Effectiveness of the Legislative Response to Joint Employer Liability

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The franchise industry occupies a unique space in the larger employment and workplace debates occurring across the country. Thousands of people work for franchised businesses in the United States—often small businesses—which are independently owned and operated. The franchisees are responsible for employing their workforce and paying their own labor costs. But their employees carry the mantle of large national brands, not mom-and-pop shops. Their uniforms and work spaces bear recognizable trademarks, and they follow detailed systems for selling specific products and services that the consuming public expects to be produced consistently across the country. Therein lies the rub. In a business model built on control, how much control is too much? And what forms can (or should) a franchisor's control take?

Franchise lawyers and business people have been grappling with these questions for years, long before "joint employer liability" became the term *du jour*. For decades, franchisors could be held liable under a theory of vicarious liablity if they exercised direct and immediate control over day-to-day employment matters related to the franchisees' employees—that is, if the franchisor disciplined, hired, fired, or supervised these employees. And the U.S. Supreme Court repeatedly considered whether or not an employment relationship existed under common law agency principles.[1]

1. *See, e.g.*, Cmty. for Creative Non Violence v. Reid, 490 U.S. 730, 751–52 (1989) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is

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The National Labor Relations Board (NLRB) and the U.S. Department of Labor (DOL) turned that established standard on its head in recent years. In the 2015 *Browning-Ferris* decision, the NLRB greatly expanded the joint employer standard under the National Labor Relations Act (NLRA)[2] to include "indirect control."[3] Likewise, the DOL issued guidance that expanded the joint employer standard under the Fair Labor Standards Act of 1938 (FLSA)[4] and the Migrant and Seasonal Agricultural Worker Protection Act[5] for violations by staffing agencies, contractors, and franchisees (and others) on January 20, 2016.[6] These developments created considerable uncertainty, which was later compounded by litigation at the state and federal level filed by franchisees, employees, and others seeking to hold franchisors responsible for everything from state wage and hour violations to discrimination and sexual harrassment. All told, what controls a franchisor could exercise without exposing itself to joint employer liabilty were in doubt.

Rather than wait for clarity from the courts or administrative agencies, state and federal legislators considered and passed laws addressing joint employer liability in franchising. At this time about forty percent of the states have passed some law addressing the issue. In addition, the U.S. House of Representatives passed a bill that would amend Section 2(2) of the NLRA[7] and Section 3(d) of the FLSA to clarify the meaning of "joint employer" under those laws.[8] This article examines the effectiveness of the legislative response. Part I details the various laws that have been passed. Part II describes trends that have emerged in the legislation. Part III concludes by analyzing the effectiveness of the laws and their implications for the future.

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part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.") (citations omitted).

2. 29 U.S.C. §§ 151–169.

3. *See* Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 186, 18 (Aug. 27, 2015), *available at* https://www.nlrb.gov/case/32-RC-109684 (follow "Board Decision" hyperlink) (The NLRB relied on indirect control and reserved contractual authority over essential terms and conditions of employment to find a joint employer relationship.) The NLRB overruled the *Browning-Ferris* decision on December 14, 2017, returning to the pre-Browning-Ferris standard to determine joint employer liability. *See generally* Hy-Brand Indus. Contractors, Ltd., 365 N.L.R.B. No. 156 (Dec. 14, 2017).

4. 29 U.S.C. §§ 201–219.

5. *Id.* §§ 1801–1872.

6. *See generally* Dep't of Lab.: Wage & Hour Div., *Administrator's Interpretation No. 2016-1* (Jan. 20, 2016), http://www.smithmoorelaw.com/webfiles/DOL_Joint_Employment2016.pdf. The DOL withdrew this guidance on June 7, 2017 through a press release issued by Secretary of Labor Alexander Acosta. Dep't of Lab., *U.S. Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance* (last visited Dec. 4, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170607. In the press release, the DOL stated that "[r]emoval of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the department's long-standing regulations and case law." *Id.*

7. 29 U.S.C. § 152(2).

8. *Id.* § 203(d).

I. Joint Employer Legislation

In response to the expanding definition of a joint employer, states began proposing and enacting legislation with the goal of restricting (or eliminating) the circumstances in which a franchisor may be deemed the employer of its franchisees or its franchisees' employees. These efforts were mimicked in the U.S. Congress, although no federal law has been enacted.

A. *Eighteen states have enacted legislation in response to "joint employer" concerns.*

Alabama, Arizona, Arkansas, Georgia, Indiana, Kentucky, Louisiana, Michigan, New Hampshire, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Wisconsin, and Wyoming—eighteen states in total—have enacted joint employer statutes.[9] The language and likely applicability of the laws, which were enacted from 2015 to 2017, are discussed in this section by introduction date to better illuminate trends. The states took widely divergent approaches to the joint employer issue—some enacted general employment statutes, others amended their franchise laws, and still others amended specific provisions of their labor and employment laws. On a certain level, this makes sense as states offer varying degrees of protection to employees generally. However, for franchisors operating on a national level and seeking to mitigate risks, the hoped-for consistency is lacking.

1. Tennessee, Texas, Louisiana, Michigan, and Wisconsin began the trend in 2015.

Tennessee

Tennessee signed its joint employer bill[10] into law on April 10, 2015, and it became effective immediately (codified as TENN. CODE § 50-1-208). The statute adopts the Federal Trade Commission's (FTC) definitions of "franchisee"[11] and "franchisor"[12] and states:

9. ALA. CODE § 25-6-5; ARIZ. REV. Stat. § 23-1604; ARK. CODE § 11-2-125; GA. CODE § 34-1-9; IND. CODE § 23-2-2.5-0.5; KY. REV. STAT. §§ 337.010(1)(e)(1), 338.021(2), 341.070(14), 342.690(4), 344.030(5); LA. STAT. § 23:921; MICH. COMP. LAWS §§ 445.1504b, 408.412(d), 408.1005(2), 408.471(d), 421.41(11); N.C. GEN. STAT. § 95-25.24A; N.D. CENT. CODE § 51-19-18; N.H. REV. STAT. § 275:4; OKLA. STAT. tit. 59, § 6005; S.D. CODIFIED LAWS § 60-1-6; TENN. CODE § 50-1-208; TEX. LAB. CODE §§ 21.0022, 61.0031, 62.006, 401.014, 411.005, 91.0013, 201.021; UTAH CODE §§ 31A-40-212(2), 34-20-14(2), 34-28-2(4), 34-40-102(4), 34A-2-103(11)(b), 34A-5-102(4), 34A-6-103(4), 35A-4-203(3)(b); WIS. STAT. §§ 102.04(2r), 104.015, 109.015, 108.065(4), 111.3205; WYO. STAT. § 27-1-116.

10. S.B. 475, 2015 Gen. Assemb., 109th Reg. Sess. (Tenn. 2015) (introduced on Feb. 9, 2015).

11. The FTC defines "franchisee" as "any person who is granted a franchise." 16 C.F.R. § 436.1(i) [hereinafter FTC Definition of Franchisee].

12. The FTC defines "franchisor" as "any person who grants a franchise and participates in the franchise relationship. Unless otherwise stated, it includes subfranchisors. For purposes of this definition, a 'subfranchisor' means a person who functions as a franchisor by engaging in both pre-sale activities and post-sale performance." *Id.* § 436.1(k) [hereinafter FTC Definition of Franchisor].

> Notwithstanding any voluntary agreement entered into between the United States department of labor and a franchisee, neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose.[13]

The statute is found in Title 50 of the Tennessee Code, which governs employer-employee relationships,[14] and specifically in Chapter 1 (Employment Relationship and Practices), Part 2 (Right to Work). Although appearing in the right to work section, there is nothing in the language to suggest that it is limited to union issues.[15] Indeed, the other parts of Chapter 1 are general statutes that apply to all employment in Tennessee.[16] It appears then that the Tennessee legislature intended this as a general employment law with broad application. This interpretation is supported by the plain language of the statute that it applies "for any purpose."[17]

Texas

Texas introduced its joint employer bill to "exclud[e] a franchisor as an employer of a franchisee or a franchisee's employees."[18] The bill was signed into law on June 19, 2015 and became effective on September 1, 2015. Texas chose to use three formulations of similar language to exclude franchisors from specific portions of the Texas Labor Code. In all, the legislature amended seven chapters of the Code by adding one of the three exclusions to each. In each instance the amendments adopt the FTC's definitions of "franchisee"[19] and "franchisor."[20]

Specifically, the following language was codified at Texas Labor Code Sections 21.0022, 61.0031, 62.006, 401.014, and 411.005:

> For purposes of this [chapter or subtitle], a franchisor is not considered to be an employer of: (1) a franchisee; or (2) a franchisee's employees.
>
> [ ] With respect to a specific claim for relief under this [chapter or subtitle] made by a franchisee or a franchisee's employee, this section does not apply to a franchisor who has been found by a court of competent jurisdiction in this state to have exercised a type or degree of control over the franchisee or the franchisee's employees not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.[21]

13. TENN. CODE § 50-1-208.
14. Title 50 has nine chapters addressing workplace issues that range from employment relationship and practices (Chapter 1) to wages (Chapter 2) to workers' compensation (Chapter 6). *Id.* §§ 50-1-101 to 50-9-115.
15. *See id.* § 50-1-208.
16. *E.g.*, *id.* § 50-1-301 (restrooms); *e.g.*, *id.* §§ 50-1-304, 501-1-801 (retaliatory discharge); *e.g.*, *id.* § 50-1-308 (health insurance payroll deductions); *e.g.*, *id.* §§ 50-1-401 to -402 (private pensions and retirement); *e.g.*, *id.* §§ 50-1-501 to -505 (abusive conduct in the workplace); *e.g.*, *id.* §§ 50-1-1001 to -1004 (employee online privacy).
17. *See id.* § 50-1-208.
18. S.B. 652, 2015 Leg., 84th Sess. (Tex. 2015) (introduced on Feb. 19, 2015).
19. FTC Definition of Franchisee, *supra* note 11.
20. FTC Definition of Franchisor, *supra* note 12.
21. TEX. LAB. CODE §§ 21.0022, 61.0031, 62.006, 401.014, 411.005.

