Ohio Legislative Service Commission

Bill Analysis

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Sub. S.B. 242*

131st General Assembly
(As Reported by S. Transportation, Commerce & Labor)

Sens. Uecker and Coley

BILL SUMMARY

- Establishes a method by which a franchisee (motor vehicle dealer), other than a franchisee that deals in recreational vehicles, may calculate its retail labor rate and the retail parts markup percentage for purposes of determining reimbursement for warranty and recall obligations.

- Establishes a process by which a franchisor (motor vehicle manufacturer) may contest a retail labor rate or retail parts markup percentage that was calculated by a franchisee.

- Requires a franchisor to use a specified method when calculating the compensation that must be provided to a franchisee for labor and parts used to fulfill warranty and recall obligations.

- Specifies that prior to a final determination that a franchisee has failed to achieve any performance criteria (or for purposes of terminating, canceling, or failing to continue or renew a franchise agreement), the franchisor must give the franchisee a reasonable opportunity to present evidence demonstrating the effect of local market conditions that materially and adversely affected the franchisee's performance.

- Prohibits a franchisor from changing a franchisee's geographic area of responsibility without reasonable cause.

- Specifies that, prior to changing or amending a franchisee's geographic area of responsibility, a franchisor must give a franchisee a reasonable opportunity to

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

present relevant evidence demonstrating the effect of local market conditions that may materially and adversely affect the franchisee's proposed new geographic area of responsibility.

- Expands the prohibition against a franchisor initiating a charge back without an audit, or performing an audit more than 12 months after the date of submission by the franchisee, so that it also applies to recall repairs, service incentives, and other forms of incentive compensation.

- Generally prohibits a franchisor from assessing any penalty or taking any other adverse action against a motor vehicle dealer with regard to a warranty repair or recall reimbursement, sales incentive or rebate, service incentive, or other form of incentive compensation claim.

- Modifies a provision of current law that allows a franchisor to reduce the amount to be paid to a new motor vehicle dealer or impose a charge back subsequent to the payment of any claim if the new motor vehicle dealer knew or should have known a new motor vehicle was sold for export to a foreign country.

- Specifies that a franchisor cannot refuse to pay warranty repair or recall reimbursements until the new motor vehicle dealer has had notice and an opportunity to participate in all franchisor internal appeal processes as well as all available legal processes.

- Prohibits a franchisor from requiring, coercing, or attempting to coerce any new motor vehicle dealer to change the location of the dealership or make any substantial alterations to the dealership premises or facilities if the change or alteration is proposed within seven years after the dealership premises was constructed or altered.

- Prohibits a franchisor from using the failure of a franchisee to meet a performance standard as the basis to prevent or deny the franchisee the opportunity to name a successor or otherwise engage in succession planning.

- Prohibits a franchisor from using the inability of a franchisee to meet a performance standard as a justification to exclude the franchisee from programs offered by the franchisor if both of the following apply:

  --The failure to meet the performance standard was based on whether the franchisee is selling an adequate number of vehicles; and

  --The franchisee can demonstrate that it was unable to purchase enough vehicles from the franchisor due to the actions of the franchisor.

- Prohibits a franchisor from unreasonably requiring or coercing a franchisee to lease or purchase a good or service from a specified vendor for purposes of expanding, constructing, or significantly modifying a facility without allowing the franchisee to choose a vendor that provides a good or service of a substantially similar quality and general appearance and that is approved by the franchisor.

- Prohibits a franchisor from coercing a franchisee to provide its customer lists or service files to the franchisor unless certain exceptions apply.

- Prohibits a franchisor from coercing or requiring a franchisee to provide other nonpublic information concerning any consumer or concerning any customer of the franchisee unless certain exceptions apply.

- Prohibits a franchisor from failing to comply with the requirements of any state or federal law that pertains to the use or disclosure of information, including the "Gramm-Leach-Bliley Act."

- Prohibits a franchisor from failing to indemnify a franchisee or its successor from damages related to any claim made against the franchisee or successor if the claim resulted directly from the improper use or disclosure of nonpublic personal information.

- Codifies a statement of intent with regard to the Motor Vehicle Sales Law.

