

2017 HOUSE INDUSTRY, BUSINESS, AND LABOR

HB 1139

2017 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Peace Garden Room, State Capitol

HB 1139

1/9/2017

26701

☐ Subcommittee

☐ Conference Committee

Committee Clerk Signature

Ellen LeTang

Explanation or reason for introduction of bill/resolution:

Workers' compensation requirements for general contractors & cease & desist orders & definition of employee, assignment of rate classification & calculation of premium.

Minutes:

Attachments 1, 2

Vice Chairman Sukut: Opens the hearing of HB 1139.

Chairman Keiser: Introduces the bill. It's simply a ruling for franchised organizations, the franchisor & franchisee. A franchisee or an employer of a franchisee is not considered an employer of the franchisor.

Rep Boschee: Where is the line for being of the franchisor & franchisee?

Chairman Keiser: We are attempting to define this in the bill. Reality is, the franchisor sets the payroll skill, hours of employment, hire or terminated, manages them on a day to day basis. Gave an example of a franchisor, number 1 & 2 in the nation, franchisee called to see why. The franchisee asked what the biggest problem & offered to set up a meeting once a week to strategize on how to hire employees. The franchisee told franchisor headquarters, I don't need you telling me how to hire, just send me employees. When you have the hiring & firing authority, you set the pay scale & work schedule, in my opinion, there are employees of the franchisee.

Rep Ruby: Basically, this is like subcontractors, they dictate what they are in control of. Has there been any other problems in the rest of the state?

Chairman Keiser: Answer is yes & yes, there has been problems in terms of interpretation of employee & also especially under the affordable care act for certain owner/operators.

7:45

Rep Dobervich: Franchisor is dictating to the franchisee, it's all or nothing, they are dictating. I'm questioning whether there is dictating to franchise owners?

Chairman Keiser: Clearly the franchisee/franchisor relationship is in the middle. A franchisor can dictate your product because you pay a fee & have to comply with the advertising. The owner controls the employees. The owner/operator at least has 95% control over the employee. Franchisor have very strict guidelines with their standards.

Vice Chairman Sukut: I had a Radio Shack franchise, I was in total control of my employees. Anyone else here to testify in HB 1139?

Brent Bogar~The Greater ND Chamber representing Glenn Spencer~Vice President of the Workforce Freedom Initiative: Attachment 1.

Chairman Keiser: Is there anyone else here to testify in support, opposition?

Waylon Hedegaard~President of the ND AFL-CIO: Attachment 2.

17:48

Rep Ruby: If there is a lack of payment or a mistake made, wouldn't still go to that franchisee who hired the person, set the wage & was obligated to pay that wage. If the software didn't work the way it should, doesn't relieve that franchisee from paying that?

Hedegaard: As we see, it should be considered joint employers & both should share the control over the employee. There needs to be flexibility.

Rep Kasper: Line 8, it says a franchisee or an employee of a franchisee is not considered an employee of the franchisor, but in your testimony, "we feel this law will encourage further employee control & work stipulations by the parent company". It appears the bill contradicts what your testimony says, it's severing that control.

Hedegaard: It severs liability for that control but it doesn't sever the control that a franchisor exerts over those employees.

Rep Kasper: I don't see the word liability, it's talking about the definition of an employee, not an employee? I don't get where you have the liability concern.

Hedegaard: Line 1 & 2, I see this as severing that liability protection.

Rep Kasper: I see that as your interpretation.

Chairman Keiser: If I were to purchase a program, it malfunctioned & created a liability for me. Could I sue the manufacture/distributor?

Hedegaard: I'm not a lawyer, but I assume you could.

Chairman Keiser: In the example you used, even if the franchisor sends a program that invalid, I would think there is civil recourse.

Hedegaard: I used this example because it's going through the courts now. Need to consider how much control there is to be considered joint employers.

Rep Ruby: I don't see it as harmful to the employee. The lawsuit is between the franchisor & franchisee between their liability, if they are hurt. I don't think that the employees are taking the risk, do you see it that way?

