Senate Fiscal Agency
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BILL ANALYSIS

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Senate Bills 492 and 493 (as enacted) **PUBLIC ACTS 266 & 267 of 2015**
House Bills 5070 through 5073 (as enacted) **PUBLIC ACTS 17-20 of 2016**
Sponsor: Senator Jack Brandenburg (S.B. 492)
Senator John Proos (S.B. 493)
Representative Eric Leutheuser (H.B. 5070)
Representative Pat Somerville (H.B. 5071)
Representative Nancy E. Jenkins (H.B. 5072)
Representative Daniela Garcia (H.B. 5073)
Senate Committee: Commerce
House Committee: Commerce and Trade

Date Completed: 4-24-17

RATIONALE

Franchising allows a business to expand and distribute its goods and services by licensing its trade name, trademarks, or service marks. In a franchisee-franchisor relationship, the franchisor (the entity granting the license to conduct business under its marks) specifies the products and services that a franchisee (an entity that is granted the license to do business under the franchisor's marks) can offer. Frequently, a franchisor also provides its franchisee or franchisees with brands, a common operating system, and support services. A franchisee is generally responsible for hiring and terminating its own employees and operating its business, while using the brand names and reputation of its franchisor to earn money.

In 2015, the National Labor Relations Board issued a decision that modified the test for determining whether an entity is a "joint employer" of an employee. The decision apparently has caused some concern about the stability of existing franchisor-franchisee relationships and the feasibility of future franchise agreements. In particular, there is concern that, under the new standard, a franchisor could be named as a joint employer of its franchisees' employees. Accordingly, it was suggested that various laws be amended to allocate responsibility for an employee between a franchisee and franchisor.

CONTENT

Senate Bill 492 amended the Franchise Investment Act to provide for the allocation of employer responsibilities between a franchisor and a franchisee. Senate Bill 493 amended the Worker's Disability Compensation Act to specify when an employee of a franchisee is considered an employee of the franchisor.

House Bills 5070 through 5073 amended the definition of "employer" in various statutes to state that, except as otherwise provided in a franchise agreement, as between a franchisee and franchisor, the franchisee is considered the sole employer of workers for whom the franchisee provides a benefit plan or pays wages.

Senate Bills 492 and 493 took effect on March 22, 2016. House Bills 5070 through 5073 took effect on May 23, 2016.

Senate Bill 492

The bill specifies that, to the extent allocation of employer responsibilities between the franchisor and franchisee is permitted by law, the franchisee is considered the sole employer of workers for whom it provides a benefit plan or pays wages except as otherwise specifically provided in the franchise agreement.

Senate Bill 493

The bill specifies that an employee of a franchisee is not considered an employee of the franchisor for purposes of the Worker's Disability Compensation Act unless both of the following are met: a) 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 b) the franchisee and franchisor directly and immediately control matters relating to the employment relationship, such as firing, discipline, supervision, and direction.

House Bills 5073-5073

House Bills 5070 through 5073 amended the definition of "employer" in various statutes to state that, except as otherwise specifically provided in a franchise agreement, as between a franchisee and franchisor, the franchisee is considered the sole employer of workers for whom the franchisee provides a benefit plan or pays wages.

House Bill 5070 amended the Michigan Occupational Safety and Health Act.

House Bill 5071 amended Public Act 390 of 1978, which regulates the payment of wages and fringe benefits.

House Bill 5072 amended the Workforce Opportunity Wage Act.

House Bill 5073 amended the Michigan Employment Security Act.

MCL 445.1504b (S.B. 492)
418.120 (S.B. 493)
408.1005 (H.B. 5070)
408.471 (H.B. 5071)
408.412 (H.B. 5072)
421.41 (H.B. 5073)

BACKGROUND

National Labor Relations Act (NLRA)

The NLRA grants private sector employees certain rights with respect to labor practices, including the right to organize into unions, engage in collective bargaining, and take collective action against an employer, including strike. The NLRA also established the National Labor Relations Board, which is charged with supervising labor union elections. The Board also is responsible for the investigation and initial adjudication of cases of alleged unfair labor practices within its jurisdiction.

The NLRA applies to an "employer" and "employee". An "employer" includes "any person acting as an agent of an employer, directly or indirectly", but does not include the United States, any wholly owned government corporation, a Federal Reserve bank, a state or its political subdivisions, a person subject to the Railway Labor Act (which includes airlines and railroads), or any labor organization. An "employee" includes any employee, and is not limited to the employees of a particular employer, unless the Act states otherwise, including any individual whose work has stopped because of a labor dispute or unfair labor practice, and who has not obtained other regular and substantially equivalent employment. The Act does not apply to agricultural laborers, domestic

workers, individuals employed by a parent or spouse, independent contractors, an individual working as a supervisor, or an individual subject to the Railway Labor Act.

