans for "entrepreneurial purposes." However, the IFA believes that the current definition and its interpretations unduly limit groups of small employers from forming AHPs preventing them from providing quality, affordable health care benefits to employees.

The Proposed Rule reiterates that for "purposes of Title I of the Act and this chapter, a bona fide group or association of employers capable of establishing a group health that is an employer welfare benefit plan shall include a group or association of employers that meets the following requirements ... [including a] 'commonality of interest'." It further states that the commonality of interest of the association's employer members may be established by employers being in the same "trade, industry, line of business or profession."

The IFA asks the Department to consider a broad interpretation of the definition of "commonality of interest" which includes the franchise business model. The franchise business model is a federally recognized and defined category of businesses that uniquely contributes to the United States economy.

The United States Federal Trade Commission (FTC) enacted the Federal Franchise Rule in 1979, and has since refined and amended it, most recently in 2008, to provide strict guidelines and definitions around what constitutes a business format franchise. The FTC defines a business arrangement as a "franchise" if it satisfies the following three criteria:<sup>12</sup>

1. The franchisor promises to provide its trademark or other commercial symbol under which the business will operate, sell, or distribute goods or services.
2. The franchisor promises to exercise significant control or provide significant assistance in the operation of the business such as, reserving site approval, imposing design or appearance requirements, prescribing operating hours, establishing production methods and standards, and dictating mandatory accounting practices. Significant assistance is supported by formal training programs, site location assistance, and operating advice such as by furnishing a detailed operating manual.
3. The franchisor requires a minimum payment of at least \$500 during the first six months of operations.

These three criteria have been accepted by agencies, regulators, and court systems on both the federal and state levels. Given this, franchises are strictly creatures of statute and are regulated as such only if they fit the FTC's statutory definition. The FTC Franchise Rule also established the requirement for franchisors to make detailed disclosures to prospective investors within a uniform Franchise Disclosure Document ("FDD").

The FTC Franchise Rule is the baseline upon which states can choose to elaborate or adopt more specific requirements for franchises. Fourteen states have enacted their own supplemental franchise laws and require franchises to register their FDD with specific state agencies prior to selling franchises in that state

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*Entrepreneurs of America Ben. Trust v. Foster*, 883 F.Supp. 1050, 1058–59 (no commonality of interest where membership limited to employers sharing "adherence to the principles of entrepreneurial spirit and free enterprise").

<sup>12</sup> 16 CFR §436.1(h).

– these registration states typically have the highest levels of regulation and enforcement of the franchise laws.

An additional ten states require franchises to file their FDD with state agencies for review and approval in order to sell franchises in that state. These enhanced franchise sales state regulations incorporate additional requirements and limitations defining what constitutes a franchise, including more stringent definitions of significant control and assistance, varying requirements that there be a marketing plan prescribed in substantial part by the franchisor, or different approaches to defining a community of interest between the parties.

Many state enforcement actions of franchise laws involve the “inadvertent or accidental franchise.” These consist mostly of business arrangements that fit all the definitions of a franchise, but are falsely operating under other business agreements (e.g., license agreements, dealer agreements, trademark agreements or consulting agreements). In these cases, the seller is often ignorant of franchise laws or is actively trying to avoid regulatory requirements. There have been hundreds such “inadvertent/accidental franchise” cases involving violation of FTC’s Franchise Rule and/or additional state requirements.<sup>13</sup>

Franchise businesses have a strong and sufficient “commonality of interest,” based on the FTC definition and governing state laws, that will give structure to AHPs limiting participation to a specific group of employer-members. At the same time, allowing franchises to establish AHPs would be broad enough to result in the creation of AHPs that will provide quality, affordable health coverage to the American workers who will most benefit from such expanded access.

The franchise business model allows small businesses to combine knowledge and resources to form a business relationship unique to franchising and limited in scope. Though franchise businesses comprise only three percent of (3%) of the U.S. GDP, there are approximately 733,000 franchise establishments in the United States. Franchising employs millions of American workers who are at risk of not having adequate health insurance coverage due to the current expense and administrative burdens of providing health care coverage in the small group market.<sup>14</sup>

Broadening the commonality of interest rule to include the franchise business model across industry sectors will allow larger risk pools, greater negotiation of rates, and administrative efficiencies thus exponentially increasing the affordability and accessibility of health insurance to working Americans who need it the most. Indeed, the preamble to the Proposed Rule specifically states that, “treating health coverage sponsored by an employer association as a single group health plan may promote economies of scale, administrative efficiencies and transfer plan maintenance responsibilities from participating employers to the associations.”

The franchise model is perhaps the best example of how economies of scale can be utilized to make the delivery of products and services more affordable for small business owners, and their customers.

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<sup>13</sup> See *Cassidy Podell Lynch, Inc. v. Snyder Gen. Corp.*, 944 F.2d 1131, 1139-40 (3d Cir. 1991), Bus. Franchise Guide (CCH) ¶ 9885 (while grant element existed, court found relationship was not a franchise because requisite community of interest was missing); *Neptune T.V. & Appliance Serv. Inc. v. Litton Microwave Cooking Prod.*, 462 A.2d 595 (N.J. 1983), Bus. Franchise Guide (CCH) ¶ 8023 (similar outcome as Cassidy); *Hoosier Penn Oil Co. v. Ashland Oil Co.*, 934 F. 2d 882, 886 (7th Cir. 1991), Bus. Franchise Guide (CCH) ¶ 9834 (applying Indiana law, court found that motor oil distributor was not substantially associated with supplier to create a franchise).

<sup>14</sup> *Franchise Business Economic Outlook for 2018, January Forecast*; Prepared for the International Franchise Association Education and Research Foundation, By: IHS Markit Economics.

Franchisors currently use their bargaining power to negotiate and efficiently provide services and distribute products in the manufacturing and agriculture industries throughout their systems. If the benefits of economies of scale can be translated to the purchase and provision of health insurance through the formation of AHPs, the franchise systems will be able to improve access to coverage at an excellent rate.

The IFA also asks the Department to consider an interpretation of “commonality of interest” for franchises defined by the industry sectors established by the Bureau of Labor Statistics (“BLS”). The BLS provides industry and labor sector analysis using the North American Industry Classification System (“NAICS”). Industries are broken into sectors based on BLS set categories of groups of employers that have a common basis for analysis and assigned specific analytic codes. Specifically, IFA asks that the Department consider that “commonality of interest” be defined to include associations within the “Service Providing Industry” NAICS codes. These businesses provide services to consumers as opposed to manufacturing products or agriculture production. The Service Providing Sector industries are recognized as a separate, definable market sector. Within the Service Providing Industry Sector there are only 43 sub-sectors that include franchise business service providers.<sup>15</sup> Ninety-five percent (95%) of active franchise brands belong to Service-Providing Industries as defined by BLS.<sup>16</sup> The Department may use the established NAIC sectors as a basis for “commonality of interest” as they are a definable, limited and federally recognized group of employers.

In summary, the IFA encourages the Department to interpret “commonality of interest” to specifically include small business employers in the franchise industry. Franchises have a definable and limited business structure, comprise only three percent (3%) of the United States Gross Domestic Product, and are uniquely positioned to use economies of scale and existing business modalities to effectively provide affordable, quality health coverage to their employees. Alternatively, the IFA would support a basis of commonality of interest for franchise business owners within the “Service Providing Sector” based on the attached NAICS Service Sector Codes.

**4. The IFA supports the adoption of a safe-harbor provision in the Final Rule clarifying that the establishment and participation in an AHP maintained pursuant to DOL regulations does not create or imply joint employer liability.**

Expanding the definition of “employer” to include AHPs will simplify and expand access to affordable, quality health coverage. However, in order to maximize the benefits of the franchise business model in health care delivery, the Department’s final rule should include language that ensures franchises and other small businesses are not at risk of joint employment liability based on the offering of an AHP.

Background

Federal and state employment laws have traditionally found that a joint employer is one who exerts direct and immediate control over essential employment terms of another entity’s employees. For over 30 years, the National Labor Relations Board (the “NLRB”) required direct and immediate control over key employment terms for a joint employer relationship. Under the long-standing test, businesses were joint employers only when they shared direct and immediate control over the essential terms and conditions

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<sup>15</sup> We have attached service sector franchise data as Appendix A.

<sup>16</sup> IFA member data.



of employment. Only those entities that were directly involved in an employee's day-to-day working conditions could be held liable for any labor law violations.