Hedegaard: I think we are getting off path. We feel that when you are limiting the ability to collectively bargain or some recourse for labor law violations, including all these other things.

Rep Beadle: When there is a violation, who is it that hired the employees? The franchisor or the franchisee?

Hedegaard: Almost in all cases it's franchisee.

Rep Beadle: In what situation would it not be?

Hedegaard: It would depend, if you require background check, certain testing, certain qualification for those employees that come in. As a franchisor to a franchisee, there is a certain level when as a franchisor, you are putting undue restrictions on who they can hire & who they can keep on.

Rep Beadle: When does the franchisor restrict who they can keep on?

Hedegaard: I don't have a specific example.

Rep Beadle: I have worked for 3 different franchises; not once can I think of a time when in which the franchisor in which they were responsible for hiring, firing or dealing directly with the employees. It was always them, to the franchisee & then the franchisee to the employees. The relationship has always been clear. I struggling to see, when the link gets blurred between the employee & the franchisor.

Hedegaard: This is a new concept & it's being worked in the court system now. The NLRB redefinition of joint employer includes, basically not only direct control, but indirect control. It does not put a hard fast rule on it. It allows flexibility for the courts & judges to make up their mind. The part we object to is there is no flexibility, they are not employees & I believe it needs to be flexible.

Rep Louser: What is the term "joint employer" relationship?

Hedegaard: It's where a customer & a contractor or a general contractor & subcontractor. It's when there is enough power actually to affect the day to day lives of the employees, in the NLRB ruling, you would be considered a joint employer.

Rep Louser: Seems that the change in the definition of employment, according to the NLRB, that could invalidate franchise agreements.

Hedegaard: I'm not a lawyer.

Chairman Keiser: Anyone else here to testify opposition, neutral position of HB 1139?
Closes the hearing.

Rep Ruby: Moves a Do Pass on HB 1139.

Lefor: Second.

Rep Ruby: Explains why he supports a Do Pass on HB 1139.

Roll call was taken for a Do Pass on HB 1139 with 12 yes, 2 no, 0 absent & Rep Becker is the carrier.

Date: 1/9/2017

Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1139

House Industry, Business and Labor Committee

☐ Subcommittee

Amendment LC# or
Description:

Recommendation

- ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions

- ☐ Reconsider ☐

Motion Made By Rep Ruby

Seconded By Rep Lefor

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep Laning	X	
Vice Chairman Sukut	X		Rep Lefor	X	
Rep Beadle	X		Rep Louser	X	
Rep R Becker	X		Rep O'Brien	X	
Rep Bosch	X		Rep Ruby	X	
Rep C Johnson	X		Rep Boschee		X
Rep Kasper	X		Rep Dobervich		X

Total (Yes) 12 No 2

Absent 0

Floor

Assignment Rep Becker

REPORT OF STANDING COMMITTEE

HB 1139: Industry, Business and Labor Committee (Rep. Keiser, Chairman)
recommends **DO PASS** (12 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING).
HB 1139 was placed on the Eleventh order on the calendar.

2017 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1139

2017 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Roosevelt Park Room, State Capitol

HB 1139
3/7/2017
Job Number 28814

- ☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to joint employer liability protection

Minutes:

Attachments 1-4

Chairman Klein: Called the committee back to order.

Representative Keiser: Introduced the bill. Simple bill, very important bill. As you know the Department of Labor a while ago now, was considering a ruling that would have required joint employer liability protection for all of the national chains. I will use McDonalds because it is near and dear to my heart. The owner operator here in Bismarck is responsible for their own employees but their employees would also be deemed to be employees of the McDonalds Corporation. That is certainly something I didn't support, clearly the employees of the McDonalds Franchise here or the Franchise in Dickinson or Fargo, the employer owner operator hires the employees, manages the employees, sets times for the employees, establishes salary within law and is very much the person in charge of those employees. If we go to Oakbrook, Illinois the home of the McDonalds Corporation they obviously are watching their franchises to make sure they are operating appropriately and hopefully profitably etc. but they really do not directly control the labor pool. This was an attempt to gain potentially at least some additional benefits and other things for employees. I didn't support it and I don't believe North Dakota supports it. He went over the bill. (:14-2:38)

Chairman Klein: I think you summed it up. It's as simple as, just because you are a franchisee employee you are not hooked up with Oakbrook, Illinois.

