Mike Kuglitsch

STATE REPRESENTATIVE • 84TH ASSEMBLY DISTRICT

DATE: January 20, 2016
RE: **Testimony on 2015 Assembly Bill 578**
TO: The Assembly Committee on Small Business Development
FROM: Representative Mike Kuglitsch

Thank you, Mr. Chairman and Committee Members for holding a public hearing on Assembly Bill 578. This common sense legislation follows what various states have done in reaction to a recent decision made by the National Labor Relations Board.

The recent decision by the NLRB proposed new standards that focused on the immediate and actual impact a franchisor has over a franchisee's employees. Since at least 1984, the NLRB has examined a franchisor's actual practices to determine whether the franchisor exercises significant, direct and immediate control over the essential terms and conditions of employment, such as supervision, discipline, scheduling, hiring and firing of the franchisee's employees. This general practice was changed with this ruling. The recent ruling by the NLRB binds franchisors, franchisees, and employees of the franchisee, regardless of how often the two business entities communicate with each other. Under this new rule, an employee of Culvers in New Berlin, is not employed by the local franchisee, but employed by the corporate office in Prairie Du Sac. Recently, Wisconsin Attorney General has stated his concerns with the recent actions made by the NLRB in a letter sent to the Chairman of the board earlier this year.

Assembly Bill 578 ensures that unless an agreement in writing is made, a franchisor is not considered the employer regarding workers compensation, unemployment insurance, employment discrimination, minimum wage, and wage payments. Also, this bill does not change any authority DWD currently has regarding an employee's status. AB 578 allows DWD to determine if a franchisor has been found by the department to have exercised a degree of control over the franchisee and its employees that is not customarily exercised by a franchisor.

This legislation makes it clear that a franchisor is not the employer of a franchisee's employees for regulatory purposes. However, this bill does not limit the franchisor's ability to be the employer of a franchisee's employees if they so choose, but rather it protects the franchisor from being forced to qualify as an employer if the arrangement is not requested. If the franchisor decides that he/she would like to be considered the ultimate employer for all franchisee employees, the option is still available. Essentially, the bill would mimic standards that were in place prior to the ruling made by the NLRB.

As legislators, we must continue to support Wisconsin businesses and the franchise business model that has been in place for over 30 years. Franchisees are small businesses that contribute greatly to our communities and we have a responsibility to protect the business model in which they have been created. In Wisconsin alone, these businesses are responsible for over 177,000 Wisconsin jobs and $13.5 billion in economic output.

Moving forward, I believe it is in the best interest of the state to pursue state standards for our franchisors and franchisees. Thank you for allowing me to testify today and I ask you to support Assembly Bill 578.

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CHRIS KAPENGA
WISCONSIN STATE SENATOR

Testimony on Assembly Bill 578

Assembly Committee on Small Business Development

January 20, 2016

First, I would like to thank Chairman Tauchen and the members of the committee for holding a hearing on Assembly Bill 578. Additionally, I would like to thank Representative Kuglitsch for his leadership on this issue in the Assembly.

Assembly Bill 578 clarifies that, under Wisconsin law, a franchisor is not the employer of a franchisee's employees for several areas of common employment claims and legal actions. It is important to note that it does not reduce or otherwise limit employee rights in Wisconsin. The franchise business model is being interpreted broadly, and I feel incorrectly, by the National Labor Relations Board (NLRB), which issued a decision in August that could have a far-reaching impact on franchisors, franchisees, and the employees of franchisees.

The board's decision in Browning-Ferris Industries of California, Inc. deals with the "joint employer" standard and binds separate business entities together, regardless of the amount of interaction that they may have, when it comes to things such as setting and policing work schedules, tracking employee performance, calculating the labor needs of franchisees, and more.

This legislation makes it clear that a franchisor is not the employer of a franchisee's employees for regulatory purposes. However, this bill does not limit the franchisor's ability to be the employer of a franchisee's employees, if they so choose. Rather, it protects the franchisor from being forced to qualify as an employer if the arrangement is not requested.

