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DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent,

v.

LYONS ENTERPRISES, INC.
d/b/a JAN-PRO CLEANING SYSTEMS,

Petitioner.

**DEPARTMENT OF LABOR AND INDUSTRIES'
ANSWER TO AMICUS CURIAE BRIEFS
OF INTERNATIONAL FRANCHISE ASSOCIATION AND
THE ASSOCIATION OF WASHINGTON BUSINESS**

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I. INTRODUCTION

The amici urge the Court to rule based solely on the existence of a franchise agreement, and turn a blind eye to the reality of the business relationship and activities. Their arguments directly conflict with the plain language of the Industrial Insurance Act and this Court's prior opinions. The Act is broadly written to define an employer as any person or entity "who contracts with one or more workers, the essence of which is the personal labor of such worker or workers" RCW 51.08.070. A "worker" is any person "working under an independent contract, the essence of which is his or her personal labor" RCW 51.08.180. Therefore, regardless of how the parties describe themselves in the franchise agreement, industrial insurance protection is required when "the essence of the work being performed . . . was personal labor." *E.g., Norman v. Dep't of Labor & Indus.*, 10 Wn.2d 180, 184, 116 P.2d 360 (1941).

Viewing Lyons' relationships with the customers and the franchisees in their totality reveals that Lyons is receiving the benefit of the franchisees' personal services. Lyons contracts with customers to provide janitorial services. It then contracts with franchisees to perform personal labor for Lyons's customers, such as vacuuming, and cleaning toilets and sinks. When Lyons enters into contracts with its customers for the labor of its franchisees, it is statutorily required to provide industrial

insurance protection.

The Legislature designed the statute to reduce the suffering and economic hardship associated with workplace injuries. RCW 51.12.010. Under the plain language of the law, the case law, and Washington's "long and proud history of being a pioneer in the protection of employee rights," responsibility for industrial insurance cannot be dodged simply by entering a franchise or independent contractor agreement. *See Drinkwitz v. Alliant Techsys, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000).

II. ARGUMENT

A. **Because Personal Labor Is the Essence of Its Contracts With the Franchisees, Lyons Must Provide Industrial Insurance**

Since 1937, the Industrial Insurance Act has required employers to provide industrial insurance coverage for independent contractors who provide personal labor to the employer. RCW 51.08.070; RCW 51.08.180. Under the Act, the term "employer" includes *any* person or entity "who contracts with one or more workers, the essence of which is the personal labor of such worker or workers." RCW 51.08.070 (emphasis added). Similarly, "worker" includes every person "who is working under an independent contract, the essence of which is his or her personal labor . . ." RCW 51.08.180. The Act neither exempts franchisees from coverage nor provides for a different test for franchisees.

Lyons is responsible to cover the franchisees that it employs because its franchisees exclusively perform work *at* Lyons's request, *under* contracts with Lyons, *to* customers of Lyons. CP 317-18, 344-45, 1902, 1906-08, 1926, 2155, 2167. Lyons is not just "in the business of selling and servicing regional franchises." CP 23. Rather, Lyons enters into contracts with various businesses for the provision of commercial cleaning services. CP 1907-08, 1926, 2155, 2167. These commercial cleaning contracts are "the property" of Lyons, not the franchisee. CP 318, 1908. However, a contract is created between Lyons and a franchisee when Lyons offers a given cleaning assignment to a franchisee and the franchisee accepts it. *See* CP 317-18, 1908. When one of Lyons's franchisees provides commercial cleaning services, it is providing those services under a contract between the franchisee and Lyons. CP 316, 1908.

Lyons engages in many such "mini-contracts" that provide services for Lyons's many customers. International Franchise Association (IFA) argues that Lyons's franchisees do not perform labor under an independent contract with Lyons because the work they perform is not done "under" the franchise agreement. IFA Br. 14-15. Association of Washington Business (AWB) similarly argues that the essence of a franchise agreement is the sale of the franchise, not the work performed under the franchise agreement. AWB Br. 5-6. IFA and AWB's arguments miss the

point: the key contracts here are not the franchise agreements themselves, but the contracts that Lyons creates when it offers cleaning accounts to its franchisees and the franchisees accept the offered work. Lyons's franchisees perform work under those contracts and the essence of the work under those contracts is personal labor.