However, in the past decade the NLRB altered the joint employer test to include indirect and unexercised control.<sup>17</sup> The NLRB departed from its longstanding precedent by expanding the concept of “control” over key employment terms. The Board’s standard in *Browning-Ferris* is a fact-based test that is decided on case-by-case basis and determines whether a company directly, indirectly or potentially controls the means or manner of another entity’s employees’ terms of employment. This case-by-case factual inquiry, along with the NLRB’s non-exhaustive list of factors, creates uncertainty and unpredictability for businesses, especially franchises.

In an attempt to bring more certainty for businesses, on December 14, 2017 in *Hy-Brand Industrial Contractors, Ltd.*, the NLRB rejected the controversial *Browning-Ferris* decision and returned to its prior test for joint employers. In doing so, the NLRB clearly articulated the return to a joint employer standard which requires the proof of actual exercise over the essential terms of employer:

[A] finding of joint-employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having “reserved” the right to exercise control), the control must be “direct and immediate” (rather than indirect), and joint-employer status will not result from control that is “limited and routine.”<sup>18</sup>

*Hy-Brand* came under immediate attack from supporters of the decision in *Browning-Ferris*. This attack eventually led the NLRB to vacate its decision in *Hy-Brand*, on February 26, 2018. Given the vacating of *Hy-Brand*, the NLRB’s standard in *Browning-Ferris* remains in effect. As such, the NLRB’s current joint employment test determines whether a company directly, indirectly or potentially controls the means or manner of another entity’s employees’ terms and conditions of employment.

To summarize, the NLRB decided *Browning-Ferris* on August 27, 2015, reversing decades of its precedent with respect to the standard for determining whether two entities were joint employers. Then, nearly two and a half years later, on December 14, 2017, the NLRB issued *Hy-Brand* reversing *Browning-Ferris* and returning to the prior standard. Then on February 26, 2018, the NLRB vacated *Hy-Brand* reinstating the *Browning-Ferris* indirect or potential control test. Given this history, is there any wonder why employers are confused about the proper joint employer standard?

To make matters even more confusing for employers, the NLRB’s expanded joint employer definition from *Browning-Ferris* spread from the NLRB to other agencies. The Wage and Hour Division at the Department previously released administrative directives expanding joint employer liability to statutes under their jurisdiction.<sup>19</sup> Of course, under your direction, the aforementioned joint employment guidance has been revoked by the Department. Although most welcome, recently Senator Rubio, in a letter addressed to you, noted that field people from the Wage and Hour Division continue to use the “revoked” standard as a new guidance or regulation has not been issued.

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<sup>17</sup> See *Browning-Ferris Industries of California, d/b/a BFI Newby Island Recyclery (Browning-Ferris)*, 362 NLRB No. 186 (2015).

<sup>18</sup> *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 165 (2017).

<sup>19</sup> See Administrator’s Interpretation No. 2015-1, *The Application of the Fair Labor Standards Act’s ‘Suffer or Permit’ Standard in the Identification of Employees Who are Misclassified as Independent Contractors* and Administrator’s Interpretation No. 2016-1, *Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act* available at <https://www.dol.gov/whd/opinion/opinion.htm>.

The Department also issued a fact sheet on joint employment under the Family and Medical Leave Act applying the same analysis.<sup>20</sup> The EEOC filed a brief in support of the NLRB's new standard in the federal appeal of *Browning-Ferris* arguing that the definition of employer under Title VII is based on the NLRA.<sup>21</sup> A draft memo by the Occupational Safety and Health Administration instructed investigators to determine whether a joint employment relationship exists between franchisors and franchisees based on indirect or potential control, though it is unclear whether this standard is in use.<sup>22</sup>

On the federal and state level, joint employer litigation has mushroomed. Numerous joint employer lawsuits have been brought under federal employment laws. At the state level, joint employment suits have been filed under Workers Compensation Acts, wage and hour laws and human rights' laws. Some of the most high-profile joint employment lawsuits have been against franchise companies. For instance, in November 2016, contract delivery drivers filed a complaint in a Chicago federal court against their employer, and a business that contracted with that employer for services, for overtime pay under the Fair Labor Standards Act. The drivers argue that the third party contractor should be considered their joint employer, although the shipping subcontractor hired and paid them. In May 2016, New York Attorney General Eric Schneiderman filed a wage and hour lawsuit against a large pizza franchisor as a joint employer with ten local franchise owners. In 2017, settlements in these suits were announced, as were nearly \$2 million in restitution payments.

Under the Fair Labor Standards Act, different courts have developed their own widely different multifactor tests for determining joint employer status. The Ninth Circuit's decision over thirty years ago in *Bonnette v. California Health and Welfare Agency*<sup>23</sup> remains the foundation for these tests. In *Bonnette*, the Court looked at whether the alleged employer: (1) maintained the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.

Several Circuits adhere to this basic framework for determining joint employer liability. For instance, the First Circuit continues to apply the *Bonnette* test.<sup>24</sup> The Fifth Circuit also uses four factors to determine joint employer status.<sup>25</sup>

However, other Circuit courts use a mishmash of factors that create a level of variation with which is impossible for businesses to comply. For instance, the Ninth Circuit has added additional factors to the *Bonnette* test that takes into account "indirect" control that putative employers may exercise over

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<sup>20</sup> Fact Sheet #28N: Joint Employment and Primary and Secondary Employer Responsibilities Under the Family and Medical Leave Act (FMLA) available at [https://www.dol.gov/whd/fmla/fact\\_sheets.htm](https://www.dol.gov/whd/fmla/fact_sheets.htm).

<sup>21</sup> *Browning-Ferris Indus. of Ca. v. N.L.R.B.*, Case No. 16-0128, Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of NLRB (D.C. Cir. filed Sept. 14, 2016).

<sup>22</sup> Available on the U.S. House of Representatives Education and Workforce Committee website: [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEwi8pMHs38DTAhVGrlQKHUroAGQQFghFMAU&url=http%3A%2F%2Fedworkforce.house.gov%2Fuploadedfiles%2Fosha\\_memo.pdf&usq=AFQjCNHsDzXDhA9xTTm0pnFoPCKUKel7yw](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEwi8pMHs38DTAhVGrlQKHUroAGQQFghFMAU&url=http%3A%2F%2Fedworkforce.house.gov%2Fuploadedfiles%2Fosha_memo.pdf&usq=AFQjCNHsDzXDhA9xTTm0pnFoPCKUKel7yw).

<sup>23</sup> 704 F.2d 1465 (9th Cir. 1983).

<sup>24</sup> See *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (finding that the plaintiffs' complaint does not allege any facts that trigger any of the four *Bonnette* factors).

<sup>25</sup> *Gray v. Powers*, 673 F.3d 352 (5th Cir. 2012); *Orozco v. Plackis*, 757 F.3d 445 (5th Cir. 2014).

workers.<sup>26</sup> That Circuit now considers a long list of factors that are not exhaustive, and no single factor is determinative. Whether an employee has joint employers depends upon all the facts in a particular case.

The most recent and expansive joint employer standard was adopted by the Fourth Circuit in *Salinas v. Commercial Interiors, Inc.*<sup>27</sup> The court found that a joint employment relationship exists when “two or more persons or entities are ‘not completely disassociated’ with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or informally, directly or indirectly – the essential terms and conditions of the worker’s employment.”<sup>28</sup> The Fourth Circuit noted that, to determine whether two entities are joint employers under this standard, courts should consider six factors.<sup>29</sup>

As the above illustrates, the concept of joint employment, which had been analyzed under established principles for decades, is in a constant state of flux leading to extreme legal uncertainty for businesses. Clarification is needed to entice and protect organizations who will adopt an AHP from the unintended consequences of a joint employment claim. By providing a safe harbor the DOL will act responsibly in promoting the AHP program while providing the legal security plan sponsors will need.

#### AHPs and Joint Employer Potential

Under these expanded legal standards, almost any business relationship could be subject to a joint employer claim. By making larger businesses liable for the employment practices of entities outside its control, expanded joint employer standards will reduce opportunities for entrepreneurs and result in fewer jobs.<sup>30</sup> Franchisors may decrease their franchise opportunities. Franchise owners may not want to stay in business when a franchisor exercises more control over its small business. The franchise industry is one of the leading creators of jobs for small businesses.

