AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 5267

OFFERED BY MR. MOYLAN OF GUAM

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "American Franchise Act".

SEC. 2. FINDINGS.

Congress finds the following:

(1) A franchise is a commercial relationship under which a franchisee acquires the right to operate an independent business that offers, sells, or distributes goods or services using a franchisor's system of operations, which typically includes the franchisor's business system and marketing plan, and its service mark, trademark, trade dress, or trade name.

(2) To protect the integrity of its system of operations, a franchisor must set and enforce uniform quality, marketing, and operational standards that govern its use. Doing so helps maintain consistency and uniformity in the nature and quality of the

goods and services distributed under the franchisor's trademarks. That consistency and uniformity, in turn, help ensure that consumer expectations are satisfied, increase the value of the franchisor's brand, and enhance the recognition and profitability of individual franchises.

(3) Although franchisees must comply with these standards, franchisees are independent business owners. It is the franchisee who determines how to implement the franchisor's standards, controlling on a day-to-day basis the operations of its franchise and its labor relations.

(4) The economic impact of this business model has been profound. According to a September 2023 report from Oxford Economics, in 2022, the economic output of franchise establishments in the United States was approximately $825,000,000,000. During that year, franchises employed approximately 5 percent of all workers in the United States, which was approximately 8,400,000 workers.

(5) Inconsistent and expansive views of what constitutes a "joint employer" have impacted the viability of franchising by creating joint employer liability based on the franchisor's exercise of control that is inherent in franchise relationships.

SEC. 3. CLARIFICATION OF JOINT EMPLOYMENT FOR FRANCHISING.

(a) NATIONAL LABOR RELATIONS ACT.—The National Labor Relations Act (29 U.S.C. 151 et seq.) is amended by adding at the end the following:

"SEC. 20. CLARIFICATION OF JOINT EMPLOYMENT FOR FRANCHISING.

''(a) DEFINITIONS.—In this section:

''(1) DIRECT AND IMMEDIATE CONTROL.—The term 'direct and immediate control' means the following with respect to each respective essential term and condition of employment:

''(A) WAGES.—A franchisor exercises direct and immediate control over wages if it actually determines the wage rates, salary, or other rate of pay that is paid to individual employees of a franchisee or job classifications of employees of a franchisee.

''(B) BENEFITS.—A franchisor exercises direct and immediate control over benefits if it actually determines the fringe benefits to be provided or offered to a franchisee's employees. Such direct and immediate control—

''(i) includes selecting the benefit plans (such as health insurance plans and pension plans) or level of benefits provided to a franchisee's employees; and

"(ii) does not include permitting a franchisee, under an arm's-length contract, to participate in a benefits plan of the franchisor.

"(C) HOURS OF WORK.—A franchisor exercises direct and immediate control over hours of work if it actually determines work schedules or the work hours, including overtime, of a franchisee's employees. Such direct and immediate control does not include—

"(i) establishing a franchisee's operating hours; or

"(ii) establishing minimum staffing levels to satisfy the franchise's service standards.

"(D) HIRING.—A franchisor exercises direct and immediate control over hiring if it actually determines which particular employees will be hired or which employees will not be hired. Such direct and immediate control does not include—

"(i) encouraging, recommending, or requesting changes in staffing levels to accomplish tasks; or

"(ii) setting minimal recruiting and hiring standards, such as those required by law, for consumer or employee safety, or for brand protection.

"(E) DISCHARGE.—A franchisor exercises direct and immediate control over discharge if it actually decides to terminate the employment of an employee of a franchisee. Such direct and immediate control does not include—

"(i) bringing misconduct or poor performance to the attention of a franchisee that makes the actual discharge decision;

"(ii) expressing a negative opinion of a franchisee's employee; or

"(iii) setting minimal standards of performance or conduct, such as those required by law, for consumer or employee safety, or for brand protection.

"(F) DISCIPLINE.—A franchisor exercises direct and immediate control over discipline if it actually decides to suspend or otherwise discipline a franchisee's employee. Such direct and immediate control does not include—

"(i) bringing misconduct or poor performance to the attention of a franchisee that makes the actual disciplinary decision;

"(ii) expressing a negative opinion of a franchisee's employee;

"(iii) refusing to allow a franchisee's employee to perform work under a franchise offer or contract; or

"(iv) setting minimal standards of performance or conduct, such as those required by law, for consumer or employee safety or for brand protection.

"(G) SUPERVISION.—A franchisor exercises direct and immediate control over supervision by consistently and directly instructing a franchisee's employees how to perform their work or by actually issuing employee performance appraisals. Such direct and immediate control does not include—

"(i) providing instructions to a franchisee's employees that—

"(I) are limited and routine; and

"(II) consist primarily of telling a franchisee's employees what work to perform, or where and when to perform the work, but not how to perform the work;

"(ii) setting brand standards for the performance of the work;

"(iii) offering training materials (including training demonstrations) for a franchisee to use in training the employees of the franchisee; or

"(iv) establishing minimum training requirements for the employees of a franchisee.

"(H) DIRECTION.—A franchisor exercises direct and immediate control over direction by assigning particular employees of a franchisee their individual work schedules, positions, and tasks. Such direct and immediate control does not include offering resources and tools for a franchisee to consider using to direct the work schedules, positions, and tasks of the employees of the franchisee.

"(2) ESSENTIAL TERMS AND CONDITIONS OF EMPLOYMENT.—The term 'essential terms and conditions of employment' means wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

"(3) FRANCHISE; FRANCHISEE; FRANCHISOR.—The terms 'franchise', 'franchisee', and 'franchisor' have the meanings given such terms in section 436.1 of title 16, Code of Federal Regulations, as in effect on the date of enactment of this section.

"(4) SUBSTANTIAL DIRECT AND IMMEDIATE CONTROL.—The term 'substantial direct and immediate control'—

"(A) means direct and immediate control that has a regular or continuous consequential effect on an essential term and condition of employment of a franchisee's employees; and

"(B) does not include direct and immediate control that is only exercised on a sporadic, isolated, or de minimis basis.

"(b) JOINT EMPLOYMENT.—For the purposes of this Act, a franchisor may be considered a joint employer of the employees of a franchisee only if the franchisor possesses and exercises substantial direct and immediate control over one or more essential terms and conditions of employment of the employees of the franchisee.".

(b) Fair Labor Standards Act of 1938.—The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) is amended by adding at the end of the following:

"SEC. 20. CLARIFICATION OF JOINT EMPLOYMENT FOR FRANCHISING.

"(a) In General.—For purposes of this Act, a franchisor may be considered a joint employer of the employees of a franchisee only if the franchisor meets the criteria for a joint employer with a franchisee under section 20 of the National Labor Relations Act, except that, for purposes of determining joint-employer status under this Act, the terms 'employee' and 'employer' referenced in section 20 of the National Labor Relations Act shall have the meanings given such terms in section 3 of this Act.".

"(b) Definitions.—In this section, the terms 'franchisor' and 'franchisee' have the meanings given such terms in section 20(a) of the National Labor Relations Act.".

SEC. 4. APPLICABILITY.

This Act, and the amendments made by this Act, shall not apply to any proceeding that is commenced before the date of enactment of this Act.

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