

Mandating English Language Proficiency for Franchisees

ERIC L. YAFFE AND IRIS FIGUEROA ROSARIO

Most franchisors require potential franchisees to have business experience in order to join their franchised systems. In addition, some franchisors require that potential franchisees have at least minimal proficiency in English.¹ English language proficiency requirements have been a source of controversy in recent years as immigrants enter the United States in record numbers and seek to achieve the American dream by owning small businesses. This article discusses recent case law concerning English language proficiency requirements for franchisees and addresses issues that franchisors should consider when implementing those requirements.

From a practical standpoint, an English language proficiency requirement for franchisees makes sense. Franchisees, which are the owners and frequently the operators of the business, must be able to communicate in English with customers, employees, suppliers, and the franchisor. Further, operating manuals and other written materials essential to the operation of a franchise are often in English. English proficiency is particularly critical to food service franchisors, which depend on each franchisee's strict compliance with food, health, and safety standards. Food service franchisees that are unable to speak and understand English may be unable to operate their franchised businesses according to the franchisor's standards, potentially jeopardizing the public health and the franchisor's trademarks and trade name.

English language proficiency requirements, however, are not always popular, as the Ladies Professional Golf Association learned when it announced plans to impose an English language proficiency requirement on its golfers.² Federal and/or state discrimination laws may be implicated if the requirement is not properly implemented because English language proficiency requirements are sometimes deemed to discriminate on the basis

Eric L. Yaffe is a principal and Iris Figueroa Rosario is an associate in the Washington, D.C., office of Gray, Plant, Mooty, Mooty & Bennett, P.A. Both attorneys are members of Gray Plant Mooty's Franchise & Distribution practice group and represented Togo's in the case of De Walsche v. Togo's Eateries Inc. The authors wish to thank Scott Raver of Gray Plant Mooty for his research assistance.



Eric L. Yaffe



Iris Figueroa Rosario

of an individual's national origin. Therefore, a franchisor interested in adopting an English proficiency requirement as part of its franchise application or transfer process must proceed cautiously.

On the other hand, franchisors should not fear utilizing English language proficiency requirements. If implemented properly and for the right reasons, the requirements will usually pass muster in state and federal courts. The case of *De Walsche v. Togo's Eateries Inc.*,³ where a California federal court upheld the English proficiency requirement of Togo's, is such a case and a good starting point for a discussion of issues that a franchisor should consider before adopting an English language proficiency requirement.

De Walsche v. Togo's Eateries, Inc.

In *De Walsche*, a franchisee challenged the Togo's English proficiency requirement and its use of an English test to measure the English proficiency of potential franchisees.⁴ Specifically, husband and wife buyers were interested in purchasing De Walsche's shop, and De Walsche submitted a fully executed purchase and sale agreement to Togo's for its approval.⁵ In accordance with its policies and procedures and contracts with De Walsche, Togo's required the buyers to pass its English language proficiency assessment test.⁶ The buyers failed the test, and Togo's denied the transfer on that ground.⁷ Togo's invited the buyers to retake the test again in six months, but the buyers never did. Instead of presenting new buyers to Togo's or seeking to remain in the system, De Walsche voluntarily closed the shop at the end of the term, which was six months after Togo's had denied the transfer, and sued Togo's for damages.⁸

De Walsche filed a three-count complaint.⁹ First, he contended that his franchise agreement did not require potential purchasers to pass an English test as a requirement of transfer, and therefore Togo's had breached the agreement and the implied covenant of good faith and fair dealing.¹⁰ He further claimed that the Togo's English test and proficiency requirement unfairly discriminated against the buyers of his shop, as well as other unnamed buyers, in violation of California's Unruh Civil Rights Act.¹¹ He never alleged that Togo's had discriminated against him personally.¹²

Togo's had set forth its reasons for requiring English proficiency of transferees in several documents, including its written policies, the Uniform Franchise Offering Circular (UFOC) provided to prospective franchisees, the franchise agreement, and a rider to the franchisees' purchase and sale agreement that De Walsche and the potential purchasers had executed.¹³ These documents noted the purpose in requiring that franchisees be proficient in English: to ensure that franchisees could pass Togo's extensive training, which was entirely in English,¹⁴ and that its franchisees could communicate with employees,

