

HB0116S01 compared with HB0116

~~deleted text~~ shows text that was in HB0116 but was deleted in HB0116S01.

inserted text shows text that was not in HB0116 but was inserted into HB0116S01.

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Representative Brian M. Greene proposes the following substitute bill:

DETERMINATION OF EMPLOYER STATUS AMENDMENTS

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brian M. Greene

Senate Sponsor: _____

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

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

Money Appropriated in this Bill:

None

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Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

31A-40-102, as enacted by Laws of Utah 2008, Chapter 318

34-28-2, as last amended by Laws of Utah 2011, Chapter 413

34-40-102, as last amended by Laws of Utah 2003, Chapter 151

34A-2-103, as last amended by Laws of Utah 2014, Chapter 303

34A-5-102, as last amended by Laws of Utah 2015, Chapters 13 and 23

34A-6-103, as last amended by Laws of Utah 2013, Chapter 413

35A-4-203, as last amended by Laws of Utah 2003, Chapter 17

ENACTS:

31A-40-212, Utah Code Annotated 1953

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

Section 1. Section **31A-40-102** is amended to read:

31A-40-102. Definitions.

As used in this chapter:

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

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

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

(2) "Assurance organization" means a person designated as an assurance organization

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in accordance with Section 31A-40-303.

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

(4) "Coemployer" means:

(a) a client; or

(b) a professional employer organization.

(5) "Coemployment relationship" means a relationship:

(a) that is intended to be ongoing rather than a temporary or project specific relationship; and

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

(i) a professional employer agreement; or

(ii) this chapter.

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

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

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

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

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

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

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

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

including:

(I) the number of employees; or

(II) the nature of the employment.

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

Sec.105, of the federal government.

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

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

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

~~{9}~~ ~~{12;13}~~ "Guarantee" means to assume an obligation of another person if that person fails to meet the obligation.

~~{10}~~ ~~{13;14}~~ "Licensee" means a person licensed under this chapter.

~~{11}~~ ~~{14;15}~~ "Professional employer agreement" means a written contract by and between a client and a professional employer organization that provides for:

(a) the coemployment of a covered employee;

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

(i) the client; and

(ii) the professional employer organization; and

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

(i) the client; or

(ii) the professional employer organization.

~~{12}~~ ~~{15;16}~~ (a) Subject to Subsection ~~{12}~~ ~~{15;16}~~(b), "professional employer organization" means a person engaged in the business of providing a professional employer service.

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

(i) a person that:

(A) does not:

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

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

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

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

(A) assumes responsibility for the product produced or service performed by the person

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or the person's agent; and

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

(iii) a person providing temporary help service.

~~(13)~~ ~~(16)~~17 "Professional employer organization group" means two or more professional employer organizations that are majority owned or commonly controlled or directed by the same one or more persons.

~~(14)~~ ~~(17)~~18 "Professional employer service" means the service of entering into a coemployment relationship under this chapter under which all or a majority of the employees who provide a service to a client, or a division or work unit of a client, are covered employees.

~~(15)~~ ~~(18)~~19 "Qualified actuary" means an individual who:

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

(b) is qualified to sign a statement of actuarial opinion or annual statement for a professional employer organization in accordance with the qualification standards for an actuary signing an opinion or annual statement as provided by the professional actuarial accreditation organization designated under Subsection ~~(15)~~ ~~(18)~~19(a);

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

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

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

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

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

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

(v) resigned or been removed as an actuary within the past five years as a result of an act or omission indicated in an adverse report on examination or as a result of failure to adhere

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to a generally acceptable actuarial standard; and

(e) has not failed to notify the commissioner of an action taken by any commissioner of another state similar to that under Subsection [(15)] (~~(18)~~19)(d).

[(16)] (~~(19)~~20) "Temporary help service" means a service consisting of a person:

- (a) recruiting and hiring the person's own employee;
- (b) finding another person that wants the services of that employee;
- (c) assigning the employee to:
 - (i) perform services at or for the other person to support or supplement the other

person's employees;

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

- (A) an employee absence;
- (B) a skill shortage; or
- (C) a seasonal workload; or

- (iii) perform a special assignment or project; and

- (d) customarily reassigning the employee to another organization when the employee finishes an assignment.