I ask you to consider the recommendation of Assembly Bill 578 for a vote in front of the full Senate. Thank you again, Chairman Tauchen and members of the committee, for taking the time to hold this public hearing. I look forward to working with you on the passage of this legislation.

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WISCONSIN

International Franchise Association

Fast Facts

IFA INTERNATIONAL FRANCHISE ASSOCIATION

FRANCHISING®
Building local businesses, one opportunity at a time.

Franchise Brand

Behind many familiar logos and brands . . .

Small Business Owners

. . . are independently-owned local businesses

Local Economy

The Franchise Business Model:

- Has created tens of thousands of American small business owners and millions of opportunities for American workers. For many entrepreneurs, franchising offers the "best of both worlds."
- Allows business owners to gain from affiliating with an established brand and the proven processes that made it a success. At the same time, it allows them to maximize both return on their investments and control over their employees and wages.
- Is under attack at the federal level and at the state and local levels as well. A recent National Labor Relations Board ruling could destroy this time-tested business model and undermine decades of regulatory, legal and legislative precedents.

WISCONSIN BY THE NUMBERS

15,353 Locations
Number of franchise establishments in the state

177,100 Jobs
Number of people employed by franchised businesses

$13.5 Billion Economic Output
Direct amount of money put into the economy by franchised businesses

Examples of Wisconsin-based franchisors
Toppers Pizza
Snap-on Tools
Batteries Plus
Monkburger Franchise Group

Source: Economic Impact Study based on 2007 U.S. Census

U.S. Franchise Facts

- Locally owned franchises are America's hidden small businesses, with 780,000 establishments across the country.
- Franchising directly contributes $890 billion in economic output, accounting for roughly 3% of private sector U.S. GDP.
- Franchising is a job-creating mechanism that not only offers opportunities to entrepreneurs but also supports more than 8.9 million direct jobs nationwide. *January 2015 forecast, IHS Economics*

Franchise Businesses: Good for America and Good for Local Communities

The International Franchise Association is the world's oldest and largest organization representing franchising worldwide. Celebrating 50 years of excellence, education and advocacy, IFA works to protect, enhance and promote franchising through its government relations and public policy, media relations and educational programs.

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To: Assembly Committee Members

From: Andrew Cook, Deputy Attorney General

Date: January 14, 2016

Re: Assembly Bill 578 - Exclusion of a franchisor as the employer of a franchisee or of an employee of a franchisee

On behalf of the Attorney General, I submit the following comments in support of Assembly Bill 578, relating to exclusion of a franchisor as the employer of a franchisee or of an employee of a franchisee. This legislation is in response to a recent decision[1] by the National Labor Relations Board (NLRB) redefining the standard for determining whether a business is a joint-employer under the National Labor Relations Act.

Background - NLRB's *Browning-Ferris Industries of California, Inc.* Decision

The recent NLRB decision involved two companies: Browning-Ferris Industries of California, Inc. (BFI), which owns and operates a recycling facility and contracts with Leadpoint Business Services to provide sorting, screen cleaning, and housekeeping staff.

The NLRB was asked in the case whether it should adhere to the longtime standard for determining joint-employer status previously established by the United States Court of Appeals, Third Circuit, in *Browning-Ferris Industries of Pennsylvania, Inc.* In that case, the court held that employers are joint employers of the same statutory employees if they "share or codetermined those matters governing the essential terms and conditions of employment."[2]

The companies encouraged the NLRB to adhere to its current standard of determining joint-employer status, which emphasized that in order to be deemed a joint-employer, the company must *exercise* authority to control employees' terms and conditions, rather than just *possess* such authority.

