



## **MEMORANDUM**

**TO:** GPM Joint Employer Webinar Participants  
**FROM:** GPM Franchise, Labor and Employment Law Team  
**DATE:** March 23, 2015  
**SUBJECT:** Webinar Follow-Up

### **I. What Can You Do Now?**

1. Recognize uncertainty
2. Understand elements of claims of vicarious liability and joint employer liability
  - a. Exercise of control over Franchisees' employment practices; or
  - b. The right to control Franchisees' employment practices; or
  - c. Control over instrumentality that caused harm
3. Issues are not new: they arise out of the definition of a franchise
  - a. The Franchisor provides substantial assistance to the Franchisee in the operation of its business; or
  - b. The Franchisor has the right to exercise substantial control over the operation of the Franchisee's business
4. If we don't know the specific bases for NLRB v. McDonald's and we do not yet have a ruling from the NLRB on the joint employer standard in Browning Ferris, does it make sense to do anything now?
  - a. Yes
    - i. Litigation claims are sizeable, usually brought as class actions covering current and former employees of Franchisees
    - ii. Exposure to claims may impact business valuation when Franchisor seeks investors or sale of businesses

## **II. How Can Franchisor Protect Against Risks?**

1. Indemnification by Franchisees against their and their employees acts and omissions
2. Insurance, including Employer Practices Liability Insurance (EPLI)
3. Consider recommending use of a PEO (Professional Employer Organization) or other HR consultant, but consider risks of designating a single PEO/consultant
4. Conduct audit of documents and practices regarding elements of control

## **III. Who Brings Claims?**

1. Franchisees and Franchisee's employees, claiming they believe they are the Franchisor's employees
2. Third parties harmed by Franchisee or Franchisee's employees
3. NLRB context:
  - a. Unions and Franchisee employees bring unfair labor practice (ULP) charges
  - b. NLRB, following finding of probable cause on ULPs
4. What can Franchisors do?
  - a. Inform employees about, and require them to sign an acknowledgment that explains the nature of the franchise relationship and that only Franchisee and Franchisee's Manager have the right to hire, fire, direct, set pay, discipline, or deal with Franchisee's employees
  - b. Clarify that Franchisor's Area Representative's and Master Franchisee's employees have no rights or responsibilities for the Franchisee's employment practices
  - c. Include a similar statement which Franchisee's must incorporate into their employee manual/handbook
  - d. Include a similar statement in training materials
  - e. Obtain regular certification of Franchisee's compliance with a - c above
  - f. Scrub Franchisor documents of unnecessary controls

#### IV. What Is The Principle Cause Of Claims?

1. Franchisor's employees' conduct toward Franchisee's employees, or Franchisor's involvement in Franchisee's employment policies practices and decisions
2. Franchisee's noncompliance with wage and hour laws
3. Area Representative's (AR), Development Agent's (DA) or Master Franchisee's (MF) employees' conduct or involvement in employment practices of Franchisees are evaluated like Franchisors' conduct. The acts could implicate liability for ARs, DAs and MFs, as well as the Franchisor
4. Structure of certain programs:
  - a. Franchisor or Master Franchisee procures contracts / business for Franchisees
  - b. Franchisor collects payments from customers
  - c. Franchisee's don't/can't independently get their own contracts
  - d. Often Franchisee is a sole proprietor - only worker in business
  - e. Many Franchisees net less than minimum wage
  - f. In ABC Test states, Master Franchisee or Franchisor also provides same services/products as Franchisees

#### V. How Can Claims Be Avoided? (COMPLIANCE CHECKLIST)<sup>1</sup>

##### Changes to Franchise Agreement

1. "Independent Contractor Relationship"
  - a. Include statement that Franchisor is not responsible for Franchisee's employment decisions
  - b. Include statement that Franchisor lacks authority to control Franchisee's employment decisions
2. "Obey all laws clause"

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<sup>1</sup> Some Franchisors may find one or more prescriptions on this checklist to be untenable under their franchise system. Administrative bodies and courts use multi-factored tests to determine joint employer liability and responsibility, so there remains some flexibility in applying these recommendations. Each Franchisor must conduct its own risk-benefit analysis to determine how these recommendations should be applied to their system. GPM is available to assist with such an analysis.