With the unpredictable expansion of the standards used to determine joint employer liability, franchise business owners are understandably reluctant to take any action that could be used to establish joint employer liability. The expansion of the definition of employer under Section 3(5) of ERISA while critical for the formation of AHPs, presents a risk for expanded joint-employer liability. Therefore, a safe harbor is absolutely essential to protect businesses from an argument that AHPs create joint employer liability, so that franchise employers will not be reluctant to participate in an AHP.

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<sup>26</sup> *Moreau v. Air France*, 356 F.3d 942, 946-47 (9th Cir. 2004).

<sup>27</sup> 848 F.3d 125 (4th Cir. 2017).

<sup>28</sup> *Id.*

<sup>29</sup>*Id.* (noting these six factors were: (1) whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means; (2) whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to – directly or indirectly – hire or fire the worker or modify the terms or conditions of the workers’ employment; (3) the degree of permanency and duration of the relationship between the putative joint employers; (4) whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer; (5) whether the work is performed on premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and, (6) whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers’ compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.)

<sup>30</sup> Aloysius Hogan, “The NLRB Joint Employer Cases: An Attack on American Business,” Competitive Enterprise Institute, June 2015, <https://cei.org/sites/default/files/Aloysius%20Hogan%20-%20The%20NLRB%20Joint-Employer%20Cases%20-%2006-4-15.pdf>.

In addition to the potential joint employer liability under the federal statutes and state laws discussed above, there is potential for joint employer liability under ERISA Section 510. An individual who is retaliated or discriminated against for the purpose of interfering with any right or benefit under ERISA, or retaliating against such person for engaging in certain protected ERISA-related activities, may sue under ERISA's anti-retaliation and anti-interference provision.<sup>31</sup> There is an apparent split in court authority regarding whether an action under Section 510 lies only against an "employer" as defined in Section 3(5) of ERISA, or whether other "persons," as described in the statute, may be sued if they violate its restrictions. With the expanded definition of "employer" under Section 3(5) of ERISA to include AHPs, there is greater potential for joint employer liability.

Some courts have held that a plaintiff may sue a person who is not the employer for violations of Section 510 if the person participated in the prohibited conduct.<sup>32</sup> Other courts disagree, holding that only an "employer" as defined in ERISA may be sued under Section 510.<sup>33</sup> Generally, a franchisor has been held not to be the employer of employees of its franchisee under ERISA.<sup>34</sup> However, given recent history, the IFA strongly encourages the DOL to include a provision in the final rule that clarifies that those businesses that utilize business format franchising will not be subject to joint employment liability based on their offering of an AHP. With the inclusion of this language, the AHP rule will maximize effectiveness and increase access to affordable, quality coverage at an excellent rate.

If a safe harbor providing protection against joint employer liability is not included in the final rule, franchise businesses will be reluctant to even consider offering AHPs, impeding the success of the rulemaking.

As set forth in our comment in Section 2 above, the Department has inherent rule making authority with respect to areas of law within which it has been granted authority from Congress.<sup>35</sup> The Department has used this rule making authority to issue safe harbor provisions in various contexts, including ERISA, FLSA and OSHA giving employers protection from liability when certain conditions are met.<sup>36</sup> In the ERISA context the Department has established safe harbors as to the time period during which amounts an employer has received from employees or withheld from wages for contributions to certain employee benefit plans will not constitute "plan assets" for ERISA and the employer will not be subject to prohibited transaction liability.<sup>37</sup> The IFA therefore urges the Department to use its rulemaking authority to issue a

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<sup>31</sup> 29 U.S.C. § 1140.

<sup>32</sup> See, e.g., *McCarthy v. Commerce Group, Inc.*, 831 F. Supp. 2d 459, 492 (D. Mass. 2011); *Simons v. Midwest Tel. Sales & Serv.*, 433 F. Supp. 2d 1007, 1013 (D. Minn. 2006); *Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp. 2d 246, 257 (W.D. Va. 2001); *Romero v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 119339 (E.D. Pa. 2010); *Roy v. Kimble Chase Life Sci. & Research Prods., LLC*, 2013 U.S. Dist. LEXIS 94439 (E.D. Tenn. 2013); *Olson v. Dex Imaging, Inc.*, 63 F. Supp. 3d 1353 (11th Cir. 2014).

<sup>33</sup> See, e.g., *Manuel v. Turner Indus. Grp., et al.*, 2016 WL 5349446, at \*2 (M.D. La. 2016); *Stout v. Health Mgmt. Assoc., Inc.*, No. CV-10-3080EFS, 2011 WL 1225575, at \*2-3 (E.D. Wash. 2011); *Stark v. Audio Marketing Solutions, Inc.*, 2010 WL 3789572 (D. Neb. 2010).

<sup>34</sup> See, e.g., *Glover v. Jobmate of Mississippi*, 887 F. Supp. 926, 930-31 (S.D. Miss. 1995).

<sup>35</sup> See, generally, *Perez v. Mortgage Bankers Assn.*, 135 S. Ct. 1199 (2015).

<sup>36</sup> 81 Fed. Reg. 59464. (Final rule that describes circumstances in which state payroll deduction savings programs with automatic enrollment would not give rise to the establishment of employee pension benefit plans under the (i.e., the IRA Payroll Deduction Safe Harbor)); 29 CFR §2520.104b (Safe Harbor regarding the Electronic disclosure of employee benefit plan information); 29 CFR Sec. 514.603(d) (Regarding safe harbor requirements to not lose white collar exemptions for expense deductions); 65 Fed. Reg. 46503 (OSHA will not use the voluntary self-audit report as evidence that a violation is willful. This policy is intended to apply when, through a voluntary self-audit, the employer learns that a violative condition exists and promptly takes diligent steps to correct the violative condition and bring itself into compliance, while providing effective interim employee protection, as necessary.)

<sup>37</sup> 75 Fed. Reg. 2068.

safe harbor protecting employer members of an AHP from the risk of potential joint employer liability. As demonstrated in the IFA member survey, 99%% of the franchisor survey participants and 61% of the franchisee survey participants would offer an AHP if there was no risk of joint employer liability.

The IFA suggests the following safe harbor provision to be included in the Final Rule to give franchise businesses assurances that participation in an AHP will not be used as a factor to establish joint-employer liability:

“Provided an AHP is established and maintained in accordance with the provisions set forth in this rule, the AHP, although created pursuant to the expansion of the definition of “employer” under Section 3(5) of ERISA, shall not create or imply joint employer liability among the association employer-members for all federal and state purposes.”

In the alternative, the IFA proposes a limited safe-harbor for federal labor law purposes as follows:

“Provided an AHP is established and maintained in accordance with the provisions set forth in this rule, the AHP, although created pursuant to the expansion of the definition of “employer” under Section 3(5) of ERISA, shall not create or imply joint employer liability among the association employer-members for federal labor and employment law purposes.”

If the Department is unable to provide one of the broader safe harbor provisions above, the IFA asks that in the minimum a narrow safe-harbor be adopted as follows:

“Provided an AHP is established and maintained in accordance with the provisions set forth in this rule, the AHP, although created pursuant to the expansion of the definition of “employer” under Section 3(5) of ERISA, shall not create or imply joint employer liability among the association employer-members for purposes of Section 510 of ERISA.”

- 5. The Department should clarify that AHPs will be considered “employers” for the purpose of sponsoring a welfare benefit plan and not MEWAs subject to state insurance requirements; or in the alternative the Department should use its authority under ERISA Section 514(b)(6) to preempt state regulation of MEWAs for AHPs.**

The IFA unequivocally supports the policy driving the creation of AHPs that affordable, quality health care coverage should not be a benefit only for employees of large employers.

In order for AHPs to effectively provide affordable, quality health insurance to the association member employees, AHPs that meet the regulations requirement should effectively be treated as a single “association” plan “subject to the same State and Federal regulatory structure as other ERISA-covered employee welfare benefit plans.” The IFA asks the Department for clarification that by expanding the definition of “employer” under Section 3(5) of ERISA, AHPs will be considered single “employer” plans and not MEWAs subject to onerous and complicated state regulations. As stated in the request for comments to the Proposed Rule, the Department is making “a revision to its long-standing interpretation of what constitutes an “employer” capable of sponsoring an “employee benefit plan” under ERISA in the context of group health coverage. Under the proposal, AHPs that meet the regulation's conditions would have a ready means of offering their employer-members, and their employer members' employees, *a single*

*group health plan subject to the same State and Federal regulatory structure as other ERISA-covered employee welfare benefit plans.”*

The IFA supports this approach which will allow AHPs to operate as single large group plans in either an insured or self-insured capacity. It will allow AHPs the flexibility to meet the health care coverage needs of the participating employee populations, provide substantial economic savings and reduce the administrative burdens of maintaining small group plans.