This language amended Texas law regarding employment discrimination,[22] payment of wages,[23] minimum wage,[24] workers' compensation,[25] and workers' health and safety.[26] Texas codified similar language in Texas Labor Code Section 91.0013, which amended the professional employer organizations laws (i.e., for staff leasing companies).[27]

Interestingly, unlike the other Texas amendments, Texas explicitly amended the definition of "employer" applied throughout the Texas Unemployment Compensation Act[28] (codified as an amendment to TEX. LAB. CODE § 201.021), which states:

> The definition of employer provided by this section does not apply to a franchisor with respect to: (1) a franchisee; or (2) a franchisee's employees.
>
> [ ] With respect to a specific claim for relief under this subtitle made by a franchisee or a franchisee's employee, Subsection (d) does not apply to a franchisor who has been found by a court of competent jurisdiction in this state to have exercised a type or degree of control over the franchisee or the franchisee's employees not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.[29]

Louisiana

Louisiana signed its joint employer bill[30] on July 1, 2015, and it became effective on August 1, 2015 (amending LA. REV. STAT. § 23:921). The statute adopts the FTC's definitions of "franchise,"[31]

22. *Id.* § 21.0022. The language amended all of Chapter 21, which contains Texas's employment discrimination laws, including discrimination, retaliation, and hiring practices, among others. *See generally id.* §§ 21.001–.556.

23. *Id.* § 61.0031. The language amended all of Chapter 61 regarding the payment of wages, including form and delivery of payment, deductions, failure to pay wages, and wage claims. *See generally id.* §§ 61.001–.104.

24. *Id.* § 62.006. The language amended all of Chapter 62 regarding minimum wages. *See generally id.* §§ 62.001–.205.

25. *Id.* § 401.014. The language amended the Workers' Compensation Act (Subtitle A of Title 5). *See generally id.* §§ 401.001–419.007. However, it did not amend the remaining portions of Title 5, which cover other aspects of workers' compensation such as the discrimination provisions of Subtitle B and the provisions governing workers' compensation coverage for certain government employees in Subtitle C. *See generally id.* §§ 451.001–506.002.

26. *Id.* § 411.005. This language amended Chapter 411 regarding workers' health and safety. *See generally id.* §§ 411.001–.110. Chapter 411 is part of the Workers' Compensation Act, so this provision seems unnecessary in light of the amendment to the Act in full. *See supra* note 25.

27. TEX. LAB. CODE § 91.0013. The amendment applies to all of Chapter 91 regarding professional employer organizations, which governs things like licensing. *See generally id.* §§ 91.001–.063.

28. *See generally id.* §§ 201.001–217.007.

29. *Id.* § 201.021.

30. H.B. 464, 2015 Leg., Reg. Sess. (La. 2015) (introduced on Apr. 3, 2015).

31. The FTC defines "franchise" as "any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that: (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark; (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the fran-

"franchisee,"[32] and "franchisor"[33] (with some caveats) and states:

> (F)(2) Except as provided in Paragraph (3) of this Subsection, neither a franchisee who is a party to a franchise agreement regulated under the Federal Trade Commission Franchise Disclosure Rule, 16 CFR 436, nor an employee of the franchisee shall be deemed to be an employee of the franchisor for any purpose. A voluntary agreement entered into between the United States Department of Labor and an employer shall not be used by a state department or agency as evidence or for any other purpose in an investigation or judicial or administrative determination, including whether an employee of a franchisee is also considered to be an employee of the franchisor.
>
> (3) Pursuant to Chapter 10 and Chapter 11 of Title 23 of the Louisiana Revised Statutes of 1950, an employee of a franchisee may be deemed to be an employee of the franchisor only where the two entities share or co-determine those matters governing the essential terms and conditions of employment and directly and immediately control matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.[34]

The statute is found in Title 23 of the Louisiana Statutes, entitled Labor and Worker's Compensation, and specifically in Chapter 9, Part 2, which is Louisiana's general prohibition against non-competition agreements.[35] Despite its name, Title 23 contains the majority of Louisiana's labor and employment laws, including laws regarding discrimination,[36] payment of wages (including minimum wages),[37] equal pay,[38] labor organizations and disputes,[39] workers' compensation,[40] and unemployment compensation,[41] among others. The language of the amendment—"for any purpose"—suggests that it is intended as a general employment statute with broad application.[42] At the very least, it should apply throughout all of Title 23 because the statute references two other chapters of that title by providing a carve out for workers' and unemployment compensation claims against a franchisor under Chapters 10 and 11.[43]

chisee's method of operation; and (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate." 16 C.F.R. § 436.1(h) [hereinafter FTC Definition of Franchise].

32. Definition of Franchisee, *supra* note 11.
33. Definition of Franchisor, *supra* note 12.
34. La Rev. Stat. § 23:921(F)(2) (amended); *id.* § 23:921(F)(3) (enacted).
35. *Id.* § 23:921. The statute generally provides that any agreements which restrain an individual from pursuing a lawful profession, trade, or business are null and void, with express exceptions (including agreements between a franchisor and a franchisee). *Id.*
36. *Id.* §§ 23:301–372.
37. *Id.* §§ 23:631–660.
38. *Id.* §§ 23:661–669.
39. *Id.* §§ 23:821–890.
40. *Id.* §§ 23:1020–1470.
41. *Id.* §§ 23:1471–1776.
42. *See id.* § 23:921(F)(2).
43. *Id.* § 23:921(F)(3).

Michigan

Michigan introduced six joint employer bills in the fall of 2015.[44] The first two were signed into law on December 31, 2015, and became effective on March 22, 2016 (codified as MICH. COMP. LAWS §§ 445.1504b, 418.120).[45] The first of these amended Michigan's Franchise Investment Law[46] by adding Section 445.1504b, which states:

> To the extent allocation of employer responsibilities between the franchisor and franchisee is permitted by law, the franchisee shall be 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.[47]

And the second amended the Worker's Disability Compensation Act of 1969[48] by adding Section 418.120 (and a control test), which states:

> An employee of a franchisee is not an employee of the franchisor for purposes of this act unless both of the following apply:
>
> (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.
>
> (b) The franchisee and franchisor both directly and immediately control matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction.[49]

Both of these statutes amended only the acts in which they are found; however, the amendment to the franchise law can certainly be read to apply more broadly.

Michigan's four remaining bills were signed into law on February 23, 2016, and became effective on May 23, 2016 (amending MICH. COMP. LAWS §§ 408.412(d), 408.1005(2), 408.471(d), 421.41(11)).[50] Unlike the other bills, they amend the definition of "employer" to include the following:

> Except as specifically provided in the 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.[51]

44. S.B. 492, 98th Leg., Reg. Sess. (Mich. 2016) (introduced on Sept. 16, 2015); S.B. 493, 98th Leg., Reg. Sess. (Mich. 2016) (introduced on Sept. 16, 2015); H.B. 5070, 98th Leg., Reg. Sess. (Mich. 2016) (introduced on Nov. 10, 2015); H.B. 5071, 98th Leg., Reg. Sess. (Mich. 2016) (introduced on Nov. 10, 2015); H.B. 5072, 98th Leg., Reg. Sess. (Mich. 2016) (introduced on Nov. 10, 2015); H.B. 5073, 98th Leg., Reg. Sess. (Mich. 2016) (introduced on Nov. 10, 2015).

45. S.B. 492, 98th Leg., Reg. Sess. (Mich. 2016); S.B. 493, 98th Leg., Reg. Sess. (Mich. 2016).

46. MICH. COMP. LAWS §§ 445.1501–.1546.

47. *Id.* § 445.1504b.

48. *Id.* §§ 418.101–.941.

49. *Id.* § 418.120.

50. H.B. 5070, 98th Leg., Reg. Sess. (Mich. 2016); H.B. 5071, 98th Leg., Reg. Sess. (Mich. 2016); H.B. 5072, 98th Leg., Reg. Sess. (Mich. 2016); H.B. 5073, 98th Leg., Reg. Sess. (Mich. 2016).

51. MICH. COMP. LAWS §§ 408.412(d), 408.1005(2), 408.471(d), 421.41(11).

This language was added to the definition of "employer" in Michigan's Workforce Opportunity Wage Act,[52] Occupational Safety and Health Act,[53] Payment of Wages and Fringe Benefits Act,[54] and Employment Security Act.[55] None of Michigan's amendments adopts the FTC's definitions or provides any other additional definition of "franchisor" or "franchisee."

Wisconsin

Wisconsin signed its joint employer bill[56] on March 2, 2016, and it became effective the next day (codified as WIS. STAT. §§ 102.04(2r), 104.015, 109.015, 108.065(4), 111.3205). These statutes incorporate the FTC's definitions of "franchisee"[57] and "franchisor"[58] and state:

> [A] franchisor, as defined in 16 CFR 436.1(k), is not considered to be an employer of a franchisee, as defined in 16 CFR 436.1(i), or of an employee of a franchisee, unless any of the following applies:
>
> [ ] The franchisor has agreed in writing to assume that role.
>
> [ ] The franchisor has been found by the department or the division 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.[59]

This language was added as an amendment to Wisconsin's Worker's Compensation Act,[60] Minimum Wage Law,[61] wage payments laws,[62] laws governing unemployment insurance and reserves,[63] and Fair Employment

52. *Id.* §§ 408.411–.424.
53. *Id.* §§ 408.1001–.1094.
54. *Id.* §§ 408.471–.490.
55. *Id.* §§ 421.1–.75.
56. S.B. 422, 2015–2016 Leg., Reg. Sess. (Wis. 2016) (introduced on Dec. 3, 2015).
57. Definition of Franchisee, *supra* note 11.
58. Definition of Franchisor, *supra* note 12.
59. WIS. STAT. §§ 102.04(2r), 104.015, 109.015, 108.065(4), 111.3205.
60. *Id.* § 102.04(2r). Specifically, the language amended the section defining "employer," and the definitions are applicable throughout the Worker's Compensation Act. *See generally id.* §§ 102.01–.89. The amendment does not amend the full roster of Wisconsin's employment statutes found in Chapters 101 to 109, containing laws regarding "Employment, Compensation and Mining." *See id.* §§ 101.01–.988, 103.001–103.97, 105.01–107.35.
61. *Id.* § 104.015. The amendment applies throughout Chapter 104, which contains the Minimum Wage Law. *See generally id.* §§ 104.001–.12.
62. *Id.* § 109.015. The language amended Chapter 109 regarding wage payments, claims, and collections. *See generally id.* §§ 109.01–.15. The chapter governs when wages are payable, cessation of heath care benefits, and other wage claims and collections. *See generally id.*
63. *Id.* § 108.065(4). This section details how an "employer" is determined under Chapter 108, which governs how unemployment reserves are financed and paid in the state. *See generally id.* §§ 108.01–.26. In addition, Wisconsin's bill amended Wisconsin Statute Section 108.065(1e)(a)–(b) and created (1e)(c). In full that section now reads:

> (1e) Except as provided in subs. (2) and (3), if there is more than one employing unit that has a relationship to an employee, the department shall determine which of the employing units is the employer of the employee by doing the following:
>
> (a) Considering an employing unit's right by contract and in fact to:

Law.[64]

2. Four more states followed in 2016: Utah, Indiana, Georgia, and Oklahoma.

Utah

Utah introduced its joint employer bill to "modif[y] provisions related to insurance, labor, and employment security to address the determination of who is an employer."[65] It was signed into law on March 29, 2016, and became effective on May 10, 2016 (codified as UTAH CODE §§ 31A-40-212, 34-20-14 and as amendments to UTAH CODE §§ 34-28-2, 34-40-102, 34A-2-103, 34A-5-102, 34A-6-103, 35A-4-203). The bill amended eight chapters in three of Utah's employment law titles in two ways. First, the

1. Determine a prospective employee's qualifications to perform the services in question and to hire or discharge the employee.
2. Determine the details of the employee's pay including the amount of, method of, and frequency of changes in that pay.
3. Train the employee and exercise direction and control over the performance of services by the employee and when and how they are to be performed.
4. Impose discipline upon the employee for rule or policy infractions or unsatisfactory performance.
5. Remove the employee from one job or assign the employee to a different job.
6. Require oral or written reports from the employee.
7. Evaluate the quantity and quality of the services provided by the employee.
8. Assign a substitute employee to perform the services of an employee if the employee is unavailable for work or is terminated from work.
9. Assign alternative work to the employee if the employee is removed from a particular job.

(b) Considering which employing unit:

1. Benefits directly or indirectly from the services performed by the employee.
2. Maintains a pool of workers who are available to perform the services in question.
3. Is responsible for employee compliance with applicable regulatory laws and for enforcement of such compliance.

(c) If, after the application of paras. (a) and (b), a franchisor, as defined in 16 CFR 436.1(k), is determined to be the employer of a franchisee, as defined in 16 CFR 436.1(i), or of an employee of a franchisee, applying sub. (4). The department shall apply sub. (4) only as provided in this paragraph.

Id. § 108.065(1e). Thus, for purposes of Chapter 108, there is a two-step process for determining a franchisor's employer status. *See id.*

64. *Id.* § 111.3205. The Wisconsin Fair Employment Law is found in Subchapter II, Chapter 111, and the amendment applies generally throughout the subchapter. *See generally id.* §§ 111.31–.397. The Fair Employment Law contains prohibitions against discrimination in hiring, pay, promotion, training, termination, and so forth on the basis of race, age, arrest, creed, disability, marital status, and sex, among others. *See generally id.*

65. H.B. 116, 2016 Leg., Gen. Sess. (Utah 2016) (introduced on Jan. 5, 2016).

FTC's definitions of "franchise,"[66] "franchisee,"[67] and "franchisor" were adopted.[68] Second, the following language was added:

> For purposes of this chapter, a franchisor is not considered to be an employer of: (i) a franchisee; or (ii) a franchisee's employee.
>
> [ ] With respect to a specific claim for relief under this chapter made by a franchisee or a franchisee's employee, this Subsection [ ] does not apply to a franchisor under a franchise that exercises a type or degree of control over the franchisee or the franchisee's employee not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.[69]

With these two changes, the Utah legislature amended its Professional Employer Organization Licensing Act,[70] laws regarding employment relations and collective bargaining,[71] Minimum Wage Act,[72] other wage laws,[73] Occupational Safety and Health Act,[74] Workers' Compensation Act,[75] Antidiscrimination Act,[76] and Employment Security Act.[77]

66. Definition of Franchise, *supra* note 31. The definitions were codified at Utah Code Sections 31A-40-102(10)–(12), 34-20-2(7)–(9), 34-28-2(1)(e)–(g), 34-40-102(2)(e)–(g), 34A-2-103(11)(a), 34A-5-102(1)(l)–(n), 34A-6-103(1)(h)–(j), and 35A-4-203(3)(a).

67. Definition of Franchisee, *supra* note 11.

68. Definition of Franchisor, *supra* note 12.

69. Utah Code §§ 31A-40-212(2), 34-20-14(2), 34-28-2(4), 34-40-102(4), 34A-2-103(11)(b), 34A-5-102(4), 34A-6-103(4), 35A-4-203(3)(b).

70. *Id.* § 31A-40-212(2). This language amended all of Chapter 40 of Utah's Insurance Code (Title 31a), containing the Professional Employer Organization Licensing Act. *See generally id.* §§ 31a-40-101 to -402.

71. *Id.* § 34-20-14(2). This language amended all of Chapter 20 containing Utah's laws regarding "Employment Relations and Collective Bargaining," including laws regarding unfair labor practices, the Labor Relations Board, collective bargaining, and the right to strike. *See generally id.* §§ 34-20-1 to -14. It did not amend the remaining chapters of Title 34, containing Utah's general labor laws. *See generally id.* §§ 34-1-1 to 34-19-13, 34-20a-1 to 34-39-3, 34-41-101 to 34-52-201.

72. *Id.* § 34-40-102(4). The amendment applies throughout Utah's Minimum Wage Act. *See generally id.* §§ 34-40-101 to -205.

73. *Id.* § 34-28-2(4). The language amended Chapter 28 of Title 34, which contains laws governing the payment of wages such as paydays and disputes over wages. *See generally id.* §§ 34-28-1 to -19.

74. *Id.* § 34A-6-103(4). The amendment applies throughout Utah's Occupational Safety and Health Act. *See generally id.* §§ 34A-6-101 to -307. But it does not appear to amend all of the chapters of Utah's Labor Code (Title 34A). *See generally id.* §§ 34A-1-101 to -409, 34A-3-101 to 34A-4-102, 34A-7-101 to 34A-11-102.

75. *Id.* § 34A-2-103(11)(b). The amendment applies throughout Utah's Worker's Compensation Act. *See generally id.* §§ 34A-2-101 to -1005.

76. *Id.* § 34A-5-102(4). The amendment applies throughout Utah's Antidiscrimination Act. *See generally id.* §§ 34A-5-101 to -112. The Act prohibits discrimination in hiring, promotion, termination, and more on the basis of race, color, sex, age, religion, or national origin (among others). *Id.* § 34A-5-106.

77. *Id.* § 35A-4-203(3)(b). The amendment applies throughout the Employment Security Act, which is Utah's unemployment insurance program. *See generally id.* §§ 35A-4-101 to -508. The amendment does not appear to apply to the remaining chapters of Utah's Workforce Services Code (Title 35A). *See generally id.* §§ 35A-1-101 to 35A-3-802, 35A-5-101 to 35A-14-304.

Indiana

Indiana signed its joint employer bill[78] on March 23, 2016, and it became effective July 1, 2016 (codified as IND. CODE § 23-2-2.5-0.5). The statute adopts the FTC's definitions of "franchisee"[79] and "franchisor"[80] and states:

> [A] franchisor is not considered to be an employer or co-employer of: (1) a franchisee; or (2) an employee of a franchisee; unless the franchisor agrees, in writing, to assume the role of an employer or co-employer of the franchisee or the employee of a franchisee.[81]

This statute appears in the Indiana Franchise Act.[82] Because no additional amendments were made to Indiana's labor and employment statutes, the scope of the amendment may be subject to litigation and interpretation by the courts.

Georgia

The Protecting Georgia Small Business Act[83] was signed into law on May 3, 2016, and became effective on January 1, 2017 (codified as GA. CODE § 34-1-9). The statute adopts the FTC's definitions of "franchisee"[84] and "franchisor"[85] and states:

> (b) Notwithstanding any order issued by the federal government or any agreement entered into with the federal government by a franchisor or a franchisee, neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose.
>
> (c) This Code section shall not apply to Chapter 9 of this title.[86]

This statute is found in the general provisions chapter of Title 34, which governs labor and industrial relations.[87] Interestingly, the statute expressly does not apply to Chapter 9 of Title 34, which contains Georgia's workers' compensation laws,[88] but otherwise applies "for any purpose."[89] Because the Georgia legislature enumerated this one specific exclusion, it is likely that the law will be interpreted as a general employment statute protecting franchisors from treatment as an employer under a wide variety of laws, includ-

78. H.B. 1218, 119th Gen. Assemb., 2nd Reg. Sess. (Ind. 2016) (introduced on Jan. 11, 2016).
79. Definition of Franchisee, *supra* note 11.
80. Definition of Franchisor, *supra* note 12.
81. IND. CODE § 23-2-2.5-0.5.
82. *See generally id.* §§ 23-2-2.5-0.5 to .51.
83. S.B. 277, 2015–2016 Gen. Assemb., Reg. Sess. (Ga. 2016) (introduced on Jan. 20, 2016).
84. Definition of Franchisee, *supra* note 11.
85. Definition of Franchisor, *supra* note 12.
86. GA. CODE § 34-1-9.
87. *See generally id.* §§ 34-1-1 to 34-10-6.
88. *Id.* § 34-1-9(c); *see generally id.* §§ 34-9-1 to -25 (containing Georgia's workers' compensation laws).
89. *Id.* § 34-1-9(b).

ing Georgia's antidiscrimination and wage and hour laws (which are also found in Title 34).[90]

Oklahoma

Oklahoma signed its joint employer bill[91] on May 24, 2016, and it became effective on November 1, 2016 (codified as OKLA. STAT. tit. 59, § 6005). The statute does not incorporate the FTC's definitions of "franchisor," "franchisee," and "franchise" by reference, but instead copies those definitions exactly into its own language.[92] It goes on to state:

> B. A franchisor shall not be considered the employer of a franchisee or a franchisee's employees.
>
> C. The employees of a franchisee shall not be considered employees of the franchisor neither shall the employees of a franchisor be considered employees of a franchisee.[93]

This statute is found in the miscellaneous chapter under the professions and occupations title, which governs the employment of accountants, plumbers, welders, mechanics, electricians, cosmetologists, barbers, realtors, and a variety of medical professionals, among others.[94] Because of its placement and broad wording, it appears likely that the Oklahoma legislature intended the protection for franchisors (and franchisees) to apply throughout Oklahoma's employment statutes.

