



FRANCHISING®
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one opportunity at a time.

RHEA LANA RINER

CEO AND FOUNDER

**RHEA LANA'S CHILDREN'S CONSIGNMENT EVENTS
CONWAY, AR**

**TESTIMONY BEFORE THE
U.S. HOUSE EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

**ON BEHALF OF THE INTERNATIONAL FRANCHISE
ASSOCIATION**

**HEARING ENTITLED "FEDERAL WAGE AND HOUR POLICIES IN
THE TWENTY-FIRST CENTURY ECONOMY"**

FEBRUARY 16, 2017

Good morning Chairman Byrne, Ranking Member Takano, and distinguished members of the Subcommittee. My name is Rhea Lana Riner, and I am the CEO and Founder of Rhea Lana, Inc. and Rhea Lana's Franchise Systems. I am so honored to be with you today and want to first thank you for your invitation. I am grateful to you for taking an interest in my struggle to protect the rights of small business owners and moms, like myself, across the nation.

It is my privilege to testify on behalf of the International Franchise Association (IFA), the world's largest organization representing franchising. IFA works to protect, enhance and promote franchising and the more than 733,000 franchise establishments that support nearly 7.6 million direct jobs, \$674.3 billion of economic output for the U.S. economy and 2.5 percent of the Gross Domestic Product. The membership includes franchise companies that operate in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law, technology and business development.

Franchising enables ambitious, hard-working people like me and my franchise owners, to go into business for themselves, but not by themselves. Franchising represents the American Dream come to life – that regardless of who you are and where you come from, initiative and hard work can pay off. Consequently, franchise business output, establishments and employment have each grown faster than the broader U.S. economy in recent years. Moreover, there have been consistently higher rates of franchise business ownership for both women and minorities as compared to non-franchised businesses. There are hundreds of franchise businesses in every congressional district. Everything about franchising should be celebrated by all members of Congress, regardless of political party.

I appreciate the opportunity to tell you my story, and explain how the issues before us today have impacted small businesses like mine.

MY SMALL BUSINESS STORY

In 1997, I began my small business as a young mom after my husband changed careers, taking our family from a corporate salary to a ministry salary. Like so many people, I had a passion for fashion, but on our limited budget, we simply could not afford to dress our children as I hoped. I also knew many other moms who experienced the same challenge, so I came up with an idea that would help all of us: I invited a few friends to a small event in my living room to buy and sell our children's used clothing. From that humble beginning of moms working together, Rhea Lana's was born and grew.

The positive feedback from our first event was overwhelming, and we quickly realized that there was an eager market among families of all kinds for gently used children's clothing. My heart went out to families with budget struggles trying to provide high quality items for their kids. I wanted to offer them the opportunity to save money while meeting their families' needs. The moms, grandmoms, and husbands who join together to host Rhea Lana's consignment events create a marketplace in which their families can participate,

with Rhea Lana's acting as the facilitator. In so doing, we play a small role in helping these families succeed, and those who participate in our events truly appreciate the value we provide. Today, we have 80 franchises operating in 23 states, and we look forward to continued growth.

THE DEPARTMENT OF LABOR'S HARASSMENT OF MY BUSINESS

Unfortunately, after many years of running our consignment events, our business model is in peril because we have been drawn into an extended legal battle that is now in its sixth year.

In the Spring of 2011, I sent an email to central Arkansas families announcing an upcoming Rhea Lana's event. The email mentioned that moms could volunteer at the event if they were interested in helping out and having early access to the items being sold. One of these emails went to the wife of an Arkansas Department of Labor employee who had signed onto our mailing list. Arkansas Labor officials soon began investigating Rhea Lana's to determine if we were violating any laws by allowing volunteers to help at events. We cooperated fully, and in the end, we received a favorable response from the State of Arkansas. We tweaked our business model slightly and signed a Consent Agreement with the State of Arkansas which allowed us to continue using consignor-volunteers as long as they sold items at our events.

Despite the sizable legal fees our small business incurred to resolve this matter, it seemed that both parties were satisfied with the result. But then, in January of 2013, we were contacted by the U.S. Department of Labor (DOL) informing us that it was opening its own investigation into whether our volunteers were, in fact, employees.