In a sleight of hand, IFA notes that a franchisee agreement and the business of the franchisee are "conceptually distinct," suggesting that this means that a franchisor should never be responsible for the work its franchisees perform.¹ IFA Br. 14. IFA ignores that there is a stronger nexus between Lyons's business and the work of each franchisee than simply the franchise agreement: every time one of Lyons's franchisees work, he or she does so under a contract with Lyons that is separate from and in addition to the franchise agreement. CP 317-18, 344-45, 1902, 1906-08, 1926, 2155, 2167. While the business of a franchise may be *conceptually* distinct from the franchise agreement itself, here the business the franchisees pursue consists entirely of performing work on Lyons's behalf and at Lyons's request, under independent contracts with Lyons.

When an individual provides work on the behalf of the employer,

¹ IFA points to *Coast to Coast Stores, Inc. v. Gruschus*, 100 Wn.2d 147, 152, 667 P.2d 619 (1983), as showing that the business of a franchisee is conceptually distinct from the franchise agreement. But the issue in that case was whether, by refusing to provide a franchisee with inventory, the franchisor has constructively terminated the franchise agreement. *See id.* *Gruschus* is inapposite to the issue presented here. *See id.*

the Industrial Insurance Act covers him or her regardless of the business model as the Legislature seeks to have broad coverage of Washington workers. Lyons's franchisees are its workers.

1. The Industrial Insurance Act's Focus on "Personal Labor" Was Not Altered by the Franchise Investment Protection Act

IFA suggests that when the Washington Franchise Investment Protection Act (FIPA) was passed in 1971, it negated the Industrial Insurance Act's application to franchises. IFA Br. 6; RCW 19.100; Laws of 1971, Ex. Sess., ch. 252. In reality, the Legislature has not amended the requirements of RCW 51.08.070 and .180 to exempt franchisors. To the contrary, in 2008 it enacted RCW 51.08.195, which excludes certain independent businesses, but made no exceptions for franchisors. Laws of 2008, ch. 102, § 4.

FIPA is entirely distinct from the Industrial Insurance Act. It protects a franchisee's investment in a franchise, regulating such things as pre-sale disclosures and the franchisor/franchisee relationship. *See* Chapter 19.100 RCW. It does not purport to regulate on-the-job injuries and is not designed to minimize the economic loss associated with such injuries. *See* RCW 19.100. Conversely, the Act regulates workplace injuries, and is designed to minimize the economic loss and hardship caused by workplace injuries. RCW 51.12.020. Nonetheless, IFA argues that the Act

has “always been understood” to not apply to a “franchisor/franchisee relationship.” IFA Br. 1. IFA fails to point to a statute, case law, legislative material, or any other document that supports this claim; it simply asks this Court to accept it at face value. But the text of the Industrial Insurance Act evidences no such understanding.

2. The Department Has Not, and Cannot, Adopt an Interpretation of the Industrial Insurance Act That Creates a New Exemption for All Franchises

The Industrial Insurance Act extends coverage to independent contractors so long as the essence of the work performed under the contract is personal labor.² IFA suggests that the Department has understood franchising to be per se exempt from coverage and argues that the Department should not be allowed to change its interpretation of the statute in the absence of an amendment. IFA Br. 1. However, IFA points to no evidence that the Department historically understood franchising to be per se exempt from the Act. *See* IFA Br. 1. Nor would it have made sense for the Department to have had such a view, as nothing in the Act

