

October 31, 2023

Employment Standards Review  
Ministry of Labour Relations and Workplace Safety  
Government of Saskatchewan  
300-1870 Albert Street  
Regina, Saskatchewan  
S4P 4W1

VIA EMAIL: [legislation.labour@gov.sk.ca](mailto:legislation.labour@gov.sk.ca)

**RE: REVIEW OF THE EMPLOYMENT STANDARDS PROVISIONS OF THE  
SASKATCHEWAN EMPLOYMENT ACT AND ASSOCIATED REGULATIONS**

Dear Sir/Madam:

On behalf of the more than 600 corporate members representing over 40,000 franchise small business owners, the Canadian Franchise Association (CFA) welcomes the opportunity to respond to the “Review of the Employment Standards Provisions of the Saskatchewan Employment Act and Associated Regulations.”

Many franchise brands that are recognized in Saskatchewan, across Canada, and throughout the world are owned and operated by franchisees who live and work in their local communities. Local franchise business owners are in business for themselves, but not by themselves. By buying a franchise, the local franchisee gains access to a proven business concept, brand, and processes while running their own small business. In addition, the franchisor provides the franchisee with ongoing support and assistance to ensure the long-term success of the franchise, which leads to the long-term success of the franchise system as a whole. The strength of the franchise model lies in this foundational franchisor-franchisee relationship.

As Saskatchewan reviews its current employment standards, the CFA strongly encourages government to adopt changes to make it easier for the over 145,000 small businesses across the province to comply with the Act.

The CFA believes that this consultation is an opportunity to reinforce the foundational relationship between franchisors and franchisees. By properly acknowledging the franchisee as the rightful employer of their employees, the province would enable the franchisor to adequately support the long-term success of its franchisee. The CFA contends that this could be achieved by two updates to the ESA. First is to exclude a franchisee from the definition of employee, recognizing them rightly as an employer. Additionally, the CFA believes the Government of Saskatchewan should take the opportunity to enshrine the four-factor test the CFA has adopted to assist government in determining whether a common employer relationship exists between a franchisor and a franchisee. By adopting the four-factor test, government would remove the risk associated with franchisors properly supporting the success of the more than 1,500 franchised establishments across Saskatchewan.

Finally, the CFA believes the mandate of the Director of Employment Standards should be focused on creating a culture of compliance through education in small businesses across Saskatchewan. Providing educational resources to employers and employees will help them to better understand their rights and responsibilities under the Act.

The recommendations that the CFA puts forward in this consultation are simple steps that the Government of Saskatchewan can take to clarify the relationship between franchisees and franchisors, so franchisees can continue to benefit from the support provided by their franchisors as they build successful businesses in their local Saskatchewan communities. The recommendations that the CFA puts forward in this consultation are simple steps that the government can make the Act easier to comply with, clarify the role of the franchisee and franchisor, and work to develop a culture of compliance in the Province of Saskatchewan.

As the representative of franchising in Canada for more than fifty years, the CFA works with governments across Canada on issues that affect the franchise industry and small businesses. Please do not hesitate to contact the CFA to discuss this submission.

Sincerely,



Sherry McNeil  
President and CEO  
Canadian Franchise Association

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## **About the Canadian Franchise Association (CFA)**

The Canadian Franchise Association (CFA) is the national, not-for-profit association of more than 600 corporate members representing over 40,000 franchise small business owners of more than 65,000 franchise establishments. The CFA is the voice of the franchise community and the recognized authority on franchising in Canada. The CFA speaks for an industry that touches the lives of every Canadian, in every community across the country.

Canadian franchises contribute nearly \$120 billion per year to the Canadian economy and create jobs for more than 1.9 million Canadians. They enable 78,000 Canadians to be their own boss as the owner of their own small business franchise location, serving their neighbours in communities from coast to coast to coast. These enterprises contribute over \$15.5 billion in federal taxation revenue and pay over \$60 billion in wages each year.

CFA members represent a diverse cross-section of businesses and over 60 sectors in Canada. Our members range from very large, established franchise systems to smaller or emerging franchise brands. Members share the conviction that their commitment to excellence improves franchising for everyone involved, including franchisors, franchisees, suppliers, and customers.