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CONTENT AND OPERATION

Overview

The bill modifies the law governing motor vehicle franchise agreements and the relationship between franchisors and franchisees. A franchisor is a new motor vehicle manufacturer, remanufacturer, or distributor who supplies new motor vehicles to a franchisee under a franchise agreement. A franchisee is a person who receives new motor vehicles from a franchisor under a franchise agreement and who offers, sells, and provides service for such new motor vehicles to the general public.[1]

Compensating franchisees for warranty and recall obligations

Under current law, a franchisor is required to fulfill warranty and recall obligations to repair and service motor vehicles and all parts and components manufactured for installation in a motor vehicle. A franchisor also must compensate each of its franchisees for labor and parts used to fulfill warranty and recall obligations at rates not less than the rates charged by the franchisee to its retail customers for like service and parts for nonwarranty work.[2]

Establishing rates of compensation

The bill allows a franchisee, other than a franchisee that deals in recreational vehicles, to establish rates of compensation for labor performed and parts used by the franchisee in accordance with a specified process. In order to establish its own rates of compensation the franchisee must submit to the franchisor either of the following:

(1) 100 sequential nonwarranty service repair orders for warranty-like repairs that have been paid by a customer and closed by the time of submission and occurring not more than 180 days before the submission;

(2) All service repair orders for warranty-like repairs, that have been paid by a customer and closed by the time of submission, for a period of 90 consecutive days occurring not more than 180 days before the submission.

A franchisee is permitted to submit a set of repair orders for purposes of calculating both its retail labor rate and its retail parts markup percentage, or may

[1] R.C. 4517.01(U) and (V).

[2] R.C. 4517.52(A) and (B).

submit separate sets of repair orders for purposes of calculating its retail labor rate and its retail parts markup percentage separately.[3]

Subject to the provisions for disputes over rates of compensation, if the franchisor determines from any set of submitted repair orders that either the retail labor rate or retail parts markup percentage is substantially higher or lower than the rate currently on record with the franchisor for parts or labor, the franchisor may request additional documentation from the franchisee for a period of either 90 days prior or 90 days subsequent to the time period for which repair orders were submitted for purposes of an alteration. The franchisee must calculate its retail labor rate by determining the franchisee's total labor sales from the service repair orders (above) and dividing that amount by the total number of labor hours that generated those sales.[4] The franchisee must calculate its retail parts markup percentage by determining the franchisee's total parts sales from the service repair orders (above) and dividing that amount by the franchisee's total cost for the purchase of those parts, subtracting one from that amount, and then multiplying the amount by one hundred.[5] However, in calculating the retail labor rate and the retail parts markup percentage, the franchisee must omit charges for any of the following from the calculation:[6]

(1) Manufacturer or distributor special events, specials, or promotional discounts for retail customer repairs;

(2) Parts sold, or repairs performed, at wholesale;

(3) Routine maintenance that is not covered under a retail customer warranty, including the replacement of fluids, filters, and belts that are not provided in the course of other repairs;

(4) Items that do not have individual part numbers, such as nuts, bolts, and fasteners;

(5) Vehicle reconditioning;

(6) Accessories;

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[3] R.C. 4517.52(B)(1).

[4] R.C. 4517.52(B)(2).

[5] R.C. 4517.52(B)(3).

[6] R.C. 4517.52(B)(4).

(7) Repairs of damage caused by a collision, a road hazard, the force of the elements, vandalism, theft, or operator negligence;

(8) Parts sold or repairs performed for insurance carriers;

(9) Vehicle emission or safety inspections required by law;

(10) Goodwill or policy repairs or replacements;

(11) Repairs for which volume discounts have been negotiated with government agencies or insurance carriers;

(12) Repairs performed on vehicles from a different line-make; and

(13) Replacement of tires or related elements.