² In 2005, a Department auditor concluded that Lyons was responsible for paying premiums for only two of Lyons’s franchisees. CP 875. Contrary to IFA’s suggestion (IFA Br. 1), this does not prove that the Department believed franchises were per se exempt from the Act: if that had been the Department’s view, it would not have found Lyons responsible for any of the franchisees. The record does not explain why the 2005 audit found that so few of the franchisees were covered workers, but, whatever the reason, it could not have been based on the idea that a per se exemption existed.

provides support for it.³

B. The Janitorial Franchisees Here Work in Lyons's Interest and Perform Personal Labor Without Hiring Employees

The existence of the third party customers does not change the relationship between Lyons and the franchisees. If the franchisees' cleaning services please Lyons's customers, it serves Lyons' business interests. The appellate courts have recognized that labor performed for the employer's customers benefits the employer. For example, in *Dana's Housekeeping*, the Court of Appeals held that an independent contractor who provides services under contracts with an employer is a covered worker even if the services are provided to a customer of the employer, since the employer benefits from the independent contractor's labor. *Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 607-09, 849 P.2d 1209 (1993); see also *Lloyd's of Yakima Floor Ctr. v. Dep't of Labor & Indus.*, 33 Wn. App. 745, 752, 662 P.2d 391 (1982) (holding same); *Emp't Dep't v. Nat'l Maint. Contractors*, 226 Or. App. 473, 481-82, 24 P.3d 151 (2010) (holding under Oregon statute that work performed by franchisees to customers of the franchisor was performed for the franchisor because the performance of that work discharged the

³ If the Department had adopted a rule that purported to grant a per se exemption to franchisees and franchisors, the rule would have been ultra vires, as it would have been contrary to law. See *Washington Public Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003).

franchisor's contractual obligation to its customers).

IFA's claim that the only ones benefitting from the work are the franchisee and the customer is incorrect for four reasons. IFA Br. 13. First, Lyons's franchises work for Lyons when Lyons's franchisees provide commercial cleaning services to customers of Lyons because they are performing the work under contracts between the franchisees and Lyons for their mutual benefit. IFA Br. 11-13 *See Dana's Housekeeping, Inc.*, 76 Wn. App. at 607-09; IFA Br. 11-13. Whether Lyons cuts a direct check to the janitorial franchisees is not determinative.⁴ *Dana's Housekeeping*, 76 Wn. App. at 607-09. Janitorial franchisees are in the course of employment under RCW 51.32.010 when they do work that furthers the employer's interest, as here. IFA Br. 13.

Second, the work provided by the janitorial franchisees discharges the contract that Lyons entered into with the customer: if the commercial cleaning services were not provided, Lyons would be in breach of its contract with that customer. *See* CP 1907-08, 1926, 2155, 2167.

Third, the franchisee's work discharges Lyons's obligation to

⁴ During the period of time covered by the Department's audit Lyons had the exclusive right to bill customers for the work its franchisees performed, and it sent the franchisees their share of the earnings for their work. CP 2158-59. Subsequent to the audit period, Lyons adjusted the contracts to give the franchisees the option to do their own billing, but no franchisees have opted to do their own billing. CP 2158-59. But whether the franchisees bill the customer and remit payments to Lyons or Lyons bills the customers and remits payments to the franchisees, Lyons's franchisee perform work under contracts with Lyons and for the benefit of Lyons and the franchisee.

provide the franchisee with a certain amount of annual billing: if Lyons fails to provide its franchisees with the guaranteed level of gross billings, Lyons would breach its contract with its franchisees and they could demand refunds of their franchise fees. *See* CP 317-18, 1907-08.

Finally, Lyons receives at least fifteen percent of all of the gross billing under all of these cleaning contracts. CP 1915-16, 1928, 1932-33. Because the franchisees perform work under contracts with Lyons and because Lyons benefits from the performance of that work, franchisees perform work *for* Lyons when they provide services *to* Lyons's customers.