Representative Keiser: That's right.

Brent Bogar, Greater North Dakota Chamber: In support. Written testimony, see attachment #1. He also handed out letters from; **Glenn Spencer, Vice President, Workforce Freedom Initiative, U.S. Chamber of Commerce**, see attachment #2, **Jeff Hanscom, Senior Director, State Government Relations & Public Policy**, see attachment #3. (3:30-4:20)

Arik Spencer, North Dakota Motor Carriers Association: In support. A number of the moving companies that are members of ours, operate under a franchise agreements and we too agree that this bill is important for their peace of mind and protection. (4:45-4:59)

Waylon Hedegaard, President of the North Dakota AFL-CIO: Opposed to the bill. Written testimony, see attachment #4. (5:14-9:05)

Chairman Klein: Closed the hearing.

2017 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee

Roosevelt Park Room, State Capitol

HB 1139

3/8/2017

Job Number 28863

☐ Subcommittee

☐ Conference Committee

Committee Clerk Signature

Eva Liebelt

Explanation or reason for introduction of bill/resolution:

Relating to joint employer liability protection

Minutes:

No Attachments

Chairman Klein: What we have here committee is the issue that came about when the National Labor Relations Board suggested that if you are a McDonalds Franchise, your North Dakota employees are joint employees of the McDonalds Corporation in Illinois.

Senator Burckhard: Was there any opposition?

Chairman Klein: Yes, the AFL-CIO said that if your shirts say McDonalds then you are an employee of the McDonalds Corporation.

Senator Roers moved a do pass.

Senator Campbell seconded the motion.

Roll Call Vote: Yes-7 No-0 Absent-0

Senator Marcellais will carry the bill.

**2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO.1139**

Senate Industry, Business and Labor Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Senator Roers Seconded By Senator Campbell

Senators	Yes	No	Senators	Yes	No
Chairman Klein	x		Senator Marcellais	x	
Vice Chairman Campbell	x				
Senator Roers	x				
Senator Burckhard	x				
Senator Casper	x				
Senator Poolman	x				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Marcellais

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1139: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1139 was placed on the Fourteenth order on the calendar.

2017 TESTIMONY

HB 1139

HB 1139

Jan 9, 2017

1

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

GLENN S. SPENCER
VICE PRESIDENT
WORKFORCE FREEDOM INITIATIVE

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
DIRECT LINE 202/463-5769
GSPENCER@USCHAMBER.COM

January 6, 2017

The Honorable George Keiser, Chairman
House Industry, Business and Labor Committee
State Capitol
600 East Boulevard
Bismarck, ND 58505

Dear Chairman Keiser and Members of the Committee:

Thank you for considering House Bill 1139 in the House Industry, Business and Labor Committee. The U.S. Chamber of Commerce's Workforce Freedom Initiative strongly supports this bill as a means to protect North Dakota's economic climate. It will help preserve the independence and investment of thousands of small businesses operating as franchises in North Dakota. These local franchise business owners provide employment for more than 31,000 workers in North Dakota and have an annual economic impact of over \$3.4 billion.

These bills are necessary because the National Labor Relations Board in Washington, DC, has issued a new joint-employer standard, one that is both broad in its coverage and vague in its application. This new standard could easily make local franchise business owners joint employers with brand name companies, compromising the independence of their businesses and undermining the franchise model that has promoted entrepreneurship, flexibility, competitiveness and growth. It would essentially make businesses liable for workplaces they don't control and workers they don't employ.

