



COMMONWEALTH of VIRGINIA

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The Honorable James M. LeMunyon
Member, House of Delegates
P.O. Box 220962
Chantilly, Virginia 20153-0962

Dear Delegate LeMunyon:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the proposed Worker Misclassification Act, S.B. 34, would apply to franchises, and if so, whether it should be read to categorize franchisees as “employees” rather than independent contractors.

Response

It is my opinion that S.B. 34 does not exclude franchises from its terms, but the application of its test would exclude typical franchises from its scope.

Applicable Law and Discussion

S.B. 34, titled the Worker Misclassification Act, was proposed during the 2010 General Assembly and continued to 2011.¹ It would establish a new Code section, § 40.1-28.13. S.B. 34 defines an “Employer” as “any individual, partnership, association, joint stock company, corporation, business trust or any other person or groups of persons acting directly or indirectly in the interest of an employer in relation to an employee.” Furthermore, the bill defines “Performing Services” [as] the performance of any task related to the business engaged in by an Employer.”

The bill sets forth a test for employee status commonly referred to as the “ABC test”:

For the purposes of this title, Title 60.2, and Title 65.2, if an individual performs services for an employer for remuneration, that individual shall be considered an employee of the party which pays that remuneration unless and until it is shown to the satisfaction of the Department that:

1. The individual has been and will continue to be free from direction and control of the employer, both under his contract of service and in fact;

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=sb34>.

2. The service is outside the usual course of the business of the employer; and
 3. The individual is customarily engaged in an independently established trade, occupation, profession, or business, both under his contract of service and in fact.
- B. The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers' compensation premiums with respect to an individual's wages shall not be considered in making a determination under this subsection A.
- C. In making determinations under subdivision A 1, employee status will be found where the control exercised by the party paying remuneration is a general one, exercised directly or indirectly, over the physical activities of the purported employee and need not extend to all the details of the physical performance of the duties performed for the employer.

The bill imposes various civil and criminal sanctions for employers who misclassify employees.²

"[A] franchise is a commercial arrangement between two businesses which authorizes the franchisee to use the franchisor's intellectual property and brand identity, marketing experience, and operational methods."³ As you note, the impact of this legislation on franchise operations is a question of no small significance, given the importance of franchising to Virginia's economy. In 2005, franchised businesses employed over 330,000 individuals in Virginia and generated \$26.8 billion of economic activity.⁴

You first inquire whether this bill applies to franchises. S.B. 34 expressly provides that it applies to "this title," meaning Title 40.1, covering labor and employment, "Title 60.2," covering unemployment compensation, and "Title 65.2," which covers workers' compensation. By its plain text, the bill does not exclude franchises from its scope. Statutes should be construed according to their plain language.⁵ Furthermore, "[t]he duty of the courts is 'to construe the law as written.'"⁶ Moreover, "[c]ourts cannot add language to the statute the General Assembly has not seen fit to include. Nor are they permitted to accomplish the same result by judicial interpretation. Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning."⁷ Therefore, whether a franchisee would be treated as an employee must be determined by application of the three-part test on a case-by-case basis.

Application of the three-part test, in general, would exclude franchisees from the scope of S.B. 34. To begin with, the franchisee is not performing services "for an employer." Rather, the franchisee, upon reaching agreement with the franchisor, is performing services for the profit and account *of the franchisee*. In addition, unlike the ordinary contract of employment, the franchisee is not being remunerated by the franchisor. Instead, it is the franchisee who pays the franchisor for the privilege of using a trademark and business system. I also note that the typical franchisee is not an "individual" but a

² S.B. 34, 2010 Reg. Sess. (Va. 2010).

³ *Kerl v. Rasmussen*, 682 N.W.2d 328, 338 (Wis. 2004).

⁴ PRICEWATERHOUSECOOPERS, *The Economic Impact of Franchised Businesses* 22, 26 (2008).

⁵ *Signal Corp. v. Keane Fed. Sys.*, 265 Va. 38, 46-47, 574 S.E.2d 253, 257 (2003).

⁶ *Hampton Roads Sanitation Dist. Comm'n v. City of Chesapeake*, 218 Va. 696, 702, 240 S.E.2d 819, 823 (1978).

⁷ *Jackson v. Fid. & Deposit Co. of Md.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) (internal quotation marks and citation omitted).

corporation. Consequently, application of this test to typical franchise agreements would result in the exclusion of franchisees and franchisors from the scope of this statute.⁸

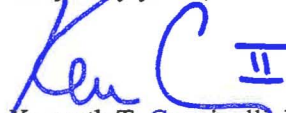
I also note that the Retail Franchising Act⁹ specifically defines the terms “franchise” and “franchisee” in the Retail Franchise Act.¹⁰ This separate treatment of franchises indicates that the General Assembly understands that franchises are a distinct form of business enterprise and bolsters the conclusion that Virginia law does not view typical franchise relationships as an ordinary employer/employee relationship.

Conclusion

Accordingly, it is my opinion that S.B. 34 does not exclude franchises from its terms, but the application of its test would exclude typical franchises from its scope.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
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⁸ Precisely because franchisors and franchisees are excluded from the scope of the ABC test, some employers may seek to mask an employer/employee relationship by using the franchisor/franchisee labels to evade it. In that situation, a court applying the ABC test could find that, notwithstanding the franchisor/franchisee label, the relationship is in reality one of employer/employee.

⁹ VA. CODE ANN. §§ 13.1-557 through 13.1-574 (2006 & Supp. 2010).

¹⁰ VA. CODE ANN. § 13.1-559 (Supp. 2010).