Our initial meeting with the U.S. DOL was held in Little Rock on February 28, 2013. We once again fully cooperated, and we provided the DOL with contact information for ten moms who had participated as consignor-volunteers. Two were teachers, and two were nurses. One was a physician – a radiologist. We assumed that once DOL spoke with these moms and recognized that they were participating on a very limited basis for their own benefit, DOL would naturally determine that they should not be considered employees.

Unfortunately, the question was not so easily settled. Instead, DOL officials requested all of our payroll records going back two years, submitted formal questions that required more legal assistance to respond, and they showed up at one of our events to conduct interviews. Every consignor-volunteer interviewed assured them they voluntarily chose to participate in order to help their families, and they expected no compensation for doing so.

In spite of this, DOL determined that the moms should be considered employees. They used a seven-factor independent contractor test, rather than looking at the economic reality of our business model, as required by the Supreme Court. Incredibly, DOL even sent letters to our consignor-volunteers suggesting that they had the right to sue Rhea Lana's for back pay. **None** of our volunteers took such action against us – even with DOL's prompting. But

DOL officials would not be deterred. Without a formal hearing or other procedural safeguards, the DOL arbitrarily determined that Rhea Lana's had violated the Fair Labor Standards Act (FLSA). This was regulatory overreach at its worst, violating many concepts of basic fairness.

In August 2013, the DOL sent us a determination letter citing legal provisions that, and I quote, "provide for the assessment of a civil money penalty for any repeated or willful violations...in an amount not to exceed \$1,100 for each such violation." Our attorney with Cause of Action Institute estimated these penalties could reach \$3.6 million. Receiving this letter was terrifying. It was difficult to accept that our small effort to help families had become the focus of our government's disdain. It was then that I decided to fight back and use the true intent of the FLSA to defend my life's work.

The DOL initially won in district court arguing that we could not challenge the agency's determination because it was not a final agency action, leaving me in regulatory purgatory. However, in a ruling last June, the D.C. Circuit Court reversed, and held that DOL's action was indeed final and therefore could be challenged in court. The D.C. Circuit's ruling to send the case back to the district court for a decision on the merits was the first positive step in four-and-a-half years of fighting to protect the future of my small business.

So, we are continuing to fight for a mother's right to use her personal time as she sees fit to help her family. The legal brief we filed just last week is included with my written statement. Fighting an unfair regulatory order is a time-consuming and costly process for a small business. If we lose, Rhea Lana's will no longer be able to provide its valuable service to families in need. DOL fines would put us out of business.

Members of the Committee, I understand and support our government's duty to enforce our laws; it's part of living in a civilized world. However, the treatment Rhea Lana's has endured at the hands of the DOL is bullying by an institution I expect to support small businesses and even advocate for us. Instead, I'm doing all I can to protect the future of Rhea Lana's and the many moms who have come to rely on it for the benefit of their own families. The Department of Labor has cost me precious dollars I could have used to grow my business. I have sacrificed my time, energy and emotional strength fighting my own government for no good reason. And what a waste of taxpayer dollars!

My story is just one example of how the Federal Wage and Hour policies are either being misapplied to new, inventive businesses or being applied unfairly and unequally. Many other types of for-profit businesses use volunteers and collaborative efforts to provide value to our society. Consider the open source software industry which allows programmers to collaborate and create new software programs – what would happen to those innovations if DOL asserted those volunteer programmers had to be paid? Or what about the wine making industry that allows volunteers the opportunity to participate for a day in an exciting experience in exchange for their work making wine? How is Rhea Lana's legally different from the volunteer labor happening every day when Americans sell their treasures on eBay, serve their own frozen yogurt, bus their own table at a quick service restaurant, pump their gas, or tag their own bag at the airport? If the Federal Wage and

Hour policies prevent these innovative businesses, then they will hamper the economy and job growth.

EXPANDED JOINT EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT

Making matters worse for franchise businesses, multiple federal agencies, including the Wage and Hour Division (WHD), are also applying broader joint employment liability under their particular statutes.

In January 2016, the WHD released an administrative interpretation (AI) on joint employment that described an extremely expansive view of who is an employer for purposes of federal wage and hour liability. The AI provided at least as broad of an interpretation of joint employment under the FLSA than even the National Labor Relations Board's definition in its *Browning-Ferris* (BFI) decision in August 2015. In its *BFI* ruling, the NLRB overturned its longstanding joint employer standard to allow regulators to potentially find joint employer liability in almost any business contractual relationship.