While the National Labor Relations Act has broad preemption authority, HB1139 will protect North Dakota's franchise businesses by codifying the prior joint-employer standard for state level enforcement actions. Some states, notably California, have already begun pursuing expanded liability under state law along the lines of the new joint-employer standard and this bill will ensure that North Dakota does not go down that path. Moreover, this legislation will send a signal to officials in Washington, DC, that they need to make this change at the federal level as well.

The Workforce Freedom Initiative supports HB 1139 and recommends its passage to protect the economic climate and local franchise businesses of North Dakota.

Sincerely,



Glenn Spencer, Vice President
Workforce Freedom Initiative, U.S. Chamber of Commerce

pg 1



FRANCHISING[®]
Building local businesses,
one opportunity at a time.

January 9, 2017

North Dakota House Industry, Business & Labor Committee
State Capitol
600 East Boulevard
Bismarck, ND 58505

RE: SUPPORT HB 1139

Dear Chairman Keiser and Members of the Committee:

On behalf of the International Franchise Association (IFA), representing all three segments of the franchise model: franchisees, franchisors, and the supplier industry, I wish to express our strong support of House Bill 1139, clarifying the relationship between franchisees and franchisors.

Right here in North Dakota, franchising accounts for over 31,000 jobs across more than 3,000 franchise establishments contributing over \$3.4 billion in economic activity each year.

This law is needed due to the National Labor Relations Board (NLRB) decision in *Browning-Ferris* that while on its face appears unrelated to franchising, actually has the potential to affect the legal relationship between franchisors and franchisees. HB 1139 simply codifies the status quo and will allow franchising to continue thriving in North Dakota. The NLRB decision disrupts decades of established law in determining who is and is not a 'joint employer' and creates uncertainty for the franchisee small business owners of North Dakota. HB 1139 fixes that.

Nine states have already enacted laws similar to HB 1139: Tennessee, Texas, Louisiana, Michigan, Wisconsin, Indiana, Georgia, Utah and Oklahoma. In 2017, a multitude of other states are considering similar legislation: South Dakota, Montana, Wyoming, Arizona, Nebraska, Mississippi, Missouri, South Carolina, Virginia and New Hampshire.

Passage of House Bill 1139 will allow franchising to continue to grow in North Dakota by giving these local business owners the certainty they need to succeed.

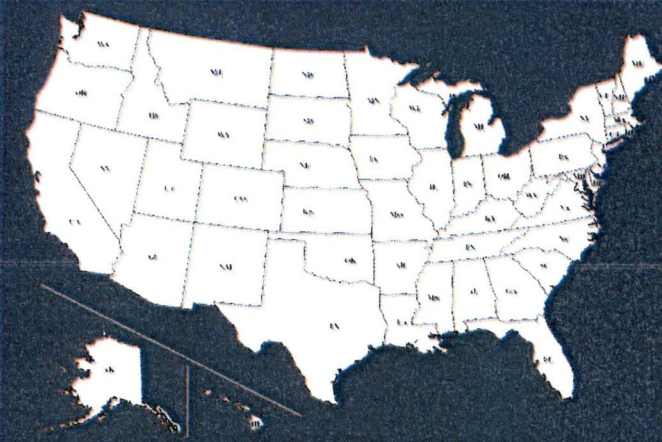
Thank you.

A handwritten signature in blue ink, appearing to read "Jeff Hanscom".

Jeff Hanscom

Senior Director, State Government Relations & Public Policy
1900 K Street, NW, Suite 700
Washington, DC 20006
Direct: 202.662.4179 | Cell: 703.407.8448

Franchise Businesses Produce Significant Impact on U.S. Economy



Economic Impact of Franchising

	In Franchises	Because of Franchises
establishments	733K	N/A
jobs	7.6M	13.3M
payroll	\$269.9B	\$565.8B
output	\$674.3B	\$1.6T
GDP	\$404.6B	\$925.9B

Franchise Fast Facts



The Franchise Business Model

- Brings together brands, local business owners, employees, and the local community.
- Is a uniquely accessible business model which allows you to start at the entry level and have the opportunity to own your own business.
- Has created tens of thousands of small business owners and millions of opportunities for workers while being the largest vocational training industry in America.



