

1 **DETERMINATION OF EMPLOYER STATUS AMENDMENTS**

2 2016 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Brian M. Greene**

5 Senate Sponsor: _____

6

7 **LONG TITLE**

8 **General Description:**

9 This bill modifies provisions related to insurance, labor, and employment security to
10 address the determination of who is an employer.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ amends definition provisions;
- 14 ▶ addresses when a franchisor is considered an employer;
- 15 ▶ in certain circumstances, prohibits reliance on federal executive branch orders or
- 16 regulations in determining whether two or more entities are joint employers; and
- 17 ▶ makes technical changes.

18 **Money Appropriated in this Bill:**

19 None

20 **Other Special Clauses:**

21 None

22 **Utah Code Sections Affected:**

23 AMENDS:

- 24 **31A-40-102**, as enacted by Laws of Utah 2008, Chapter 318
- 25 **34-28-2**, as last amended by Laws of Utah 2011, Chapter 413
- 26 **34-40-102**, as last amended by Laws of Utah 2003, Chapter 151
- 27 **34A-2-103**, as last amended by Laws of Utah 2014, Chapter 303



28 [34A-5-102](#), as last amended by Laws of Utah 2015, Chapters 13 and 23

29 [34A-6-103](#), as last amended by Laws of Utah 2013, Chapter 413

30 [35A-4-203](#), as last amended by Laws of Utah 2003, Chapter 17

31 ENACTS:

32 [31A-40-212](#), Utah Code Annotated 1953



34 *Be it enacted by the Legislature of the state of Utah:*

35 Section 1. Section [31A-40-102](#) is amended to read:

36 **[31A-40-102. Definitions.](#)**

37 As used in this chapter:

38 (1) (a) Except as provided in Subsection (1)(b), "administrative fee" means a fee
39 charged to a client by a professional employer organization for a professional employer service.

40 (b) "Administrative fee" does not include an amount or a fee received by a professional
41 employer organization that is:

- 42 (i) compensation of a covered employee;
- 43 (ii) a benefit for a covered employee;
- 44 (iii) a payroll-related tax;
- 45 (iv) an unemployment insurance contribution;
- 46 (v) withholding of compensation for a covered employee;
- 47 (vi) a workers' compensation premium; or
- 48 (vii) another assessment paid by a professional employer organization to or on behalf
49 of a covered employee under a professional employer agreement.

50 (2) "Assurance organization" means a person designated as an assurance organization
51 in accordance with Section [31A-40-303](#).

52 (3) "Client" means a person who enters into a professional employer agreement with a
53 professional employer organization.

54 (4) "Coemployer" means:

- 55 (a) a client; or
- 56 (b) a professional employer organization.

57 (5) "Coemployment relationship" means a relationship:

- 58 (a) that is intended to be ongoing rather than a temporary or project specific

59 relationship; and

60 (b) wherein the rights and obligations of an employer that arise out of an employment
61 relationship are allocated between coemployers pursuant to:

62 (i) a professional employer agreement; or

63 (ii) this chapter.

64 (6) Notwithstanding Section 31A-1-301, "controlling person" means a person who,
65 individually or acting in concert with one or more persons, owns, directly or indirectly, 10% or
66 more of the equity interest in a professional employer organization.

67 (7) "Covered employee" means an individual who has a coemployment relationship
68 with a client and a professional employer organization if the conditions of Section 31A-40-203
69 are met.

70 (8) (a) "Employment related economic incentive" means:

71 (i) (A) a credit against or exemption from taxes due the state or a political subdivision
72 of the state; or

73 (B) an economic inducement, including a loan or a grant; and

74 (ii) if the credit, exemption, or economic inducement described in Subsection (8)(a)(i):

75 (A) is offered by the state or a political subdivision of the state; and

76 (B) has an eligibility requirement that relates in whole or in part to employment

77 including:

78 (I) the number of employees; or

79 (II) the nature of the employment.

80 (9) "Federal executive agency" means an executive agency, as defined in 5 U.S.C.

81 Sec.105, of the federal government.

82 (10) "Franchisee" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

83 (11) "Franchisor" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

84 ~~[(9)]~~ (12) "Guarantee" means to assume an obligation of another person if that person
85 fails to meet the obligation.

86 ~~[(10)]~~ (13) "Licensee" means a person licensed under this chapter.

87 ~~[(11)]~~ (14) "Professional employer agreement" means a written contract by and
88 between a client and a professional employer organization that provides for:

89 (a) the coemployment of a covered employee;

90 (b) with respect to a covered employee, the allocation of a right or obligation of an
91 employer between:

92 (i) the client; and

93 (ii) the professional employer organization; and

94 (c) the assumption of the obligations imposed by this chapter by:

95 (i) the client; or

96 (ii) the professional employer organization.

97 ~~[(12)]~~ (15) (a) Subject to Subsection ~~[(12)]~~ (15)(b), "professional employer
98 organization" means a person engaged in the business of providing a professional employer
99 service.

100 (b) "Professional employer organization" does not include:

101 (i) a person that:

102 (A) does not:

103 (I) have as a principal business activity the entering into of a professional employer
104 arrangement; or

105 (II) hold the person out as a professional employer organization; and

106 (B) shares an employee with a commonly owned company within the meaning of
107 Sections 414(b) and (c), Internal Revenue Code;

108 (ii) an independent contractor arrangement by which a person:

109 (A) assumes responsibility for the product produced or service performed by the person
110 or the person's agent; and

111 (B) retains and exercises primary direction and control over the work performed by an
112 individual whose service is supplied under the independent contractor arrangement; or

113 (iii) a person providing temporary help service.