The NLRB General Counsel and labor organizations argued that the standard should be amended to lower the bar for determining joint-employer status. They supported the new standard, encouraging the NLRB to abandon its focus on direct and immediate control, and instead to evaluate the "totality of a putative employer's influence over employees' working conditions, including control that is exercised indirectly or reserved via contractual right."[3]

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[1] https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries
[2] 691 F.2d 1117 (3d. Cir. 1982).
[3] *Browning-Ferris Industries of California, Inc.*, Case 32-RC-109684 (2015) (not yet reported in Case Volumes), p. 8.

In a controversial 3-2 decision, the NLRB reversed the longtime standard, opining that the standard did not best serve the National Labor Relation Act's policy of "encouraging the practice and procedure of collective bargaining."[4] Consequently, the NLRB significantly relaxed the standard by imputing joint-employer status on employers that indirectly exercise control through an intermediary, as well as to those that merely possess the ability to control but do not exercise it.

In reaching its decision, the NLRB construed BFI's right to terminate the contract with Leadpoint at will as giving BFI control over Leadpoint employees. The Board also highlighted other ways in which BFI possessed the ability to exercise (though they may choose not to exercise) some degree of control (either direct or indirect) over Leadpoint employees. The new standard requires a case-by-case analysis of employment relationships, removing all certainty and predictability from NLRB regulation with respect to many common business relationships.

The dissent noted that the majority's new test exceeds the NLRB's statutory authority, pointing out that the Act was meant to encourage collective bargaining by an employer in direct relation to its employees, but by expanding the definition of employer, the Board is going far beyond what Congress intended.

In addition, the dissent laid out the large scale implications of such a change, including the impact it will have on subcontracts and third-party commercial relationships, including user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor consumer relationships.

Effect of New Definition of Joint-Employer on Wisconsin Businesses

Below are some potential ramifications to businesses due to the NLRB's decision.

- **Increased Liability under the National Labor Relations Act:** The new standard exposes putative joint employers to liability for labor violations committed by the direct employer. This would occur even in instances where the putative joint employer exerts no control over the employees of the direct employer or how the direct employer manages its labor relations.

- **Forcing Employers into Collective Bargaining:** Under the new standard, if a direct employer is organized, the putative joint employer would have to participate in collective bargaining. This could lead to the putative employer being forced into bargaining relationships with hundreds of entities over day-to-day operations with which they have no control.

- **Secondary Boycotts:** Under the National Labor Relations Act's prohibition on secondary boycotts, if a union has a dispute with one employer, it cannot entangle other employers in the dispute. Based on the NLRB's new standard this

[4] 29 U.S.C. § 151.

distinction is likely to be negated, allowing unions to picket and demonstrate against both entities.

Assembly Bill 578 - Excluding a Franchisor as the Employer of a Franchisee

If AB 578 is enacted, Wisconsin would join other states (Louisiana,[5] Tennessee,[6] and Texas[7]) that have passed legislation in response to the previously anticipated National Labor Relations Board's decision amending the joint employer standard. A similar bill is currently pending in Michigan.[8]

Each of these bills establish that an employee of a franchise is not an employee of the franchisor. In addition, the measures provide that it is the franchisee that is responsible for the employment relationship, including hiring, firing, discipline, supervision and direction of the employee.

Given the preemptive nature of the National Labor Relations Act, AB 578 would not completely overturn the NLRB's recent decision amending the joint employer standard. However, the legislation will protect franchisees from potential state claims involving liability and other potential state law claims. Perhaps more importantly, the laws send a message to the federal government that they do not approve of the NLRB's new joint employer standard.

Conclusion

The NLRB's recent decision overturning nearly three decades of law setting forth the standard determining whether a business is a joint-employer under the National Labor Relations Act will have a significant impact on Wisconsin employers. Assembly Bill 578 is a positive step in protecting the franchise model and small businesses throughout the state.

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[5] Act No. 404.
[6] Pub. Chap. No. 114, Senate Bill 475.
[7] Senate Bill 652.
[8] Senate Bill 492.