Legislative Analysis

APPLICATION OF EMPLOYMENT RULES TO FRANCHISEES

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House Bill 5070 w/o amendment)
Sponsor: Rep. Eric Leutheuser

House Bill 5071 w/o amendment
Sponsor: Rep. Pat Somerville

House Bill 5072 w/o amendment
Sponsor: Rep. Nancy E. Jenkins

House Bill 5073 w/o amendment
Sponsor: Rep. Daniela Garcia
House Committee: Commerce and Trade

Senate Bill 492 w/o amendment
Sponsor: Sen. Jack Brandenburg

Senate Bill 493 w/o amendment
Sponsor: Sen. John Proos
Senate Committee: Commerce and Trade
House Committee: Commerce and Trade

Complete to 12-14-15

BRIEF SUMMARY: Five of these bills would allocate employer responsibilities to franchisees rather than franchisors, to the extent allowed by law, and the sixth bill would provide an exception whereby franchisees and franchisors share employer responsibilities.

FISCAL IMPACT: The bills would have no fiscal impact.

THE APPARENT PROBLEM:

A recent decision by the National Labor Relations Board (NLRB) has raised certain questions about the franchisor-franchisee relationship. While some argue that the NLRB ruling "restates" existing law, those supporting these bills describe it as a "radical reconstruction." This bill would clarify state law concerning the relationship. (See the ***Background Information*** section of this analysis for a discussion of the NLRB decision.)

THE CONTENT OF THE BILL:

Senate Bill 492 and the four House bills would amend the Franchise Investment Law and four employment acts to add that ***franchisees are considered the sole employer of the workers for whom they provide a benefit plan or pay wages, except as specifically provided in the franchise agreement***. This clarifies that an employee may only seek compensation or redress from the franchisee for whom he or she directly works, and not from the franchisor. The bills would take effect 90 days after they are enacted.

Senate Bill 493 would present the specific circumstances under which a franchisee and franchisor to employer are considered joint employers.

Often, a large company (franchisor) contracts with an individual or smaller company (franchisee), so that the individual may use the business model and brand of the company for a period of time, and in exchange will pay the company a portion of its sales and additional fees. Subway, McDonald's, and 7-Eleven are three of the country's largest franchises and, along with other franchises, comprise 11 million American jobs. Although these are national brands, these bills would make clear that the employees who work in a franchise store are considered employees of that franchisee alone, unless otherwise specified in the franchise agreement.

Senate Bill 492 would add the above highlighted language to the Franchise Investment Law. (MCL 445.1501 to 445.1546)

House Bill 5070 would amend the Michigan Occupational Safety and Health Act by adding the above highlighted language to its definition of "employer." (MCL 408.1005)

House Bill 5071 would amend Public Act 390 of 1978, by replacing the Department of Labor as the department governing the payment of wages, rights and responsibilities of employers and employees, and dispute resolution, with the Department of Licensing and Regulatory Affairs. It would also add the above highlighted language to its definition of "employer." (MCL 408.471)

House Bill 5072 would amend the Workforce Opportunity Wage Act by adding the above highlighted language to its definition of "employer." (MCL 408.412)

House Bill 5073 would amend the Michigan Employment Security Act by adding the above highlighted language to its definition of "employer." (MCL 421.41)

Senate Bill 493 would amend the Worker's Disability Compensation Act of 1969 to reflect that an employee of the franchisee is not an employee of the franchisor for purposes of the act unless the following circumstances apply:

- The franchisee and franchisor share in the determination of or codetermine the matters governing the essential terms and conditions of the employee's employment, and
- The franchisee and franchisor both directly and immediately control matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction.

BACKGROUND INFORMATION:

In August of 2015, the National Labor Relations Board issued a ruling in the latest Browning case,[1] which stated that a company may be considered a joint-employer if it exerts **direct or indirect control** (including through an intermediary) over the employees of another company with which it contracts. The NLRB listed several factors which

[1] *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner., 362 NLRB 186 (2015).*

determine whether a company is a joint-employer, including involvement in hiring and firing decisions, supervision of employees, and determination of wages.