[(17)] (~~(20)~~21) "Working capital" means the current assets minus the current liabilities of a professional employer organization determined in accordance with generally accepted accounting principles.

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

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

(1) For purposes of this chapter **and to the extent not preempted by federal statute**, in determining whether two or more persons are considered to be in a coemployment relationship, a person may not rely on an order or regulation of a federal executive agency **that has not been expressly authorized by Congress or upheld by a court of law.**

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

- (i) a franchisee; or
- (ii) a franchisee's employee.

(b) With respect to a specific claim for relief under this chapter made by a franchisee or a franchisee's employee, this Subsection (2) does not apply to a franchisor **under a franchise**

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that ~~has been found by a court of competent jurisdiction in this state to have exercised~~ exercises a type or degree of control over the franchisee or the franchisee's employee not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.

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

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

(1) As used in this chapter:

(a) "Commission" means the Labor Commission.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) the unincorporated entity; or

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

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

(i) "active manager";

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

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

(d) The commission by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, may establish a procedure, consistent with Section 34-28-7, under which an unincorporated entity may seek approval of a mutual agreement to pay wages on non-regular paydays.

(3) In determining whether two or more persons are considered joint employers for purposes of this chapter, a person may not rely on an order or regulation of a federal executive agency ~~that has not been expressly authorized by Congress or upheld by a court of law.~~

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

(i) a franchisee; or

(ii) a franchisee's employee.

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

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

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

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

(2) As used in this chapter:

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

(b) "Commission" means the Labor Commission.

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

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

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

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

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

~~(d)~~ ~~(f)(g)(h)~~ "Minimum wage" means the state minimum hourly wage for adult employees as established under this chapter, unless the context clearly indicates otherwise.

~~(e)~~ ~~(h)(i)~~ "Tipped employee" means an employee who customarily and regularly receives tips or gratuities.

(3) Notwithstanding Subsection (1), in determining whether two or more persons are considered joint employers for purposes of this chapter, a person may not rely on an order or regulation of a federal executive agency that has not been expressly authorized by Congress or upheld by a court of law.

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

(i) a franchisee; or

(ii) a franchisee's employee.

(b) With respect to a specific claim for relief under this chapter made by a franchisee or a franchisee's employee, this Subsection (4) does not apply to a franchisor under a franchise ~~that has been found by a court of competent jurisdiction in this state to have exercised~~

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exercises a type or degree of control over the franchisee or the franchisee's employee not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.

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

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

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

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

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

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

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

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

(B) not subject to the routine rule or control of the employer;

(C) engaged only in the performance of a definite job or piece of work; and

(D) subordinate to the employer only in effecting a result in accordance with the employer's design.

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

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

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(i) is considered the employer of a covered employee; and

(ii) subject to Section 31A-40-209, shall secure workers' compensation benefits for a covered employee by complying with Subsection 34A-2-201(1) or (2) and commission rules.

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

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

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

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

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

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

(A) an agricultural employer's:

(I) spouse;

(II) grandparent;

(III) parent;

(IV) sibling;

(V) child;

(VI) grandchild;

(VII) nephew; or

(VIII) niece;

(B) a spouse of any person provided in Subsections (5)(a)(ii)(A)(II) through (VIII); or

(C) an individual who is similar to those listed in Subsection (5)(a)(ii)(A) or (B) as defined by rules of the commission; and

(iii) "nonimmediate family" means a person who is not a member of the employer's

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immediate family.

(b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an agricultural employer is not considered an employer of a member of the employer's immediate family.

(c) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an agricultural employer is not considered an employer of a nonimmediate family employee if:

(i) for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees was less than \$8,000; or

(ii) (A) for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees was equal to or greater than \$8,000 but less than \$50,000; and

(B) the agricultural employer maintains insurance that covers job-related injuries of the employer's nonimmediate family employees in at least the following amounts:

(I) \$300,000 liability insurance, as defined in Section 31A-1-301; and

(II) \$5,000 for health care benefits similar to benefits under health care insurance as defined in Section 31A-1-301.