114 ~~[(13)]~~ (16) "Professional employer organization group" means two or more
115 professional employer organizations that are majority owned or commonly controlled or
116 directed by the same one or more persons.

117 ~~[(14)]~~ (17) "Professional employer service" means the service of entering into a
118 coemployment relationship under this chapter under which all or a majority of the employees
119 who provide a service to a client, or a division or work unit of a client, are covered employees.

120 ~~[(15)]~~ (18) "Qualified actuary" means an individual who:

121 (a) is a member in good standing of a professional actuarial accreditation organization
122 designated by the department by rule;

123 (b) is qualified to sign a statement of actuarial opinion or annual statement for a
124 professional employer organization in accordance with the qualification standards for an
125 actuary signing an opinion or annual statement as provided by the professional actuarial
126 accreditation organization designated under Subsection [~~(15)~~] (18)(a);

127 (c) is familiar with the valuation requirements applicable to a professional employer
128 organization;

129 (d) has not been found by the commissioner, or if so found has subsequently been
130 reinstated as a qualified actuary, following appropriate notice and hearing to have:

131 (i) violated a provision of, or an obligation imposed by, statute or other law in the
132 course of the actuary's dealings as a qualified actuary;

133 (ii) been found guilty of a fraudulent or dishonest practice;

134 (iii) demonstrated the actuary's incompetency, lack of cooperation, or
135 untrustworthiness to act as a qualified actuary;

136 (iv) submitted to the commissioner during the past five years, pursuant to this rule, an
137 actuarial opinion or memorandum that the commissioner rejected because it did not meet the
138 provisions of rule; or

139 (v) resigned or been removed as an actuary within the past five years as a result of an
140 act or omission indicated in an adverse report on examination or as a result of failure to adhere
141 to a generally acceptable actuarial standard; and

142 (e) has not failed to notify the commissioner of an action taken by any commissioner of
143 another state similar to that under Subsection [~~(15)~~] (18)(d).

144 [~~(16)~~] (19) "Temporary help service" means a service consisting of a person:

145 (a) recruiting and hiring the person's own employee;

146 (b) finding another person that wants the services of that employee;

147 (c) assigning the employee to:

148 (i) perform services at or for the other person to support or supplement the other
149 person's employees;

150 (ii) provide assistance in a special work situation such as:

151 (A) an employee absence;

- 152 (B) a skill shortage; or
- 153 (C) a seasonal workload; or
- 154 (iii) perform a special assignment or project; and
- 155 (d) customarily reassigning the employee to another organization when the employee
- 156 finishes an assignment.

157 [(17)] (20) "Working capital" means the current assets minus the current liabilities of a
158 professional employer organization determined in accordance with generally accepted
159 accounting principles.

160 Section 2. Section 31A-40-212 is enacted to read:

161 **31A-40-212. Determination of coemployment relationship not based on federal**
162 **order or regulation -- Franchisors excluded.**

163 (1) For purposes of this chapter, in determining whether two or more persons are
164 considered to be in a coemployment relationship, a person may not rely on an order or
165 regulation of a federal executive agency.

166 (2) (a) For purposes of this chapter, a franchisor is not considered to be an employer of:

167 (i) a franchisee; or

168 (ii) a franchisee's employee.

169 (b) With respect to a specific claim for relief under this chapter made by a franchisee or
170 a franchisee's employee, this Subsection (2) does not apply to a franchisor that has been found
171 by a court of competent jurisdiction in this state to have exercised a type or degree of control
172 over the franchisee or the franchisee's employee not customarily exercised by a franchisor for
173 the purpose of protecting the franchisor's trademarks and brand.

174 Section 3. Section 34-28-2 is amended to read:

175 **34-28-2. Definitions -- Unincorporated entities -- Joint employers -- Franchisors.**

176 (1) As used in this chapter:

177 (a) "Commission" means the Labor Commission.

178 (b) "Division" means the Division of Antidiscrimination and Labor.

179 (c) "Employer" includes every person, firm, partnership, association, corporation,
180 receiver or other officer of a court of this state, and any agent or officer of any of the
181 above-mentioned classes, employing any person in this state.

182 (d) "Federal executive agency" means an executive agency, as defined in 5 U.S.C. Sec.

183 105, of the federal government.

184 (e) "Franchisee" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

185 (f) "Franchisor" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

186 ~~(d)~~ (g) "Unincorporated entity" means an entity organized or doing business in the
187 state that is not:

188 (i) an individual;

189 (ii) a corporation; or

190 (iii) publicly traded.

191 ~~(e)~~ (h) "Wages" means the amounts due the employee for labor or services, whether
192 the amount is fixed or ascertained on a time, task, piece, commission basis or other method of
193 calculating such amount.

194 (2) (a) For purposes of this chapter, an unincorporated entity that is required to be
195 licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act, is presumed to
196 be the employer of each individual who, directly or indirectly, holds an ownership interest in
197 the unincorporated entity.

198 (b) Pursuant to rules made by the commission in accordance with Title 63G, Chapter 3,
199 Utah Administrative Rulemaking Act, an unincorporated entity may rebut the presumption
200 under Subsection (2)(a) for an individual by establishing by clear and convincing evidence that
201 the individual:

202 (i) is an active manager of the unincorporated entity;

203 (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated
204 entity; or

205 (iii) is not subject to supervision or control in the performance of work by:

206 (A) the unincorporated entity; or

207 (B) a person with whom the unincorporated entity contracts.