- a. Include specific reference to Franchisee's obligation to comply with all applicable labor and employment laws and regulations
- b. Include Franchisee's obligation to comply with all data privacy laws
3. "Franchisor's Obligations"
  - a. Delete any reference to Franchisor's obligation to train or approve Franchisee's non-managerial employees
  - b. Delete any reference to Franchisor's obligation to provide to Franchisee any employment forms or employee handbooks or for Franchisees to use any employment forms provided by Franchisor
  - c. Delete or minimize any obligation by the Franchisor to hire, train or supervise Franchisee's managerial employees
4. "Duties of Franchisee"
  - a. Include language requiring Franchisee to make all employment decisions for all of its employees
  - b. If Franchisees are obligated to "strictly comply with all Operations Manuals," make sure that the operations manuals do not include unnecessary controls by Franchisor, especially relating to employment-related issues. (See Operations Manuals below.)
5. "Indemnification Clause"
  - a. Add language specifically including all local state and federal employment and labor laws and regulations
  - b. Add language specifically including all data privacy laws
  - c. Make sure the scope of indemnification covers not only the acts of Franchisee, but also the acts of Franchisee's employees
6. "Insurance Clause"
  - a. Consider requiring that all Franchisees purchase Employment Practices Liability Insurance, covering both defense costs and liability claims
  - b. Require that Franchisees produce a separate endorsement for all policies showing that the Franchisor is covered as an "additional insured," not just a Certificate of Insurance

7. "FDD"
  - a. To the extent that any of the above provisions in the franchise agreement are revised, check whether these revisions require changes to the FDD, including in Items 8, 9, 11, 13, 15 and 16

### **Operations Manuals**

8. Determine the scope of what is defined as "Operations Manuals" in the franchise agreement—more is not necessarily better
9. Online Operations Manuals are often a dumping ground for outdated material. Consider wholesale purge of material that is no longer used or relevant to current operations
10. Review Operations Manuals to determine what the manuals state is "mandatory" versus what is a "suggested guideline"
  - a. Use the "Customer Deliverable" construct to determine what operational standards should be "mandatory"
  - b. Any operational standard that is not directly related to a Customer Deliverable should be clearly identified as a "suggested guideline or practice" with proper disclaimers
  - c. Rarely, if ever, should an employment practice (hiring, firing, compensation, discipline) be identified as a "mandatory" operational standard
11. Other Operations Manuals Suggestions/Issues:
  - a. Use disclaimers liberally on any "suggested" controls
  - b. Do not provide employment "Forms" to Franchisees
  - c. Do not provide employee "Handbooks" to Franchisees
  - d. Do not dictate employment practices in manuals or otherwise
  - e. Do not use the Franchisor's "Corporate Store Manual" for Franchisees
  - f. Do not give the "Corporate Store Manual" to Franchisees, even as a reference
  - g. Eliminate "Franchise Partners" from your dialect and all documents

- h. Require “independently owned and operated Franchisee” posting on location/forms
- i. Do not let Franchisees use Franchisor’s Mark as part of their corporate name
- j. Do not let Franchisees use Franchisor’s Mark in its Employee Handbook
- k. Do not give Franchisee’s employees corporate email addresses

**Policies, Directives, and Communication with Franchisees**

- 12. Does your Franchise Agreement deem all policies, directives and communications from the Franchisor as “mandatory” system standards? Check the scope of your “Operations Manual” language in your Franchise Agreement
- 13. Be clear whether any communication is a mandatory directive or a suggested “best practice.” If it’s mandatory, it belongs in the Operations Manual
- 14. Refrain from any employment practice policies or directives unless it qualifies as a Customer Deliverable—very rare
- 15. Refrain from Franchisor communications directly to Franchisee’s employees—can cause confusion as to who is employer