(d) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an agricultural employer is considered an employer of a nonimmediate family employee if:

(i) for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees is equal to or greater than \$50,000; or

(ii) (A) for the previous year the agricultural employer's total payroll for nonimmediate family employees was equal to or exceeds \$8,000 but is less than \$50,000; and

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

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

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

(b) the rules of the commission.

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

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person directly employs a person:

- (A) a sole proprietorship;
- (B) a corporation;
- (C) a partnership;
- (D) a limited liability company; or
- (E) a person similar to one described in Subsections (7)(a)(i)(A) through (D).

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

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

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

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

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

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

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

(d) A director or officer of a corporation is not considered an employee under

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Subsection (7)(a) if the director or officer is excluded from coverage under Subsection 34A-2-104(4).

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

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

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

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

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

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

(A) is an employer; and

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

including:

(I) all persons employed by the contractor;

(II) all subcontractors under the contractor; and

(III) all persons employed by any of these subcontractors.

(ii) Notwithstanding the other provisions in this Subsection (7), if the conditions of Subsection (7)(f)(iii) are met, an eligible employer is considered an employer for purposes of Section 34A-2-105 of the contractor, subcontractor, and all persons employed by the contractor or subcontractor described in Subsection (7)(f)(i)(B).

(iii) Subsection (7)(f)(ii) applies if the eligible employer:

(A) under Subsection (7)(a) is liable for and pays workers' compensation benefits as an original employer under Subsection (7)(a) because the contractor or subcontractor fails to

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comply with Section 34A-2-201;

(B) (I) secures the payment of workers' compensation benefits for the contractor or subcontractor pursuant to Section 34A-2-201;

(II) procures work to be done that is part or process of the trade or business of the eligible employer; and

(III) does the following with regard to a written workplace accident and injury reduction program that meets the requirements of Subsection 34A-2-111(3)(d):

(Aa) adopts the workplace accident and injury reduction program;

(Bb) posts the workplace accident and injury reduction program at the work site at which the eligible employer procures work; and

(Cc) enforces the workplace accident and injury reduction program according to the terms of the workplace accident and injury reduction program; or

(C) (I) obtains and relies on:

(Aa) a valid certification described in Subsection (7)(c)(i) or (7)(e)(i);

(Bb) a workers' compensation coverage waiver described in Subsection (7)(c)(ii) or (7)(e)(ii); or

(Cc) proof that a director or officer is excluded from coverage under Subsection 34A-2-104(4);

(II) is liable under Subsection (7)(a) for the payment of workers' compensation benefits if the contractor or subcontractor fails to comply with Section 34A-2-201;

(III) procures work to be done that is part or process in the trade or business of the eligible employer; and

(IV) does the following with regard to a written workplace accident and injury reduction program that meets the requirements of Subsection 34A-2-111(3)(d):

(Aa) adopts the workplace accident and injury reduction program;

(Bb) posts the workplace accident and injury reduction program at the work site at which the eligible employer procures work; and

(Cc) enforces the workplace accident and injury reduction program according to the terms of the workplace accident and injury reduction program.

(8) (a) For purposes of this Subsection (8), "unincorporated entity" means an entity organized or doing business in the state that is not:

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

(b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an unincorporated entity that is required to be licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act, is presumed to be the employer of each individual who holds, directly or indirectly, an ownership interest in the unincorporated entity. Notwithstanding Subsection (7)(c) and Subsection 34A-2-104(3), the unincorporated entity shall provide the individual who holds the ownership interest workers' compensation coverage under this chapter and Chapter 3, Utah Occupational Disease Act, unless the presumption is rebutted under Subsection (8)(c).

(c) Pursuant to rules made by the commission in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, an unincorporated entity may rebut the presumption under Subsection (8)(b) for an individual by establishing by clear and convincing evidence that the individual:

- (i) is an active manager of the unincorporated entity;
 - (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated entity; or
 - (iii) is not subject to supervision or control in the performance of work by:
 - (A) the unincorporated entity; or
 - (B) a person with whom the unincorporated entity contracts.
- (d) As part of the rules made under Subsection (8)(c), the commission may define:
- (i) "active manager";
 - (ii) "directly or indirectly holds at least an 8% ownership interest"; and
 - (iii) "subject to supervision or control in the performance of work."