The franchisee must provide notice of its retail labor rate and retail parts markup percentage calculated in accordance with the bill to the franchisor.[7]

Disputes over rates of compensation

Under the bill, a franchisor may contest the retail labor rate or retail parts markup percentage that was calculated as provided above within 30 days after receiving notice from the franchisee. If the franchisor seeks to contest the retail labor rate or retail parts markup percentage, the franchisor must do all of the following:

(1) Notify the franchisee that the franchisor believes the rate or markup percentage is materially inaccurate or substantially different than that of other similarly situated, same line-make new motor vehicle dealers in the vicinity;

(2) Provide a full explanation of the reasons the franchisor disagrees with the rate or markup percentage;

(3) Provide evidence substantiating the franchisor's position; and

(4) Propose an adjustment of the contested rate or markup percentage.

The bill prohibits the franchisor from modifying its notice to the franchisee or its grounds for contesting the rate or markup percentage after submitting a notice to the franchisee.[8]

[7] R.C. 4517.52(B)(5).

[8] R.C. 4517.52(C)(1).

If the franchisor does not contest the rate or markup percentage that was calculated by the franchisee within 30 days after receiving notice of the rate or markup percentage from the franchisee, the uncontested rate or markup percentage takes effect. The franchisor then must use the rate and markup percentage to determine compensation for any warranty and recall work and service performed by the franchisee until the rate or markup percentage is modified. If the franchisor contests a rate or markup percentage established by the franchisee, the franchisor and franchisee must resolve the disagreement through the franchisor's internal dispute resolution process. However, the franchisee may appeal a determination made as part of the dispute resolution process to a court of competent jurisdiction. Any rate or markup percentage established either through an internal dispute resolution process or by a court as part of an appeal must be applied retroactively to govern reimbursement for labor or parts, as applicable, beginning 30 days after the date the franchisee submitted the disputed rate or markup percentage.[9]

A franchisee is prohibited from establishing or modifying a retail labor rate or retail parts markup percentage more frequently than once per calendar year.[10]

Calculating the amount of compensation

When calculating the compensation that must be provided to a franchisee for labor and parts used to fulfill warranty and recall obligations, all of the following apply:

(1) The franchisor must use time allowances for the diagnosis and performance of the warranty and recall work and service that are reasonable and adequate for the work or services to be performed by a qualified technician;

(2) The franchisor must use any retail labor rate and any established retail parts markup percentage in calculating the compensation;

(3) If the franchisor provided a part or component to the franchisee at no cost to use in performing repairs under a recall, campaign service action, or warranty repair, the franchisor must provide to the franchisee an amount equal to the retail parts markup for that part or component, which must be calculated by multiplying the dealer cost for the part or component as listed in the franchisor's price schedule by the retail parts markup percentage; and

(4) A franchisor is prohibited from assessing penalties, surcharges, or similar costs to a franchisee, transferring or shifting any costs to a franchisee, limiting allocation

[9] R.C. 4517.52(C)(2) and (3).

[10] R.C. 4517.52(C)(4).

of vehicles or parts to a franchisee, or otherwise taking retaliatory action against a franchisee based on any franchisee's exercise of its rights under the bill. However, the bill specifically states that a franchisor is not prohibited from increasing the price of a vehicle or part in the normal course of business.[11] The franchisee bears the burden of proof for any claims against the franchisor under this provision by a preponderance of the evidence.

The bill also prohibits a franchisor from requiring a franchisee to establish a retail labor rate or retail parts markup percentage using any method that is unduly burdensome or time consuming, or requiring the use of information that is unduly burdensome or time consuming to obtain, including part-by-part or transaction-by-transaction calculations or utilization of the franchisee's financial statement. Further, the bill prohibits a franchisor from unilaterally calculating a retail labor rate or retail parts markup percentage for a franchisee.[12]

Cause to terminate or fail to continue a franchise

Current law specifies a number of factors that must be considered by a franchisor in determining whether there is good cause to terminate, cancel, or fail to continue or renew a franchise agreement. Further, current law specifies factors that do not constitute sufficient good cause to take such an action. One factor that does not constitute sufficient good cause is the failure of the franchisee to achieve any unreasonable or discriminatory performance criteria.[13]

The bill specifies that prior to a final determination by a franchisor that a franchisee has failed to achieve any performance criteria for purposes of terminating, canceling, or failing to continue or renew a franchise agreement, the franchisor must give the franchisee a reasonable opportunity to present evidence demonstrating the effect of local market conditions that materially and adversely affected the franchisee's performance. If a franchisor makes a final decision related to performance criteria without allowing the franchisee the reasonable opportunity to present evidence, or does not consider the effect of the local market conditions on the franchisee's performance, the performance criteria is deemed unreasonable.[14]

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[11] R.C. 4517.52(D).