According to the NLRB, the initial codification of the joint-employer definition, in a 1982 federal court case also involving Browning,[2] has been diminished and narrowed by successive NLRB decisions which have no basis in the Third Circuit's decision. Accordingly, the NLRB says its most recent ruling broadens the definition to its initial intent.

Texas, Louisiana, and Tennessee have already enacted state laws this year specifying that a franchisor is generally not the employer of its franchisees or its franchisees' employees, which contradict the NLRB ruling. The state attorneys general of Colorado, Nevada, South Carolina, Utah, and Wisconsin have also expressed concern about the NLRB ruling.

ARGUMENTS:

Both sides agree that these bills are presented in response to the recent NLRB ruling that franchisors may be considered joint-employers with franchisees. The bills' supporters frame this as an issue of small business autonomy, while opponents say that the bills would frustrate workers' attempts to unionize and bargain for higher wages and better working conditions.

For:

Proponents argue that franchisees consider themselves to be local business owners rather than merely managers of those businesses and, as such, should not lose their autonomy. Franchisees testified before the committee that they currently have sole responsibility for hiring and firing employees, supervising health and safety inspections, and providing health care to their employees. They feel that the NLRB ruling would give the franchisor a say in those proceedings, and would reduce their control over the businesses they consider to be theirs, and to which they purchased the rights.

Franchisees also testified that they have run these businesses for many years and often paid hundreds of thousands of dollars for them. The NLRB decision might change the franchise model to more of a corporate model, where decisions are made at a higher level and enforced at a local level, which would both diminish the value of a franchisee's investment and remove any decision-making ability.

While the NLRB claimed that it was "restating" the franchisee determination in the *Browning* ruling, proponents of this bill argue that it drastically changes the franchisor-franchisee relationship, and is a result of partisan politics, as the Board split 3-2 along party lines.

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[2] *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117 (3rd Cir. 1982)

Against:

Opponents of the bills argue that the model in place for the last 30 years has allowed a parent company to franchise its business so that it receives all of the benefits, in the form of franchise fees and a percentage of the franchisee's revenue, while insulating itself from any liability.

They argue that the NLRB ruling would increase corporate accountability, by allowing an employee who wears the corporate logo and sells the corporate goods to advocate for better working conditions and higher wages from the corporation itself.

Currently, a union representing workers can only bargain for higher wages and better working conditions with the franchisee. Because the franchisee has smaller profit margins (a fast-food franchisee typically sees profit margins in the single digits, whereas McDonalds Corporate enjoys a profit margin around 20%) and may be limited by the terms of a franchise agreement, the franchisee's bargaining ability may be limited, thus limiting the bargaining power of the union and employees. A franchisor, with "deeper pockets," is better equipped to meet workers' demands.

POSITIONS:

The Michigan Department of Treasury supports these bills. (12-1-15)
The National Federation of Independent Business (NFIB) supports these bills. (12-1-15)
The Michigan Chamber of Commerce supports these bills. (12-1-15)
The International Franchise Association supports these bills. (12-1-15)
The Michigan Restaurant Association supports these bills. (12-1-15; 12-8-15)
The United States Chamber of Commerce supports these bills. (12-1-15)
The Grand Rapids Area Chamber of Commerce supports these bills. (12-1-15)
A McDonald's franchisee indicated supports these bills. (12-1-15)
The Auto Dealers of Michigan support these bills. (12-1-15)
The Small Business Association of Michigan supports these bills. (12-1-15)
Service Master of Kalamazoo supports these bills. (12-1-15)
Two Men and a Truck (corporate) supports these bills. (12-1-15)
Two Men and a Truck of Livonia supports these bills. (12-1-15)
The Michigan Freedom Fund supports these bills. (12-8-15)
The American Federation of State, County and Municipal Employees (AFSCME) opposes these bills. (12-1-15)
The Laborers International Union of North America opposes these bills. (12-1-15)
The United Auto Workers (UAW) oppose these bills. (12-1-15)
The Michigan American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) opposes these bills. (12-1-15)
The Teamsters Union opposes these bills. (12-8-15)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.