208 (c) As part of the rules made under Subsection (2)(b), the commission may define:

209 (i) "active manager";

210 (ii) "directly or indirectly holds at least an 8% ownership interest"; and

211 (iii) "subject to supervision or control in the performance of work."

212 (d) The commission by rule made in accordance with Title 63G, Chapter 3, Utah

213 Administrative Rulemaking Act, may establish a procedure, consistent with Section 34-28-7,

214 under which an unincorporated entity may seek approval of a mutual agreement to pay wages
215 on non-regular paydays.

216 (3) In determining whether two or more persons are considered joint employers for
217 purposes of this chapter, a person may not rely on an order or regulation of a federal executive
218 agency.

219 (4) (a) For purposes of this chapter, a franchisor is not considered to be an employer of:

220 (i) a franchisee; or

221 (ii) a franchisee's employee.

222 (b) With respect to a specific claim for relief under this chapter made by a franchisee or
223 a franchisee's employee, this Subsection (4) does not apply to a franchisor that has been found
224 by a court of competent jurisdiction in this state to have exercised a type or degree of control
225 over the franchisee or the franchisee's employee not customarily exercised by a franchisor for
226 the purpose of protecting the franchisor's trademarks and brand.

227 Section 4. Section **34-40-102** is amended to read:

228 **34-40-102. Definitions -- Joint employees -- Franchisors.**

229 (1) [~~This~~] Subject to Subsection (3), this chapter and the terms used in it, including the
230 computation of wages, shall be interpreted consistently with [~~29 U.S.C. Sec. 201 et seq.,~~] the
231 Fair Labor Standards Act of 1938, 29 U.S.C. Sec. 201 et seq., as amended, to the extent that act
232 relates to the payment of a minimum wage.

233 (2) As used in this chapter:

234 (a) "Cash wage obligation" means an hourly wage that an employer pays a tipped
235 employee regardless of the tips or gratuities a tipped employee receives.

236 (b) "Commission" means the Labor Commission.

237 (c) "Division" means the Division of Antidiscrimination and Labor in the commission.

238 (d) "Federal executive agency" means an executive agency, as defined in 5 U.S.C. Sec.
239 105, of the federal government.

240 (e) "Franchisee" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

241 (f) "Franchisor" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

242 [~~(g)~~] (g) "Minimum wage" means the state minimum hourly wage for adult employees
243 as established under this chapter, unless the context clearly indicates otherwise.

244 [~~(e)~~] (h) "Tipped employee" means an employee who customarily and regularly

245 receives tips or gratuities.

246 (3) Notwithstanding Subsection (1), in determining whether two or more persons are
247 considered joint employers for purposes of this chapter, a person may not rely on an order or
248 regulation of a federal executive agency.

249 (4) (a) For purposes of this chapter, a franchisor is not considered to be an employer of:

250 (i) a franchisee; or

251 (ii) a franchisee's employee.

252 (b) With respect to a specific claim for relief under this chapter made by a franchisee or
253 a franchisee's employee, this Subsection (4) does not apply to a franchisor that has been found
254 by a court of competent jurisdiction in this state to have exercised a type or degree of control
255 over the franchisee or the franchisee's employee not customarily exercised by a franchisor for
256 the purpose of protecting the franchisor's trademarks and brand.

257 Section 5. Section 34A-2-103 is amended to read:

258 **34A-2-103. Employers enumerated and defined -- Regularly employed --**
259 **Statutory employers -- Exceptions.**

260 (1) (a) The state, and each county, city, town, and school district in the state are
261 considered employers under this chapter and Chapter 3, Utah Occupational Disease Act.

262 (b) For the purposes of the exclusive remedy in this chapter and Chapter 3, Utah
263 Occupational Disease Act prescribed in Sections 34A-2-105 and 34A-3-102, the state is
264 considered to be a single employer and includes any office, department, agency, authority,
265 commission, board, institution, hospital, college, university, or other instrumentality of the
266 state.

267 (2) (a) Except as provided in Subsection (4), each person, including each public utility
268 and each independent contractor, who regularly employs one or more workers or operatives in
269 the same business, or in or about the same establishment, under any contract of hire, express or
270 implied, oral or written, is considered an employer under this chapter and Chapter 3, Utah
271 Occupational Disease Act.

272 (b) As used in this Subsection (2):

273 (i) "Independent contractor" means any person engaged in the performance of any work
274 for another who, while so engaged, is:

275 (A) independent of the employer in all that pertains to the execution of the work;

276 (B) not subject to the routine rule or control of the employer;
277 (C) engaged only in the performance of a definite job or piece of work; and
278 (D) subordinate to the employer only in effecting a result in accordance with the
279 employer's design.

280 (ii) "Regularly" includes all employments in the usual course of the trade, business,
281 profession, or occupation of the employer, whether continuous throughout the year or for only a
282 portion of the year.

283 (3) (a) The client under a professional employer organization agreement regulated
284 under Title 31A, Chapter 40, Professional Employer Organization Licensing Act:

285 (i) is considered the employer of a covered employee; and
286 (ii) subject to Section 31A-40-209, shall secure workers' compensation benefits for a
287 covered employee by complying with Subsection 34A-2-201(1) or (2) and commission rules.

288 (b) The division shall promptly inform the Insurance Department if the division has
289 reason to believe that a professional employer organization is not in compliance with
290 Subsection 34A-2-201(1) or (2) and commission rules.

291 (4) A domestic employer who does not employ one employee or more than one
292 employee at least 40 hours per week is not considered an employer under this chapter and
293 Chapter 3, Utah Occupational Disease Act.

