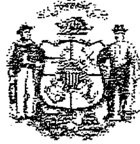

CHRIS KAPENGA
WISCONSIN STATE SENATOR

December 9, 2015

Ms. Janell Knutson, Chairman
Unemployment Insurance Advisory Council
Department of Workforce Development
201 East Washington Avenue
P.O. Box 8942
Madison, WI 53708

Dear Chairman Knutson,

I am writing to inform you of two bills that I have authored during the 2015-16 legislative session in regards to unemployment insurance (UI).

The first is Senate Bill 401, which relates to criminal penalties for fraud in obtaining unemployment insurance benefits. During a recent review of the UI laws here in Wisconsin, we noted that the penalties for someone who intentionally defrauds the UI system are substantially lower than the theft statutes. This bill seeks to remedy this situation by ensuring similar penalties for similar behavior. The penalties are as follows:

- If the value of any benefits obtained does not exceed $2,500, is subject to a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both;
- If the value of any benefits obtained exceeds $2,500 but does not exceed $5,000, is guilty of a Class I felony;
- If the value of any benefits obtained exceeds $5,000 but does not exceed $10,000, is guilty of a Class H felony;
- If the value of any benefits obtained exceeds $10,000, is guilty of a Class G felony.

As with other changes to the UI system, increased criminal penalties for UI fraud will strengthen program integrity and ensure the system functions for its intended purpose.

The second is Senate Bill 422, which clarifies that a franchisor is not an employer of a franchise or of an employee of a franchise. The franchise business model, which is responsible for over 177,000 Wisconsin jobs and $13.5 billion in economic output, is being interpreted broadly, and I feel incorrectly, by the National Labor Relations Board, who 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.

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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, but rather it protects the franchisor from being forced to qualify as an employer if the arrangement is not requested. The franchise model encourages entrepreneurship, which leads to further economic growth, and allows individuals to pursue the American dream.

I look forward to speaking with the Unemployment Insurance Advisory Council at the Thursday, December 17 meeting to discuss these important pieces of legislation with you and the rest of the board. Thank you in advance for your attention to these important issues.

I look forward to your input on strengthening UI laws here in Wisconsin.

Sincerely,

Chris Kapenga
State Senator
33rd Senate District

To: Unemployment Insurance Advisory Council

From: Andy Rubsam

CC: Janell Knutson

Date: December 17, 2015

Re: Proposal to exempt franchisors from employer status in certain scenarios (2015 SB 422 and 2015 AB 578)

Current law provides that, where multiple employing units have a relationship with an employee, the department must determine which employing unit is the employer for the purposes of Wisconsin unemployment insurance law.[1] The law provides several factors for the department to consider when making this determination, such as the employing units' respective rights to hire, fire, and determine pay rates.

2015 SB 422 would create an exception to the employer determination analysis in the case of franchisors and franchisees. Under the bill the franchisor would not be the employer of the worker unless (1) the franchisor agrees in writing to assume that role or (2) the department determines that the franchisor exercised a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.[2] The unemployment insurance division has identified four points the UIAC should be aware of.

First, under the bill if the franchisee is the true employer of the employees, the franchisor will not incur any unemployment insurance tax liability. This is already the case. The department cannot hold franchisors jointly and severally liable with franchisees for the unemployment insurance tax of the franchisee. Only one employing unit is subject to unemployment insurance law as the employer of employees who have a relationship with

[1] Wis. Stat. § 108.065(1e).

[2] 2015 SB 422 § 3.

multiple employers. While data is unavailable, department staff is unaware of a franchisor being determined to be the employer of a franchisee's employees instead of the franchisee.

Second, this proposal potentially creates an unintended unemployment insurance tax burden on franchisors. Currently, employers pay both a state and a federal unemployment tax on employees' wages. If the employer pays a state tax, it receives a credit toward its federal tax, which results in the employer only paying a small portion of the federal tax (0.6% vs 6.0%). The exception that the proposed legislation creates could cause an employer to pay the full federal tax and not pay the state tax.

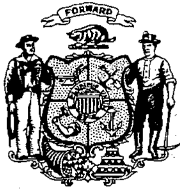
If the department determines that, only due to the exception under this proposal, the franchisee is the employer for state unemployment insurance tax purposes, the franchisee would pay the state unemployment tax on the employees' wages. If the federal government determines that the franchisor should be the employer for the purposes of paying federal unemployment tax (due to the lack of a similar exception in federal law), the franchisor will have to pay the full federal tax on the employees' wages and will not receive a credit because it did not pay the state tax. In this scenario, the franchisor pays the full federal tax and the franchisee pays the full state tax. The result is more total tax paid than if just one employer paid both the state tax and federal tax on the employees' wages because that one employer would receive the federal tax credit.

Third, the proposal states that the franchisor may only be the employer of the franchisee's employees if the franchisor exercised control over the franchisee or the franchisee's employees "that is not customarily exercised by a franchisor for the purposes of protecting the franchisor's trademarks and brand." The terms of this proposal, such as "customarily exercised" and the "purposes of protecting the franchisor's trademarks and brand", are not defined in the statute. So the department will be required to create new questionnaires to send to franchisor and franchisee

employers regarding the degree of control that the franchisor exerts and request a copy of the franchise agreement. The additional time spent determining which employing unit is the employer could cause delays in establishing employer coverage and paying benefit claims, negatively affecting the department's timeliness scores.