Franchise Business: Good for America and Good for Local Communities

- The International Franchise Association is the world's oldest and largest organization representing franchising worldwide. Celebrating 50 years of excellence, education and advocacy, IFA works to protect franchisee interests, and promote franchising through its government relations and public policy, media relations, and educational programs.

pg 3

Franchise Fast Facts



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U.S. Franchise Facts

- Locally owned franchises are America's hidden small businesses, with 733,000 establishments across the country.
- Franchising directly contributes \$674.3 billion in economic output, accounting for roughly 2.5% of private sector U.S. GDP.
- Franchising is a job-creating mechanism that not only offers opportunities to entrepreneurs but also supports more than 7.6 million direct jobs nationwide.



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Economic Impact of Franchising in North Dakota



Franchise Fast Facts



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pg 5

2017 House Bill 1139
Testimony before the House Industry, Business and Labor Committee
Presented by Waylon Hedegaard—President of the North Dakota AFL-CIO
January 9th.

Mr. Chairman, Members of the Committee:

My name is Waylon Hedegaard, President of the North Dakota AFL-CIO. I am here today to provide testimony on House Bill 1139. The North Dakota AFL-CIO opposes this bill.

As we see it, House Bill 1139 puts an absolute in our century code, one that provides less flexibility in complicated cases involving employee/employer relationships. "Notwithstanding any other provision of law or any voluntary agreement between the United States department of labor and a franchisee, a franchisee or an employee of a franchisee is not considered an employee of the franchisor."

This one-way protection limits the liability of the Franchisor for any labor law violation brought against the Franchisee. It limits liability when it is unwarranted to do so, and it limits it when it is potentially harmful.

It unnecessarily protects the Franchisor at the expense of the employee and the franchisee. And it will protect them even when a responsibility for fault lies with the parent franchisor. Certain types franchises operate under an operating agreement where the franchisor has a complicated package of equipment, software, training materials and rules on how to use them. For instance, McDonald's requires its franchisees to provide specific training to their employees that describes how each job is performed, down to the exact time it takes, among other aspects.

Franchises like these are not hands off approaches with regard to the employees. Factors right down to the dress and comportment of every employee is covered.

So the question needs to be, at what point does a franchisor bear some responsibility for labor violations against its franchisee's employees? If the McDonalds Corporation supplies its franchisees with timekeeping software that miscalculates overtime hours or mandatory reimbursements for its employees resulting in labor law violations, as is the case that is going through the California courts presently, are they not at part responsible for those violations? As the judge in that case—James Donato—found, employees had valid reasons to believe McDonald's was their employer. Workers wore McDonald's uniforms, packed food in McDonald's boxes and received all their information on documents emblazoned with the company's logo—and McDonalds supplied the software that made the errors in the first place.

As we see it, this change to the North Dakota Century Code does nothing to protect franchisees and everything to protect the much larger and more powerful corporate

franchisors, regardless of how they influence the lives of the rank and file workers. We feel this law will encourage further employee control and work stipulations by the parent company resulting in greater franchisee liability, while fostering less corporate accountability for those actions.

We urge this committee to vote no on House Bill 1139.



Testimony of Brent Bogar
Greater North Dakota Chamber
HB 1139
March 7, 2017

Mr. Chairman and members of the committee, my name is Brent Bogar. I am here representing the Greater North Dakota Chamber (GNDC), the champions for business in North Dakota. GNDC is working on behalf of our more than 1,100 members to build the strongest business environment in North Dakota. GNDC also works closely with the U.S. Chamber of Commerce and the International Franchise Association. As a group, we stand in support of HB 1139.

The Greater North Dakota Chamber supports the many segments of the business community in North Dakota and HB 1139 is one in which we stand to support the franchise business model. The franchise business model has given many individuals in the state the opportunity to pursue owning and operating their own business. When someone takes that risk on to start a business they should have the certainty that they are solely responsible for the employees that they hire to work in their place of business.