3. In 2017, nine more states enacted joint employer laws.

North Dakota

North Dakota signed its joint employer bill[95] on March 22, 2017, and it became effective on August 1, 2017 (codified as N.D. CENT. CODE § 51-19-18). The statute amends the North Dakota Franchise Investment Law and states:

> Notwithstanding any other provision of law or any voluntary agreement between the United States department of labor and a franchisee, a franchisee or an employee of a franchisee is not considered an employee of the franchisor.[96]

The North Dakota Franchise Investment Law (Chapter 19 of Title 51)[97] already contained definitions for "franchise," "franchisee," and "franchisor,"

90. *See, e.g.*, *id.* §§ 34-4-1 to -6 (governing minimum wages); *see, e.g.*, *id.* §§ 34-5-1 to -7 (governing discrimination based on sex); *see, e.g.*, *id.* §§ 34-6a-1 to -6 (governing discrimination based on disability).

91. S.B. 1496, 2015–2016 Leg., Reg. Sess. (Okla. 2016) (introduced on Feb. 1, 2016).

92. *Compare* OKLA. STAT. tit. 59, § 6005(A)(1)–(3) *with* Definitions of Franchisee, Franchisor, and Franchise, *supra* notes 11–12, 31.

93. OKLA. STAT. tit. 59, § 6005.

94. *See generally id.* §§ 15.1 to 6005.

95. H.B. 1139, 65th Leg. Assemb., Reg. Sess. (N.D. 2017) (introduced on Jan. 3, 2017).

96. N.D. CENT. CODE § 51-19-18.

97. *Id.* §§ 51-19-01 to -18.

which apply throughout the law.[98] Similar to Indiana's joint employer law, the North Dakota legislature did not make further amendments to North Dakota's labor and employment statutes, meaning the scope of this amendment may be subject to litigation and interpretation by the courts.

Wyoming

Wyoming introduced its joint employer bill to "clarify[ ] the business relationships between franchisors and franchisees and between franchisors and employees of franchisees."[99] It was signed into law on March 8, 2017, and became effective on July 1, 2017 (codified as WYO. STAT. § 27-1-116). The statute adopts the FTC's definitions of "franchisee"[100] and "franchisor"[101] and states:

> Neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose under this title, unless otherwise agreed to in writing by the franchisor and the franchisee. This section shall not apply to a voluntary agreement entered into between the United States department of labor and a franchisee.[102]

This statute applies to Wyoming's labor and employment title (Title 27),[103] which includes Wyoming's workers' compensation,[104] unemployment compensation,[105] right to work and labor,[106] wage,[107] and fair employment practices[108] laws, among others.

Arizona

Arizona signed its joint employer bill[109] on March 21, 2017, and it became effective on August 9, 2017 (codified as ARIZ. REV. STAT. § 23-1604). The statute adopts the FTC's definitions of "franchisee"[110] and "franchisor"[111] and states:

98. *Id.* § 51-19-02(5), (7)–(8). North Dakota defines these terms in ways that are similar to, but not the same as, the FTC definitions. *Compare id. with* Definitions of Franchisee, Franchisor, and Franchise, *supra* notes 11–12, 31.

99. S.B. 94, 64th Leg., Gen. Sess. (Wyo. 2017) (introduced on Jan. 17, 2017).

100. Definition of Franchisee, *supra* note 11.

101. Definition of Franchisor, *supra* note 12.

102. WYO. STAT. § 27-1-116.

103. *See generally id.* §§ 27-1-101 to 27-15-103.

104. *Id.* §§ 27-14-101 to 27-14-806.

105. *Id.* §§ 27-3-101 to -706.

106. *Id.* §§ 27-7-101 to -115.

107. *Id.* §§ 27-4-101 to -508. This chapter includes laws regarding minimum wages, equal pay, and collection of unpaid wages, among others. *See generally id.*

108. *Id.* §§ 27-9-101 to -108. The fair employment practices chapter includes laws against discrimination and other unfair employment practices on the basis of age, sex, race, creed, color, national origin, or ancestry (among others). *See generally id.*

109. H.B. 2322, 53rd Leg., 1st Reg. Sess. (Ariz. 2017) (introduced on Jan. 18, 2017).

110. Definition of Franchisee, *supra* note 11.

111. Definition of Franchisor, *supra* note 12.

> 1. A franchisor is not an employer or co-employer of either a franchisee or an employee of the franchisee, unless the franchisor agrees, in writing, to assume the role of employer or co-employer of the franchisee or the employee of the franchisee.
>
> 2. The owner of a mark is not an employer or co-employer of either the licensee or an employee of the licensee, unless the owner of the mark agrees, in writing, to assume the role of employer or co-employer of the licensee or the employee of the licensee.[112]

This statute applies to Arizona's labor title (Title 23).[113] Title 23 contains a significant portion of Arizona's labor and employment statutes, including, for example, laws governing wages and working conditions,[114] unemployment,[115] workers' compensation,[116] and labor,[117] and the Employers' Liability Law[118] and Employment Protection Act.[119] Notably, Arizona's Civil Rights Act, which protects employees from discrimination and other unlawful employment practices, is found in Title 41, which was not amended.[120] Arizona was also the first state to include additional protection for trademark owners who license their marks.[121]

New Hampshire

New Hampshire signed its joint employer bill[122] on July 20, 2017, and it became effective immediately (amending N.H. REV. STAT. § 275:4). The statute adopts the FTC's definitions of "franchisor"[123] and "franchisee"[124] and states:

> . . . A franchisor is only an employer if the franchisor agrees in writing to assume the role of employer or co-employer of the franchisee or the employee of the franchisee. [ ] For the purposes of this section, "franchisee" and "franchisor" have the same meanings as in Part 436.1 of Title 16 of the Code of Federal Regulations.[125]

The statute is codified in Chapter 275, specifically Section 275.4, which is a definitions section.[126] It includes the definitions of "employer" and "employee," and now "franchisor" and "franchisee."[127] The statutory definitions

112. ARIZ. REV. STAT. § 23-1604.
113. *See generally id.* §§ 23-101 to -1604.
114. *Id.* §§ 23-201 to -495.01. This chapter contains laws relating to hours of labor, minimum wages, equal wages, and the payment of wages, among others. *See generally id.*
115. *Id.* §§ 23-601 to -799.
116. *Id.* §§ 23-901 to -1105.
117. *Id.* §§ 23-1301 to -1412. This chapter includes laws relating to the right to work and organizational rights. *See generally id.*
118. *Id.* §§ 23-801 to -808.
119. *Id.* §§ 23-1501 to 2501. This chapter includes protections from retaliatory discharge. *See generally id.*
120. *See generally id.* §§ 41-1401 to -1493.04.
121. *Id.* § 23-1604(A)(2).
122. S.B. 89, 2017 Gen. Ct., Reg. Sess. (N.H. 2017) (introduced on Jan. 24, 2017).
123. Definition of Franchisor, *supra* note 12.
124. Definition of Franchisee, *supra* note 11.
125. N.H. REV. STAT. § 275:4.
126. *Id.*
127. *Id.*

are limited alternately to "this subdivision," "this section," or the "preceding section," so the scope is unclear.[128] Notably, there are additional definitions of "employer" and "employee" in New Hampshire's labor code (Title XXIII, Chapters 273–83)[129] that were not explicitly amended.[130] The scope of the amendment will therefore likely be the subject of litigation.

South Dakota

South Dakota introduced its joint employer bill to "establish certain provisions regarding joint employer liability protection."[131] It was signed into law on March 6, 2017 (codified as S.D. CODIFIED LAWS § 60-1-6). The statute does not define "franchisee" or "franchisor" or adopt the FTC's definitions. It states:

> Notwithstanding any other provisions of law or any voluntary agreement between the United States Department of Labor and a franchisor, a franchisee or an employee of a franchisee is not considered an employee of the franchisor.[132]

This statute is codified in South Dakota's labor and employment title,[133] and particularly in the title's first chapter named "Nature and Terms of Employment."[134] Given this placement and its expansive language, the amendment may fairly be read as a general labor and employment statute governing all employment in South Dakota.[135]

Kentucky

Kentucky signed its joint employer bill[136] on March 16, 2017, and it became effective on June 29, 2017, amending five labor and employment statutes either by excluding franchisors from the definition of "employer" or providing them with a general carve out from the law (KY. REV. STAT. §§ 337.010(1)(e)(1),

128. *See id.* The "preceding section" requires an employer to pay for an employee's or applicant's medical examination or records if required by the employer as a condition of employment. *Id.* § 275:3.

129. *Id.* §§ 273.1–283:9.

130. For example, the definition of "employer" and "employee" in the sections regarding minimum wages, payment of wages, and discrimination were not amended. *See id.* §§ 275:36, 275:42, 279:1.

131. S.B. 137, 2017 Leg., Reg. Sess. (S.D. 2017) (introduced on Jan. 26, 2017).

132. S.D. CODIFIED LAWS § 60-1-6.

133. *Id.* §§ 60-1-1 to 60-14-6.

134. *Id.* §§ 60-1-1 to 60-1-6. This first chapter also contains the definition of "employee." *Id.* § 60-1-1.

135. Notably, South Dakota's laws regarding unemployment compensation (Title 61) and workers' compensation (Title 62) contain their own definition sections, including specific sections defining "employer." *Id.* § 61-1-1 (defining terms for unemployment compensation laws); *id.* § 61-1-4 (defining employer for unemployment compensation laws); *id.* § 62-1-1 (defining terms for workers' compensation laws); *id.* § 62-1-2 (defining employer for workers' compensation laws). These laws also appear outside of the labor and employment title (Title 60). *See generally id.* §§ 60-1-1 to 60-14-6.

