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Honorable Members of the City Council
c/o Office of the City Clerk
200 N. Spring Street, Room 395
Los Angeles, CA 90012

March 29, 2022

Honorable Members:

BUREAU OF CONTRACT ADMINISTRATION – LOS ANGELES FAIR WORK WEEK IMPLEMENTATION RECOMMENDATIONS (CF 19-0229)

BACKGROUND

In response to instruction by the Economic Development and Jobs Committee on February 8, 2022, the Office of Wage Standards (OWS) in the Bureau of Contract Administration (BCA), in partnership with the Office of the City Attorney, submits for your consideration a report of additional information and recommendations related to franchises, integrated enterprises, and other topics for the Los Angeles Fair Work Week law.

As part of its research, the BCA reviewed Fair Work Week laws in cities across the country including Seattle, San Francisco, New York, Philadelphia, Emeryville, and San Jose. To evaluate the information and develop recommendations, the BCA worked with the Office of the City Attorney, the Office of the Chief Legislative Analyst, and City Council staff.

1. INTEGRATED ENTERPRISES

Of the six cities analyzed, three have provisions that include "integrated enterprises" in the definition of an employer covered by the law. While similar, all three definitions are based on subjective criteria that will require a case-by-case analysis to determine whether an employer fits this definition and is therefore covered by the law. Not one of these cities provides objective criteria that an employer or employee can use to easily identify whether they would fall within this definition and therefore be covered by the law. Instead, employers are urged to consult with their attorneys to determine applicability. The definitions are below.

A. Seattle

Separate entities will be considered an integrated enterprise and a single employer where a separate entity controls the operation of another entity. The factors to consider include, but are not limited to:

1. Degree of interrelation between the operations of multiple entities;
2. Degree to which the entities share common management;
3. Centralized control of labor relations; and
4. Degree of common ownership or financial control over the entities.

B. New York City

New York City uses the same definition of "integrated enterprises," but only applies it to fast food establishments, and not retail establishments.

C. Philadelphia

Philadelphia's equivalent of an "integrated enterprise" is "co-employment," which is defined below.

More than one entity may be the "Employer" of an Employee, if Employment by one Employer is not completely disassociated from Employment by the other Employer. Determining whether a co-employment exists will depend upon all of the facts in a particular case. A co-employment will generally be found where:

1. The Employee performs work that simultaneously benefits two or more Employers, or works for two or more Employers at different times during the workweek, such as pursuant to an arrangement between the Employers, or one Employer and the central office of the Chain entity, to interchange Employees among retail locations; or

2. One Employer acts directly or indirectly in the interest of the other Employer or Employers in relation to the Employee; or

3. Where the Employers are not completely disassociated with respect to the employment of a particular Employee and may be deemed to share control of the Employee, directly or indirectly, by reason of the fact that one Employer controls, is controlled by, or is under common control with the other Employer.

4. Where the length of time a temporary employee employed by a temporary or staffing agency works at the location of a Covered Employer is at least 16 hours over a two-week period. If the facts establish that an Employee is co-employed by two or more Employers, all of the co-Employers are responsible, both individually and jointly, for compliance with all of the provisions of the Ordinance with respect to the entire employment for the particular Work Week and pay period.

The subjective nature of these definitions could create confusion among both Employers and Employees who may be trying to determine whether they are covered by this law. The BCA would not be able to provide legal advice and would need to refer parties to private attorneys. Therefore, if the City Council's desire is to provide a definition of coverage that is clear and easily interpreted and applied, the BCA does not believe that 'Integrated Enterprises' would be a useful concept to define coverage of this law.

BCA RECOMMENDATION

A. **To provide a more objective way to determine applicability of this law, the BCA recommends including alternatives such as 'franchises' and 'subsidiaries' instead of 'integrated enterprises' in the definition of Employer, as further discussed below. These alternative terms will cover some of the businesses that have operational or ownership relationships but do so in a more objective way.**

2. FRANCHISES - DEFINITION

The BCA researched other programs to see how franchises were defined and whether they were covered under other Fair Work Week laws. The BCA found that Seattle, New York City, and San Jose include "franchises" and utilize very similar definitions. Philadelphia opted to use the term "chains" to cover a similar group of employers in their law. San Francisco and Emeryville do not include franchises or chains.

Seattle, New York City, and San Jose define "franchise" with the same 3 core criteria. The definitions are below.

A. Seattle

"Franchise" means a written agreement by which:

1. A person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliate;

2. The operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol; designated, owned by, or licensed by the grantor or its affiliate; and

3. The person pays, agrees to pay, or is required to pay, directly or indirectly, a franchise fee.

B. New York City

"Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, and the franchisee is required to pay, directly or indirectly, a franchise fee, or

b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate, and the franchisee is required to pay, directly or indirectly, a franchise fee.