**Training Franchisor Field Support Staff**

- 16. Educate on joint employer and vicarious liability law
  - a. It’s all about control
  - b. Understand Customer Deliverables concept
  - c. Teach the difference between mandatory system standards (Customer Deliverable) and suggested policies and procedures
- 17. Emphasize the risks of getting involved in employment issues/decisions
  - a. Do not direct Franchisee’s employees’ activities on site
  - b. Do not train Franchisee’s employees directly
  - c. Do not get involved in hiring, discipline, firing, compensation, etc.

- d. Redirect Franchisee employee complaints to Franchisee, and train all Franchisor employees to follow this practice. Treat Franchisee’s employee complaints as potential breach of Franchise Agreement (Franchisee is not complying with obligation to control all employment issues and decisions – something for Franchisees to remedy)
18. Provide staff with checklists for inspections and QC purposes
- a. Checklist should primarily address compliance with Customer Deliverables
  - b. Verify compliance with contractual “independence” obligations
    - i. Use public signs on premises and on business forms identifying business as an independently owned Franchisee
    - ii. All Franchisee employment forms/handbook identify Franchisee as employer—not Franchisor
    - iii. Franchisee should not use Trademark in corporate name
    - iv. Get “additional insured” endorsement, not just COI

**Other Action Items**

- 19. Consider requiring use of Professional Employer Organization (PEO) or other HR consultant for HR assistance
- 20. Audit Franchisor and Franchisee practices and training to ensure that actions are in line with written policies

**VI. How Else Can Franchisor And Area Representatives And Master Franchisees Control Conduct To Avoid Or Mitigate Claims?**

- 1. Provide notice to new employees explaining relationship and controls
- 2. Provide training about relationship for employees of Franchisees, ARs, DAs, MFs and Franchisor
- 3. Explain relationship in employee manuals/handbook
- 4. Give regular reminders of issues especially to Franchisor’s field staff and AR’s, DA’s and MF’s, and their staff who visit franchised outlets
- 5. Restrict actions of field reps when interacting with Franchisees and their employees

6. Establish training, policies and procedures for fielding Franchisor's employees' complaints at Franchisor, AR, DA or MF offices
7. Pay special attention to how ARs, DAs and MFs, and their employees "job descriptions" are set and by whom

**VII. Besides Direct Testimony Of Employees, What Evidence Do Plaintiffs' Lawyers, NLRB And Other Enforcement Agencies Examine**

1. Website and press releases about nature of franchise and integration of the franchise organization
2. Franchise Agreements and FDDs descriptions of Franchisor controls, especially related to employment practices
3. Operations manuals, especially anything that prescribes or suggests employment practices
4. Employee manuals or handbooks
5. Reports from field representatives
6. Responses to employee complaints
7. Investigative interviews with employees and employee testimony

**VIII. What Is The Next Step?**

1. Review each document, policy, practice or lack thereof which may expose Franchisor to claims
2. Create an action plan including:
  - a. Review of all documents and rewrite as needed
  - b. Create and distribute notices of policies and procedures
  - c. Incorporate policies and procedures into training, inspections and repeat
3. Focus on delivering a consistent customer experience
4. Support IFA and its efforts
5. Take the opportunity to explain how franchising actually works

## **IX. What Can Gray Plant Mooty Do?**

1. Provide GPM compliance checklist
2. Provide a "GAP Analysis" of potential exposure
3. Review Franchise Agreements, FDD, Operations Manual, policies and procedures
4. Advise on explaining needs of Franchisor for control or Franchisee support without creating exposure to claims
5. Advise on revising documents and structuring a compliance program
6. Provide updates on legal developments

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