294 (5) (a) As used in this Subsection (5):

295 (i) (A) "agricultural employer" means a person who employs agricultural labor as
296 defined in Subsections 35A-4-206(1) and (2) and does not include employment as provided in
297 Subsection 35A-4-206(3); and

298 (B) notwithstanding Subsection (5)(a)(i)(A), only for purposes of determining who is a
299 member of the employer's immediate family under Subsection (5)(a)(ii), if the agricultural
300 employer is a corporation, partnership, or other business entity, "agricultural employer" means
301 an officer, director, or partner of the business entity;

302 (ii) "employer's immediate family" means:

303 (A) an agricultural employer's:

304 (I) spouse;

305 (II) grandparent;

306 (III) parent;

- 307 (IV) sibling;
- 308 (V) child;
- 309 (VI) grandchild;
- 310 (VII) nephew; or
- 311 (VIII) niece;
- 312 (B) a spouse of any person provided in Subsections (5)(a)(ii)(A)(II) through (VIII); or
- 313 (C) an individual who is similar to those listed in Subsection (5)(a)(ii)(A) or (B) as
- 314 defined by rules of the commission; and
- 315 (iii) "nonimmediate family" means a person who is not a member of the employer's
- 316 immediate family.
- 317 (b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an
- 318 agricultural employer is not considered an employer of a member of the employer's immediate
- 319 family.
- 320 (c) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an
- 321 agricultural employer is not considered an employer of a nonimmediate family employee if:
- 322 (i) for the previous calendar year the agricultural employer's total annual payroll for all
- 323 nonimmediate family employees was less than \$8,000; or
- 324 (ii) (A) for the previous calendar year the agricultural employer's total annual payroll
- 325 for all nonimmediate family employees was equal to or greater than \$8,000 but less than
- 326 \$50,000; and
- 327 (B) the agricultural employer maintains insurance that covers job-related injuries of the
- 328 employer's nonimmediate family employees in at least the following amounts:
- 329 (I) \$300,000 liability insurance, as defined in Section [31A-1-301](#); and
- 330 (II) \$5,000 for health care benefits similar to benefits under health care insurance as
- 331 defined in Section [31A-1-301](#).
- 332 (d) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an
- 333 agricultural employer is considered an employer of a nonimmediate family employee if:
- 334 (i) for the previous calendar year the agricultural employer's total annual payroll for all
- 335 nonimmediate family employees is equal to or greater than \$50,000; or
- 336 (ii) (A) for the previous year the agricultural employer's total payroll for nonimmediate
- 337 family employees was equal to or exceeds \$8,000 but is less than \$50,000; and

338 (B) the agricultural employer fails to maintain the insurance required under Subsection
339 (5)(c)(ii)(B).

340 (6) An employer of agricultural laborers or domestic servants who is not considered an
341 employer under this chapter and Chapter 3, Utah Occupational Disease Act, may come under
342 this chapter and Chapter 3, Utah Occupational Disease Act, by complying with:

343 (a) this chapter and Chapter 3, Utah Occupational Disease Act; and

344 (b) the rules of the commission.

345 (7) (a) (i) As used in this Subsection (7)(a), "employer" includes any of the following
346 persons that procures work to be done by a contractor notwithstanding whether or not the
347 person directly employs a person:

348 (A) a sole proprietorship;

349 (B) a corporation;

350 (C) a partnership;

351 (D) a limited liability company; or

352 (E) a person similar to one described in Subsections (7)(a)(i)(A) through (D).

353 (ii) If an employer procures any work to be done wholly or in part for the employer by
354 a contractor over whose work the employer retains supervision or control, and this work is a
355 part or process in the trade or business of the employer, the contractor, all persons employed by
356 the contractor, all subcontractors under the contractor, and all persons employed by any of
357 these subcontractors, are considered employees of the original employer for the purposes of
358 this chapter and Chapter 3, Utah Occupational Disease Act.

359 (b) Any person who is engaged in constructing, improving, repairing, or remodeling a
360 residence that the person owns or is in the process of acquiring as the person's personal
361 residence may not be considered an employee or employer solely by operation of Subsection
362 (7)(a).

363 (c) A partner in a partnership or an owner of a sole proprietorship is not considered an
364 employee under Subsection (7)(a) if the employer who procures work to be done by the
365 partnership or sole proprietorship obtains and relies on either:

366 (i) a valid certification of the partnership's or sole proprietorship's compliance with
367 Section 34A-2-201 indicating that the partnership or sole proprietorship secured the payment of
368 workers' compensation benefits pursuant to Section 34A-2-201; or

369 (ii) if a partnership or sole proprietorship with no employees other than a partner of the
370 partnership or owner of the sole proprietorship, a workers' compensation coverage waiver
371 issued pursuant to Part 10, Workers' Compensation Coverage Waivers Act, stating that:

372 (A) the partnership or sole proprietorship is customarily engaged in an independently
373 established trade, occupation, profession, or business; and

374 (B) the partner or owner personally waives the partner's or owner's entitlement to the
375 benefits of this chapter and Chapter 3, Utah Occupational Disease Act, in the operation of the
376 partnership or sole proprietorship.

377 (d) A director or officer of a corporation is not considered an employee under
378 Subsection (7)(a) if the director or officer is excluded from coverage under Subsection
379 [34A-2-104\(4\)](#).

