April 14, 2015

To: Senate Committee of Business and Transportation and Interested Parties

Fr: Coalition of Opposing Organizations; Oregon AFL-CIO, Oregon School Employees Association, Oregon AFSCME, Oregon Trial Lawyers Association, Northwest Workers' Justice Project, SEIU Local 49, SEIU Local 503, Family Forward Oregon

Re: Opposition to Senate Bill 136 – exempts franchisors from coverage for certain labor laws

Regretfully, after reviewing the options before us in amending Senate Bill 136, there is no way for the organizations listed above to be supportive or even neutral of the bill. We will be opposing the bill for the reasons outlined below.

1. Senate Bill 136 would go against current court precedent regarding whether or not franchisors should be considered employers for the purposes of state unemployment insurance, labor laws or other important worker protections.
2. Creating a presumption that all franchisees who should have received required disclosures are not employees of the franchisor would only encourage business relationships that exploit workers.
3. Removing the ability of the courts or state agencies to respond to review these relationships through audits or judicial review eliminates an important safeguard for workers in our state.
4. Passing this bill overturns a long held standard in labor and employment law that a worker cannot sign away their rights. For example, no legal agreement could be reached where a worker could be paid less than minimum wage.

How Senate Bill 136 - 3 Works

Senate Bill 136-3 provides that a franchise is not an employee of the franchisor if certain conditions are met. Those conditions are:

"(a) The franchise is subject to ORS 650.005 to 650.100 and federal regulation under 16 C.F.R. part 436;
"(b) The franchisee or subfranchisor:
"(A) Obtains any licenses, registrations or other authorizations that are necessary under federal, state or local law to engage in business under the terms of the franchise; and
"(B) Files with the Department of Consumer and Business Services a copy of the franchise that includes a signed statement in which the parties to the franchise attest that the parties understand and agree to the terms of the franchise; and
"(c) The franchisee or subfranchisor:
"(A) Is a business entity that is formed under the laws of, or authorized to do business in, this state with the purpose of engaging in business under the terms of the franchise; or
"(B) Engages in business under the terms of the franchise as a sole proprietor.

“(2) A franchisor may not defend against a franchisee’s or subfranchisor’s claim in any forum that the franchisee or subfranchisor is an employee of the franchisor on the basis that the franchisor has met the requirements set forth in subsection (1) of this section if a court of competent jurisdiction has found, within the 10 years that preceded the date on which the franchisee or subfranchisor brought the claim, that the franchisor:
“(a) Violated section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; or
“(b) Engaged in an unlawful practice under ORS 646.608 in connection with the franchise.”

The laws and regulations referenced deal mostly with the requirements of franchisors to disclose information to potential franchises and govern some of the terms of those sales. This law account for changes in the nature of the agreement over time, nor would there be any consideration for relevant employment related statutes. This is important because the bill fundamentally makes a determination regarding who is and is not an employee.

The proposed amendments do not deal with the underlying flaws with Senate Bill 136

Even if there is a stronger registry of franchise agreements, an important element missing from those laws and regulations is any ability to review the nature of the ongoing relationship between a franchisor and a franchisee. The key determination with regard to whether or not a franchisee or independent contractor has been misclassified is to look at the level of direct control a franchisor exerts over a franchisee. Assuming that there were monitoring required of the corporate disclosures, this would not satisfy our concerns. If the relationship between a franchisor and a franchisee operates like an employer/employee relationship, the worker should be able to challenge that relationship. We would ask that the committee consider a long standing principle in wage and hour and labor laws that workers cannot agree to waive their rights under the law, for example they cannot agree to work for less than minimum wage.

We believe that Senate Bill 136 is especially troubling given the changing nature of work in the Oregon. As described by the National Employment Law Project,

> “Our economy is in the midst of a major restructuring in the way business operates, particularly in fast-growing service industries. Whether the result of contingent work structures, outsourcing to contractors, the misclassification of employees as independent contractors, individual franchising, or other strategies, increasingly the businesses that individuals “work for” are not the ones they are “employed by”—a distinction that can hamper organizing, erode labor standards, and dilute accountability.”[1]

There will be major consequences to workers for hastening a shift from a more traditional employment relationship to one that seeks to exempt out parent companies from their responsibilities as employers.

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[1] WHO’S THE BOSS: Restoring Accountability for Labor Standards in Outsourced Work Catherine Ruckelshaus, Rebecca Smith, Sarah Leberstein, Eunice Cho MAY 2014

According to the Employment Department, over a 3 year period, out of 4,200 businesses audited just, "103 individual workers were 'employees' despite being franchises…If that is extrapolated to the entire state, it would mean an estimated 2,668 workers, or .18% of the workforce currently covered by the UI program." The Employment Department reports the employees in question worked for just 8 business or less than .2% of the number of businesses audited during that time frame.[2] In those cases workers were often paid a rate so low for their hours worked that they did not even make close to minimum wage. At the same time the amount of direction and control exerted by the parent franchisor was enough to preclude them from growing their business. I have previously provided the committee with an article detailing the practice in the janitorial industry and how workers can be harmed by these practices. Oregon courts ultimately found the company discussed in the article at fault for misclassifying employees as franchises.[3]

For example in Employment Department v. National Maintenance Contractors of Oregon, the court found,

> "the legislature has recognized that, at least for purposes of regulating the sale of franchises, the franchisor-franchisee relationship is a specific type of contractual relationship in which the franchisee "is required to give to the franchisor a valuable consideration for the right to transact business pursuant to the plan or system." ORS 650.005(4)(c). That is, consideration in the sale of a typical franchise agreement is paid by the *franchisee to the franchisor*. Moreover, the consideration is not paid for a service rendered but rather "for the right to transact business pursuant to [a] plan or system." *Id.*
>
> **ORS chapter 650 does not, however, provide any guidance concerning the nature of the ongoing relationship between franchisor and franchisee that results *after* the sale of the franchise.** Nor are we aware of any other relevant Oregon statutes that specifically define the nature of the ongoing relationship between a franchisor and its franchisees or otherwise inform the question whether a franchise relationship and an employment relationship are necessarily mutually exclusive.[(9)] **For that reason, ORS chapter 650 does not inform the question whether the relationship between NMC and its franchisees could also constitute an "employment" relationship…**
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> We appreciate that franchises are unique business arrangements that can differ in many important ways from a traditional employment relationship… As such, a natural tension exists between the types of franchisor controls that are inherent in franchising and the types of control over day-to-day tasks that courts and regulators traditionally evaluate to determine whether an employment relationship exists."). That said, we are not persuaded that franchise relationships demand a modified definition of

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[2] Testimony of David Gerstenfeld on Senate Bill 136, February 4, 2014. Found on OLIS

[3] Employment Department v. National Maintenance Contractors of Oregon

> service or remuneration for purposes of ORS 657.030. Rather, **<u>the question whether a particular franchise relationship satisfies that statute must be answered on a case-by-case basis,</u>** by determining whether services for remuneration have been provided and, if so, whether some exclusion to the definition of employment nevertheless applies."[4]

Existing Oregon law and case law has meant those offending businesses were forced to clean up their practices and make the workers whole. If this law should pass, those businesses would be let off the hook. Instead of improving conditions for workers this bill would actually have the opposite effect – opening up more workers to abusive franchise relationships.

[4] Employment Department v. National Maintenance Contractors of Oregon