Joint Employers Under the NLRA

A party's rights and responsibilities under the NLRA depend on the proper identification of the party as an employer, employee, or union. In the modern economy, there are a variety of workplace arrangements. Depending on the underlying circumstances, the arrangement might not make it clear which entity is responsible for compliance with the Act's provisions. In other situations, it may be clear that the employee is responsible to two or more entities in the course of his or her employment. To ensure that employees' rights are maintained, the Board may find that two or more statutory employers are joint employers of the same statutory employee under certain conditions. This determination subjects all joint employers of those employees to the NLRA's requirements, including the requirement to bargain in good faith with the employees' representative.

Before 1984, the standards for determining the existence of a joint employer relationship were not clearly articulated. In some cases, the Board held that the right to control, in addition to actual exercise of control, was probative of joint-employer status. However, in two decisions reached in 1984, the Board created a new heightened standard for the existence of a joint employer relationship.[1] Under that standard, a joint employer relationship existed only where an employer negotiating in good faith with another company retained for itself sufficient control of the terms and conditions of employment of the other company's employees to the extent that the entities shared or codetermined "those matters governing the essential terms and conditions of employment". Typically, those matters included such areas as hiring, firing, discipline, supervision, and direction. In subsequent cases, e.g., *Airborne Express*, 338 NLRB 597 (2002), the Board held that a joint employer relationship existed only when a putative joint employer exercised actual control that was "direct and immediate", and not "limited or routine". This formulation of the joint employer test was used by the Board until 2015.

In *Browning-Ferris Industries of California*,[2] the NLRB opted to modify the test. Under the new test, the Board may find that two or more entities are joint employers if all relevant entities are employers under common law, and if the putative joint employer has sufficient control over employment terms and conditions to permit meaningful bargaining. "Control" under the new test can be direct, indirect, or a reserved right to control, regardless of whether the right to control has been exercised.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Franchisees are local business owners. As such, they, not their franchisor, have the sole responsibility of owning the business and managing the people who work for them. In addition, the franchisees are the people who have invested the most capital and time into the business. The NLRB ruling, which overturned over 30 years of established precedent, altered the calculation and allocation of risk. Under *Browning-Ferris*, depending on minute factual differences, a franchisor could be named as a joint employer, making it responsible for compliance with myriad Federal laws that it otherwise would not have to comply with, without having planned for those contingencies.

[1] *Laerco Transportation*, 269 NLRB 324 (1984) and *TLI, Inc.*, 271 NLRB 798 (1984).
[2] 362 NLRB No. 186 (2015). This case was appealed, and is currently pending before the United States Court of Appeals for the District of Columbia.

This ruling encourages franchisors reduce their support for franchisees. In the alternative, a franchisor may decide to stop granting franchises completely. This option, while mitigating the risk for a franchisor, forecloses many opportunities for small business ownership. The other option facing franchisors is to alter the current business model such that the franchisors would act as managers. This option effectively would end franchisee autonomy as well as eliminate the value of the franchisee's investment in his or her business.

With respect to Michigan law, the bills restore the NLRB previous test for joint employer before the *Browning-Ferris* decision, and help to clarify who is responsible for compliance with the State's various labor laws.

Opposing Argument

The *Browning-Ferris* decision restores the law to the state it was before 1984. Since the 1980s, many businesses enjoyed the benefits of labor but, through various staffing arrangements, shielded themselves from having to satisfy the responsibilities owed to those who work for them. Under the NLRB decision, an entity that has the right to control, or does control, another employer's employees' terms and conditions of employment is considered a joint employer, and must comply with the NLRA as a statutory employer. This ensures that an entity that functions as an employer in all but name remains obligated to comply with the NLRA.

The recent decision applies only to businesses that are considered joint employers for purposes of the NLRA, not necessarily franchises. Each case heard before the NLRB is determined on its own facts. In addition, the ruling is currently on appeal to the U.S. Court of Appeals for the D.C. Circuit, and the enacted legislation could be premature. Furthermore, the NLRA is Federal law. If the *Browning-Ferris* decision is upheld by the courts, it is doubtful that the Board would consider a state's law in its analysis if a future franchisor is held to be a joint employer.

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The bills will have no fiscal impact on State or local government.

Fiscal Analyst: Joe Carrasco
Bill Bowerman

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