380 (e) A contractor or subcontractor is not an employee of the employer under Subsection
381 (7)(a), if the employer who procures work to be done by the contractor or subcontractor obtains
382 and relies on either:

383 (i) a valid certification of the contractor's or subcontractor's compliance with Section
384 [34A-2-201](#); or

385 (ii) if a partnership, corporation, or sole proprietorship with no employees other than a
386 partner of the partnership, officer of the corporation, or owner of the sole proprietorship, a
387 workers' compensation coverage waiver issued pursuant to Part 10, Workers' Compensation
388 Coverage Waivers Act, stating that:

389 (A) the partnership, corporation, or sole proprietorship is customarily engaged in an
390 independently established trade, occupation, profession, or business; and

391 (B) the partner, corporate officer, or owner personally waives the partner's, corporate
392 officer's, or owner's entitlement to the benefits of this chapter and Chapter 3, Utah
393 Occupational Disease Act, in the operation of the partnership's, corporation's, or sole
394 proprietorship's enterprise under a contract of hire for services.

395 (f) (i) For purposes of this Subsection (7)(f), "eligible employer" means a person who:

396 (A) is an employer; and

397 (B) procures work to be done wholly or in part for the employer by a contractor,
398 including:

399 (I) all persons employed by the contractor;

400 (II) all subcontractors under the contractor; and
401 (III) all persons employed by any of these subcontractors.
402 (ii) Notwithstanding the other provisions in this Subsection (7), if the conditions of
403 Subsection (7)(f)(iii) are met, an eligible employer is considered an employer for purposes of
404 Section 34A-2-105 of the contractor, subcontractor, and all persons employed by the contractor
405 or subcontractor described in Subsection (7)(f)(i)(B).
406 (iii) Subsection (7)(f)(ii) applies if the eligible employer:
407 (A) under Subsection (7)(a) is liable for and pays workers' compensation benefits as an
408 original employer under Subsection (7)(a) because the contractor or subcontractor fails to
409 comply with Section 34A-2-201;
410 (B) (I) secures the payment of workers' compensation benefits for the contractor or
411 subcontractor pursuant to Section 34A-2-201;
412 (II) procures work to be done that is part or process of the trade or business of the
413 eligible employer; and
414 (III) does the following with regard to a written workplace accident and injury
415 reduction program that meets the requirements of Subsection 34A-2-111(3)(d):
416 (Aa) adopts the workplace accident and injury reduction program;
417 (Bb) posts the workplace accident and injury reduction program at the work site at
418 which the eligible employer procures work; and
419 (Cc) enforces the workplace accident and injury reduction program according to the
420 terms of the workplace accident and injury reduction program; or
421 (C) (I) obtains and relies on:
422 (Aa) a valid certification described in Subsection (7)(c)(i) or (7)(e)(i);
423 (Bb) a workers' compensation coverage waiver described in Subsection (7)(c)(ii) or
424 (7)(e)(ii); or
425 (Cc) proof that a director or officer is excluded from coverage under Subsection
426 34A-2-104(4);
427 (II) is liable under Subsection (7)(a) for the payment of workers' compensation benefits
428 if the contractor or subcontractor fails to comply with Section 34A-2-201;
429 (III) procures work to be done that is part or process in the trade or business of the
430 eligible employer; and

- 431 (IV) does the following with regard to a written workplace accident and injury
432 reduction program that meets the requirements of Subsection 34A-2-111(3)(d):
- 433 (Aa) adopts the workplace accident and injury reduction program;
- 434 (Bb) posts the workplace accident and injury reduction program at the work site at
435 which the eligible employer procures work; and
- 436 (Cc) enforces the workplace accident and injury reduction program according to the
437 terms of the workplace accident and injury reduction program.
- 438 (8) (a) For purposes of this Subsection (8), "unincorporated entity" means an entity
439 organized or doing business in the state that is not:
- 440 (i) an individual;
- 441 (ii) a corporation; or
- 442 (iii) publicly traded.
- 443 (b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an
444 unincorporated entity that is required to be licensed under Title 58, Chapter 55, Utah
445 Construction Trades Licensing Act, is presumed to be the employer of each individual who
446 holds, directly or indirectly, an ownership interest in the unincorporated entity.
447 Notwithstanding Subsection (7)(c) and Subsection 34A-2-104(3), the unincorporated entity
448 shall provide the individual who holds the ownership interest workers' compensation coverage
449 under this chapter and Chapter 3, Utah Occupational Disease Act, unless the presumption is
450 rebutted under Subsection (8)(c).
- 451 (c) Pursuant to rules made by the commission in accordance with Title 63G, Chapter 3,
452 Utah Administrative Rulemaking Act, an unincorporated entity may rebut the presumption
453 under Subsection (8)(b) for an individual by establishing by clear and convincing evidence that
454 the individual:
- 455 (i) is an active manager of the unincorporated entity;
- 456 (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated
457 entity; or
- 458 (iii) is not subject to supervision or control in the performance of work by:
- 459 (A) the unincorporated entity; or
- 460 (B) a person with whom the unincorporated entity contracts.
- 461 (d) As part of the rules made under Subsection (8)(c), the commission may define:

462 (i) "active manager";
463 (ii) "directly or indirectly holds at least an 8% ownership interest"; and
464 (iii) "subject to supervision or control in the performance of work."
465 (9) (a) As used in this Subsection (9), "home and community based services" means
466 one or more of the following services provided to an individual with a disability or to the
467 individual's family that helps prevent the individual with a disability from being placed in a
468 more restrictive setting:
469 (i) respite care;
470 (ii) skilled nursing;
471 (iii) nursing assistant services;
472 (iv) home health aide services;
473 (v) personal care and attendant services;
474 (vi) other in-home care, such as support for the daily activities of the individual with a
475 disability;
476 (vii) specialized in-home training for the individual with a disability or a family
477 member of the individual with a disability;
478 (viii) specialized in-home support, coordination, and other supported living services;
479 and
480 (ix) other home and community based services unique to the individual with a
481 disability or the family of the individual with a disability that help prevent the individual with a
482 disability from being placed in a more restrictive setting.
483 (b) Notwithstanding Subsection (4) and subject to Subsection (9)(c), an individual with
484 a disability or designated representative of the individual with a disability is considered an
485 employer under this chapter and Chapter 3, Utah Occupational Disease Act, of an individual
486 who provides home and community based services if the individual with a disability or
487 designated representative of the individual with a disability:
488 (i) employs the individual to provide home and community based services for seven
489 hours per week or more; and
490 (ii) pays the individual providing the home and community based services from state or
491 federal money received by the individual with a disability or designated representative of the
492 individual with a disability to fund home and community based services, including through a

493 person designated by the Secretary of the Treasury in accordance with Section 3504, Internal
494 Revenue Code, as a fiduciary, agent, or other person who has the control, receipt, custody, or
495 disposal of, or pays the wages of, the individual providing the home and community based
496 services.

497 (c) The state and federal money received by an individual with a disability or
498 designated representative of an individual with a disability shall include the cost of the workers'
499 compensation coverage required by this Subsection (9) in addition to the money necessary to
500 fund the home and community based services that the individual with a disability or family of
501 the individual with a disability is eligible to receive so that the home and community based
502 services are not reduced in order to pay for the workers' compensation coverage required by
503 this Subsection (9).

504 (10) (a) For purposes of this Subsection (10), "federal executive agency" means an
505 executive agency, as defined in 5 U.S.C. Sec.105, of the federal government.

506 (b) In determining whether two or more persons are considered joint employers for
507 purposes of this chapter and Chapter 3, Utah Occupational Disease Act, a person may not rely
508 on an order or regulation of a federal agency.

509 (11) (a) As used in this Subsection (11):

510 (i) "Franchisee" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

511 (ii) "Franchisor" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

512 (b) For purposes of this chapter, a franchisor is not considered to be an employer of:

513 (i) a franchisee; or

514 (ii) a franchisee's employee.

515 (c) With respect to a specific claim for relief under this chapter made by a franchisee or
516 a franchisee's employee, this Subsection (11) does not apply to a franchisor that has been found
517 by a court of competent jurisdiction in this state to have exercised a type or degree of control
518 over the franchisee or the franchisee's employee not customarily exercised by a franchisor for
519 the purpose of protecting the franchisor's trademarks and brand.

520 Section 6. Section **34A-5-102** is amended to read:

521 **34A-5-102. Definitions -- Unincorporated entities -- Joint employers --**
522 **Franchisors.**

523 (1) As used in this chapter:

- 524 (a) "Affiliate" means the same as that term is defined in Section 16-6a-102.
- 525 (b) "Apprenticeship" means a program for the training of apprentices including a
526 program providing the training of those persons defined as apprentices by Section 35A-6-102.
- 527 (c) "Bona fide occupational qualification" means a characteristic applying to an
528 employee that:
- 529 (i) is necessary to the operation; or
- 530 (ii) is the essence of the employee's employer's business.
- 531 (d) "Court" means:
- 532 (i) the district court in the judicial district of the state in which the asserted unfair
533 employment practice occurs; or
- 534 (ii) if the district court is not in session at that time, a judge of the court described in
535 Subsection (1)(d)(i).
- 536 (e) "Director" means the director of the division.
- 537 (f) "Disability" means a physical or mental disability as defined and covered by the
538 Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12102.
- 539 (g) "Division" means the Division of Antidiscrimination and Labor.
- 540 (h) "Employee" means a person applying with or employed by an employer.
- 541 (i) (i) "Employer" means:
- 542 (A) the state;
- 543 (B) a political subdivision;
- 544 (C) a board, commission, department, institution, school district, trust, or agent of the
545 state or a political subdivision of the state; or
- 546 (D) a person employing 15 or more employees within the state for each working day in
547 each of 20 calendar weeks or more in the current or preceding calendar year.
- 548 (ii) "Employer" does not include:
- 549 (A) a religious organization, a religious corporation sole, a religious association, a
550 religious society, a religious educational institution, or a religious leader, when that individual
551 is acting in the capacity of a religious leader;
- 552 (B) any corporation or association constituting an affiliate, a wholly owned subsidiary,
553 or an agency of any religious organization, religious corporation sole, religious association, or
554 religious society; or

555 (C) the Boy Scouts of America or its councils, chapters, or subsidiaries.

556 (j) "Employment agency" means a person:

557 (i) undertaking to procure employees or opportunities to work for any other person; or

558 (ii) holding the person out to be equipped to take an action described in Subsection

559 (1)(j)(i).

560 (k) "Federal executive agency" means an executive agency, as defined in 5 U.S.C. Sec.

561 105, of the federal government.

562 (l) "Franchisee" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

563 (m) "Franchisor" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

564 ~~(k)~~ (n) "Gender identity" has the meaning provided in the Diagnostic and Statistical
565 Manual (DSM-5). A person's gender identity can be shown by providing evidence, including,
566 but not limited to, medical history, care or treatment of the gender identity, consistent and
567 uniform assertion of the gender identity, or other evidence that the gender identity is sincerely
568 held, part of a person's core identity, and not being asserted for an improper purpose.