In Saskatchewan, in 2023 it is projected that there are over 1,500 franchise establishments which will contribute \$2.4 billion to the nominal GDP of the province and create 36,900 jobs.<sup>1</sup> Saskatchewan franchises will contribute an estimated \$230 million in provincial taxation each year.<sup>2</sup>



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<sup>1</sup> *Canadian Franchise Industry Economic Outlook 2023 at p 8 Table 2*

<sup>2</sup> *Canadian Franchise Industry Economic Outlook 2023 at p 8 Table 3.*



## Topics of Discussion

### 1) Application of Employment Standards Provisions

#### Exclusion from Provisions

1. Are the current exclusions to the employment standards provisions appropriate?
2. Do you see a need to change the current exemptions? To which industries or occupations?

The CFA supports and believes the Government of Saskatchewan should maintain the existing provisions and regulations with respect to exclusions found under Sections 2-3 under the *Saskatchewan Employment Act* (“ESA”).

#### Youth Employment

1. Are the existing provisions adequate? Do you see areas where changes are required?

The CFA supports and believes the Government of Saskatchewan should maintain the existing provisions and regulations with respect to youth employment found under section 9.2 of *The Conditions of Employment Regulations*.

### 2) Determination of an Employer and Employee

1. Are the current definitions of an employer and employee sufficient and appropriate?

The CFA’s primary submission is that the Government of Saskatchewan should take this opportunity to define and provide clear guidance to the franchise community about what is, and what is not, an employer, and who is, and who is not, an employee.

First and foremost, the CFA submits that there should be a new legal test specifically set out under the ESA to define a common employer that is unique to the franchisor-franchisee relationship.

Second, the CFA requests additional clarification on the definitions of an “employee” and “employer” under the Act. Specifically, the Ministry should clarify that the definition of “employee” specifically does not include a franchisee.

The CFA urges the Government of Saskatchewan to consider the proposed amendments stated above and below, with respect to the test of employee status, and that of common control in the context of the franchise relationship. Specifically, the CFA recommends the Ministry take this opportunity to adopt a clear test to determine who is the employer between a franchisee and a franchisor with regard to both the franchisee in its own right, as well as the franchisee’s employees.

## **Background**

The most common type of franchise arrangement is the business format franchise, which is the model of franchising utilized by quick service restaurants, hotels, fitness studios, services-based businesses and most other franchised businesses that consumers typically associate with franchising. In this model, the franchisor grants the franchisee the right and obligation to operate a business in association with the franchisor's trademarks and system of operation, in exchange for the payment of fees, typically in the form of a recurring percentage of sales revenue. Franchised businesses under this model are required to operate in strict adherence to the franchisor's system of operations and brand standards.

Employment law can inadvertently penalize franchisors for establishing control mechanisms to protect their intellectual property and enforce standards that protect the brand to ensure that products/services within the franchise network meet customers' expectations everywhere. The hallmark of franchising is consistency and uniformity across all franchised businesses within a system, which is achieved through adherence to the franchisor's systems and standards. The law can therefore be erroneously interpreted to assert that franchisors create a joint employment relationship with the franchisee with respect to the franchisees' employees by exercising these controls over system standards, trademarks and intellectual property. As a result, franchisors can sometimes be hesitant to provide guidance and operational controls out of fear of being deemed a common or joint employer. This in turn has a negative effect on franchisees, who are often small, independent business owners, as the franchisee is then deprived of valuable support that a franchisor may be hesitant to provide.

There needs to be clarity in employment law on this issue so franchisors can protect the intellectual property and reputation of their brand, while at the same time best serving the interests of franchisees as independent business owners. The law should be clear that while franchisees follow a franchisor's systems, standards, and leverage ongoing support, they remain the independent owners of their franchised businesses and the sole employers of their staff. While a franchise agreement requires that a franchisee follow brand guidelines and standards, the franchisee remains an independent owner and operator, with autonomy in regard to its employment decisions impacting the business.

We believe there is significant benefit in enshrining and protecting the contractual nature of the franchisor-franchisee relationship in provincial labour and employment legislation. As well, clarification of this could be achieved through changing the definition of "employee" to reflect the true nature of the franchise business model by specifically excluding franchisees from the definition of employees to recognize that franchisees are not employees of their franchisors.

An amendment ensures that a franchisor can act in the best interest of protecting their brand and trademark without the risk of being found to be a common/related employer, while supporting the needs of the franchisor's independent franchisees. It will bring much-needed clarity to franchising in Saskatchewan and encourage continued growth, job creation and new franchise systems entering Saskatchewan.