[12] R.C. 4517.52(E).

[13] R.C. 4517.55(A) and (B).

[14] R.C. 4517.55(C).

Local market conditions

The bill specifies that "local market conditions" includes but is not limited to:

(1) Demographics in the franchisee's area;

(2) Geographical and market characteristics in the franchisee's area;

(3) Local economic circumstances;

(4) The proximity of other motor vehicle dealers of the same line-make;

(5) The proximity of motor vehicle manufacturing facilities;

(6) The buying patterns of motor vehicle purchasers;

(7) Customer drive time and drive distance.[15]

Prohibited actions by a franchisor

Current law prohibits a franchisor from taking specified actions regardless of the terms, provisions, or conditions of any agreement, franchise, or waiver. The bill modifies several existing prohibitions and adds additional prohibitions.

Changes to a franchisee's quota, sales expectancy, or sales penetration

Current law specifies that no franchisor may "unfairly change or amend unilaterally a franchisee's allotment of motor vehicles or quota, sales expectancy, or sales penetration without reasonable cause." The bill further prohibits a franchisor from changing a franchisee's geographic area of responsibility without reasonable cause. Additionally, the bill specifies that, prior to changing or amending a franchisee's geographic area of responsibility, the franchisor must give the franchisee, other than a franchisee who deals in recreational vehicles, a reasonable opportunity to present relevant evidence demonstrating the effect of local market conditions that may materially and adversely affect the franchisee's proposed new geographic area of responsibility. Any final decision made by the franchisor without considering such local market conditions is considered unreasonable.[16]

Additionally, the bill provides that the above prohibitions do not authorize a franchisee that is located outside of the relevant market area to challenge the establishment or relocation of a franchise location. Under the bill, relevant market area

[15] R.C. 4517.01(MM).

[16] R.C. 4517.59(A)(6).

means any area within a radius of ten miles from the site of a potential new dealership, except that for manufactured home or recreational vehicle dealerships the radius is 25 miles. The ten-mile radius is measured from the dealer's established place of business that is used exclusively for the purpose of selling, displaying, offering for sale, or dealing in motor vehicles.[17]

Charge backs

Current law specifies that no franchisor may initiate a charge back without an audit or perform an audit to confirm a warranty repair, sales incentive, or rebate more than 12 months after the date of submission by the franchisee. A chargeback generally means the process by which a franchisor charges the franchisee the amount of incentive payments made to the franchisee due to the determination that the incentives were made improperly. The bill expands the prohibition to include recall repairs, service incentives, and other forms of incentive compensation. Under current law, unchanged by the bill, these restrictions do not apply to a fraudulent claim.[18]

Reduced payments

Current law specifies that no franchisor may reduce the amount to be paid to a new motor vehicle dealer or charge a new motor vehicle dealer back subsequent to the payment of any claim unless either:

(1) The manufacturer shows that the claim lacks material documentation or is false, fraudulent, or a misrepresentation; or

(2) The new motor vehicle dealer knew or should have known a new motor vehicle was sold for export to a foreign country.

The bill alters this provision so that a franchisor cannot assess any penalty, charge back, or take any other adverse action against a motor vehicle dealer subsequent to and in relation to the payment of any claim related to a warranty repair or recall reimbursement, sales incentive or rebate, service incentive, or other form of incentive compensation.[19]

With regard to the second exception to the prohibition above, which relates to the export of a motor vehicle, current law specifies that there is a rebuttable presumption that a new motor vehicle dealer did not know, or should not have known,

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[17] R.C. 4517.01(CC) and 4517.59(A)(6).

[18] R.C. 4517.59(A)(18).