136. S.B. 151, 2017 Gen. Assemb., Reg. Sess. (Ky. 2017) (introduced on Feb. 10, 2017).

338.021(2), 341.070(14), 342.690(4), 344.030(5)). The statutes adopt the FTC's definitions of "franchisee"[137] and "franchisor"[138] and state:

> Notwithstanding any voluntary agreement entered into between the United States Department of Labor and a franchisee, neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose under this chapter[.] . . .
>
> Notwithstanding any voluntary agreement entered into between the United States Department of Labor and a franchisor, neither a franchisor nor a franchisor's employee shall be deemed to be an employee of the franchisee for any purpose under this chapter.[139]

The Kentucky legislature amended laws regarding wage and hour,[140] occupational health and safety,[141] unemployment compensation,[142] workers' compensation,[143] and civil rights.[144] However, the entire labor and employment law title (Title XXVII, Chapters 336–47) was not explicitly amended.[145]

North Carolina

North Carolina signed its joint employer bill[146] on May 4, 2017, and it became effective immediately (codified as N.C. GEN. STAT. § 95-25.24A). The statute adopts the FTC's definitions of "franchisee"[147] and "franchisor"[148] and states:

> Neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purposes, including, but not limited to, this Article and Chapters 96, 97, and 105 of the General Statutes.[149]

137. Definition of Franchisee, *supra* note 11.
138. Definition of Franchisor, *supra* note 12.
139. KY. REV. STAT. §§ 337.010(1)(e)(1), 338.021(2), 341.070(14), 342.690(4), 344.030(5).
140. *Id.* § 337.010(1)(e)(1). This language applies throughout Chapter 337 governing wage and hour laws, including payment of wages, minimum wages, and equal pay, among others. *See generally id.* §§ 337.015–.994.
141. *Id.* § 338.021(2). This language applies throughout Chapter 338 governing the occupational safety and health of employees. *See generally id.* §§ 338.010–.991.
142. *Id.* § 341.070(14). This language applies throughout Chapter 341 governing unemployment compensation. *See generally id.* §§ 341.005–.990.
143. *Id.* § 342.690(4). This language applies throughout Chapter 342, which covers a wide variety of workers' compensation issues, including hazardous employment, medical benefits, and payments. *See generally id.* §§ 342.0011–.990.
144. *Id.* § 344.030(5). This language applies explicitly to Kentucky Revised Statutes Sections 344.030–.110 and not to the entire civil rights chapter (Chapter 344). *See id.* § 344.030. Those sections cover a variety of discriminatory practices, including discrimination in hiring, firing, or other terms of employment based on race, color, religion, national origin, sex, or disability, among others. *See, e.g.*, *id.* § 344.040.
145. *See supra* notes 140–44. For example, the child labor laws (Chapter 339) and laws regarding employment agencies (Chapter 340) were not explicitly amended. *See generally id.* §§ 339.010–340.990.
146. S.B. 131, 2017 Gen. Assemb., Extra Sess. 1 (N.C. 2017) (introduced on Feb. 23, 2017).
147. Definition of Franchisee, *supra* note 11.
148. Definition of Franchisor, *supra* note 12.
149. N.C. GEN. STAT. § 95-25.24A.

Although codified in North Carolina's Wage and Hour Act,[150] the statute is broadly worded and states that it applies "for any purposes,"[151] so it will likely be interpreted to grant franchisors broad protections. In addition to the Wage and Hour Act, the amendment explicitly applies to the Employment Security Law,[152] the Workers' Compensation Act,[153] and the Revenue Act.[154]

Arkansas

Arkansas introduced its joint employer bill "to clarify the relationship between a franchisor and franchisee regarding the definition of 'employee.'"[155] It was signed into law on April 6, 2017, and it became effective on August 1, 2017 (amending ARK. CODE § 11-2-125). The statute adopts its own definitions of "franchise," "franchisee," "franchisor," and "subfranchisor," but they are nearly identical to the FTC's definitions.[156] The statute provides:

> Notwithstanding a voluntary agreement entered into between the United States Department of Labor and a franchisee, neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor or subfranchisor.[157]

This statute is enacted in the "General Provisions" subchapter of the Arkansas Department of Labor laws (Title 11, Chapter 2).[158] There is nothing in its language that limits its application to any specific title, chapter, or section of Arkansas law. Given that, the broad language, and the generality of the legislature's stated purpose for the bill, it is expected to apply expansively.

Alabama

Alabama signed its joint employer bill, the Franchise Business Protection Act,[159] on May 17, 2017, and it became effective on August 1, 2017 (codified as ALA. CODE § 25-6-5). The Act adopts the FTC's definitions of "franchisee"[160] and "franchisor"[161] and states:

150. *Id.* §§ 95-25.1 to .25.
151. *Id.* § 95-25.24A.
152. *Id.* §§ 96-1 to -40. The Employment Security Law governs North Carolina's unemployment plan, including payments by employers and administration of benefits. *See generally id.*
153. *Id.* §§ 97-1 to -200. Chapter 97 contains the Workers' Compensation Act and other provisions, including specific applications of the Act to individual employers. *See generally id.* § 97-165 to -200.
154. *Id.* §§ 105-1 to -570. The Revenue Act governs state taxes. *See generally id.*
155. S.B. 695, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (introduced on Mar. 6, 2017).
156. *Compare* ARK. CODE § 11-2-125(a) *with* Definitions of Franchisee, Franchisor, and Franchise, *supra* notes 11–12, 31.
157. ARK. CODE § 11-2-125(b).
158. *See generally id.* §§ 11-2-101 to -206.
159. H.B. 390, 2017 Leg., Reg. Sess. (Ala. 2017) (introduced on Mar. 9, 2017).
160. Definition of Franchisee, *supra* note 11.
161. Definition of Franchisor, *supra* note 12.

> (c) Except as provided in a voluntary agreement entered into between the United States Department of Labor and a franchisor, the following persons may not be deemed or construed to be employees of a franchisor:
>
> (1) A franchisee.
>
> (2) An employee of a franchisee.
>
> (3) An independent contractor working for a franchisee.
>
> (d) To the extent that this section does not conflict with federal law, this section shall only apply to the following:
>
> (1) The enforcement or enactment of rules or ordinances by state agencies or local governmental bodies.
>
> (2) Labor relations and collective bargaining.[162]

The amendment is codified in the chapter named "Employer's Liability for Certain Injuries" in Alabama's Industrial Relations and Labor title.[163] Its language appears to apply broadly. However, the Alabama legislature included the limitation that the statute applies only to "(1) [t]he enforcement or enactment of rules or ordinances by state agencies or local governmental bodies [or] (2) [l]abor relations and collective bargaining," to the extent the statute does not conflict with federal law.[164] What constitutes a "local governmental bod[y]" and specifically if the Alabama legislature is a local governmental body is not defined by the statute.[165]

B. *Additional states are expected to enact laws in 2018 and beyond.*

State legislative efforts to address joint employer liability are expected to continue. Three states have joint employer bills pending—South Carolina,[166]

162. ALA. CODE § 25-6-5.

163. *See generally id.* §§ 25-6-1 to -5.

164. *Id.* § 25-6-5(d).

165. *See id.*

166. South Carolina introduced its joint employer bill on January 10, 2017. H.B. 3031, 2017 Gen. Assemb., 122nd Sess. (S.C. 2017). If enacted, it will amend South Carolina Code Section 41-1-30. It is currently in committee in South Carolina's House of Representatives. The bill seeks to take effect immediately upon passage and to add definitions for "franchise," "franchisee," and "franchisor," similar to the FTC's definitions. The bill states:

> For purposes of this title, a franchisor is not considered to be an employer or co-employer of a franchisee or an employee of a franchisee unless the franchisor agrees, in writing, to assume the role of an employer or co-employer of the franchisee or the employee of a franchisee. These provisions apply notwithstanding a voluntary agreement between the United States Department of Labor and a franchisor.

H.B. 3031, 2017 Gen. Assemb., 122nd Sess. (S.C. 2017). The amendment would expressly apply to South Carolina's labor and employment title (Title 41), which includes chapters controlling the right to work (S.C. Code §§ 41-7-10 to -130), payment of wages (*id.* §§ 41-10-10 to -110), occupational health and safety (*id.* §§ 41-15-10 to -640), and employee benefits and claims (*id.* §§ 41-35-10 to -760), among others. *See generally id.* §§ 41-1-10 to 41-45-60.

Nebraska,[167] and Washington.[168] In addition to these three, the International Franchise Association, a key player in the effort to enact joint employer legislation, has targeted Idaho, Iowa, Kansas, Ohio, Mississippi,[169] Missouri, West Virginia, and Pennsylvania for joint employer legislation in 2018.[170] The ad-

167. Nebraska introduced its joint employer bill on January 17, 2017. L.B. 436, 105th Leg., 1st Sess. (Neb. 2017). The last committee hearing was on March 13, 2017. It adopts the FTC's definitions of "franchisee" and "franchisor" and states:

> (1) [E]xcept as provided in subsection (2) of this section, a franchisor shall not be considered to be an employer of a franchisee or a franchisee's employees.
>
> (2) Subsection (1) of this section does not prevent a franchisor from being considered an employer of a franchisee or a franchisee's employees in a specific case if the franchisor is 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.

The bill seeks to amend several of Nebraska's labor and employment laws, including the: Workers' Compensation Act (Neb. Rev. Stat. §§ 48-101 to 48-1,118); Employment Security Law (*id.* §§ 48-601 to -683); Wage and Hour Act (controlling minimum wages) (*id.* §§ 48-1201 to -1209.01); Wage Payment and Collections Act (*id.* §§ 48-1228 to -1234); Age Discrimination in Employment Act (*id.* §§ 48-1001 to -1010); Fair Employment Practice Act (*id.* §§ 48-1101 to -1126); Non-English-Speaking Workers Protection Act (*id.* §§ 48-2207 to -2214); New Hire Reporting Act (*id.* §§ 48-2301 to -2308); Workplace Privacy Act (*id*. §§ 48-3501 to -3511); and certain other labor and employment laws regarding employee medical examinations (*id*. §§ 48-220 to -223), adoptive parental leave (*id.* § 48-234), genetic testing (*id*. § 48-236), use of employees' Social Security numbers (*id*. § 48-237), secondary boycott (*id*. §§ 48-901 to -912), sex discrimination (*id*. §§ 48-12190 to -1227.01), and drug and alcohol testing (*id.* §§ 48-1901 to -1910).