HB 1139 does just that, by introducing in code the current interpretation of business law in North Dakota it ensures that the franchise business model can continue to operate in and be successful. GNDC believes that by creating certainty North Dakota can continue to support the growth and opportunities for small business owners in the state.

Thank you for allowing me to appear before you in support of HB 1139. The Greater North Dakota Chamber strongly supports a Do Pass on HB 1139 and I would stand for any questions that you may have.



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CHAMBER OF COMMERCE
OF THE
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March 7, 2017

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State Capitol
600 East Boulevard
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Dear Chairman Klein and Members of the Committee:

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This bill is necessary because the National Labor relations Board in Washington, D.C., has issued a new joint-employer standard, one that is both broad in its coverage and vague in its application. This new standard could easily make local franchise business owners joint employers with brand name companies, compromising the independence of their businesses and undermining the franchise model that has promoted entrepreneurship, flexibility, competitiveness and growth. It would essentially make businesses liable for workplaces they don't control and workers they don't employ.

While the National Labor Relations Act has broad preemptive authority, HB 1139 will protect North Dakota's franchise businesses by codifying the prior joint-employer standard for state level enforcement actions. Some states, notably California, have already begun pursuing expanded liability under state law along the lines of the new joint-employer standard and this bill will ensure that North Dakota does not go down that path. Moreover, this legislation will send a signal to officials in Washington, D.C. that they need to make this change at the federal level as well.

The Workforce Freedom Initiative supports HB 1139 and recommends its passage to protect the economic climate and local franchise businesses in North Dakota.

Sincerely,



Glenn Spencer, Vice President
Workforce Freedom Initiative, U.S. Chamber of Commerce



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March 6, 2017

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State Capitol
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Bismarck, ND 58505

RE: SUPPORT HB 1139

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Nine states have already enacted laws similar to HB 1139: Tennessee, Texas, Louisiana, Michigan, Wisconsin, Indiana, Georgia, Utah and Oklahoma. In 2017, a multitude of other states are considering similar legislation, with bills already on the Governors' desks in South Dakota and Wyoming; with others moving through the process in: Arizona, Nebraska, Missouri, South Carolina, Virginia and New Hampshire.

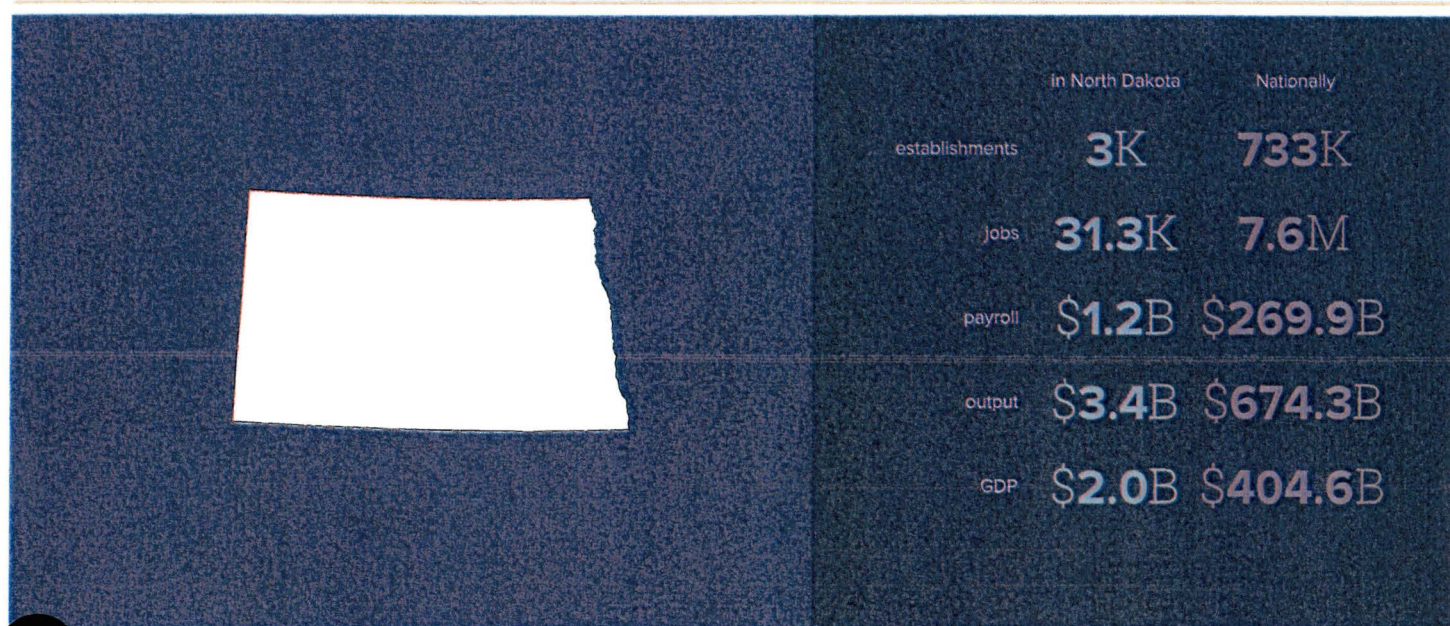
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Thank you.