The IFA recognizes the need for mechanisms to support sufficient reserve funding and actuarial soundness of AHPs and supports a regulatory scheme to ensure reserves and financial and administrative safeguards for the protection of the AHP benefits.

In the event that the Department considers AHPs MEWAs, AHPs must be allowed to self-insure and must be exempt from the myriad of oppressive state MEWA regulations in order to adequately meet the policy directives. Each state regulates health insurance sold in its jurisdiction. ERISA recognizes the traditional authority of states to regulate insurance. Every fully-insured welfare benefit plan must meet the different funding, actuarial standards, benefit mandates, and administrative requirements of each state. It is prohibitively expensive and burdensome to provide fully-insured plan options for an association across state lines. Self-insured welfare benefit plans are exempt from state insurance requirements, except in the case of self-funded MEWAs.

Large employers with locations in multiple states have the option to self-insure their welfare benefit plans, and are thus exempt from state insurance compliance requirements. Large self-insured plans that do not have to comply with state insurance requirements are less expensive and have less administrative constraints than fully insured plans or MEWAs.

The IFA recognizes the historical reasons for state regulation of MEWAs. In the absence of federal and state regulations in past decades, unscrupulous promoters sold self-insured MEWA plans to small employers without sufficient funding and reserves. They took the premiums and failed to pay the benefits. In the wake of such schemes, the states were left to clean up the mess and almost all states enacted onerous and oppressive funding and registration requirements or banned them completely to prevent such fraud and abuse. MEWAs have effectively been eliminated by state regulation. By way of example, Texas has five (5) registered MEWAs, Montana has eleven (11), California has four (4) and Georgia has no registered MEWAs.

The Department sets forth that it does not have the authority to exempt AHPs from “state insurance laws that establish reserves and contribution requirements that must be met in order for the non-fully insured MEWA plan to be considered able to pay benefits in full when due and provisions to enforce such standards.” However, the IFA submits that the Department does have such authority if it establishes its own standards, “requiring the maintenance of specified levels of reserves and specified levels of contributions ... and provisions to enforce such standards.”

The IFA understands the need to protect AHP members and their employees from potential fraud and abuse and recognizes the statute’s intent not to infringe on state insurance regulations. Fully insured welfare benefit plans remain subject to insurance market regulation under state law. However, ERISA provides the Department with the purpose and authority to pre-empt state regulation of MEWAs and

issue regulations that will provide a uniform and consistent framework for ensuring adequate reserves and funding to support benefit claims and prevent fraud and abuse.

“Congress enacted ERISA to ‘protect ... the interests of participants in employee benefit plans and their beneficiaries’ by setting out substantive regulatory requirements for employee benefit plans and to “provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.”<sup>38</sup> The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions,<sup>39</sup> which are intended to ensure that employee benefit plan regulation would be “exclusively a federal concern.”<sup>40</sup> More specifically, although the authority has never been used, ERISA Section 514(b)(6)(B) confers on the Department the authority to pre-empt self-funded MEWAs from state law as follows:

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii)<sup>41</sup>, individually or by class, multiple employer welfare arrangements which are not fully-insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.<sup>42</sup>

The IFA contends that if AHPs are considered MEWAs and if they are to effectively provide health insurance coverage as intended by the Executive Order and the Proposed Rule, the Department must use its authority under Section 514(b)(6)(B) to provide a uniform, consistent framework for AHP operation and pre-emption of state MEWA regulations.

**6. The IFA recognizes and supports the need for non-discrimination requirements applicable to AHPs to prevent stacking of risk pools which could undermine the affordability and accessibility of health coverage for those who need it most and recognizes the need for the Proposed Rule’s non-discrimination requirements for AHPs.**

The IFA supports the Proposed Rule’s requirements that an AHP may not condition employer membership based on the health factors of any current or former employees of the employer members (or any employee’s family member or other beneficiary). HIPAA and ACA rules prohibit discrimination *within* groups of similarly situated employees, but not *across* different groups of similarly situated individuals. Permitted classification is allowed based on bona fide employment-based classification such as part-time or full-time employment status. The Proposed Rule would not allow associations to treat different employer-members as different bona fide employment classifications (i.e. no employer-by-employer risk rating). The IFA supports this requirement because it protects against AHPs cherry-picking only healthy employee populations thus defeating the purpose to spread risk among larger diverse populations. The Proposed Rule strikes the right balance between risk selection issues with the stability of the AHP market.

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<sup>38</sup> 29 U.S.C. § 1001(b).

<sup>39</sup> ERISA §514, 29 U.S.C. § 1144.

<sup>40</sup> *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (citing *Alessi v. Raybestos–Manhattan, Inc.*, 451 U.S. 504, 523, 101 S. Ct. 1895, 68 L.Ed.2d 402 (1981)).

<sup>41</sup> allowing the application of state insurance laws to apply to self-insured MEWAs to the extent not inconsistent with ERISA

<sup>42</sup> 29 U.S.C. § 1144(b)(6)(B).

The IFA believes treating AHPs as large group plans which are not subject to the minimum essential health benefit requirements of the ACA will not create a flood of “skinny” coverage. Despite no requirement to offer essential health benefits, large self-insured health plans continue to do so because offering such benefits provides quality, affordable health coverage to employers with a larger risk pool. Essential health benefits include, among other things, coverage for ambulance service, emergency room visits, preventive care, prescription drugs and laboratory tests. Providing a “skinny” plan would not be competitive for AHPs because such essential health benefits will be affordable if provided through a large group plan. In the past, small group plans could not always afford to provide such coverage because smaller plans are more expensive, and in order to provide any benefits at all certain benefits had to be eliminated. The larger the plan, the less expensive it will be to provide a large range of benefits. To that end, associations such as the IFA would have no incentive to risk the good will of their members by providing plans without quality coverage.

### **Conclusion**

The IFA enthusiastically supports the Proposed Rule expanding access to AHPs with the comments set forth in this letter. The data provided by the IFA member survey supports the need and enthusiasm of franchise employers for AHPs. The IFA looks to the Department for the following in the Final Rule:

- A broad interpretation of the commonality of interest requirement to include the franchise business model or, additionally, limiting the franchise business model further to the “service providing sector” of franchises.
- The adoption of a safe harbor limiting joint employer liability for employer-members of an AHP.
- The specific clarification that AHPs are not MEWAs or in the alternative, use of the Department’s inherent power under ERISA to pre-empt state MEWA requirements applicable to AHPs.



Thank you for the opportunity to submit these comments.

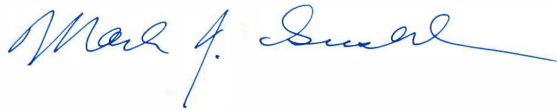
Respectfully,



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**Appendix A**  
**NAICS Service Provider Codes**