168. Washington introduced its joint employer bill on February 1, 2017. H.B. 1881, 65th Leg., Reg. Sess. (Wash. 2017). It is still in committee, having been reintroduced and retained in its present form three times. If enacted, it will amend Washington Revised Code Sections 49.12.005, 49.17.020, 49.46.010, 49.60.040, 50.04.080, and 51.08.070, and codify a new section in Chapter 52 of Title 49. The bill states:

> The legislature finds that franchising is an important business model which provides small business opportunities, creates jobs, and benefits communities throughout this state. Franchisees are able to own their own businesses but with protections such as brand name recognition and proven methods. The legislature further finds that under employment laws, persons who work for a franchisee are the employees of only the franchisee. Recent developments, however, have suggested that franchisors may be found to be joint employers with franchisees. Joint employer status of franchisors threatens the independence of franchisees and the entire franchise model. Therefore, the legislature intends to clarify that franchisors are not employers of franchisees or of the employees of a franchisee. . . . A franchisor, as defined in RCW 19.100.010, is not an employer of a franchisee, as defined in RCW 19.100.010, or of an employee of a franchisee.

The bill seeks to amend the definition of "employer" under Washington's industrial welfare chapter (which includes wage discrimination due to sex, time-off and sick leave for care of family members, and parental leave) (WASH. REV. CODE §§ 49.12.005 to .903); Industrial Safety and Health Act (*id.* §§ 49.17.010 to .910); Minimum Wage Act (*id.* §§ 49.46.005 to .920); wages, deductions, contributions, and rebates chapter (*id.* §§ 49.52.010 to .090); law against discrimination chapter (*id.* §§ 49.60.010 to .505); unemployment compensation title (*id.* §§ 50.01.005 to 50.98.110); and industrial insurance title (*id.* §§ 51.04.010 to 51.98.080).

169. This would be Mississippi's second bite at the apple, having failed to pass a joint employer bill once before. *See* S.B. 2110, 2017 Leg., Reg. Sess. (Miss. 2017) (the bill died in committee on Feb. 28, 2017).

170. Email from Jeff Hanscom, Vice President, State Government Relations for the International Franchise Association, to Adrienne L. Saltz (Nov. 13, 2017) (on file with author).

dition of these states could be a tipping point for federal efforts because over half of the states would then have joint employer legislation on the books.

C. *The U.S. House of Representatives recently passed the Save Local Business Act.*

On November 7, 2017, the U.S. House of Representatives passed the Save Local Business Act.[171] If enacted, it will amend the definition of "employer" in the NLRA and FLSA. The bill states:

> (a) Section 2(2) of the National Labor Relations Act (29 U.S.C. 152(2)) is amended—(1) by striking "The term 'employer'" and inserting "(A) The term 'employer'"; and (2) by adding at the end the following: "(B) A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline."
>
> (b) Fair Labor Standards Act of 1938.—Section 3(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(d)) is amended—(1) by striking " 'Employer' includes" and inserting "(1) 'Employer' includes"; and (2) by adding at the end the following: "(2) A person may be considered a joint employer in relation to an employee for purposes of this Act only if such person meets the criteria set forth in section 2(2)(B) of the National Labor Relations Act (29 U.S.C. 152(2)(B))."

The proposed act returns to a direct control standard, but stops short of conclusively defining or limiting the "essential terms and conditions of employment[.]"[172] And it does not preempt state law or amend the majority of federal employment statutes.[173]

II. Trends in the State Joint Employer Statutes

The language of each joint employer bill varies state-to-state, as does the scope of the employment and other statutes amended, but some interesting trends have emerged.

A. *The states rely upon the FTC's definitions.*

The state joint employer statutes overwhelmingly adopt the FTC's definitions of "franchisee" and "franchisor." Michigan, Oklahoma, North Dakota, South Dakota, and Arkansas are the only exceptions, but Oklahoma, North Dakota, and Arkansas either already had or added their own defini-

171. Save Local Business Act, H.R. 3441, 115th Congress (2017–2018) (introduced on July 27, 2017).

172. *Id.*

173. In its present state, the Save Local Business Act does not amend any of the following federal laws: Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 621–634); Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101–12213); Title VII of the Civil Rights Act of 1964 (*id.* §§ 2000e to 2000e-17); Family and Medical Leave Act (29 U.S.C. §§ 2601–2654); Migrant and Seasonal Agricultural Worker Protection Act (*id.* §§ 1801–1872); or Occupational Safety and Health Act of 1970 (*id.* §§ 651–678).

tions mirroring (or nearly mirroring) the FTC's definitions.[174] Interestingly, the statutes are not as likely to adopt the FTC's definition of "franchise" nor are they likely to define "franchise" on their own, which is strange because that term is included in and critical to understanding the FTC's definitions of "franchisee" and "franchisor."[175]

B. *The states generally codify their joint employer bills in one of three ways.*

The states typically take one of three approaches to codify their joint employer bills.[176] The bills (1) amend specific labor and employment chapters or acts by adding a carve out or amending the definition of "employer,"[177] (2) craft a general labor and employment law and house it somewhere in the labor and employment title,[178] or (3) amend the state franchise law.[179] Although each approach has its strengths and weaknesses, the overall result is that the joint employment statutes are often not comprehensive, amending certain laws but neglecting others with no explanation and for no apparent reason, and they are certainly not consistent from state-to-state. This leaves franchisors exposed to liability and does not put the current uncertainty to rest.

In 2015, three of the five states proposing joint employer bills followed the first approach (Texas, Michigan, and Wisconsin),[180] but over time, there has been a noticeable move away from amending specific labor and employment laws and toward implementing a general law governing all employment.[181] The year 2017 saw six states propose general laws (Wyoming,

174. South Carolina's joint employer bill likewise did not expressly adopt the FTC's definitions but has similar definitions. H.B. 3031, 2017 Gen. Assemb., 122nd Sess. (S.C. 2017).

175. Definitions of Franchisee, Franchisor, and Franchise, *supra* notes 11–12, 31.

176. Louisiana takes an entirely unique approach by amending the state law against noncompetition agreements. H.B. 464, 2015 Leg., Reg. Sess. (La. 2015). And New Hampshire does not fit easily into any of the three categories. *See* S.B. 89, 2017 Gen. Ct., Reg. Sess. (N.H. 2017).

177. Texas, Michigan, Wisconsin, Utah, and Kentucky each amended specific labor and/or employment laws. S.B. 652, 2015 Leg., 84th Sess. (Tex. 2015); S.B. 493, 98th Leg., Reg. Sess. (Mich. 2016); H.B. 5070, 98th Leg., Reg. Sess. (Mich. 2016); H.B. 5071, 98th Leg., Reg. Sess. (Mich. 2016); H.B. 5072, 98th Leg., Reg. Sess. (Mich. 2016); H.B. 5073, 98th Leg., Reg. Sess. (Mich. 2016); S.B. 422, 2015–2016 Leg., Reg. Sess. (Wis. 2016); H.B. 116, 2016 Leg., Gen. Sess. (Utah 2016); S.B. 151, 2017 Gen. Assemb., Reg. Sess. (Ky. 2017). Michigan takes a hybrid approach by also amending its franchise law. S.B. 492, 98th Leg., Reg. Sess. (Mich. 2016).

178. Tennessee, Georgia, Oklahoma, Wyoming, Arizona, South Dakota, North Carolina, Arkansas, and Alabama take this approach. S.B. 475, 2015 Gen. Assemb., 109th Reg. Sess. (Tenn. 2015); S.B. 277, 2015–2016 Gen. Assemb., Reg. Sess. (Ga. 2016); S.B. 1496, 2015–2016 Leg., Reg. Sess. (Okla. 2016); S.B. 94, 64th Leg., Gen. Sess. (Wyo. 2017); H.B. 2322, 53rd Leg., 1st Reg. Sess. (Ariz. 2017); S.B. 137, 2017 Leg., Reg. Sess. (S.D. 2017); S.B. 131, 2017 Gen. Assemb., Extra Sess. 1 (N.C. 2017); S.B. 695, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); H.B. 390, 2017 Leg., Reg. Sess. (Ala. 2017).

179. Michigan, Indiana, and North Dakota are the only states to amend their franchise laws. S.B. 492, 98th Leg., Reg. Sess. (Mich. 2016); H.B. 1218, 119th Gen. Assemb., 2nd Reg. Sess. (Ind. 2016); H.B. 1139, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

180. *See* Part I.A.1.

181. *See* Part I.A.

Arizona, South Dakota, North Carolina, Arkansas, and Alabama) with only one (Kentucky) choosing to amend specific chapters or acts.[182] The amendments to state franchise laws (Michigan, Indiana, and North Dakota) are spread equally over time.[183]

Of the three approaches, the amendments to the franchise laws arguably create the most ambiguity. Unlike Michigan, both Indiana and North Dakota did not make any further changes to their labor and employment statutes or specify where and to what extent amendments to the franchise law might apply more broadly.[184]

There is a degree of consistency among the states that choose to amend specific labor and employment statutes. Namely, four of the five states taking this approach (Kentucky, Texas, Utah, and Wisconsin) explicitly included protection for franchisors under the state's wage and hour laws and laws against discrimination.[185]

C. *Carve outs for joint employer liability are common.*

The amendments are typically willing to carve out circumstances under which a franchisor may be deemed a joint employer. In fact, sixteen of the eighteen states have at least one type of carve out (with North Carolina and Oklahoma as the only two exceptions). These carve outs generally take one of three forms:

- Alabama, Arkansas, Georgia, Kentucky, North Dakota, South Dakota, Tennessee, and Wyoming each have a carve out for a voluntary agreement entered into between the DOL (or the federal government for Georgia) and a franchisee or a franchisor.[186]
- Arizona, Indiana, New Hampshire, Michigan, Wisconsin, and Wyoming allow the franchisor to agree in writing to assume the role of an employer of the franchisee or employees of the franchisee.[187]
- Louisiana, Michigan, Texas, Utah, and Wisconsin have some form of carve out for franchisor control.[188]

182. *See* Part I.A.3.