(9) (a) As used in this Subsection (9), "home and community based services" means one or more of the following services provided to an individual with a disability or to the individual's family that helps prevent the individual with a disability from being placed in a more restrictive setting:

- (i) respite care;
- (ii) skilled nursing;

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- (iii) nursing assistant services;
 - (iv) home health aide services;
 - (v) personal care and attendant services;
 - (vi) other in-home care, such as support for the daily activities of the individual with a disability;
 - (vii) specialized in-home training for the individual with a disability or a family member of the individual with a disability;
 - (viii) specialized in-home support, coordination, and other supported living services;
- and
- (ix) other home and community based services unique to the individual with a disability or the family of the individual with a disability that help prevent the individual with a disability from being placed in a more restrictive setting.
- (b) Notwithstanding Subsection (4) and subject to Subsection (9)(c), an individual with a disability or designated representative of the individual with a disability is considered an employer under this chapter and Chapter 3, Utah Occupational Disease Act, of an individual who provides home and community based services if the individual with a disability or designated representative of the individual with a disability:
- (i) employs the individual to provide home and community based services for seven hours per week or more; and
 - (ii) pays the individual providing the home and community based services from state or federal money received by the individual with a disability or designated representative of the individual with a disability to fund home and community based services, including through a person designated by the Secretary of the Treasury in accordance with Section 3504, Internal Revenue Code, as a fiduciary, agent, or other person who has the control, receipt, custody, or disposal of, or pays the wages of, the individual providing the home and community based services.
- (c) The state and federal money received by an individual with a disability or designated representative of an individual with a disability shall include the cost of the workers' compensation coverage required by this Subsection (9) in addition to the money necessary to fund the home and community based services that the individual with a disability or family of the individual with a disability is eligible to receive so that the home and community based

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services are not reduced in order to pay for the workers' compensation coverage required by this Subsection (9).

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

(b) In determining whether two or more persons are considered joint employers for purposes of this chapter and Chapter 3, Utah Occupational Disease Act, a person may not rely on an order or regulation of a federal agency ~~that has not been expressly authorized by Congress or upheld by a court of law.~~

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

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

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

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

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

(i) a franchisee; or

(ii) a franchisee's employee.

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

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

34A-5-102. Definitions -- Unincorporated entities -- Joint employers --

Franchisors.

(1) As used in this chapter:

(a) "Affiliate" means the same as that term is defined in Section 16-6a-102.

(b) "Apprenticeship" means a program for the training of apprentices including a program providing the training of those persons defined as apprentices by Section 35A-6-102.

(c) "Bona fide occupational qualification" means a characteristic applying to an

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employee that:

- (i) is necessary to the operation; or
- (ii) is the essence of the employee's employer's business.

(d) "Court" means:

(i) the district court in the judicial district of the state in which the asserted unfair employment practice occurs; or

(ii) if the district court is not in session at that time, a judge of the court described in Subsection (1)(d)(i).

(e) "Director" means the director of the division.

(f) "Disability" means a physical or mental disability as defined and covered by the Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12102.

(g) "Division" means the Division of Antidiscrimination and Labor.

(h) "Employee" means a person applying with or employed by an employer.

(i) (i) "Employer" means:

(A) the state;

(B) a political subdivision;

(C) a board, commission, department, institution, school district, trust, or agent of the state or a political subdivision of the state; or

(D) a person employing 15 or more employees within the state for each working day in each of 20 calendar weeks or more in the current or preceding calendar year.

(ii) "Employer" does not include:

(A) a religious organization, a religious corporation sole, a religious association, a religious society, a religious educational institution, or a religious leader, when that individual is acting in the capacity of a religious leader;

(B) any corporation or association constituting an affiliate, a wholly owned subsidiary, or an agency of any religious organization, religious corporation sole, religious association, or religious society; or

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

(j) "Employment agency" means a person:

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

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

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(1)(j)(i).