NAICS Abbr.	NAICS	Service-Providing Industry (Y/N)	Count of Franchised Brands	Sum of Franchised Units	Number of Employees
111	Crop Production (NAICS 111)	N	1	-	-
114	Fishing, Hunting and Trapping (NAICS 114)	N	1	17	175
115	Support Activities for Agriculture and Forestry (NAICS 115)	N	1	15	155
236	Construction of Buildings (NAICS 236)	N	46	2,307	23,762
237	Heavy and Civil Engineering Construction (NAICS 237)	N	3	150	1,545
238	Specialty Trade Contractors (NAICS 238)	N	98	6,295	64,839
311	Food Manufacturing (NAICS 311)	N	6	1,040	10,712
312	Beverage and Tobacco Product Manufacturing (NAICS 312)	N	1	7	72
315	Apparel Manufacturing (NAICS 315)	N	1	-	-
323	Printing and Related Support Activities (NAICS 323)	N	7	701	7,220
324	Petroleum and Coal Products Manufacturing (NAICS 324)	N	1	34	350
326	Plastics and Rubber Products Manufacturing (NAICS 326)	N	2	44	453
327	Nonmetallic Mineral Product Manufacturing (NAICS 327)	N	1	-	-
336	Transportation Equipment Manufacturing (NAICS 336)	N	1	-	-
339	Miscellaneous Manufacturing (NAICS 339)	N	3	523	5,387
423	Merchant Wholesalers, Durable Goods (NAICS 423)	Y	5	3,322	34,217
424	Merchant Wholesalers, Nondurable Goods (NAICS 424)	Y	5	6,199	63,850
441	Motor Vehicle and Parts Dealers (NAICS 441)	Y	15	1,900	19,570
442	Furniture and Home Furnishings Stores (NAICS 442)	Y	30	1,774	18,272
443	Electronics and Appliance Stores (NAICS 443)	Y	13	741	7,632
444	Building Material and Garden Equipment and Supplies Dealers (NAICS 444)	Y	11	11,303	116,421
445	Food and Beverage Stores (NAICS 445)	Y	48	9,187	94,626
446	Health and Personal Care Stores (NAICS 446)	Y	40	13,658	140,677
447	Gasoline Stations (NAICS 447)	Y	6	801	8,250
448	Clothing and Clothing Accessories Stores (NAICS 448)	Y	30	1,851	19,065
451	Sporting Goods, Hobby, Book, and Music Stores (NAICS 451)	Y	23	1,182	12,175
452	General Merchandise Stores (NAICS 452)	Y	9	195	2,009
453	Miscellaneous Store Retailers (NAICS 453)	Y	62	4,454	45,876
454	Nonstore Retailers (NAICS 454)	Y	5	615	6,335
484	Truck Transportation (NAICS 484)	Y	14	491	5,057
485	Transit and Ground Passenger Transportation (NAICS 485)	Y	4	957	9,857
488	Support Activities for Transportation (NAICS 488)	Y	4	408	4,202
492	Couriers and Messengers (NAICS 492)	Y	3	23	237
493	Warehousing and Storage (NAICS 493)	Y	1	32	330
511	Publishing Industries (except Internet) (NAICS 511)	Y	12	975	10,043
517	Telecommunications (NAICS 517)	Y	1	323	3,327
518	Data Processing, Hosting, and Related Services (NAICS 518)	Y	1	-	-
519	Other Information Services (NAICS 519)	Y	1	276	2,843
522	Credit Intermediation and Related Activities (NAICS 522)	Y	12	604	6,221
523	Securities, Commodity Contracts, and Other Financial Investments and Related Activities (NAICS 523)	Y	3	56	577
524	Insurance Carriers and Related Activities (NAICS 524)	Y	11	1,686	17,366
531	Real Estate (NAICS 531)	Y	80	15,579	160,464
532	Rental and Leasing Services (NAICS 532)	Y	33	3,460	35,638
541	Professional, Scientific, and Technical Services (NAICS 54)	Y	134	17,701	182,320
561	Administrative and Support Services (NAICS 561)	Y	257	63,557	654,637
562	Waste Management and Remediation Services (NAICS 562)	Y	17	1,128	11,618
611	Educational Services (NAICS 61)	Y	181	9,824	101,187
621	Ambulatory Health Care Services (NAICS 621)	Y	110	10,993	113,228
623	Nursing and Residential Care Facilities (NAICS 623)	Y	4	162	1,669
624	Social Assistance (NAICS 624)	Y	49	1,968	20,270
711	Performing Arts, Spectator Sports, and Related Industries (NAICS 711)	Y	8	283	2,915
713	Amusement, Gambling, and Recreation Industries (NAICS 713)	Y	217	18,911	194,783
721	Accommodation (NAICS 721)	Y	129	27,137	279,511
722	Food Services and Drinking Places (NAICS 722)	Y	1,133	186,177	1,917,623
811	Repair and Maintenance (NAICS 811)	Y	95	9,584	98,715
812	Personal and Laundry Services (NAICS 812)	Y	212	11,949	123,075
813	Religious, Grantmaking, Civic, Professional, and Similar Organizations (NAICS 813)	Y	1	-	-
921	Executive, Legislative, and Other General Government Support (NAICS 921)	Y	1	16	165

NAICS Abbr.	Service-Providing Industry NAICS (From BLS)	Count of Franchised Brands	Sum of Franchised Units	Number of Employees
423	Merchant Wholesalers, Durable Goods (NAICS 423)	5	3,322	34,217
424	Merchant Wholesalers, Nondurable Goods (NAICS 424)	5	6,199	63,850
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493	Warehousing and Storage (NAICS 493)	1	32	330
511	Publishing Industries (except Internet) (NAICS 511)	12	975	10,043
517	Telecommunications (NAICS 517)	1	323	3,327
518	Data Processing, Hosting, and Related Services (NAICS 518)	1	-	-
519	Other Information Services (NAICS 519)	1	276	2,843
522	Credit Intermediation and Related Activities (NAICS 522)	12	604	6,221
523	Securities, Commodity Contracts, and Other Financial Investments and Related Activities (NAICS 523)	3	56	577
524	Insurance Carriers and Related Activities (NAICS 524)	11	1,686	17,366
531	Real Estate (NAICS 531)	80	15,579	160,464
532	Rental and Leasing Services (NAICS 532)	33	3,460	35,638
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812	Personal and Laundry Services (NAICS 812)	212	11,949	123,075
813	Religious, Grantmaking, Civic, Professional, and Similar Organizations (NAICS 813)	1	-	-

## NAICS Code for All Industries Franchise Brands

111419 - Other Food Crops Grown Under Cover  
114210 - Hunting and Trapping  
115210 - Support Activities for Animal Production  
236115 - New Single-Family Housing Construction (except For-Sale Builders)  
236117 - New Housing For-Sale Builders  
236118 - Residential Remodelers  
236220 - Commercial and Institutional Building Construction  
237110 - Water and Sewer Line and Related Structures Construction  
237990 - Other Heavy and Civil Engineering Construction  
238110 - Poured Concrete Foundation and Structure Contractors  
238140 - Masonry Contractors  
238150 - Glass and Glazing Contractors  
238160 - Roofing Contractors  
238170 - Siding Contractors  
238190 - Other Foundation  
238210 - Electrical Contractors and Other Wiring Installation Contractors  
238220 - Plumbing  
238290 - Other Building Equipment Contractors  
238310 - Drywall and Insulation Contractors  
238320 - Painting and Wall Covering Contractors  
238330 - Flooring Contractors  
238340 - Tile and Terrazzo Contractors  
238350 - Finish Carpentry Contractors  
238390 - Other Building Finishing Contractors  
238990 - All Other Specialty Trade Contractors  
311811 - Retail Bakeries  
311812 - Commercial Bakeries  
311821 - Cookie and Cracker Manufacturing  
312130 - Wineries  
315220 - Men's and Boys' Cut and Sew Apparel Manufacturing  
323111 - Commercial Printing (except Screen and Books)  
323113 - Commercial Screen Printing  
324121 - Asphalt Paving Mixture and Block Manufacturing

326212 - Tire Retreading  
327991 - Cut Stone and Stone Product Manufacturing  
336390 - Other Motor Vehicle Parts Manufacturing  
339116 - Dental Laboratories  
339950 - Sign Manufacturing  
423220 - Home Furnishing Merchant Wholesalers  
423510 - Metal Service Centers and Other Metal Merchant Wholesalers  
423610 - Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers  
423710 - Hardware Merchant Wholesalers  
423840 - Industrial Supplies Merchant Wholesalers  
424320 - Men's and Boys' Clothing and Furnishings Merchant Wholesalers  
424490 - Other Grocery and Related Products Merchant Wholesalers  
424590 - Other Farm Product Raw Material Merchant Wholesalers  
424690 - Other Chemical and Allied Products Merchant Wholesalers  
441222 - Boat Dealers  
441228 - Motorcycle  
441310 - Automotive Parts and Accessories Stores  
441320 - Tire Dealers  
442110 - Furniture Stores  
442210 - Floor Covering Stores  
442291 - Window Treatment Stores  
442299 - All Other Home Furnishings Stores  
442299 - All Other Home Furnishings Stores  
443141 - Household Appliance Stores  
443142 - Electronics Stores  
444130 - Hardware Stores  
444190 - Other Building Material Dealers  
444220 - Nursery  
445110 - Supermarkets and Other Grocery (except Convenience) Stores  
445120 - Convenience Stores  
445291 - Baked Goods Stores  
445292 - Confectionery and Nut Stores  
445299 - All Other Specialty Food Stores  
445310 - Beer

