



OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

Kelly Bomba

Sub. H.B. 494*

132nd General Assembly

(As Reported by S. Transportation, Commerce and Workforce)

Reps. Antani, Brenner, Green, Greenspan, Hambley, Henne, Lang, Merrin, Patton, Pelanda, Reineke, Riedel, Roegner, Ryan, Schaffer, Scherer, Schuring, Seitz, Thompson, Wiggam, R. Smith

BILL SUMMARY

- Considers, unless an exception applies, a franchisor not to be an employer of a franchisee or a franchisee's employees for purposes of the minimum wage and overtime laws, the Bimonthly Pay Law, the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law.
- Considers a franchisor to be the employer of a franchisee or a franchisee's employees if a court of competent jurisdiction determines that the franchisor exercises a type or degree of control over the franchisee or the franchisee's employees that is not customary in a franchise relationship.
- Allows a franchisor to agree in writing to assume the role of an employer with respect to a franchisee or a franchisee's employees.
- Requires the Director of Administrative Services to establish the Women-owned Business Enterprise Program.
- Requires the Director to adopt rules under the Administrative Procedure Act to establish specified elements of the Program including eligibility, certification, and outreach.
- Extends eligibility under the Program to women-owned businesses that are certified by another state under a similar business assistance program if the Director has entered into a reciprocal agreement with the state.

* This analysis was prepared before the report of the Senate Transportation, Commerce and Workforce Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

- Exempts generally from disclosure as a public record any business and personal financial information and trade secrets submitted by a Program applicant.
- Requires the Director to file an annual report with the Governor and General Assembly describing the progress made by state agencies in advancing the Program.

CONTENT AND OPERATION

Franchisor not an employer

Under the bill, unless an exception applies a franchisor (see "**Definition of franchise**," below) is not considered the employer of a franchisee or a franchisee's employees for purposes of the following state laws:

- The Minimum Fair Wage Standards Law¹ (governing overtime and minimum wage (see **COMMENT**));²
- The Bimonthly Pay Law;³
- The Workers' Compensation Law;⁴
- The Unemployment Compensation Law;⁵
- The Income Tax Law.⁶

Exceptions

Under the bill, a franchisor is considered the employer of a franchisee or a franchisee's employees for purposes of the laws listed above if either of the following applies:

- A court of competent jurisdiction determines that the franchisor exercises a type or degree of control over the franchisee or the franchisee's

¹ R.C. Chapter 4111.; see also Ohio Const., art. II, sec. 34a.

² R.C. 4111.03(D) and 4111.14(B).

³ R.C. 4113.15 and 4113.16.

⁴ R.C. Chapters 4121., 4123., 4127., and 4131.; R.C. 4121.01(A) and 4123.01(B), with conforming changes in R.C. 1349.61, 4123.30, 4123.38, and 4123.77.

⁵ R.C. Chapter 4141.; R.C. 4141.01(A).

⁶ R.C. Chapter 5747.; R.C. 5747.01(II).



employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademark, brand, or both;

- The franchisor agrees in writing to assume the role of an employer.⁷

Definition of franchise

Under the bill, a franchise is a continuing commercial relationship or arrangement in which one individual or entity (the "franchisee") obtains from another individual or entity (the "franchisor") one or both of the following rights through a contract with the franchisor or the franchisor's representative:

(1) The right to operate a business that is identified or associated with the franchisor's trademark;

(2) The right to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark.

The contract must allow the franchisor to exert (or have the authority to exert) a significant degree of control over the franchisee's method of operation or provide significant assistance in the franchisee's method of operation. As a condition of obtaining or starting operation of the franchise, the franchisee must make a required payment to the franchisor or the franchisor's affiliate, or must promise to make that payment.⁸

Women-owned Business Enterprise Program

The bill requires the Director of Administrative Services to establish the Women-owned Business Enterprise Program to assist women-owned business enterprises in obtaining state contracts. The Director must adopt rules under the Administrative Procedure Act to establish specified elements of the Program including eligibility, certification, and outreach, and the Director must file an annual report about progress under the Program. The bill gives the Director authority to enter into reciprocal agreements with other states that have similar programs; an agreement would mandate that certified participants under the other state's program are eligible to participate in Ohio's Program and vice versa. Finally, the bill specifies that business and personal financial information and trade secrets submitted by a Program applicant is exempt

⁷ R.C. 4111.03(D), 4111.14(B), 4113.15(D), 4121.01(A), 4123.01(B), 4141.01(A), and 5747.01(II).