## Amendments in Recent Legislation

The CFA's request would further align the Saskatchewan ESA with recent amendments to both federal and Saskatchewan provincial legislation which have the effect of helping franchisees run their small businesses. The significant amendments noted below recognize the CFA's submission to protect the interests of franchisees, and its employees, from expanded liability for the actions or status of a franchisor.

By accepting the CFA's submission, Saskatchewan would implement changes to its Employment Standards Act in line with the majority of our other provinces, granting necessary protection to franchisees and in turn, the franchised model.

### *Saskatchewan Legislation*

As we are aware, the Government of Saskatchewan has begun seeking public comments on implementing a new provincial franchise legislation. The primary features of this legislation would be to:

- Implement a duty of fair dealing between franchisor and franchisees;
- Create a duty for a franchisor to disclose financial statements and specific information about the franchise to the franchisee;
- Give a franchisee the ability to rescind agreement if there is deficiency in franchisor disclosure;
- Give a franchisee the ability to sue a franchisor for misrepresentation in franchisor disclosure;
- Implement franchisee rights to associate and form an association; and
- Prevent contracting out of franchisee legislation as between a franchisee and their employees.

The points above make clear the Ministry's intention to bolster the independent nature of franchisee relationships. In addition, the contracting out language is present in existing employment standards act across Canada (for example, section 5 of the Ontario *Employment Standards Act, 2000*). This language makes clear that a relationship between a franchisee and its employees is separate and apart from any such relationship between the franchisee and franchisor.

This legislation proposes to put Saskatchewan in line with other provinces that have already implemented protections to franchisees. This includes British Columbia, Alberta, Manitoba, Ontario, New Brunswick, and PEI.

### Federal Legislation

On June 23, 2022, Parliament enacted amendments to the Competition Act (RSC 1985, C-34) prohibiting agreements between and amongst unaffiliated employers not to solicit or hire each other's employees (no-poach agreements) and to fix wages or terms and conditions of employment (wage-fixing agreements).[1] The new prohibitions came into force on June 23, 2023. They carry significant criminal penalties (i.e., prison sentences of up to 14 years and/or fines with no statutory limit), as well as potential civil liability (including by way of class actions for damages).

Franchisors and franchisees are separate legal entities, independent contractors, and not affiliates in law. The franchisor is the owner of a brand/trademark, and has the know how needed to open and operate the business (often referred to as the "system"). The franchisee is the small business owner who very often

lives in the community they serve. While franchisees hire, remunerate, and are entirely responsible for the terms and conditions of employment of their own employees, to protect the integrity of the system and the goodwill in their brand and trademarks, franchisors typically establish brand standards and requirements that a franchisee must agree and adhere to, either under a franchise agreement or through operation manuals and directives, including standards and requirements which may have, in past, dictated certain conditions of franchisees' employees' employment.

In its enforcement guidelines on the new prohibitions, the Competition Bureau acknowledged the importance and legitimacy of labour-related restraints in franchise agreements but cautioned that franchisors face potential criminal liability under the Competition Act where the labour-related restraints in their franchise agreements are "clearly broader than necessary in terms of duration or affected employees, or where the ... agreement or arrangement is a sham".

Consistent with the new Competition Act prohibitions, the clarified test for common employer proposed by the CFA functions to separate the liability of a franchisee from a franchisor or even a third-party franchisee, and to assert the independence of the franchisee in determining all terms and conditions of the franchisee's employees' employment.

If liability against franchisors is expanded through a common employer declaration, it would necessitate coordination between franchisors and franchisees with respect to wages and terms and conditions of employment to address the risk of civil liability under the Saskatchewan ESA. Such coordination would in turn increase the exposure of both franchisors and franchisees to potential criminal liability and civil damages claims under the Competition Act and would be inconsistent with the general policy objectives underpinning Parliament's enactment of those prohibitions.

The separation of franchisees and franchisors under the Saskatchewan ESA would only further align Saskatchewan with the Federal government's pursuit to assert the independence of franchisees with regard to their employees.

### **The Saskatchewan Employment Standards Act should recognize the Independent Nature of the Franchisor-Franchisee Relationship**

At the heart of the franchise business model is the independent nature of the franchisor-franchisee relationship. The franchisor grants a license to the franchisee, granting the right to operate a business using the franchisor's trademarks, brand and operating system. The franchisee in return is responsible for operating this system, as well as all day-to-day activities related to their business (hiring, firing, scheduling, etc.). As a result of these carefully outlined roles and responsibilities, franchisees are indeed independent small business owners.