446110 - Pharmacies and Drug Stores  
446120 - Cosmetics  
446130 - Optical Goods Stores  
446191 - Food (Health) Supplement Stores  
446199 - All Other Health and Personal Care Stores  
447110 - Gasoline Stations with Convenience Stores  
448120 - Women's Clothing Stores  
448130 - Children's and Infants' Clothing Stores  
448140 - Family Clothing Stores  
448150 - Clothing Accessories Stores  
448190 - Other Clothing Stores  
448210 - Shoe Stores  
448310 - Jewelry Stores  
451110 - Sporting Goods Stores  
451120 - Hobby  
451140 - Musical Instrument and Supplies Stores  
451211 - Book Stores  
451212 - News Dealers and Newsstands  
452111 - Department Stores (except Discount Department Stores)  
452112 - Discount Department Stores  
452990 - All Other General Merchandise Stores  
453110 - Florists  
453210 - Office Supplies and Stationery Stores  
453220 - Gift  
453310 - Used Merchandise Stores  
453310- Used Merchandise Stores  
453910 - Pet and Pet Supplies Stores  
453991 - Tobacco Stores  
453998 - All Other Miscellaneous Store Retailers (except Tobacco Stores)  
453998 -All Other Miscellaneous Store Retailers (except Tobacco Stores)  
454111 - Electronic Shopping  
454112 - Electronic Auctions  
454210 - Vending Machine Operators  
454390 - Other Direct Selling Establishments

484110 - General Freight Trucking, Local  
484210 - Used Household and Office Goods Moving  
484230 - Specialized Freight (except Used Goods) Trucking  
485310 - Taxi Service  
485320 - Limousine Service  
485999 - All Other Transit and Ground Passenger Transportation  
488510 - Freight Transportation Arrangement  
492210 - Local Messengers and Local Delivery  
493190 - Other Warehousing and Storage  
511120 - Periodical Publishers  
517210 - Wireless Telecommunications Carriers (except Satellite)  
518210 - Data Processing  
519130 - Internet Publishing and Broadcasting and Web Search Portals  
522291 - Consumer Lending  
522292 - Real Estate Credit  
522298 - All Other Nondepository Credit Intermediation  
522320 - Financial Transactions Processing  
522390 - Other Activities Related to Credit Intermediation  
523930 - Investment Advice  
523999 - Miscellaneous Financial Investment Activities  
524126 - Direct Property and Casualty Insurance Carriers  
524210 - Insurance Agencies and Brokerages  
524291 - Claims Adjusting  
531110 - Lessors of Residential Buildings and Dwellings  
531120 - Lessors of Nonresidential Buildings (except Miniwarehouses)  
531130 - Lessors of Miniwarehouses and Self-Storage Units  
531190 - Lessors of Other Real Estate Property  
531210 - Offices of Real Estate Agents and Brokers  
531311 - Residential Property Managers  
531320 - Offices of Real Estate Appraisers  
531390 - Other Activities Related to Real Estate  
532111 - Passenger Car Rental  
532112 - Passenger Car Leasing  
532120 - Truck



532210 - Consumer Electronics and Appliances Rental  
532220 - Formal Wear and Costume Rental  
532289 - All Other Consumer Goods Rental  
532289 All Other Consumer Goods Rental  
532291 - Home Health Equipment Rental  
532292 - Recreational Goods Rental  
532299 - All Other Consumer Goods Rental  
532310 - General Rental Centers  
532490 - Other Commercial and Industrial Machinery and Equipment Rental and Leasing  
541199 - All Other Legal Services  
541213 - Tax Preparation Services  
541214 - Payroll Services  
541219 - Other Accounting Services  
541310 - Architectural Services  
541340 - Drafting Services  
541350 - Building Inspection Services  
541410 - Interior Design Services  
541511 - Custom Computer Programming Services  
541512 - Computer Systems Design Services  
541513 - Computer Facilities Management Services  
541519 - Other Computer Related Services  
541611 - Administrative Management and General Management Consulting Services  
541612 - Human Resources Consulting Services  
541613 - Marketing Consulting Services  
541618 - Other Management Consulting Services  
541620 - Environmental Consulting Services  
541690 - Other Scientific and Technical Consulting Services  
541720 - Research and Development in the Social Sciences and Humanities  
541810 - Advertising Agencies  
541850 - Outdoor Advertising  
541860 - Direct Mail Advertising  
541870 - Advertising Material Distribution Services  
541890 - Other Services Related to Advertising  
541921 - Photography Studios

541922 - Commercial Photography  
541930 - Translation and Interpretation Services  
541940 - Veterinary Services  
541990 - All Other Professional  
541990 - All Other Professional, Scientific, and Technical Services  
561110 - Office Administrative Services  
561311 - Employment Placement Agencies  
561311 - Employment Placement Agencies  
561312 - Executive Search Services  
561320 - Temporary Help Services  
561431 - Private Mail Centers  
561439 - Other Business Service Centers (including Copy Shops)  
561491 - Repossession Services  
561499 - All Other Business Support Services  
561510 - Travel Agencies  
561612 - Security Guards and Patrol Services  
561621 - Security Systems Services (except Locksmiths)  
561622 - Locksmiths  
561710 - Exterminating and Pest Control Services  
561720 - Janitorial Services  
561730 - Landscaping Services  
561730 Landscaping Services  
561740 - Carpet and Upholstery Cleaning Services  
561790 - Other Services to Buildings and Dwellings  
561910 - Packing and Labeling Services  
561920-Convention and Trade Show Organizers  
561990 - All Other Support Services  
562111 - Solid Waste Collection  
562910 - Remediation Services  
562991 - Septic Tank and Related Services  
611110 - Elementary and Secondary Schools  
611420 - Computer Training  
611430 - Professional and Management Development Training  
611511 - Cosmetology and Barber Schools

611519 - Other Technical and Trade Schools  
611610 - Fine Arts Schools  
611620 - Sports and Recreation Instruction  
611630 - Language Schools  
611691 - Exam Preparation and Tutoring  
611692 - Automobile Driving Schools  
611699 - All Other Miscellaneous Schools and Instruction  
611710 - Educational Support Services  
621111 - Offices of Physicians (except Mental Health Specialists)  
621112 - Offices of Physicians  
621210 - Offices of Dentists  
621310 - Offices of Chiropractors  
621320 - Offices of Optometrists  
621330 - Offices of Mental Health Practitioners (except Physicians)  
621340 - Offices of Physical  
621399 - Offices of All Other Miscellaneous Health Practitioners  
621492 - Kidney Dialysis Centers  
621493 - Freestanding Ambulatory Surgical and Emergency Centers  
621498 - All Other Outpatient Care Centers  
621511 - Medical Laboratories  
621610 - Home Health Care Services  
621999 - All Other Miscellaneous Ambulatory Health Care Services  
623220 - Residential Mental Health and Substance Abuse Facilities  
623312 - Assisted Living Facilities for the Elderly  
624110 - Child and Youth Services  
624120 - Services for the Elderly and Persons with Disabilities  
624410 - Child Day Care Services  
624410 - Child Day Care Services  
711110 - Theater Companies and Dinner Theaters  
711120 - Dance Companies  
711211 - Sports Teams and Clubs  
711320 - Promoters of Performing Arts  
711510 - Independent Artists  
713120 - Amusement Arcades

713940 - Fitness and Recreational Sports Centers  
713990 - All Other Amusement and Recreation Industries  
713990- All other Amuse and Recreation Industries  
721110 - Hotels (except Casino Hotels) and Motels  
721199 - All Other Traveler Accommodation  
721211 - RV (Recreational Vehicle) Parks and Campgrounds  
721214 - Recreational and Vacation Camps (except Campgrounds)  
722310 - Food Service Contractors  
722320 - Caterers  
722330 - Mobile Food Services  
722410 - Drinking Places (Alcoholic Beverages)  
722511 - Full-Service Restaurants  
722513 - Limited-Service Restaurants  
722514 - Cafeterias  
722515 - Snack and Nonalcoholic Beverage Bars  
811111 - General Automotive Repair  
811112 - Automotive Exhaust System Repair  
811113 - Automotive Transmission Repair  
811118 - Other Automotive Mechanical and Electrical Repair and Maintenance  
811121 - Automotive Body  
811122 - Automotive Glass Replacement Shops  
811122 - Automotive Glass Replacement Shops  
811191 - Automotive Oil Change and Lubrication Shops  
811192 - Car Washes  
811198 - All Other Automotive Repair and Maintenance  
811211 - Consumer Electronics Repair and Maintenance  
811212 - Computer and Office Machine Repair and Maintenance  
811213 - Communication Equipment Repair and Maintenance  
811219 - Other Electronic and Precision Equipment Repair and Maintenance  
811310 - Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance  
811412 - Appliance Repair and Maintenance  
811420 - Reupholstery and Furniture Repair  
811430 - Footwear and Leather Goods Repair  
811490 - Other Personal and Household Goods Repair and Maintenance