183. *See supra* notes 46–47, 81–82, 96–98 and accompanying text.

184. *Compare supra* notes 46–55 and accompanying text with *supra* notes 81–82, 96–98 and accompanying text.

185. *See supra* notes 21–29, 59–64, 69–77, 139–44, and accompanying text.

186. ALA. CODE § 25-6-5; ARK. CODE § 11-2-125; GA. CODE § 34-1-9; KY. REV. STAT. §§ 337.010(1)(e)(1), 338.021(2), 341.070(14), 342.690(4), 344.030(5); N.D. CENT. CODE § 51-19-18; S.D. CODIFIED LAWS § 60-1-6; TENN. CODE § 50-1-208; WYO. STAT. § 27-1-116. South Carolina's proposed joint employer bill likewise has a carve out for a voluntary agreement. H.B. 3031, 2017 Gen. Assemb., 122nd Sess. (S.C. 2017).

187. ARIZ. REV. STAT. § 23-1604; IND. CODE § 23-2-2.5-0.5; N.H. REV. STAT. § 275:4; *see* MICH. COMP. LAWS §§ 445.1504b, 408.412(d), 408.1005(2), 408.471(d), 421.41(11); WIS. STAT. §§ 102.04(2r), 104.015, 109.015, 108.065(4), 111.3205; WYO. STAT. § 27-1-116. South Carolina's proposed joint employer bill likewise allows for joint employer liability where the franchisor assumes the role in writing. H.B. 3031, 2017 Gen. Assemb., 122nd Sess. (S.C. 2017).

188. LA. STAT. § 23:921(F)(3); MICH. COMP. LAWS § 418.120; TEX. LAB. CODE §§ 21.0022, 61.0031, 62.006, 401.014, 411.005, 91.0013, 201.021; UTAH CODE §§ 31A-40-212(2), 34-20-14(2),

D. *Only five states included some form of control test in their joint employer legislation.*

The states generally steer clear of control tests. However, Texas, Utah, and Wisconsin state that if the franchisor has been found to exercise a type or degree of control over the franchisee or the franchisee's employees not customarily exercised by a franchisor for the purpose of protecting its trademarks and brand, the franchisor may be deemed an employer of the franchisee or the franchisee's employees.[189]

Only Michigan and Louisiana reference the "essential terms and conditions" of employment, but neither defines that term.[190] Louisiana states that a franchisor may be deemed the employer of a franchisee's employees "where the two entities share or co-determine those matters governing the essential terms and conditions of employment and directly and immediately control matters relating to the employment relationship[.]"[191] Similarly, Michigan allows for joint employer liability where the "[t]he franchisee and franchisor share in the determination of or codetermine the matters governing the essential terms and conditions of the employee's employment [and] [t]he franchisee and franchisor both directly and immediately control matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction," but only as it relates to Michigan's Worker's Disability Compensation Act of 1969.[192]

Interestingly, the control tests are found in some of the first statutes to be enacted. None of the states enacting bills in 2017 included this type of language. It remains to be seen how the courts will interpret these provisions and if the exception will swallow the rule.

E. *Several states address matters beyond franchisor liability as a joint employer.*

Finally, some of the states took their legislation beyond franchisor liability as a joint employer or aggressively limited liability in certain circumstances, such as for control exercised over a trademark. For example:

34-28-2(4), 34-40-102(4), 34A-2-103(11)(b), 34A-5-102(4), 34A-6-103(4), 35A-4-203(3)(b); WIS. STAT. §§ 102.04(2r), 104.015, 109.015, 108.065(4), 111.3205. Nebraska's proposed joint employer bill and the Save Local Business Act likewise allow for joint employer liability where the franchisor exercises a certain degree or type of control. L.B. 436, 105th Leg., 1st Sess. (Neb. 2017); Save Local Business Act, H.R. 3441, 115th Congress (2017–2018).

189. TEX. LAB. CODE §§ 21.0022, 61.0031, 62.006, 401.014, 411.005, 91.0013, 201.021; UTAH CODE §§ 31A-40-212(2), 34-20-14(2), 34-28-2(4), 34-40-102(4), 34A-2-103(11)(b), 34A-5-102(4), 34A-6-103(4), 35A-4-203(3)(b); WIS. STAT. §§ 102.04(2r), 104.015, 109.015, 108.065(4), 111.3205. Neither Texas, Utah, nor Wisconsin defines what "customarily exercised" control means. *See id.*

190. LA. STAT. § 23:921; MICH. COMP. LAWS § 418.120. The Save Local Business Act also references the "essential terms and conditions[.]" Save Local Business Act, H.R. 3441, 115th Congress (2017–2018).

191. LA. STAT. § 23:921(F)(3). Importantly, this carve out applies only to workers' and unemployment compensation claims. *Id.*

192. MICH. COMP. LAWS § 418.120.

- Arizona is the only state to legislate explicitly that the owner of a trademark is not an employer of the licensee or an employee of the licensee (unless the licensor agrees in writing to assume that role).[193] This provides an interesting second layer of protection under Arizona law and could even be used to protect accidental franchisors.
- Alabama is the only state to provide that an independent contractor of a franchisee cannot be deemed or construed to be an employee of the franchisor.[194] Because Alabama's joint employer statute may be limited to "[t]he enforcement or enactment of rules or ordinances by state agencies or local governmental bodies" and does not define "local governmental bodies," the usefulness of this provision is dubious until the scope of Alabama's joint employer statute is determined.[195]
- Kentucky and Oklahoma grant an extra level of protection for franchisees by clarifying that the employees of a franchisor are not employees of the franchisee.[196]
- Louisiana states that "a voluntary agreement entered into between the United States Department of Labor and an employer shall not be used by a state department or agency as evidence or for any other purpose in an investigation or judicial or administrative determination, including whether an employee of a franchisee is also considered to be an employee of the franchisor."[197]
- Michigan states that as long as the franchisee provides a benefit plan or pays wages and there is nothing in the franchise agreement that provides otherwise, the franchisee is considered the sole employer of its employees.[198]
- Wisconsin applies a two-part test for determining a franchisor's employer status under its unemployment insurance and reserves chapter.[199]

III. Analysis and Implications

Judging whether the flurry of legislative activity over the course of the last three years has been effective depends on the goal. Does the state or federal legislature want to provide franchisors with certainty regarding which activities they may control without incurring liability as an employer? Is the goal to ensure franchisors can protect their trademarks and goodwill, protect the

193. Ariz. Rev. Stat. § 23-1604.
194. Ala. Code § 25-6-5.
195. *See id.* § 25-6-5(d).
196. Ky. Rev. Stat. §§ 337.010(1)(e)(1), 338.021(2), 341.070(14), 342.690(4), 344.030(5); Okla. Stat. tit. 59, § 6005.
197. La. Stat. § 23:921(F)(2).
198. Mich. Comp. Laws §§ 408.412(d), 408.1005(2), 408.471(d), 421.41(11).
199. Wis. Stat. § 108.065.

franchisor-franchisee relationship, or the franchisee's independence? What about job creation? Or perhaps the goal is to limit costly litigation?

A good deal of the discussion surrounding the recent legislative actions concentrates simply on dismantling the threat of joint employer liability.[200] This goal glosses over the fact that joint employer liability is not one thing, but rather arises from a litany of statutes, regulatory agency decisions, and common law precedent. This has led to a patchwork of fixes that do not uniformly address a franchisor's need for predictability and nationwide consistency or a franchisee's need to control its own employment practices.

A. *Uncertainty remains: The state joint employer statutes provide a patchwork of (untested) coverage.*

Because so much of the legislative activity has occurred at the state level, the resulting protections for franchisors are inconsistent.[201] Some states have instituted sweeping changes to their labor and employment laws, effectively protecting franchisors from liability as joint employers for the full range of employment related claims.[202] However, other states have instituted minimal changes[203] or the application of their joint employer laws remains unclear.[204] In large part, this is to be expected because the underlying state laws regarding employment issues, such as wage and hour, sexual harassment, and discrimination, vary from state-to-state and nationwide franchisors have come to expect state law inconsistencies and nuances.

Here, not only are the underlying laws and the joint employer amendments different, but the scope of the language also remains untested. Judicial interpretation of the state joint employer laws is virtually non-existent. In fact, there are no published decisions applying *any* of the enacted joint employer statutes. This presents a challenge to franchisors whose potential liability will depend on the reach of the joint employer statutes.

Even so, one recent development sheds light on where judicial interpretation could head under the Texas law. The Texas Department of Labor recently conducted a routine audit of a master franchisee.[205] The auditor originally found the master franchisee to be a joint employer with all of it sub-

200. For example, the stated goal of the Save Local Business Act is "to clarify the treatment of two or more employers as joint employers[.]" Save Local Business Act, H.R. 3441, 115th Congress (2017–2018).

201. *See supra* Part I.A. In addition, some states like California have actually expanded the bases for liability. *See, e.g.*, CAL. LAB. CODE § 2810.3(b) (creating liability for the payment of wages and provision of workers' compensation coverage for companies, referred to as "client employer[s]," that use workers from staffing agencies or other "labor contractor[s]").

202. *See, e.g.*, TENN. CODE § 50-1-208; *see, e.g.*, TEX. LAB. CODE §§ 21.0022, 61.0031, 62.006, 401.014, 411.005, 91.0013, 201.021; *see, e.g.*, N.C. GEN. STAT. § 95-25.24A; *see, e.g.*, S.D. CODIFIED LAWS § 60-1-6; *see, e.g.*, UTAH CODE §§ 31A-40-212(2), 34-20-14(2), 34-28-2(4), 34-40-102(4), 34A-2-103(11)(b), 34A-5-102(4), 34A-6-103(4), 35A-4-203(3)(b); *see, e.g.*, WYO. STAT. § 27-1-116.

203. *See, e.g.*, IND. CODE § 23-2-2.5-0.5; *see, e.g.*, N.D. CENT. CODE § 51-19-18.