[19] R.C. 4517.59(A)(20).

that a vehicle was sold for export to a foreign country if the motor vehicle is titled in the United States. The bill adds that unless the manufacturer establishes that the new motor vehicle dealer knew or should have known of information that should have caused the new motor vehicle dealer to know that the new motor vehicle was purchased for export, the new motor vehicle dealer is presumed not to have known that the new motor vehicle was purchased for export if all of the following apply:

(1) The new motor vehicle was titled in the United States;

(2) The new motor vehicle was exported not sooner than 12 months after the date of purchase of the motor vehicle; and

(3) The purchaser's information was not on a franchisor's written list of known or suspected exporters received by the new motor vehicle dealer at least five days prior to the date of the sale of the motor vehicle (see **COMMENT**).[20]

Notice and opportunity to participate in an appeal

Current law specifies that a franchisor cannot do any of the following until the new motor vehicle dealer has had notice and an opportunity to participate in all franchisor internal appeal processes as well as all available legal processes:

(1) Refuse to pay sales incentives, service incentives, rebates, or other forms of incentive compensation;

(2) Reduce the amount to be paid to the new motor vehicle dealer; or

(3) Charge back subsequent to the payment of a claim.

The bill also specifies that a franchisor cannot refuse to pay warranty repair or recall reimbursements in the manner prohibited above.[21]

Changes to or relocation of dealership premises

Current law specifies that no franchisor may require, coerce, or attempt to coerce any new motor vehicle dealer in Ohio to change location of the dealership or make any substantial alterations to the dealership premises or facilities, when either:

(1) The proposed change or alteration would be unreasonable; or

[20] R.C. 4517.59(A)(20)(b).

[21] R.C. 4517.59(A)(20).

(2) The change or alteration is proposed without a written estimation of a sufficient supply of new motor vehicles so as to justify the location change or alterations in light of the current market and economic conditions.[22]

The bill specifies that the determination of whether the change or alteration is unreasonable must be made in light of current market and economic conditions. Further, the bill expands the prohibition to include a third circumstance: that the change or alteration is proposed within seven years after the dealership premises was constructed or altered, as approved by the franchisor unless the change or alteration is necessary to comply with a health or safety law, or a technology requirement that is essential to the sale or service of a motor vehicle that the new motor vehicle dealer is authorized by the franchisor to sell or service. The bill further provides that the seven-year time period continues with regard to a successor to the new motor vehicle dealer if the successor was approved by the franchisor in the franchise agreement. Under the bill, "substantial alteration" means an alteration that has a major impact on the architectural features, characteristics, or integrity of a structure or lot. "Substantial alteration" does not include routine maintenance, such as interior painting, that is reasonably necessary to keep the dealership facility in an attractive condition.[23]

The bill specifically states that the prohibition discussed above does not prohibit a franchisor from taking any of the following actions:

(1) Continuing, renewing, or modifying a facility improvement program that involves more than one new motor vehicle dealer in Ohio and that was in effect prior to the effective date of the bill;

(2) Providing payments to assist a new motor vehicle dealer in making any facility improvement, including construction, remodeling, or installing signage or franchisor image elements; or

(3) Providing reimbursement to a new motor vehicle dealer for a portion of the costs that the new motor vehicle dealer incurs in making any facility improvement.[24]

Opportunity to designate a successor

The bill prohibits a franchisor from using the failure of a franchisee to meet a performance standard as the basis to prevent or deny the franchisee the opportunity to name a successor or otherwise engage in succession planning. However, the bill

[22] R.C. 4517.59(A)(23).

[23] R.C. 4517.59(A)(23)(a)(iii), (b), and (c).