569 ~~(h)~~ (o) "Joint apprenticeship committee" means an association of representatives of a
570 labor organization and an employer providing, coordinating, or controlling an apprentice
571 training program.

572 ~~(m)~~ (p) "Labor organization" means an organization that exists for the purpose in
573 whole or in part of:

574 (i) collective bargaining;

575 (ii) dealing with employers concerning grievances, terms or conditions of employment;

576 or

577 (iii) other mutual aid or protection in connection with employment.

578 ~~(n)~~ (q) "National origin" means the place of birth, domicile, or residence of an
579 individual or of an individual's ancestors.

580 ~~(o)~~ (r) "On-the-job-training" means a program designed to instruct a person who,
581 while learning the particular job for which the person is receiving instruction:

582 (i) is also employed at that job; or

583 (ii) may be employed by the employer conducting the program during the course of the
584 program, or when the program is completed.

585 ~~(p)~~ (s) "Person" means:

586 (i) one or more individuals, partnerships, associations, corporations, legal
587 representatives, trusts or trustees, or receivers;

588 (ii) the state; and

589 (iii) a political subdivision of the state.

590 ~~[(t)]~~ (t) "Pregnancy, childbirth, or pregnancy-related conditions" includes
591 breastfeeding or medical conditions related to breastfeeding.

592 ~~[(r)]~~ (u) "Presiding officer" means the same as that term is defined in Section
593 [63G-4-103](#).

594 ~~[(s)]~~ (v) "Prohibited employment practice" means a practice specified as
595 discriminatory, and therefore unlawful, in Section [34A-5-106](#).

596 ~~[(t)]~~ (w) "Religious leader" means an individual who is associated with, and is an
597 authorized representative of, a religious organization or association or a religious corporation
598 sole, including a member of clergy, a minister, a pastor, a priest, a rabbi, an imam, or a spiritual
599 advisor.

600 ~~[(t)]~~ (x) "Retaliate" means the taking of adverse action by an employer, employment
601 agency, labor organization, apprenticeship program, on-the-job training program, or vocational
602 school against one of its employees, applicants, or members because the employee, applicant,
603 or member:

604 (i) opposes an employment practice prohibited under this chapter; or

605 (ii) files charges, testifies, assists, or participates in any way in a proceeding,
606 investigation, or hearing under this chapter.

607 ~~[(v)]~~ (y) "Sexual orientation" means an individual's actual or perceived orientation as
608 heterosexual, homosexual, or bisexual.

609 ~~[(w)]~~ (z) "Unincorporated entity" means an entity organized or doing business in the
610 state that is not:

611 (i) an individual;

612 (ii) a corporation; or

613 (iii) publicly traded.

614 ~~[(x)]~~ (aa) "Vocational school" means a school or institution conducting a course of
615 instruction, training, or retraining to prepare individuals to follow an occupation or trade, or to
616 pursue a manual, technical, industrial, business, commercial, office, personal services, or other

617 nonprofessional occupations.

618 (2) (a) For purposes of this chapter, an unincorporated entity that is required to be
619 licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act, is presumed to
620 be the employer of each individual who, directly or indirectly, holds an ownership interest in
621 the unincorporated entity.

622 (b) Pursuant to rules made by the commission in accordance with Title 63G, Chapter 3,
623 Utah Administrative Rulemaking Act, an unincorporated entity may rebut the presumption
624 under Subsection (2)(a) for an individual by establishing by clear and convincing evidence that
625 the individual:

626 (i) is an active manager of the unincorporated entity;

627 (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated
628 entity; or

629 (iii) is not subject to supervision or control in the performance of work by:

630 (A) the unincorporated entity; or

631 (B) a person with whom the unincorporated entity contracts.

632 (c) As part of the rules made under Subsection (2)(b), the commission may define:

633 (i) "active manager";

634 (ii) "directly or indirectly holds at least an 8% ownership interest"; and

635 (iii) "subject to supervision or control in the performance of work."

636 (3) In determining whether two or more persons are considered joint employers for
637 purposes of this chapter, a person may not rely on an order or regulation of a federal executive
638 agency.

639 (4) (a) For purposes of this chapter, a franchisor is not considered to be an employer of:

640 (i) a franchisee; or

641 (ii) a franchisee's employee.

642 (b) With respect to a specific claim for relief under this chapter made by a franchisee or
643 a franchisee's employee, this Subsection (4) does not apply to a franchisor that has been found
644 by a court of competent jurisdiction in this state to have exercised a type or degree of control
645 over the franchisee or the franchisee's employee not customarily exercised by a franchisor for
646 the purpose of protecting the franchisor's trademarks and brand.

647 Section 7. Section **34A-6-103** is amended to read:

648 **34A-6-103. Definitions -- Unincorporated entities -- Joint employers --**

649 **Franchisors.**

650 (1) As used in this chapter:

651 (a) "Administrator" means the director of the Division of Occupational Safety and
652 Health.

653 (b) "Amendment" means such modification or change in a code, standard, rule, or
654 order intended for universal or general application.

655 (c) "Commission" means the Labor Commission.

656 (d) "Division" means the Division of Occupational Safety and Health.

657 (e) "Employee" includes any person suffered or permitted to work by an employer.

658 (f) "Employer" means:

659 (i) the state;

660 (ii) a county, city, town, and school district in the state; and

661 (iii) a person, including a public utility, having one or more workers or operatives
662 regularly employed in the same business, or in or about the same establishment, under any
663 contract of hire.

664 (g) "Federal executive agency" means an executive agency, as defined in 5 U.S.C. Sec.
665 105, of the federal government.