204. *See, e.g.*, N.H. REV. STAT. § 275:4; *see, e.g.*, ALA. CODE § 25-6-5.

205. Email from Jeff Hanscom, Vice President, State Government Relations for the International Franchise Association, to Adrienne L. Saltz (Aug. 31, 2017) (on file with author).

franchisees.[206] The master franchisee challenged the determination based on the Texas joint employer statute, and the Texas Department of Labor revised its finding, determining the master franchisee was not a joint employer.[207] In this instance, the decision-maker accepted a broad reading of the applicable joint employer statute.

Perhaps more telling than this decision is the fact that there are no published decisions interpreting the joint employer laws, despite some of them being over two years old. Anecdotal evidence suggests that franchisors are facing a barrage of sexual harassment, wage and hour, discrimination, and other employment claims. This begs the question of why there are no decisions. Several forces (or a combination thereof) may be at work: (1) parties may be fighting these battles in state courts that do not publish their opinions, (2) the new legislation may be deterring the plaintiffs from bringing joint employer claims against franchisors in states with joint employer laws, (3) judges might be exercising caution in relying on these new statutes to limit franchisor liability, (4) some of the new statutes may be too limited in application and therefore not relied upon by franchisors for the majority of joint employer claims, or (5) these statutes may simply be too recent to have published case law. Further, at least in Texas and Wisconsin, the joint employer amendments limit liability only for conduct occurring after the effective date.[208]

B. *The Save Local Business Act is unlikely to resolve the uncertainty and inconsistency.*

It is unlikely that the uncertainty regarding a franchisor's nationwide status as a joint employer under state law will be resolved by the federal Save Local Business Act.[209] The Act itself does not propose a consistent test for the states or even hint at preemption.

The Save Local Business Act, if enacted, would only apply to the FLSA and the NLRA.[210] It would provide some much needed clarity under those statutes,[211] but it would not resolve inconsistency under federal employment stat-

206. *Id.*

207. *Id.*

208. S.B. 652, 2015 Leg., 84th Sess. (Tex. 2015); S.B. 422, 2015–2016 Leg., Reg. Sess. (Wis. 2016).

209. Save Local Business Act, H.R. 3441, 115th Congress (2017–2018).

210. *See id.*

211. For example, *Hall v. DIRECTV, LLC*, a recent FLSA case in which the Fourth Circuit reversed the district court's decision, found that the plaintiffs stated a claim under the FLSA and created a new test for joint employment. Hall v. DIRECTV, LLC, 846 F.3d 757, 770–71, 774, 779 (4th Cir. 2017). The joint employment test in *Hall* is comprised of six factors: "'(1) the degree of control that the putative employer[s] ha[ve] over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer[s'] business.'" *Id.* at 774. The Fourth Circuit found that "the entity must only play a role in establishing the key terms and conditions of the worker's employment" and "'one factor alone'" can give rise to a reasonable inference that the entities are "'not completely disassoci-

utes, much less state law. For example, it will not change or clarify the "joint employer" standard under the antidiscrimination laws enforced by the Equal Employment Opportunity Commission,[212] which applies a liberal definition of joint employer,[213] the Occupational Safety and Health Act,[214] or the Family and Medical Leave Act,[215] among others.[216]

It is unlikely that the final iteration of the Save Local Business Act, or a different, yet-to-be-proposed federal law, will be so broad as to effectively replace state joint employer standards. First, states protect employees on issues like wages very differently, and Congress is slow to impose federal standards on top of states' rights to set policies.[217] Second, state laws often provide more expansive protections to employees than federal laws.[218] A federal employment law is unlikely to entirely "occupy the field," which leaves states to set their own standards for joint employment on a host of issues. The most likely way the Save Local Business Act will impact franchisor liability for state law claims is that the courts will consider the federal standard as persuasive in rendering decisions.

C. *The judicial process will likely bring some clarity—but slowly.*

Because state law tests for "employment" or "joint employment" are often highly fact specific,[219] franchisors must engage in costly discovery to defeat

ated'" as long as the factor demonstrates that the entity '"has a substantial role in determining the terms and conditions of a worker's employment."' *Id.* at 771. The defendants filed a petition for a writ of certiorari with the Supreme Court on June 5, 2017, which is still pending. U.S. SUPREME CT., *Search Results: No. 16-1449* (last visited Dec. 4, 2017), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-1449.html.

212. 42 U.S.C. §§ 2000e to e-17. Courts commonly apply a "single employer" test to claims under Title VII, including claims in the franchise context. *See, e.g.*, Matthews v. Int'l House of Pancakes, Inc., 597 F. Supp. 2d 663, 669–71 (E.D. La. 2009). Under the "single employer" test, the court examines four factors to determine if one entity is liable for the actions of another: "(1) interrelation of operations, i.e., common offices, common record keeping, shared bank accounts and equipment; (2) common management, common directors and boards; (3) centralized control of labor relations and personnel; and (4) common ownership and financial control." Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 993–94 (6th Cir. 1997). This test is broader than other tests for joint employer liability because of Title VII's "remedial purposes[.]" *See* Peppers v. Cobb Cnty., Ga., 835 F.3d 1289, 1297 (11th Cir. 2016).

213. Tammy Binford, *New bill latest effort to tackle definition of joint employment*, HRHERO (July 28, 2017), http://blogs.hrhero.com/hrnews/2017/07/28/new-bill-latest-effort-to-tackle-definition-of-joint-employment/.

214. 29 U.S.C. §§ 651–678.

215. *Id.* §§ 2601–2654.

216. *See, e.g.*, Age Discrimination in Employment Act of 1967 (*id.* §§ 621–634); *see, e.g.*, Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101–12213); *see, e.g.*, Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. §§ 1801–1872).

217. For example, the last amendment to the federal minimum wage occurred in 2007 with the passage of the Fair Minimum Wage Act. Fair Minimum Wage Act of 2007, H.R. 2, 110th Congress (2007–2008). The act increased the minimum wage from $5.15 to $7.25 per hour. *Id.*; Jonathan Weisman, *House Passes Increase in Minimum Wage to $7.25*, THE WASHINGTON POST CO. (Jan. 11, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/01/10/AR2007011001666.html.

218. For example, the FLSA does not provide for vacation or sick leave. *See generally* 29 U.S.C. §§ 201–219.

219. For example, the common law test under the Restatement for whether a person is an employee of a joint employer is (1) whether the "individual renders services to at least one of

them.[220] The joint employer statutes—and in particular, the broader statutes in Tennessee, Texas, North Carolina, South Dakota, Utah, and Wyoming[221]—should foreclose this for specific state law claims.[222] Over time, the courts will hopefully bring some certainty to the meaning and scope of the more ambiguous joint employer statutes. This will benefit franchisors both in planning to avoid liability and in defeating spurious claims.

It also seems probable that addressing joint employer liability at the state level will lead to inconsistent judicial decisions. A particular activity might expose a franchisor to liability for say wage and hour violations in one state but not another. These discrepancies make planning for a nationwide franchisor and its franchisees a challenge. They will also lead to incongruous results particularly in the class action context.

D. *An alternate approach: Amend the Lanham Act.*

Although the recent state legislation and the proposed Save Local Business Act are helpful in limiting joint employer liability under specific laws, they do not directly address the overall concern that a franchisor's control over its trademark will be deemed control over employment issues. And perhaps the most fundamental goal of the joint employer legislation should be to ensure that franchisors can protect their trademarks and control the goods and services offered under them.

The Lanham Act requires all licensors—including franchisors—to control their licensees' use of their trademark or else the rights in that mark may be lost.[223] Recent cases have found joint employer liability on the basis that the law does not "distinguish between controls put in place to protect a franchise's goodwill and intellectual property and controls for other purposes."[224] This is in part because the "Lanham Act does not define the extent or manner of supervision necessary to satisfy the requirement of reasonable

the employers" and (2) whether "that employer and the other joint employers each control or supervise such rendering of services[.]" Restatement of Employment Law § 1.04(b). Tests under state laws can have many more factors. For example, the New Jersey Law Against Discrimination relies on a multi-factor test to determine whether or not a worker is an employee. Thomas v. Cnty. of Camden, 902 A.2d 327, 334 (N.J. Super. Ct. App. Div. 2006). Courts consider factors like the employer's right to control the means and manner of the worker's performance, who furnished the equipment and workplace, the method of payment, the manner of termination, and whether the employer pays Social Security taxes, among others. *Id.* at 335.

220. Little is required at the initial pleading stages; all the purported employee must do is allege sufficient facts that make it plausible that the franchisor is its joint employer. *See* Federal Rule of Civil Procedure 8(a); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

221. TENN. CODE § 50-1-208; TEX. LAB. CODE §§ 21.0022, 61.0031, 62.006, 401.014, 411.005, 91.0013, 201.021; N.C. GEN. STAT. § 95-25.24A; S.D. CODIFIED LAWS § 60-1-6; UTAH CODE §§ 31A-40-212(2), 34-20-14(2), 34-28-2(4), 34-40-102(4), 34A-2-103(11)(b), 34A-5-102(4), 34A-6-103(4), 35A-4-203(3)(b); WYO. STAT. § 27-1-116.

222. Indeed in states with comprehensive joint employer statutes, employees would be well advised to focus on alternate theories of liability such as integrated enterprise or ostensible agency.

223. *See* 15 U.S.C. §§ 1055, 1064.

224. Williams v. Jani-King of Phila., Inc., 837 F.3d 314, 322, 324 (3d Cir. 2016) (internal quotation marks omitted).

control."[225] A possible solution then is to amend the Lanham Act to define the controls that trademarks owners must exercise over their trademarks and provide that those controls do not create liability as an employer or joint employer under federal or state law.[226] Such an amendment would provide additional certainty to a nationwide franchisor and its franchisees.

225. Restatement (Third) of Unfair Competition § 33 cmt. c (1995).

226. For example, the amendment could state that a trademark owner may exercise control over the nature and quality of the goods or services offered under the mark in order to preserve its quality and to ensure that public expectations are met and goodwill is preserved. Going further, the amendment could specify that the controls exercised under the Lanham Act for these purposes do not create employment or agency relationships under any federal or state law.