AWB attempts to distinguish the case from *Dana's Housekeeping*, but none of the differences it points to support its contentions. AWB Br. 6-7. AWB contends that the employer in *Dana's Housekeeping* exercised control by requiring its contractors to follow "priority lists". AWB Br. 6. However, while *Dana's Housekeeping* mentions the priority lists in its factual summary, it did not discuss that fact in its holding, let alone rely on it.⁵ *See Dana's Housekeeping*, 76 Wn. App. at 603, 607-09.

AWB also argues that the contractors in *Dana's Housekeeping* were prevented from using others to perform cleaning work, while Lyons's franchisees had the right to hire workers. AWB Br. 6. However,

⁵ Furthermore, the "priority list" was something that the customer generated, not the employer, and, while the cleaners were expected to follow the customer's wishes, the case does not indicate that the degree of control exercised through the "priority list" was large. *See Dana's Housekeeping*, 76 Wn. App. at 603; *contra* AWB Br. 6.

the Court of Appeals accounted for this by holding that it is only the franchisees who did not use workers of their own who were covered under the Act. *Dep't of Labor & Indus. v. Lyons Enter., Inc.*, 186 Wn. App. 518, 534-35, 347 P.3d 464, *review granted*, 183 Wn.2d 1017 (2015).

Finally, AWB argues that the contractors bore the risks of nonpayment in *Dana's Housekeeping* while Lyons's franchisees bore that risk here. AWB Br. 7. AWB is correct that this factual difference exists, but this Court should not treat that factor as determinative in this case because what *Dana's Housekeeping* fundamentally stands for is that the particular contractual model chosen by the parties is not determinative. *See Dana's Housekeeping*, 76 Wn. App. at 607-09; *see also Nat'l Maint. Contractors*, 226 Or. App. at 482-83 (explaining that while franchisees bore risk if customer failed to pay did not stop the franchisees from being workers who were covered under Oregon's statute because the franchisees performed work under contracts with the franchisor). Rather, the Industrial Insurance Act demands looking to see whether personal labor was performed under a contract, however the contract may describe the parties' relationships to each other, and whether the essence of that work is personal labor. While Lyons's franchisees bear the risk of nonpayment for their work, the essence of their *work* is nonetheless the physically demanding personal labor inherent in janitorial services.

Making an argument that misstates the holding of *White v. Department of Labor & Industries*, 48 Wn.2d 470, 472-74, 294 P.2d 650 (1956), IFA and AWB argue that because Lyons's franchisees can hire workers of their own if they choose, none of Lyons's franchisees provide personal labor to Lyons, including those who personally performed all of the work under the contract. IFA Br. 13-14; AWB Br. 7-10. *White* does not support that argument. *White*, 48 Wn.2d at 472-74.

Rather, in *White* this Court limited its holding on personal labor and employment of others to rule that it is only where the independent contractor *actually* employed someone to perform the work that the essence of the contract that the essence of the work is not personal labor. *See id.* The essence of the work under a contract is not personal labor if the independent contractor "of necessity or choice employs others to do all or part of the work." *Id.* at 474.

AWB represents that *White* agrees with *Crall v. Department of Labor & Industries*, 45 Wn.2d 497, 275 P.2d 903 (1954), that if the contract contemplates labor by another the independent contractor is not covered. AWB Br. 8-9. But in *White*, the Court expressly disavowed language that the Court used in *Crall* and another of its earlier decisions suggesting that the mere contractual ability to use another to perform work was enough. *See White*, 48 Wn.2d at 472-73. The *White* decision

emphasized that these decisions were “too broad” and the Industrial Insurance Act does not cover only those “extremely rare cases” where the employer wants only the services of the contractor. *Id.* at 473-74.