Fourth, the department administers the unemployment insurance program by analyzing the current statutory factors in determining which employing unit is the employer of an employee. This results in predictability for employers because the factors are explicitly listed in the statute. But, 2015 SB 422 creates an exception for one type of employer and adds complexity and uncertainty to the statute.

Current law appears to achieve the unemployment insurance policy goals of the bill. However, the proposed law change may result in unintended tax increases for certain employers.



State of Wisconsin
2015 - 2016 LEGISLATURE

LRB-3674/1
GM/AM/MD:emw

2015 SENATE BILL 422

December 3, 2015 - Introduced by Senators KAPENGA, MARKLEIN and STROEBEL, cosponsored by Representatives KUGLITSCH, BORN, R. BROOKS, CRAIG, GANNON, HUTTON, JARCHOW, KNODL, MURPHY, ROHRKASTE, SANFELIPPO, SKOWRONSKI and TITTL. Referred to Committee on Labor and Government Reform.

1 AN ACT ***to create*** 102.04 (2r), 104.015, 108.065 (4), 109.015 and 111.3205 of the
2 statutes; **relating to:** exclusion of a franchisor as the employer of a franchisee
3 or of an employee of a franchisee.

Analysis by the Legislative Reference Bureau

This bill excludes a franchisor as the employer of a franchisee or of an employee of a franchisee for purposes of certain laws relating to employment. Specifically, the bill provides that for purposes of the laws relating to worker's compensation, unemployment insurance, employment discrimination, minimum wage, and wage payments, a franchisor is not considered to be the employer of a franchisee or of an employee of a franchisee, unless any of the following applies:

1. The franchisor has agreed in writing to assume that role.
2. The franchisor has been found to have exercised a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.

For further information see the ***state*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

4 SECTION 1. 102.04 (2r) of the statutes is created to read:

1 102.04 **(2r)** For purposes of this chapter, a franchisor, as defined in 16 CFR
2 436.1 (k), is not considered to be an employer of a franchisee, as defined in 16 CFR
3 436.1 (i), or of an employee of a franchisee, unless any of the following applies:
4 (a) The franchisor has agreed in writing to assume that role.
5 (b) The franchisor has been found by the department or the division to have
6 exercised a type or degree of control over the franchisee or the franchisee's employees
7 that is not customarily exercised by a franchisor for the purpose of protecting the
8 franchisor's trademarks and brand.

9 **SECTION 2.** 104.015 of the statutes is created to read:

10 **104.015 Franchisors excluded.** For purposes of this chapter, a franchisor,
11 as defined in 16 CFR 436.1 (k), is not considered to be an employer of a franchisee,
12 as defined in 16 CFR 436.1 (i), or of an employee of a franchisee, unless any of the
13 following applies:
14 **(1)** The franchisor has agreed in writing to assume that role.
15 **(2)** The franchisor has been found by the department to have exercised a type
16 or degree of control over the franchisee or the franchisee's employees that is not
17 customarily exercised by a franchisor for the purpose of protecting the franchisor's
18 trademarks and brand.

19 **SECTION 3.** 108.065 (4) of the statutes is created to read:

20 108.065 **(4)** Notwithstanding sub. (1e), a franchisor, as defined in 16 CFR 436.1
21 (k), is not considered to be an employer of a franchisee, as defined in 16 CFR 436.1
22 (i), or of an employee of a franchisee, unless any of the following applies:
23 (a) The franchisor has agreed in writing to assume that role.
24 (b) The franchisor has been found by the department to have exercised a type
25 or degree of control over the franchisee or the franchisee's employees that is not

1 customarily exercised by a franchisor for the purpose of protecting the franchisor's
2 trademarks and brand.

3 **SECTION 4.** 109.015 of the statutes is created to read:

4 **109.015 Franchisors excluded.** For purposes of this chapter, a franchisor,
5 as defined in 16 CFR 436.1 (k), is not considered to be an employer of a franchisee,
6 as defined in 16 CFR 436.1 (i), or of an employee of a franchisee, unless any of the
7 following applies:

8 **(1)** The franchisor has agreed in writing to assume that role.

9 **(2)** The franchisor has been found by the department to have exercised a type
10 or degree of control over the franchisee or the franchisee's employees that is not
11 customarily exercised by a franchisor for the purpose of protecting the franchisor's
12 trademarks and brand.

13 **SECTION 5.** 111.3205 of the statutes is created to read:

14 **111.3205 Franchisors excluded.** For purposes of this subchapter, a
15 franchisor, as defined in 16 CFR 436.1 (k), is not considered to be an employer of a
16 franchisee, as defined in 16 CFR 436.1 (i), or of an employee of a franchisee, unless
17 any of the following applies:

18 **(1)** The franchisor has agreed in writing to assume that role.

19 **(2)** The franchisor has been found by the department to have exercised a type
20 or degree of control over the franchisee or the franchisee's employees that is not
21 customarily exercised by a franchisor for the purpose of protecting the franchisor's
22 trademarks and brand.

23 **SECTION 6. Initial applicability.**

1 (1) EXCLUSION OF FRANCHISORS AS EMPLOYERS. This act first applies to work
2 performed on the effective date of this subsection.

3 **(END)**