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

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

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

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

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

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

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

(i) collective bargaining;

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

or

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

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

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

(i) is also employed at that job; or

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

(~~p~~) (~~st~~~~t~~) "Person" means:

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

(ii) the state; and

(iii) a political subdivision of the state.

~~(q)~~ ~~(ttu)~~ "Pregnancy, childbirth, or pregnancy-related conditions" includes breastfeeding or medical conditions related to breastfeeding.

~~(r)~~ ~~(tuv)~~ "Presiding officer" means the same as that term is defined in Section 63G-4-103.

~~(s)~~ ~~(vuw)~~ "Prohibited employment practice" means a practice specified as discriminatory, and therefore unlawful, in Section 34A-5-106.

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

~~(u)~~ ~~(xyy)~~ "Retaliate" means the taking of adverse action by an employer, employment agency, labor organization, apprenticeship program, on-the-job training program, or vocational school against one of its employees, applicants, or members because the employee, applicant, or member:

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

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

~~(v)~~ ~~(yzz)~~ "Sexual orientation" means an individual's actual or perceived orientation as heterosexual, homosexual, or bisexual.

~~(w)~~ ~~(zzaa)~~ "Unincorporated entity" means an entity organized or doing business in the state that is not:

(i) an individual;

(ii) a corporation; or

(iii) publicly traded.

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

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nonprofessional occupations.

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

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

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

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

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

(A) the unincorporated entity; or

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

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

(i) "active manager";

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

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

(3) In determining whether two or more persons are considered joint employers for purposes of this chapter, a person may not rely on an order or regulation of a federal executive agency ~~that has not been expressly authorized by Congress or upheld by a court of law.~~

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

(i) a franchisee; or

(ii) a franchisee's employee.

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

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

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

Franchisors.

(1) As used in this chapter:

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

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

(c) "Commission" means the Labor Commission.

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

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

(f) "Employer" means:

(i) the state;

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

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

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

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

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

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

~~[(g)]~~ ~~[(j)]~~ (k) "Hearing" means a proceeding conducted by the commission.

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

~~[(i)]~~ ~~[(l)]~~ (m) "National consensus standard" means any occupational safety and health standard or modification:

(i) adopted by a nationally recognized standards-producing organization under

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procedures where it can be determined by the administrator and division that persons interested and affected by the standard have reached substantial agreement on its adoption;

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

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

~~(f)~~ ~~(m)~~n "Person" means the general public, one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, and the state and its political subdivisions.

~~(k)~~ ~~(m)~~o "Publish" means publication in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

~~(t)~~ ~~(o)~~p "Secretary" means the Secretary of the United States Department of Labor.

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

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

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

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

~~(p)~~ ~~(s)~~t "Workplace" means any place of employment.

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

(b) Pursuant to rules made by the commission in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, an unincorporated entity may rebut the presumption

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under Subsection (2)(a) for an individual by establishing by clear and convincing evidence that the individual:

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

entity; or

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

- (A) the unincorporated entity; or

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

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

- (i) "active manager";

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

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

(3) In determining whether two or more persons are considered joint employers for purposes of this chapter, a person may not rely on an order or regulation of a federal executive agency ~~that has not been expressly authorized by Congress or upheld by a court of law.~~

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

- (i) a franchisee; or

- (ii) a franchisee's employee.

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

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

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

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

[(+)] (a) an individual or employing unit which employs one or more individuals for some portion of a day during a calendar year, or that, as a condition for approval of this chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required, under the act, to be an employer;

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~~[(2)]~~ (b) an employing unit that, having become an employer under Subsection (1)(a), has not, under Sections 35A-4-303 and 35A-4-310, ceased to be an employer subject to this chapter; or

~~[(3)]~~ (c) for the effective period of its election under Subsection 35A-4-310(3), an employing unit that has elected to become fully subject to this chapter.

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

(b) In determining whether two or more persons are considered joint employers for purposes of this chapter, a person may not rely on an order or regulation of a federal agency that has not been expressly authorized by Congress or upheld by a court of law.

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

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

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

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

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

(i) a franchisee; or

(ii) a franchisee's employee.

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

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Legislative Review Note

Office of Legislative Research and General Counsel