White's limitation reflects the Court's adherence to the fundamentals of *Norman*, where the Court recognized that the intent of the Legislature is to “bring under its protection independent contractors whose personal efforts constitute the main essential in accomplishing the objects of the employment.” *Norman v. Dep't of Labor & Indus.*, 10 Wn.2d 180, 184, 116 P.2d 360 (1941). Thus, the actual work performed by the independent contractor is the touchstone, not the hypothetical possibility of using another for labor. This makes sense because it would be easy for all employers of independent contractors to simply have a provision in the contract that allows for another to perform the job to avoid coverage—but as *Norman* recognized, what the Legislature is looking at is the actual labor performed, not the business model or hypotheticals. The Legislature wishes to cover Washington workers to reduce economic and physical suffering when they provide personal labor, and there is no work more personal than janitorial work. RCW 51.12.020.⁶

⁶ IFA argues that it is unfair for the question of whether work is essentially personal or not to turn on whether a franchisee chooses to employ others since the franchisee alone has the power to make that choice. IFA Br. 13-14. But Lyons chose this contractual arrangement and cannot now complain that it must follow the Industrial Insurance Act's dictates to look to personal labor. *See White*, 48 Wn.2d at 472-74.

C. It Is Not Impossible for a Franchisor to Comply With the Industrial Insurance Act

Franchisors that use franchisees to perform labor under independent contracts, the essence of which is personal labor, are bound by the Industrial Insurance Act. IFA argues without support that the Industrial Insurance Act should not cover franchisees because franchisors “universally” lack the ability to obtain any information regarding whether their franchisees have hired any workers, and thus franchisors would never be able to file the quarterly reports with the Department that it would have to file if its franchisees are its workers. IFA Br. 16. The claim that franchisors are universally incapable of obtaining information regarding their franchisee’s employment related activities is implausible and is contradicted by the record in this case. *See* CP 331-32, 337-39.

Under the terms of its franchise agreements, Lyons has a broad right to review all of a franchisee’s business records, which logically includes the franchisee’s employment records. *See* CP 331-32, 337-39. Provision 10.1 of the franchise agreement requires franchisees to “maintain complete and accurate books and records for the Franchised Business’s operations.” CP 331. If a franchisee employs workers as part of his or her business, this would be part of the franchisee’s business operations and would be an item as to which the franchisee would need to

maintain “complete and accurate” books and records. CP 331.

Furthermore, no basis exists to conclude that franchisors generally would be incapable of absorbing the cost of industrial insurance premiums.⁷ It is true that, like any other business that is taxed, a franchisor’s profits are reduced if it is taxed—but the purpose of the tax is to fund the health care of injured workers. The Legislature has made the decision that franchisors must meet this requirement. But it must be borne in mind that there are limiting principles in place: like any other business, a franchisor is only responsible if it contracts with franchisees for their labor and the essence of those contracts is personal labor. Here there are multiple “mini-contracts” between Lyons and the franchisees to do work for Lyons’s customers—this might not be the contractual arrangement for other franchised businesses.

Additionally, under *White*, franchisees that employ workers of their own will be exempt. See *White*, 48 Wn.2d at 474. IFA alludes to

⁷ IFA argues that “thousands” of franchised businesses would likely fail if the Industrial Insurance Act applied to them, comparing the owner of Lyons’s testimony that his yearly profits (\$125,000) and the Department’s original estimate that the premiums would be approximately \$150,000 a year. IFA Br. 2. However, IFA’s use of the \$150,000 figure is misleading because that number was derived based on the assumption that both the franchisees with workers of their own and the franchisees who did not have any workers of their own would be covered under the Act (and that Lyons would be responsible for the workers hired by the franchisees as well), while, under the Court of Appeal’s opinion, Lyons is only liable for premiums for the franchisees who do not have workers of their own. CP 113. *Lyons*, 186 Wn. App. at 534-35. Per Lyons’s own estimate, 80 percent of the franchised businesses hired workers of their own; if correct, this would result in premiums far lower than the \$150,000 originally estimated by the Department. See CP 2147.

businesses like Burger King and Domino's (e.g., IFA Br. 12), but such franchisors would rarely if ever be liable for their franchisees' industrial insurance premiums because the owners of such franchises would almost certainly have to hire a staff of workers to operate their franchises and thus would be exempt from coverage under *White*. See 48 Wn.2d at 474.