812111 - Barber Shops  
812112 - Beauty Salons  
812113 - Nail Salons  
812191 - Diet and Weight Reducing Centers  
812199 - Other Personal Care Services  
812310 - Coin-Operated Laundries and Drycleaners  
812320 - Drycleaning and Laundry Services (except Coin-Operated)  
812332 - Industrial Launderers  
812910 - Pet Care (except Veterinary) Services  
812990 - All Other Personal Services  
812990 All Other Personal Services  
813311 - Human Rights Organizations  
921190 - Other General Government Support

## NAICS Code for Service-Providing Industries Franchise Brands

423220 - Home Furnishing Merchant Wholesalers  
423510 - Metal Service Centers and Other Metal Merchant Wholesalers  
423610 - Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers  
423710 - Hardware Merchant Wholesalers  
423840 - Industrial Supplies Merchant Wholesalers  
424320 - Men's and Boys' Clothing and Furnishings Merchant Wholesalers  
424490 - Other Grocery and Related Products Merchant Wholesalers  
424590 - Other Farm Product Raw Material Merchant Wholesalers  
424690 - Other Chemical and Allied Products Merchant Wholesalers  
441222 - Boat Dealers  
441228 - Motorcycle  
441310 - Automotive Parts and Accessories Stores  
441320 - Tire Dealers  
442110 - Furniture Stores  
442210 - Floor Covering Stores  
442291 - Window Treatment Stores  
442299 - All Other Home Furnishings Stores  
442299 - All Other Home Furnishings Stores  
443141 - Household Appliance Stores  
443142 - Electronics Stores  
444130 - Hardware Stores  
444190 - Other Building Material Dealers  
444220 - Nursery  
445110 - Supermarkets and Other Grocery (except Convenience) Stores  
445120 - Convenience Stores  
445291 - Baked Goods Stores  
445292 - Confectionery and Nut Stores  
445299 - All Other Specialty Food Stores  
445310 - Beer  
446110 - Pharmacies and Drug Stores  
446120 - Cosmetics  
446130 - Optical Goods Stores  
446191 - Food (Health) Supplement Stores

446199 - All Other Health and Personal Care Stores  
447110 - Gasoline Stations with Convenience Stores  
448120 - Women's Clothing Stores  
448130 - Children's and Infants' Clothing Stores  
448140 - Family Clothing Stores  
448150 - Clothing Accessories Stores  
448190 - Other Clothing Stores  
448210 - Shoe Stores  
448310 - Jewelry Stores  
451110 - Sporting Goods Stores  
451120 - Hobby  
451140 - Musical Instrument and Supplies Stores  
451211 - Book Stores  
451212 - News Dealers and Newsstands  
452111 - Department Stores (except Discount Department Stores)  
452112 - Discount Department Stores  
452990 - All Other General Merchandise Stores  
453110 - Florists  
453210 - Office Supplies and Stationery Stores  
453220 - Gift  
453310 - Used Merchandise Stores  
453310- Used Merchandise Stores  
453910 - Pet and Pet Supplies Stores  
453991 - Tobacco Stores  
453998 - All Other Miscellaneous Store Retailers (except Tobacco Stores)  
453998 -All Other Miscellaneous Store Retailers (except Tobacco Stores)  
454111 - Electronic Shopping  
454112 - Electronic Auctions  
454210 - Vending Machine Operators  
454390 - Other Direct Selling Establishments  
484110 - General Freight Trucking, Local  
484210 - Used Household and Office Goods Moving  
484230 - Specialized Freight (except Used Goods) Trucking  
485310 - Taxi Service

485320 - Limousine Service  
485999 - All Other Transit and Ground Passenger Transportation  
488510 - Freight Transportation Arrangement  
492210 - Local Messengers and Local Delivery  
493190 - Other Warehousing and Storage  
511120 - Periodical Publishers  
517210 - Wireless Telecommunications Carriers (except Satellite)  
518210 - Data Processing  
519130 - Internet Publishing and Broadcasting and Web Search Portals  
522291 - Consumer Lending  
522292 - Real Estate Credit  
522298 - All Other Nondepository Credit Intermediation  
522320 - Financial Transactions Processing  
522390 - Other Activities Related to Credit Intermediation  
523930 - Investment Advice  
523999 - Miscellaneous Financial Investment Activities  
524126 - Direct Property and Casualty Insurance Carriers  
524210 - Insurance Agencies and Brokerages  
524291 - Claims Adjusting  
531110 - Lessors of Residential Buildings and Dwellings  
531120 - Lessors of Nonresidential Buildings (except Miniwarehouses)  
531130 - Lessors of Miniwarehouses and Self-Storage Units  
531190 - Lessors of Other Real Estate Property  
531210 - Offices of Real Estate Agents and Brokers  
531311 - Residential Property Managers  
531320 - Offices of Real Estate Appraisers  
531390 - Other Activities Related to Real Estate  
532111 - Passenger Car Rental  
532112 - Passenger Car Leasing  
532120 - Truck  
532210 - Consumer Electronics and Appliances Rental  
532220 - Formal Wear and Costume Rental  
532289 - All Other Consumer Goods Rental  
532289 All Other Consumer Goods Rental



532291 - Home Health Equipment Rental  
532292 - Recreational Goods Rental  
532299 - All Other Consumer Goods Rental  
532310 - General Rental Centers  
532490 - Other Commercial and Industrial Machinery and Equipment Rental and Leasing  
541199 - All Other Legal Services  
541213 - Tax Preparation Services  
541214 - Payroll Services  
541219 - Other Accounting Services  
541310 - Architectural Services  
541340 - Drafting Services  
541350 - Building Inspection Services  
541410 - Interior Design Services  
541511 - Custom Computer Programming Services  
541512 - Computer Systems Design Services  
541513 - Computer Facilities Management Services  
541519 - Other Computer Related Services  
541611 - Administrative Management and General Management Consulting Services  
541612 - Human Resources Consulting Services  
541613 - Marketing Consulting Services  
541618 - Other Management Consulting Services  
541620 - Environmental Consulting Services  
541690 - Other Scientific and Technical Consulting Services  
541720 - Research and Development in the Social Sciences and Humanities  
541810 - Advertising Agencies  
541850 - Outdoor Advertising  
541860 - Direct Mail Advertising  
541870 - Advertising Material Distribution Services  
541890 - Other Services Related to Advertising  
541921 - Photography Studios  
541922 - Commercial Photography  
541930 - Translation and Interpretation Services  
541940 - Veterinary Services  
541990 - All Other Professional

541990 - All Other Professional, Scientific, and Technical Services  
561110 - Office Administrative Services  
561311 - Employment Placement Agencies  
561311 - Employment Placement Agencies  
561312 - Executive Search Services  
561320 - Temporary Help Services  
561431 - Private Mail Centers  
561439 - Other Business Service Centers (including Copy Shops)  
561491 - Repossession Services  
561499 - All Other Business Support Services  
561510 - Travel Agencies  
561612 - Security Guards and Patrol Services  
561621 - Security Systems Services (except Locksmiths)  
561622 - Locksmiths  
561710 - Exterminating and Pest Control Services  
561720 - Janitorial Services  
561730 - Landscaping Services  
561730 Landscaping Services  
561740 - Carpet and Upholstery Cleaning Services  
561790 - Other Services to Buildings and Dwellings  
561910 - Packing and Labeling Services  
561920-Convention and Trade Show Organizers  
561990 - All Other Support Services  
562111 - Solid Waste Collection  
562910 - Remediation Services  
562991 - Septic Tank and Related Services  
611110 - Elementary and Secondary Schools  
611420 - Computer Training  
611430 - Professional and Management Development Training  
611511 - Cosmetology and Barber Schools  
611519 - Other Technical and Trade Schools  
611610 - Fine Arts Schools  
611620 - Sports and Recreation Instruction  
611630 - Language Schools