In turn, Saskatchewan's legislation should protect the franchisor-franchisee relationship and recognize the true nature of the franchise relationship as that of an independent contract. To achieve this result, the CFA believes the Government of Saskatchewan should adopt the four-factor test below, to determine whether a common employer relationship exists between a franchisee and a franchisor.

Franchising is a unique licensing model that provides individuals interested in starting their own business with the opportunity to do so with the support of the franchisor and the existing franchise system. Much of the success of the franchisor and franchisee relies on the consistent application of system standards set out above and the preservation of the franchisor's "brand" standards. Franchisees invest in, own, and operate their business. Simply put, a franchisee is in business *for* themselves but, not *by* themselves.

While a franchisor requires its franchisees to meet system standards to maintain consistency in products, services and customer experience across the franchise system, this control does not extend to determining the essential terms and conditions of the employment relationship between a franchisee and its employees, as they operate under the rules prescribed by the franchisor's "system". The amendments to the *Competition Act* mentioned above codify this concept by including criminal liability to franchisors that overstep in this regard and attempt to impact the terms and conditions of the franchisee's employees. Subsequent ESA amendments are not needed, as the law is already well settled on this matter in Canada.

The concept of a common employer allows courts and administrative decision-makers to treat separate legal entities as a single employer for the purposes of attaching liability for things such as wages, vacation pay, benefits, termination notice, and wrongful and constructive dismissal.

Our amendment will ensure greater protections and safeguarding for franchisees, who are most often a small business owner receiving assistance from a larger franchisor. These small businesses are made of hard-working Saskatchewan citizens, who only wish for financial and business-decision making independence without potentially looming anxiety for penalties, given simply for receiving assistance from a larger franchisor.

The support from a franchisor to a franchisee is key to the franchisee's success. However, without clarification on the definition of "employee" and the test for common employer not to include a franchisor, a franchisor will constantly face this looming threat of penalty from the Ministry, simply for providing assistance to its franchisees.

The CFA's amendments to the common employer test will bolster the Ministry's support to hard-working Saskatchewan residents and small business owners.

### **The Four-Factor Test to Determine Common Employer Status**

The test below will assist both employees and employers to determine who the employer is in a franchise relationship. In general, it is the franchisee, not the franchisor, who carries the hallmarks of the employment relationship.

In light of the above, the CFA proposes the following test for determining whether a franchisor is an employer of a franchisee's employee:

#### **Does the franchisor:**

- 1. Hire or terminate the employee;**
- 2. Supervise and control the employee's work schedule or conditions of employment;**
- 3. Determine the employee's rate and method of payment; and**
- 4. Maintain the employee's employment records.**

A franchisor that does not engage in this activity should not be considered a joint or common employer of the franchisee's employees in the context of a franchisor-franchisee relationship.

This type of provision is not unique. There are many jurisdictions in the United States that have enacted similar provisions to provide that a franchisee is not an employee of their franchisor, and a franchisee's employees are not employees of the franchisor.

The process for clarifying the standard began in 2015 in Louisiana and Texas. In 2016, six states enacted similar language, in 2017 nine more states enacted such laws and one more state did the same in 2018. The states are as follows:

Alabama	(2017)	North Carolina	(2017)
Arizona	(2017)	North Dakota	(2017)
Arkansas	(2017)	Oklahoma	(2016)
Georgia	(2016)	South Dakota	(2017)
Idaho	(2018)	Tennessee	(2015)
Indiana	(2016)	Texas	(2015)
Kentucky	(2017)	Utah	(2016)
Louisiana	(2015)	Wisconsin	(2016)
Michigan <sup>3</sup>	(2016)	Wyoming	(2017)
New Hampshire	(2017)		

### 3) Hours of Work

1. Are the hours of work provisions appropriate and adequate? Do you see a need to change these provisions? How?
2. Do these provisions adequately address the needs of the changing workplace?
3. Are there redundancies or red tape with respect to these requirements?

The CFA supports and believes the Government of Saskatchewan should maintain the existing provisions and regulations with respect to hours of work found under Sections 2-11 and 12-14 under the *Saskatchewan Employment Act* (“ESA”).

### 4) Wages and Regulation Tips

1. Are existing provisions clear and adequate?
2. Is there a need to regulate the administration of tips and gratuities? If so, how?