The Industrial Insurance Act represents a compromise between business and labor. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002). Each forfeited certain rights in exchange for the "sure and certain relief" provided by the Act. RCW 51.04.010; *Minton*, 146 Wn.2d at 390. In this compromise, the Legislature balanced the competing interests involved in assessing premiums and resolved them to protect individuals who are injured on the job so that they may have health care and wage replacement benefits. RCW 51.04.010; RCW 51.12.010. As part of the bargain struck between business and labor, the Legislature has recognized that there may be situations where the independent contractor operates as a truly independent business, and an employer is not covered if all of the requirements of RCW 51.08.195 are met. IFA and AWB should not second guess the legislative resolution of the public policies underlying the Act.

D. Lyons's Franchisees Are Not Exempt Under RCW 51.08.195

Under RCW 51.08.070 an employer is subject to the Industrial

Insurance Act if it utilizes a contractor to perform personal labor.

RCW 51.08.195 provides an exemption from coverage if an independent contractor meets six criteria. Two of RCW 51.08.195's requirements are not met here. First, Lyons's franchisees are not "free from control or direction over the performance of the service" by the employer that contracted for the personal labor as RCW 51.08.195(1) requires. Second, Lyons's franchisees are neither "customarily engaged" in an "independently established" trade or business, nor do they have a principal place of business that qualifies for a business deduction under the federal tax code as RCW 51.08.195(3) requires.

1. An Independent Contractor Who Is a Franchisee Is Exempt Under RCW 51.08.195(1) Only if He or She Is Free of the Franchisor's Direction or Control

RCW 51.08.195(1) is met only if an independent contractor is "free" of "direction or control" by an employer. IFA argues that RCW 51.08.195 should be modified for franchisees, contending that the standard under RCW 51.08.195(1) "ought to be" whether a franchisor controls the "methods and details" of the franchisees' work. IFA contends that franchisors would never qualify for an exemption if RCW 51.08.195(1) is applied literally to them and therefore a literal reading of the statute should not be applied. IFA Br. 20. This argument fails for three reasons.

First, under the plain language of RCW 51.08.195(1), the independent contractor must be “free” from direction or control. There is no basis under the Act for applying a less exacting standard to franchisors.

Second, IFA conflates the standard that determines whether an employer-employee relationship exists with the standard that determines whether an independent contractor is exempt from coverage. For an employer-employee relationship to exist, the employer must exercise control over the “methods and details” of the worker’s performance. *Risher v. Dep’t of Labor & Indus.*, 55 Wn.2d 830, 834, 350 P.2d 645 (1960). But an employer necessarily does not control the methods and details of an independent contractor’s work: if it did, an employer-employee relationship would exist. *See Risher*, 55 Wn.2d at 834.

Third, IFA’s assertion that it would be impossible for a franchisee to ever be free of direction or control is unsupported and incorrect. *See* IFA Br. 19-20. The issue under the Industrial Insurance Act is not whether a franchisor has some controls in place to protect its trademark, but whether the franchisor exercises a degree of control over the performance of the work under the contract. *See* RCW 51.08.195(1). A franchisor might well qualify for the exemption if, unlike Lyons, it only exercised control over its franchisees use of the trademark and did not

control the franchisees' work performances.⁸

Although IFA suggests that Lyons did not exercise control over its franchisee's work (IFA Br. 19-20), substantial evidence supports the Board's finding that Lyons did do so. The Board's finding that Lyons exercised control over its franchisees' performance of the work under their contracts cannot be second guessed on appeal. *See Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 943, 640 P.2d 1051 (1982) (explaining that an appellate court does not reweigh evidence or revisit credibility determinations made by the finder of fact). The Board's findings are supported by substantial evidence because Lyons owns all of the cleaning contracts that it assigns to the franchisees and it can reassign a cleaning contract from one franchisee to another at any time.⁹ CP 317-18, 1908, 1918. Furthermore, it regularly audits its

⁸ This Court need not reach whether a franchisor's exercise of the controls mandated by FIPA, alone, precludes a finding that RCW 51.08.195(1) was met because Lyons exercised controls over its franchisees' work that was not required by FIPA.