C. San Jose

"Franchise" is defined by California Business and Professions Code Section 20001, which states that a Franchise is a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

1. A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and

2. The operations of the franchisee's business pursuant to that plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and

3. The franchisee is required to pay, directly or indirectly, a franchise fee.

D. Philadelphia

"Chain" is defined as a set of establishments that do business under the same trade name and that are characterized by standardized options for decor, marketing, packaging, products and services, regardless of the type of ownership of each individual establishment.

BCA RECOMMENDATION

B. **The BCA recommends adopting the San Jose definition of "Franchise" for consistency with California Business and Professions Code. This definition is almost identical to the definition implemented by Seattle. The BCA also recommends including within the definition of Employer, businesses of a certain size that operate pursuant to a "Franchise," as discussed below. Furthermore, this definition should provide an objective method for employers and workers to identify whether a company is covered by this law.**

3. FRANCHISES – SQUARE FOOTAGE MINIMUM

The BCA researched the similar existing Los Angeles Municipal Code Sections related to retail establishments that include square footage thresholds for applicability. These include:

a) Premium Hazard Pay for On-Site Grocery & Drug Retail Workers, LAMC 200.101 - at least 1 site in the City over 85,000 square feet;

b) Grocery Worker Retention, LAMC 181.01 – Over 15,000 square feet; and

c) Grocery Shopping Priority for Elderly and Disabled Residents, LAMC 200.01 - 2,500 square feet.

BCA RECOMMENDATION

C. **The BCA recommends incorporating the minimum space threshold of over 15,000 square feet into the definition of Franchises that will be included in the definition of Employer and the aggregate employee count. This will exclude extremely small retail businesses from being covered under this law.**

4. SUBSIDIARIES

The concept of 'subsidiaries' can be utilized to cover businesses that have a shared ownership relationship. The other jurisdictions analyzed don't define this term in their Ordinances, but subsidiaries are widely accepted to involve majority ownership at more than 50%, and details such as these could be clearly identified in the Rules and Regulations. For example, Retail Corporation A would be a subsidiary of Retail Corporation B if more than half of its shares are owned by Retail Corporation B. To ensure that the subsidiary relationship is germane to this law's stated goal of addressing the retail industry, a covered subsidiary could be limited to a retail business or establishment as defined by the NAICS codes identified in the draft Ordinance.

BCA RECOMMENDATION

D. **The BCA recommends incorporating retail 'subsidiaries' into the definition of a covered Employer and in the aggregate employee count to achieve the City Council's goal of including businesses with direct, substantive relationships, in a way that is more objective and transparent.**

5. DRAFT LANGUAGE

The committee also requested the City Attorney provide revisions to the definitions in the draft ordinance based on the recommendations in this report and the committee's requests.

Pursuant to the committee's request, the definition of Employee would be amended to remove the language regarding the exclusion of self-scheduling employees, as follows:

> "Employee" means any individual who:
>
> 1. In a particular work week performs at least two hours of work within the geographic boundaries of the City for an Employer; and
>
> 2. Qualifies as an employee entitled to payment of a minimum wage from any Employer under the California minimum wage law as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission.
>
> For purposes of this article, a worker is presumed to be an Employee of an Employer, and an Employer has the burden to demonstrate that a worker is a bona fide independent contractor and not an Employee.

Pursuant to the recommendations in this report, the definition of Employer would be amended to add subsidiaries, and franchises over 15,000 square feet, as follows.

"Employer" means any Person who:

1. Is identified as a retail business in the North American Industry Classification System (NAICS) within the retail trade categories and subcategories 44 through 45; and

2. Directly, indirectly or through an agent or any other Person, including through the services of a temporary service or staffing agency, exercises control over the wages, hours, or working conditions of any Employee; and

3. Has 300 employees globally. For purposes of determining the number of employees of an Employer, the following shall be included:

   (a) Any employee over whom the Employer directly, or through an agent or any other Person, including through the services of a temporary service or staffing agency, exercises control over the wages, hours, or working conditions.

   (b) Any employee of an Employer's subsidiary provided that the subsidiary is identified as a retail business pursuant to section 185.01.D.1.

   (c) Any employee of any Person operating a business pursuant to a Franchise, provided that the franchisee's business is over 15,000 square feet and identified as a retail business pursuant to section 185.01.D.1.

Any Person or business whose employees are included in the count of total employees of the Employer, including those identified in subsections 3(b) and 3(c) above, qualifies as an Employer for purposes of this Section.

A definition for Franchise and Person would be added as follows:

"Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

1. A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and

2. The operation of the franchisee's business pursuant to that plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

3. The franchisee is required to pay, directly or indirectly, a Franchise fee.

"Person" means any person, association, organization, partnership, business trust, limited liability company, or corporation.

6. ADDITIONAL REQUESTS

Finally, pursuant to the committee's request, the draft ordinance can be amended to (1) delete Section 185.06.B.2.; and (2) add an operative date of January 1, 2023.

The BCA looks forward to your instruction on the continued development and implementation of the Los Angeles Fair Work Week policy.

Sincerely,

JOHN L. REAMER, JR., Director
Bureau of Contract Administration

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OWS Fair Work Week Final - CF 19-0229