[24] R.C. 4517.59(A)(23)(d).

specifies that any designated successor must meet the manufacturer's written and uniformly applied requirements to be a franchisee at the time of succession.[25]

Exclusion from franchisor programs

The bill prohibits a franchisor from using the inability of a franchisee to meet a performance standard as a justification to exclude the franchisee from programs offered by the franchisor if the failure to meet the performance standard was based on whether the franchisee is selling an adequate number of vehicles and the franchisee can demonstrate that it was unable to purchase enough vehicles from the franchisor due to the actions of the franchisor.[26]

Required use of specified vendors

The bill prohibits a franchisor from unreasonably requiring or coercing a franchisee to lease or purchase a good or service from a specified vendor for purposes of expanding, constructing, or significantly modifying a facility without allowing the franchisee to choose a vendor that provides a good or service of a substantially similar quality and general appearance and that is approved by the franchisor. The bill also prohibits a franchisor from unreasonably withholding approval of a vendor. The bill specifically states that this prohibition does not do either of the following:

(1) Allow a franchisee or vendor to eliminate or impair the franchisor's intellectual property rights, including with regard to a trademark; or

(2) Permit a franchisee to erect or maintain signs that do not conform to the intellectual property usage guidelines of the franchisor.[27]

Research on vehicle purchasers

The bill prohibits a franchisor from requiring a franchisee to conduct research on vehicle purchasers.[28]

Customer lists, service files, and other nonpublic personal information

Current law specifies that a franchisor cannot require a franchisee to provide its customer lists or service files to the franchisor unless necessary for the sale and delivery of a new motor vehicle to a consumer, to validate and pay consumer or dealer

[25] R.C. 4517.59(A)(25).

[26] R.C. 4517.59(A)(26).

[27] R.C. 4517.59(A)(28).

[28] R.C. 4517.59(A)(29).

incentives, or for the submission to the franchisor for any services supplied by the franchisee for any claim for warranty parts or repairs. The bill also prohibits a franchisor from coercing a franchisee from providing such information and expands the prohibition to include other nonpublic information concerning any consumer or concerning any customer of the franchisee.[29]

The bill also adds two related prohibitions. First, the bill prohibits a franchisor from failing to comply with the requirements of any state or federal law that pertains to the use or disclosure of information, including the "Gramm-Leach-Bliley Act," 113 Stat. 1338 (1999), 15 U.S.C. 6801 et seq. Second, the bill prohibits a franchisor from failing, upon demand, to indemnify any existing or former franchisee and the successors and assigns of the franchisee from all damages that result from or relate to any claim made by a third party against the franchisee or successor if the claim results directly from the improper use or disclosure of nonpublic personal information by the manufacturer, distributor, or any third party to whom information was provided by the manufacturer or distributor. The bill specifies that the franchisor must pay attorney's fees and other expenses reasonably incurred by the franchisee or successor in relation to such a claim.[30]

Declaration of intent

The bill codifies a statement of intent in the Motor Vehicle Sales Law. The statement of intent specifies that the distribution and sale of motor vehicles in Ohio vitally affects commerce, the economy, and the public interest, welfare, and safety. The bill further provides that in order to promote the interests of this state, the Motor Vehicle Sales Law must be liberally construed in order to ensure a sound system for distributing and selling motor vehicles through all of the following:

(1) Enforcing the comprehensive and uniform framework for licensing and regulating manufacturers, distributors, wholesalers, and dealers of motor vehicles;

(2) Promoting the right of the public to post-sale mechanical and operational services between the buyer and seller that are necessary to ensure the safe operating condition of a motor vehicle and are expected and implied at the time of sale;

(3) Enforcing the Motor Vehicle Sales Law as to other persons to provide for compliance with the manufacturer's warranties and to prevent fraud, unfair practices, discrimination, or other abuses;

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[29] R.C. 4517.59(B)(2).

[30] R.C. 4517.59(B)(3) and (4).

(4) Maintaining full and fair competition among intra-brand and inter-brand dealers; and

(5) Maintaining strong and sound dealerships in order to provide continuing and necessary reliable services to the citizens of Ohio and to provide stable employment to the citizens of Ohio.[31]

The bill also specifies that the distribution and sale of motor vehicles is a matter of general statewide interest that requires uniform statewide regulation and the provisions of the Revised Code governing such distribution and sale constitute a comprehensive plan with regard to such issues.[32]

COMMENT

It is unclear how the two presumptions would work in conjunction with one another.

HISTORY

ACTION	DATE
Introduced	11-12-15
Reported, S. Transportation, Commerce & Labor	---

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[31] R.C. 4517.011(A).

[32] R.C. 4517.011(B).