⁹ IFA claims that a franchisor does not have a form of control similar to that exercised by an employer because, unlike an employer, it has no remedy available to it if it is dissatisfied with a franchisee's work aside from terminating the franchise agreement in its entirety. IFA Br. 10, n.7. That is not true in this case: Lyons has the power to take a given cleaning assignment away from a franchisee based on poor work performance without terminating the franchise agreement itself. CP 317-18, 1908, 1918. This is analogous to an employer disciplining an employee by reducing the employee's hours, and thereby reducing the employee's earnings. Furthermore, if Lyons receives a complaint about a franchisee from a customer, it can assess a one-time penalty against the franchisee. CP 1916. This is analogous to an employer disciplining an employee by docking his or her pay. Lyons has a variety of tools available to it that allow it to control the work its franchisees perform. Far from highlighting a difference between franchisors and other employers, Lyons's ability to regulate its franchisees' work underscores the similarity it bears to more traditional employers.

franchisees' work and can remove a franchisee from a cleaning contract— with no obligation to find another contract for the franchisee—if it finds that the work was faulty. CP 318, 2173-74.

2. A Franchisee Who Has Not Pursued a Trade or Business Independently of a Franchisor Is Not Customarily Engaged in an Independently Established Trade or Business

Lyons's franchisees also do not meet the third element for an exemption under RCW 51.08.195. *See* RCW 51.08.195(3). RCW 51.08.195(3) unambiguously provides that an independent contractor must be “customarily engaged” in an “independently established” trade or business. IFA suggests that a franchisee should be held to satisfy RCW 51.08.195(3) so long as it paid its own expenses and insurance, filed its own taxes, made staffing decisions, and assumed the risk of business failure, regardless of whether it ever pursued the business or trade that is the subject of the franchise before becoming a franchisee and regardless of whether a non-compete clause would forbid it from pursuing that business after the franchise agreement ended. IFA Br. 17-18. Contrary to IFA's arguments, RCW 51.08.195 requires the court to look to see if the individual could and did operate an independent business before, during, and potentially after working for the employer because it looks to the customary practice of an “established” business. IFA effectively reads

“customarily engaged” and “independently established” out of the statute, as its reading gives no effect to either term.

IFA effectively asks for special treatment for franchisees, arguing that RCW 51.08.195(3) is too restrictive if it is applied literally to franchisees. IFA Br. 17-20. But here the franchisor made the choice in how to configure its business to preclude independent businesses and by doing so it choose not to avail itself of RCW 51.08.195.¹⁰ It is not an employer’s business model that determines the exemption, but whether the elements of RCW 51.08.195 are met.

III. CONCLUSION

The touchstone of the analysis is the work performed under the contract—here it is the personal labor of cleaning for Lyons under contracts with Lyons. Accordingly, this Court should reject the arguments of Amici IFA and AWB and affirm.

RESPECTFULLY SUBMITTED this 7th day of January, 2016.

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¹⁰ Nothing in FIPA requires non-compete clauses. RCW 19.100.

NO. 91610-1

**SUPREME COURT
OF THE STATE OF WASHINGTON**

WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent,

v.

LYONS ENTERPRISES, INC.,
d/b/a JAN-PRO CLEANING
SYSTEMS,

Appellant.

DECLARATION OF
SERVICE

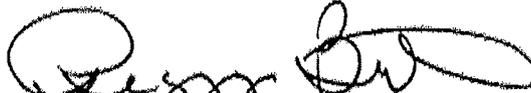
The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department of Labor and Industries' Answer to Amicus Curiae Briefs of International Franchise Association and The Association of Washington Business and this Declaration of Service to all parties on record by U.S. Mail and E-mail as follows:

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DLI v. Lyons Enterprises, Inc., dba. Jan-Pro Cleaning Systems
Case No. 91610-1
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