611691 - Exam Preparation and Tutoring  
611692 - Automobile Driving Schools  
611699 - All Other Miscellaneous Schools and Instruction  
611710 - Educational Support Services  
621111 - Offices of Physicians (except Mental Health Specialists)  
621112 - Offices of Physicians  
621210 - Offices of Dentists  
621310 - Offices of Chiropractors  
621320 - Offices of Optometrists  
621330 - Offices of Mental Health Practitioners (except Physicians)  
621340 - Offices of Physical  
621399 - Offices of All Other Miscellaneous Health Practitioners  
621492 - Kidney Dialysis Centers  
621493 - Freestanding Ambulatory Surgical and Emergency Centers  
621498 - All Other Outpatient Care Centers  
621511 - Medical Laboratories  
621610 - Home Health Care Services  
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624410 - Child Day Care Services  
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711120 - Dance Companies  
711211 - Sports Teams and Clubs  
711320 - Promoters of Performing Arts  
711510 - Independent Artists  
713120 - Amusement Arcades  
713940 - Fitness and Recreational Sports Centers  
713990 - All Other Amusement and Recreation Industries  
713990- All other Amuse and Recreation Industries  
721110 - Hotels (except Casino Hotels) and Motels

721199 - All Other Traveler Accommodation  
721211 - RV (Recreational Vehicle) Parks and Campgrounds  
721214 - Recreational and Vacation Camps (except Campgrounds)  
722310 - Food Service Contractors  
722320 - Caterers  
722330 - Mobile Food Services  
722410 - Drinking Places (Alcoholic Beverages)  
722511 - Full-Service Restaurants  
722513 - Limited-Service Restaurants  
722514 - Cafeterias  
722515 - Snack and Nonalcoholic Beverage Bars  
811111 - General Automotive Repair  
811112 - Automotive Exhaust System Repair  
811113 - Automotive Transmission Repair  
811118 - Other Automotive Mechanical and Electrical Repair and Maintenance  
811121 - Automotive Body  
811122 - Automotive Glass Replacement Shops  
811122 - Automotive Glass Replacement Shops  
811191 - Automotive Oil Change and Lubrication Shops  
811192 - Car Washes  
811198 - All Other Automotive Repair and Maintenance  
811211 - Consumer Electronics Repair and Maintenance  
811212 - Computer and Office Machine Repair and Maintenance  
811213 - Communication Equipment Repair and Maintenance  
811219 - Other Electronic and Precision Equipment Repair and Maintenance  
811310 - Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance  
811412 - Appliance Repair and Maintenance  
811420 - Reupholstery and Furniture Repair  
811430 - Footwear and Leather Goods Repair  
811490 - Other Personal and Household Goods Repair and Maintenance  
812111 - Barber Shops  
812112 - Beauty Salons  
812113 - Nail Salons  
812191 - Diet and Weight Reducing Centers

812199 - Other Personal Care Services

812310 - Coin-Operated Laundries and Drycleaners

812320 - Drycleaning and Laundry Services (except Coin-Operated)

812332 - Industrial Launderers

812910 - Pet Care (except Veterinary) Services

812990 - All Other Personal Services

812990 All Other Personal Services

813311 - Human Rights Organizations

**Congress of the United States**  
**Washington, DC 20515**

March 1, 2018

The Honorable Alexander Acosta  
Secretary  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, D.C. 20010

Dear Secretary Acosta:

We are writing to share our views on the U.S. Department of Labor (DOL)'s Notice of Proposed Rulemaking to expand access to healthcare through Small Business Health Plans. We support the proposed rule's intent to increase small businesses' ability to provide affordable, comprehensive coverage for employees.

Allowing small businesses to band together as a single group and purchase insurance in the large group market may reduce administrative costs through economies of scale and strengthen their bargaining position in the health insurance market. Most importantly, the flexibility for expanded Small Business Health Plans is a step towards improving access to coverage for employees and their families.

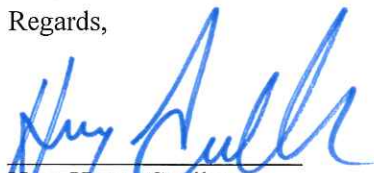
With regard to those small businesses that utilize the franchise business model, the need and desire for expanded and flexible Small Business Health Plans is paramount. The model perhaps is the best example of how economies of scale can be utilized to make the delivery of products and services more affordable for small business owners, the independent, local franchisees, and those businesses' customers. For example, franchisors currently use their bargaining power to negotiate and efficiently distribute products in the manufacturing and agriculture industries throughout their systems. If the benefits of economies of scale can be translated to the purchase of health insurance, the franchise systems will be able to improve access to coverage at an excellent rate.

In order to maximize the benefits of the franchise business model in health care delivery, DOL's final rule should include language that ensures franchises are not at risk of joint employment liability based on the offering of a Small Business Health Plan. Federal and state employment laws have traditionally found that a joint employer is one who exerts direct and immediate control over essential employment terms of another entity's employees. The tests used to determine joint employment status have increasingly become vague, even allowing for the analysis to be made based on factors that make "indirect" or "unexercised reserved control" be determinative. If this language is not included, franchise businesses will be reluctant to even consider offering a Small Business Health Plan, impeding the success of the rulemaking.

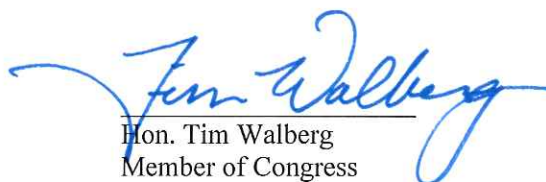
For these reasons, we strongly encourage DOL to include a provision that clarifies that those businesses that utilize business format franchising will not be subject to joint employment liability based on their offering of a Small Business Health Plan. With the inclusion of this language, the Small Business Health Plan rule will maximize effectiveness and increase access to affordable, quality coverage at an excellent rate.

Thank you for your attention to this matter.

Regards,



Hon. Henry Cuellar  
Member of Congress



Hon. Tim Walberg  
Member of Congress

BRADLEY BYRNE  
1ST DISTRICT, ALABAMA

SERVING BALDWIN, CLARKE,  
ESCAMBIA, MOBILE, MONROE AND  
WASHINGTON COUNTIES

HOUSE COMMITTEES:  
ARMED SERVICES  
EDUCATION AND THE WORKFORCE  
RULES

**Congress of the United States**  
**House of Representatives**  
Washington, DC 20515

March 1, 2018

The Honorable Alexander Acosta  
Secretary  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, D.C. 20010

Dear Secretary Acosta:

As the Department considers an association health plan rule, I write with concern for certain entities potentially being held as “joint employers.” While I support the proposed rule’s intent to increase small businesses’ ability to provide affordable, comprehensive coverage for employees, I hope you will include a provision clarifying that businesses who utilize business format franchising will not be subject to joint employment liability based on their offering of a Small Business Health Plan.

Allowing small businesses to band together as a single group and purchase insurance in the large group market may reduce administrative costs through economies of scale and strengthen their bargaining position in the health insurance market. Most importantly, the flexibility for expanded Small Business Health Plans is a step towards improving access to coverage for employees and their families.

As you know, those small businesses that utilize the franchise business model have a great need for expanded and flexible Small Business Health Plans. The model perhaps is the best example of how economies of scale can be utilized to make the delivery of products and services more affordable for small business owners, the independent, local franchisees, and those businesses’ customers. For example, franchisors currently use their bargaining power to negotiate and efficiently distribute products in the manufacturing and agriculture industries throughout their systems. If the benefits of economies of scale can be translated to the purchase of health insurance, the franchise system will greatly improve.

In order to maximize the benefits of the franchise business model in health care delivery, DOL’s final rule should include language that ensures franchises are not at risk of joint employment liability based on the offering of a Small Business Health Plan. Federal and state employment laws have traditionally found that a joint employer is one who exerts direct and immediate control over essential employment terms of another entities’ employees. As you know, the tests used to determine joint employment status have become increasingly vague, even allowing for the analysis to be made based on factors that make “indirect” or “unexercised reserved control” be determinative.

If this language is not included, franchise businesses will be reluctant to even consider offering a Small Business Health Plan, impeding the success of the rulemaking. With the inclusion of language to ensure franchises who offer a Small Business Health Plan are not joint employers, the rule will maximize effectiveness and increase access to affordable, quality coverage at an excellent rate.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bradley Byrne", with a long horizontal flourish extending to the right.

Bradley Byrne  
Chairman, Workforce Protections Subcommittee  
Committee on Education and the Workforce