Franchise business owners have been very concerned about the WHD AI, because it introduced the doctrines of "horizontal" and "vertical" joint employment. The AI describes vertical joint employment as occurring when an employee of one employer (an "intermediary employer") is economically dependent on another employer (referred to in the AI as a "potential joint employer"). Indeed, the WHD was surprisingly candid in revealing that the purpose of the AI was to expand the statutory coverage of the FLSA to small businesses (franchisees) and collect back wages from larger companies (franchisors).

Everyone can see that the vertical joint employment policy is squarely focused on the franchisor-franchisee relationship. It is remarkable that the 16-page AI doesn't mention "franchising" once, despite naming several other industries and business formats in which WHD finds joint employment liability. Then again, former WHD Administrator David Weil's views of my business and franchising are clear, as he has described franchising as a business model designed simply to skirt labor laws. What an overly cynical and incorrect view of an economic engine that has helped tens of thousands of entrepreneurs achieve the American Dream of business ownership.

Some have minimized the joint employment concerns of franchise business owners. But expanded joint employment liability across multiple federal statutes is already harming franchise businesses, long before a lawsuit arrives at the door. In June 2016, the IFA and the U.S. Chamber of Commerce collaborated on a report entitled "[*Main Street in Jeopardy: The Expanding Joint Employer Threat to Small Businesses*](#)," that revealed how the Federal government's joint employer policy is already affecting locally owned franchise businesses, and none of it is positive:

- **More operational costs** – Expanded joint employer liability means that small business owners have to pay for products and services they used to receive from their franchise brand companies, undermining the franchise relationship.

- **More legal costs** – Joint employer claims against both franchisors and franchisees are increasing as trial lawyers and aggressive politicians recognize the potential opportunity to exploit this new liability risk.
- **Decreased value of business** – Small business owners’ are seeing the devaluation of their retirement savings and nest eggs as the NLRB is perceived to have taken away control of their operations.
- **Less compliance assistance** – Franchisors used to help franchisees navigate complex employment laws. Some compliance assistance has been curbed, due to understandable fear by franchisors of joint employment lawsuits over involvement in franchisee employment practices. This may lead to an increase in companies who are unaware of their legal obligations – a perverse result of the new standard.
- **Less growth** – Franchise business owners are choosing not to grow and create jobs, and may stop operating their business altogether.

These negative effects are consequences of franchise businesses being justifiably concerned that their operations may never be safe from overzealous regulators who seek to apply an inexplicably broad "indirect" and "unexercised" liability standard.

The expansion of joint employer under the AI, and the application of it by plaintiffs’ attorneys in multiple cases against franchisees and franchisors, flies in the face of some of the claims made some, as recently as a hearing in this Committee earlier this week, that franchisors and franchisees are not the target of this unlimited joint employer standard. In fact, nothing could be further from the truth. Furthermore, the NLRB’s advice memorandum in the Freshii case, which has been held up by those same members of this Committee as evidence of the type of franchise that would be safe from joint employment finding, does not carry the force of law and is obsolete, since it was released prior to the issuance of the NLRB’s BFI decision and the WHD AI.

We need the new DOL to rescind the January 2016 AI and return to the pre-existing joint employment test that focused more on actual interdependence of two or more entities. But we also need Congress to clarify a definition of employer that reflects less cynicism about the motivations of franchisees who risk their capital to provide products and services, create jobs and serve people in communities across the country.

CONCLUSION

Mr. Chairman, I never intended to be a “business person.” Twenty years ago, I had never sold a product in my life – never wanted to, but I have been sincerely thankful for the opportunity to build and grow a business that helps so many families have what they otherwise could not afford. As with any pursuit, there have been highs and lows, victories and challenges. Our challenges have certainly been many, but I am hopeful that by hearing my story today, you will be inspired to help small businesses like mine in seeking government actions ruled by fairness in our ever-evolving labor economy.

Mr. Chairman, thank you for your leadership on behalf of all small businesses, and thank you again for allowing me the honor of addressing you today. I would be happy to answer any questions you have.