666 (h) "Franchisee" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

667 (i) "Franchisor" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

668 ~~(g)~~ (j) "Hearing" means a proceeding conducted by the commission.

669 ~~(h)~~ (k) "Imminent danger" means a danger exists which reasonably could be expected
670 to cause an occupational disease, death, or serious physical harm immediately, or before the
671 danger could be eliminated through enforcement procedures under this chapter.

672 ~~(i)~~ (l) "National consensus standard" means any occupational safety and health
673 standard or modification:

674 (i) adopted by a nationally recognized standards-producing organization under
675 procedures where it can be determined by the administrator and division that persons interested
676 and affected by the standard have reached substantial agreement on its adoption;

677 (ii) formulated in a manner which affords an opportunity for diverse views to be
678 considered; and

679 (iii) designated as such a standard by the Secretary of the United States Department of
680 Labor.

681 ~~[(j)]~~ (m) "Person" means the general public, one or more individuals, partnerships,
682 associations, corporations, legal representatives, trustees, receivers, and the state and its
683 political subdivisions.

684 ~~[(k)]~~ (n) "Publish" means publication in accordance with Title 63G, Chapter 3, Utah
685 Administrative Rulemaking Act.

686 ~~[(H)]~~ (o) "Secretary" means the Secretary of the United States Department of Labor.

687 ~~[(m)]~~ (p) "Standard" means an occupational health and safety standard or group of
688 standards which requires conditions, or the adoption or use of one or more practices, means,
689 methods, operations, or processes, reasonably necessary to provide safety and healthful
690 employment and places of employment.

691 ~~[(n)]~~ (q) "Unincorporated entity" means an entity organized or doing business in the
692 state that is not:

- 693 (i) an individual;
- 694 (ii) a corporation; or
- 695 (iii) publicly traded.

696 ~~[(o)]~~ (r) "Variance" means a special, limited modification or change in the code or
697 standard applicable to the particular establishment of the employer or person petitioning for the
698 modification or change.

699 ~~[(p)]~~ (s) "Workplace" means any place of employment.

700 (2) (a) For purposes of this chapter, an unincorporated entity that is required to be
701 licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act, is presumed to
702 be the employer of each individual who, directly or indirectly, holds an ownership interest in
703 the unincorporated entity.

704 (b) Pursuant to rules made by the commission in accordance with Title 63G, Chapter 3,
705 Utah Administrative Rulemaking Act, an unincorporated entity may rebut the presumption
706 under Subsection (2)(a) for an individual by establishing by clear and convincing evidence that
707 the individual:

- 708 (i) is an active manager of the unincorporated entity;
- 709 (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated

710 entity; or

711 (iii) is not subject to supervision or control in the performance of work by:

712 (A) the unincorporated entity; or

713 (B) a person with whom the unincorporated entity contracts.

714 (c) As part of the rules made under Subsection (2)(b), the commission may define:

715 (i) "active manager";

716 (ii) "directly or indirectly holds at least an 8% ownership interest"; and

717 (iii) "subject to supervision or control in the performance of work."

718 (3) In determining whether two or more persons are considered joint employers for

719 purposes of this chapter, a person may not rely on an order or regulation of a federal executive

720 agency.

721 (4) (a) For purposes of this chapter, a franchisor is not considered to be an employer of:

722 (i) a franchisee; or

723 (ii) a franchisee's employee.

724 (b) With respect to a specific claim for relief under this chapter made by a franchisee or

725 a franchisee's employee, this Subsection (4) does not apply to a franchisor that has been found

726 by a court of competent jurisdiction in this state to have exercised a type or degree of control

727 over the franchisee or the franchisee's employee not customarily exercised by a franchisor for

728 the purpose of protecting the franchisor's trademarks and brand.

729 Section 8. Section 35A-4-203 is amended to read:

730 **35A-4-203. Definition of employer -- Joint employers -- Franchisors.**

731 (1) As used in this chapter "employer" means:

732 [(1)] (a) an individual or employing unit which employs one or more individuals for

733 some portion of a day during a calendar year, or that, as a condition for approval of this chapter

734 for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required,

735 under the act, to be an employer;

736 [(2)] (b) an employing unit that, having become an employer under Subsection (1)(a),

737 has not, under Sections 35A-4-303 and 35A-4-310, ceased to be an employer subject to this

738 chapter; or

739 [(3)] (c) for the effective period of its election under Subsection 35A-4-310(3), an

740 employing unit that has elected to become fully subject to this chapter.

741 (2) (a) For purposes of this Subsection (2), "federal executive agency" means an
742 executive agency, as defined in 5 U.S.C. Sec. 105, of the federal government.

743 (b) In determining whether two or more persons are considered joint employers for
744 purposes of this chapter, a person may not rely on an order or regulation of a federal agency.

745 (3) (a) As used in this Subsection (3):

746 (i) "Franchisee" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

747 (ii) "Franchisor" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

748 (b) For purposes of this chapter, a franchisor is not considered to be an employer of:

749 (i) a franchisee; or

750 (ii) a franchisee's employee.

751 (c) With respect to a specific claim for relief under this chapter made by a franchisee or
752 a franchisee's employee, this Subsection (3) does not apply to a franchisor that has been found
753 by a court of competent jurisdiction in this state to have exercised a type or degree of control
754 over the franchisee or the franchisee's employee not customarily exercised by a franchisor for
755 the purpose of protecting the franchisor's trademarks and brand.

Legislative Review Note
Office of Legislative Research and General Counsel