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<sup>3</sup> For instance, and as an alternative, the Michigan Worker's Disability Compensation Act of 1969 now provides as follows:  
418.120 Employee of franchisee as employee of franchisor. Sec. 120.

An employee of a franchisee is not an employee of the franchisor for purposes of this act unless both of the following apply:

- (a) The franchisee and franchisor share in the determination of or codetermine the matters governing the essential terms and conditions of the employee's employment.
- (b) The franchisee and franchisor both directly and immediately control matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction.

The CFA supports and believes the Government of Saskatchewan should maintain the existing provisions and regulations with respect to wages and regulation of gratuities found under sections 2-35 of *The Saskatchewan Employment Standards Act*.

## **5) Protection When Ill or Injured**

### **1. Are the existing protections for illness and injury sufficient? Why or why not?**

The CFA supports and believes the Government of Saskatchewan should maintain the existing provisions and regulations with respect to protections for illness and injury, found under Sections 2-40 of the *Saskatchewan Employment Act* (“ESA”), and *The Workers’ Compensation Act, 2013*.

## **6) Employment Leaves**

### **1. Are the employment leave provisions sufficient? Do you have any suggestions?**

### **2. Should bereavement leave provisions be clarified to explicitly include end of pregnancy?**

The CFA supports and believes the Government of Saskatchewan should maintain the existing provisions and regulations with respect to protected employment leave, found under Sections 2-43 and 2-59.1 of the *Saskatchewan Employment Act* (“ESA”).

## **7) Layoff and Termination**

### **1. Are layoff and termination provisions adequate and relevant?**

The CFA supports and believes the Government of Saskatchewan should largely maintain the existing provisions and regulations with respect to layoff and termination, found under the *Saskatchewan Employment Act* (“ESA”).

## **8) Authority of Employment Standards Officers**

### **1. Should the director of employment standards have the authority to order an employee’s reinstatement and payment of lost wages due to discriminatory action, subject to standard appeal right?**

The CFA supports the Government of Saskatchewan’s current mandate as it applies to the Director of Employment Standards (the “Director”) and an Employment Standards Officer (an “ESO”). The Director should not possess the additional authority to order an employee’s reinstatement or payment of lost wages due to discriminatory action, as there is already a judicial process in place for determining such remedies.

However, the CFA believes the mandate of the Director, and in turn the ESO, should emphasize the progress of education, training, and skills development. Specifically, an ESO should coordinate and provide educational expertise in the implementation of policy, programs and provincial standards, based on their front-line experience.

As a front-line responder to an employment standards issue, an ESO's focus should ensure both parties, the employer and the employee, are fully aware of their rights under the Saskatchewan ESA. This includes the right to request disclosure and the right of an ESO to investigate all incoming complaints.

An ESO's remedial authority should be focused on equitable remedies as opposed to penal remedies. This can include, but is not limited to, educational training and remediation. To achieve this goal, an ESO can schedule training sessions with an employer, mandatory training for all employees, and advise the employer of ongoing disclosure requirements under the Act. In addition, the existing appeal process for an ESO decision should be limited to a modification of the equitable remedy order.

As a public-sector agent, the Director's funding is limited. It simply cannot afford to have an ESO address every employment concern and issue or have the resources to sufficiently and substantively address penal legal remedies. Instead, the CFA believes the Director's funding would be better served focused on its educational mandate.

## **Conclusion and Summary**

### **Summary of Key Recommendations:**

1. Ensure that an updated *Employment Standards Act* is written in a clear and easy to understand manner that removes ambiguity for the over 145,000 small businesses in Saskatchewan;
2. Change the definition of "employee" in the ESA to reflect the true independent nature of the franchisor/franchisee relationship;
3. Introduce the four-factor status test for a joint or common employer, to determine the true employer in a franchise relationship;
4. Emphasize the mandate of education and training for the Director of Employment Standards and an Employment Standards Officer. In doing so, the Director should not be given expanded powers to reinstate a discharged employee or make an order for lost wages against an employer, in keeping with the existing provisions under the ESA; and
5. Provide support to franchisors, franchisees, and industry associations and continue to work on an ongoing basis to collect feedback and recommendations, particularly for small businesses.

Outside of the issues discussed above, the CFA believes in and supports the Government of Saskatchewan's decision to maintain the existing provisions under the ESA and surrounding regulations.