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Jeff Hanscom
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Economic Impact of Franchising in North Dakota



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2017 House Bill 1139
Senate Industry, Business and Labor Committee
Waylon Hedegaard—President of the North Dakota AFL-CIO
March 7th.

Mr. Chairman, Members of the Committee:

My name is Waylon Hedegaard, President of the North Dakota AFL-CIO. I am here to oppose this bill.

As we see it, House Bill 1139 puts an absolute in our century code, one that provides less flexibility in cases involving complicated employee/employer relationships.

This one-way protection limits the liability of the Franchisor for any labor law violation brought against the Franchisee, and it would limit liability when it is unwarranted to do so and when it is potentially harmful.

It unnecessarily protects the Franchisor at the expense of the employee and the franchisee. And it will protect them even when a responsibility for fault lies with the parent franchisor. Certain types franchises operate under an operating agreement where the franchisor has a complicated package of equipment, software, training materials and rules on how to use them. For instance, McDonald's requires its franchisees to provide specific training to their employees that describes how each job is performed, down to the exact time it takes, among other aspects. McDonalds has had a "Hamburger University" for decades where they train managers in every aspect of how to run one of their restaurants. 5000 people a year go through this training.

Franchises like these are not hands-off approaches with regard to the employees. Factors right down to the dress and comportment of every employee is covered. So as we see it the question needs to be, at what point does a franchisor bear some responsibility for labor violations against its franchisee's employees? We believe the answer is more complicated than "never".

If the McDonalds Corporation supplies its franchisees with timekeeping software that miscalculates overtime hours or mandatory reimbursements for it employees, and these miscalculations result in labor law violations, as is the case that is going through the California courts presently, are they not at part responsible for those violations?

As the judge in that case—James Donato—found, employees had valid reasons to believe McDonalds Corporation was their employer. Workers wore McDonald's uniforms, packed food in McDonald's boxes and received

all their information on documents emblazoned with the company's logo—and McDonalds supplied the software that made the errors in the first place.

The NLRB ruling, the Browning Ferris decision, that is prompting bills like this across the country, happened 18 months ago. So the question I would ask is this. Are there franchisors currently being held unfairly accountable that really need this law in place? Is there a need at all?

As we see it, this change to the North Dakota Century Code does nothing to protect franchisees or their employees and does everything to protect the much larger and more powerful and often out-of-state, corporate franchisors, regardless of how they influence the lives of the rank and file workers. We feel this law will also encourage further employee control and work stipulations by the parent company resulting in greater franchisee liability, while fostering less corporate accountability for those actions.

I urge this committee to vote no on House Bill 1139.