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AMERICAN BAR ASSOCIATION
Forum on Franchising

The Franchise Lawyer

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Message from the Chair

By Ron Coleman, Bradley Arant Boult Cummings LLP

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Time flies. This is my last Chair's Column, and by the time you are reading this, my term as Forum Chair will be over. Elizabeth Weldon's term as Chair begins on August 1, and I could not be more excited for the Forum about her taking the reins. Elizabeth has performed more significant jobs in the Forum than I can count, including as Annual Developments author/presenter, LADR Director, and Finance Officer on the Governing Committee, so she has the experience and energy to lead our group. The Forum will be in great hands with Elizabeth, and I look forward to supporting her for the next two years in the role of Immediate Past Chair.

I want to take this final opportunity to thank the many people who have helped me during my time as Chair. First, I want to thank Will Woods for his many contributions in the role of Immediate Past Chair during my term. There is great value in having the continuity of leadership that our Forum governing structure provides, and Will's insight and guidance proved very helpful to me and the entire Governing Committee.

Next, I want to thank the members of the Governing Committee and senior appointed leadership who have served during my two years as Chair. We have a great group of committed and capable GC members, division directors, and publication editors who put in countless hours of work to support the Forum. You may not know that in addition to their GC and leadership functions, these folks also serve as program directors for our annual meeting workshops and intensives to perform the important peer-review services, which ensure that our written materials and presentations meet the high standard of excellence our members expect. They are an essential part of what makes this organization so valuable for all of us.

I want to give special thanks and well-deserved recognition to our ABA Forum Director Yolanda Muhammad, who is retiring this year after having served the ABA in various roles over a span of more than 30 years, including 13 years of service to our Forum. Most of our members have interacted with Yolanda in the many roles she has performed, such as registration and on-site support for our annual meetings, assistance with CLE, addressing Listserv and communications issues, and generally helping us

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Forum on Franchising

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Evolution of Minimum Standards in Franchise Agreements: Do Anti-Harassment Policies Enhance Joint Employment Risk?

By Andrew B. Murphy and Brian T. Ruocco, Faegre Drinker Biddle & Reath LLP

Consistency is a hallmark of the franchise business model and central to the success of most franchise systems. To facilitate it, franchisors adopt minimum service standards that apply across the franchise network to build a strong quality brand. Customers with positive experiences with a franchised location or brand are more likely to frequent the location again or visit other franchised locations. Minimum operating hours, the required sale of certain products, cleanliness and appearance specifications, and other minimum service standards can benefit the entire franchise system. Adopting certain standards, however, can create litigation and liability risks. Some courts have accepted arguments that franchisor standards are evidence of "control" for purposes of determining if the franchisor jointly employs the franchisee employees. Accordingly, franchisors must carefully evaluate new standards before adopting them.

Many franchisors have recently come to realize that franchise consistency can extend beyond traditional minimum service standards. Increasingly, franchise systems are implementing anti-harassment and other workplace conduct policies. These standards impact the workplace, but they are also increasingly vital to brands. In this age of viral social media, allegations of harassment or other types of misconduct can generate significant and swift adverse publicity across a brand, harming franchisors and franchisees alike.

This article explores the intersection between minimum service standards and workplace-conduct policies in franchise systems. Some franchise systems may be reluctant to implement anti-harassment practices for fear that a court might cite such standards in finding that a franchisor jointly employed its franchisee's employees. The article surveys the current state of the law on this issue and previews developments on the near horizon.

The Joint Employment Peril of Minimum Standards

It is no secret that minimum service standards are a frequent source of litigation against franchisors. This is true even when the claims against the franchisor are not successful. For example, in *Ketterling v. Burger King Corp.*, 272 P.3d 527, 533 (Idaho 2012), a plaintiff sued Burger King after she fell on snow and ice outside a franchised location. The plaintiff argued that Burger King exercised control over the franchised business because Burger King's franchise operations manual requires franchisees to clear snow and ice. *Id.* Although the court dismissed the plaintiff's claim against Burger King, the case demonstrates how even common-sense minimum standards can provide a hook for plaintiffs seeking to hold a franchisor liable for a franchisee's alleged failures.

Harassment standards are another sensible component of any business operation. Yet, many states do not specifically require employers to implement anti-harassment programming. *See* Sexual Harassment Training Requirements—All 50 States, Clear Law Institute, https://clearlawinstitute.com/harassment-training-essential-employees-states-not-just-california-supervisors. Even so, franchisors and franchisees have an interest in protecting the reputation of their collective brand. An instance of sexual harassment or discrimination at one franchised location could negatively impact customers' perception of the brand nationwide. Studies

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show that "a single sexual harassment claim can be enough to dramatically shape public perception of a company." Serena Does et al., *How Sexual Harassment Affects a Company's Public Image*, Harvard Bus. Rev. (June 11, 2018), https://hbr.org/2018/06/research-how-sexual-harassment-affects-a-companys-public-image. Customers could see a sexual harassment incident "as more indicative of a culture problem than a bad apple problem" and might associate the entire brand with that problem. *Id.*; *cf. Am. Dairy Queen Corp. v. Wardlow*, No. 4:15-CV-04131-RAL, 2015 WL 5178454, at *4 (D.S.D. Sept. 4, 2015) (noting that a franchisor's brand might "suffer if customers have a negative experience at Defendants' restaurant and attribute this experience to the . . . brand in general").