⁸ R.C. 4111.03(D), 4111.14(B), 4113.15(D), 4121.01(A), 4123.01(B), 4141.01(A), and 5747.01(II), by reference to 16 Code of Federal Regulations 436.1.



from disclosure as a public record unless made public by the Director regarding the applicant's eligibility.

Eligibility

To be eligible, a business enterprise must be owned and controlled, for at least one year, by women who are U.S. citizens and Ohio residents or residents of a state with whom Ohio has a reciprocal agreement as discussed below. For a business enterprise to be "owned and controlled" by women, women must own at least 51% of the business.⁹ Those owners must have control over the day-to-day operations of the business and an interest in the capital, assets, and profits and losses of the business proportionate to their percentage of ownership.

Reciprocal agreements with other states

The Director may extend eligibility under the Program to women-owned businesses that are certified by another state under a similar business assistance program. In order to do so, the Director must enter into a reciprocal agreement with the state's appropriate officials; the Attorney General must approve each agreement. Under the agreement, certified participants under the other state's program must be eligible to participate in Ohio's Program, and Ohio's certified participants must be eligible to participate in the other state's program.

Administration

The Director must adopt rules under the Administrative Procedure Act¹⁰ to administer the program, specifically, to establish all of the following:

- Procedures to apply for certification;
- Eligibility standards;
- A system to validate eligibility including self-reporting and inspection;
- An outreach program to educate potential participants about the Program;
- A process to mediate complaints and review certification appeals;
- A system to assist state agencies in identifying and utilizing certified businesses;

⁹ Including corporate stock if the business is a corporation.

¹⁰ R.C. Chapter 119.



--A system to make publicly available a list of certified businesses.

Financial information and trade secrets

Unless the Director presents financial information or trade secrets at a public hearing regarding an applicant's eligibility, the bill specifically exempts that information from disclosure as a public record.¹¹

Report to Governor and General Assembly

The Director must issue a report annually by October 1 to the Governor and each member of the General Assembly describing: the progress made by state agencies in advancing the Program, the total number of contracts each agency awards to women-owned businesses, and the initiatives implemented to encourage participation by women-owned businesses in programs funded with state money or federal money. The Director issues this report under current law regarding the Minority Business Enterprise (MBE) and Encouraging Diversity, Growth, and Equity (EDGE) programs, but the bill expands the report to include programs funded by *state* money, and programs funded by *any* federal money, whereas current law limits the report to programs funded by federal money received by the state for fiscal stabilization and recovery purposes.¹²

COMMENT

Ohio's minimum wage was established by an amendment to the Ohio Constitution¹³ ("Section 34a"). Section 34a states that "employer" has the same meaning as in the federal Fair Labor Standards Act,¹⁴ except that Section 34a adds that "employer" also includes the state and every political subdivision. Section 34a stipulates that the section must be liberally construed in favor of its purposes. The section specifies that laws "may be passed to implement and create additional remedies, increase the minimum wage rate, and extend the coverage of the section, but in no manner restricting any provision of the section." The bill's exclusion of a franchisor from the definition of employer for purposes of the Minimum Wage Law could potentially be viewed as a restriction on Section 34a.¹⁵

¹¹ R.C. 123.154.

¹² R.C. 123.153.

¹³ Ohio Const., art. II, sec. 34a.

¹⁴ 29 United States Code 201 *et seq.*

¹⁵ R.C. 4111.14.



HISTORY

ACTION	DATE
Introduced	02-05-18
Reported, H. Gov't Accountability & Oversight	03-21-18
Passed House (69-24)	06-20-18
Reported, S. Transportation, Commerce & Workforce	---

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