

Franchise Joint Employer and Vicarious  
Liability Threats:  
*Practical Steps to Minimize Risk*

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# Moderator & Speakers

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# Overview

- Joint Employer Developments
- Items to Review
  - Documents
  - Practices
  - Franchisor Staff Training



# Joint Employer Developments

- New Day
  - Agency focus
  - Plaintiff awareness
  - Franchisor risk



# Joint Employer Developments

- Joint Employer Contexts
- Joint Employer Effects
  - Liability
  - Responsibility
- Joint Employer Factors (vary by context):
  - Power to hire, fire, and discipline employees
  - Authority to supervise and control employee work schedules and employment conditions
  - Maintenance of employment records
  - Ability to determine the rate and method of pay
  - Ownership of equipment and facilities
  - Assignment of tasks and direction of employees
  - Authority to promulgate work rules



# Joint Employer Developments

- NLRB General Counsel
  - *Browning Ferris*
    - NLRB GC advocating a broader standard
    - An entity could be a joint employer if it—
      - Exercised direct or indirect control over working conditions;
      - Had the *unexercised potential* to control working conditions; or
      - Where “industrial realities” otherwise made the entity essential to meaningful collective bargaining
  - McDonald’s complaints



# Joint Employer Developments

- NLRB - McDonald's Complaints
  - Charged franchisor with liability for unfair labor practices committed by franchisees under a joint employer theory
  - Alleged McDonald's "possessed and/or exercised control over the labor relations policies" of the franchisees
  - "McDonald's, USA, LLC, through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees . . ."

# Items to Review—Documents

- Franchise Agreement
  - Relationship / independent contractor
    - Explicit regarding employment decisions and controls
    - Franchisee responsible for all employment decisions
    - Franchisor not responsible for franchisee's employment decisions
  - Obey All Laws Clause
    - Include specific reference to all state and federal labor and employment laws
    - Data privacy laws





# Items to Review—Documents

- Franchise Agreement (cont.)
  - Duties of franchisor/what we provide
    - Eliminate training of franchisee's non-Manager employees
    - Eliminate unnecessary controls
    - Eliminate employment forms or handbooks
  - Duties of franchisee
    - Exclusive control of all employment decisions
    - Comply with all manuals—careful what they say



# Items to Review—Documents

- Franchise Agreement (cont.)
  - Indemnification Clause—claims relating to:
    - All state and federal employment and labor laws
    - Data Privacy laws
    - Acts of franchisee’s employees
  - Insurance Clause
    - Mandate EPLI coverage?
    - Don’t accept COI showing “Additional Insured” – demand separate endorsement
  - Many revisions flow back into FDD
    - Items 8, 9, 11, 13,15,16

# Items to Review—Documents

- Operations Manuals
  - Biggest source of major risks
  - Determine scope
    - Paper manuals
    - On-line—often a graveyard of outdated material
    - Flyers, updates, programs, policies, announcements
  - What is mandatory vs. suggested guideline?

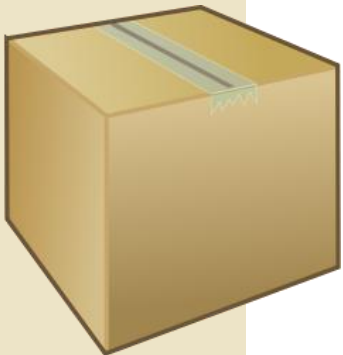


# Items to Review—Documents

- Operations Manuals (cont.)
  - Courts say control over trademark, product and brand should not result in vicarious liability—employment or otherwise
    - Trademark is relatively easy to identify
    - How do you decide what is control over “The Brand”?
  - Answer: The concept of the “Deliverable”
    - Conceptual filter for reviewing franchisor content
    - Flexible approach for any system
    - Use when reviewing franchisee controls in any form

# Items to Review—Documents

- Deliverable- What is it?
  - Put yourself in the place of the customer
  - What comprises their experience and perception when interacting with the franchisee’s product or service offering?
    - Holistic viewpoint
  - Anything directly impacting the “Deliverable,” you can control via mandatory operational standards
  - Anything not directly impacting the “Deliverable,” should be deleted or “suggested” only



# Items to Review—Documents

- Deliverables
  - Examples
    - Easy: food safety, service standards, store layout, menu, uniforms, signage, trademark use and display, approved products, vehicle signage
    - Harder: cash controls, drug testing, grooming standards, background checks, mobile device use, drug and alcohol policies, bookkeeping systems, closing procedures
    - If you can tie it *directly* to the customer experience (Deliverable), then you can control it

# Items to Review—Documents

- Why is the Deliverable concept important?
  - When sued as a joint employer or claimed to be vicariously liable, you can articulate how your mandatory franchisee controls directly relate to your efforts to protect the “Brand,” which established case law says should not subject you to vicarious liability
    - Patterson v. Domino’s
    - Kerl v. Rasmussen



# Items to Review—Practices

- Review/Minimize Franchisor Interaction with Franchisee's Non-Management Employees
  - Training/coaching
  - Auditing/inspections
  - Recruiting, interviewing, hiring, certifying
  - Setting compensation
  - Discipline
  - Handling complaints





# Items to Review— Franchisor Staff Training

- Training Franchisor Field Support Staff
  - Educate on joint employer and vicarious liability law-Deliverable concept
  - Treat franchisee employee complaints as potential breach of Franchise Agreement
  - Provide staff with checklists for inspections and QC purposes
    - Checklist should primarily cover Deliverables
    - Verify compliance with contractual independence obligations/ Insurance coverage
  - Caveat: area representative/master franchisee



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