Harassment and anti-discrimination standards are the kind of workplace rules that have traditionally been left to the province of franchisees—the direct employers—rather than being incorporated into the franchisor's minimum standards. Some franchisors have rationally shied away from harassment and anti-discrimination standards out of concern that these standards are a form of control that could give rise to a joint-employment claim.

But in a world where incidents of harassment are increasingly presenting a risk to brands, will the law evolve toward permitting franchisors to specify anti-harassment and anti-discrimination guidance as a form of minimum service standards without enhancing the risk of joint employer liability? Courts have been less than clear.

Courts' Inconsistent Approaches to Harassment Standards

Some courts have allowed franchisors to encourage anti-harassment policies without assuming legal risks. Indeed, some have expressly held that a franchisor does not become a joint employer merely by virtue of assisting franchisees in implementing anti-harassment policies. But courts have not applied these rules uniformly.

McDonald's experience illustrates the inconsistency in the courts. *See, e.g.*, *Smith v. JEENS, Inc.*, No. 1:21-CV-00002-RP-SBJ, 2022 WL 1584702, at *34 (S.D. Iowa Mar. 10, 2022); *Ries v. McDonald's USA, LLC*, No. 1:20-cv-2, 2021 WL 5768436, at *4 (W.D. Mich. Dec. 6, 2021).

In *Ries*, a federal court in Michigan held that McDonald's was not a joint employer for Title VII purposes when McDonald's provided an "Employee Resources" poster that describes "employee rights and a sexual harassment policy" and has "Global Brand Standards" that "prioritize actions" in "harassment, discrimination, and retaliation prevention." *Ries*, 2021 WL 5768436, at *4. The plaintiffs argued that "McDonald's purportedly required Franchisee to display the Employee Resources poster" and therefore "effectively required Franchisee to adopt the McDonald's policy described on the poster." *Id.* Granting summary judgment in favor of McDonald's, the court found that this did not give "McDonald's control over the essential terms of employment for Franchisee's employees" or make McDonald's a joint employer. *Id.* at *46.

In *Smith*, on the other hand, a federal court in Iowa suggested that McDonald's anti-harassment policies might indicate joint employment. *Smith*, 2022 WL 1584702, at *34. The plaintiffs had sued McDonald's and its franchisees alleging harassment and retaliation. *Id.* at *3. They argued that McDonald's was a joint employer in part because McDonald's drafted policies related to sexual harassment that it provided to franchisees, who used them in their restaurants. *Id.* Granting the plaintiffs' motion to compel, the court ordered McDonald's to produce its policies as relevant to the claims and defenses in the case, although the court did not elaborate on the strength or validity of the plaintiffs' theory. *Id.* at *4.

Beyond the McDonald's system, in *Harris v. Midas*, No. CV 17-95, 2017 WL 3440693, at *78 (W.D. Pa. Aug. 10, 2017), a federal court in Pennsylvania held that the employee of a franchisee did not plausibly allege joint employment when the franchisor provided training to the franchisee's executive and upper management about discrimination and harassment. The court found that the franchisor did not impose workplace policies or have any authority over the franchisee's hiring and firing decisions. *Id.* The *Harris* court distinguished an earlier case, which held that a worker plausibly alleged joint employment by claiming that the franchisor "required [franchisees] and its employees to submit to training, required [franchisees] to implement a 'zero tolerance' policy for certain employee behavior, and published mandatory codes of conduct that included policies on diversity and non-discrimination." *Id.* at *8 (quoting *Myers v. Garfield & Johnson Enters., Inc.*, 679 F. Supp. 2d 598, 612 (E.D. Pa. Jan. 14, 2010)).

These cases suggest that a franchisor might be able to offer franchisees anti-harassment policies or training programs without assuming additional liabilities, but that any involvement in termination decisions heightens the risk of a joint employer finding against franchisors.

No Clear Guidance from the Department of Labor

In the face of ambiguous case law, the U.S. Department of Labor has had several chances to clarify the degree to which franchisors can require adherence to anti-discrimination and harassment standards. Unfortunately, despite a promising start, it has declined to do so.

In 2020, the department issued a rule stating that franchisors could require compliance with legal requirements or other health and safety standards without becoming a joint employer of its franchisees' employees. Specifically, the department said that "control exercised by a potential joint employer over a contractor's employees to 'ensure compliance with various safety and security regulations'" like disciplinary policies are "'qualitatively different' from control that indicates employer status." Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60613 (Sept. 25, 2020) (quoting *Moreau v. Air France*, 356 F.3d 942, 950–51 (9th Cir. 2003)).

In 2022, however, the Department of Labor rescinded that final rule. The new notice of proposed rulemaking states that compliance with legal obligations or health and safety standards may "in some cases indicate that the employer is exerting control, suggesting that the worker is economically dependent on the employer." Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, 62246 (Oct. 13, 2022). The Department of Labor stated that some minimum standards are permissible and gave two examples. Requiring "all individuals to wear hard hats at a construction site" is "less probative" of joint employment, whereas dictating "a specific time and location for weekly safety briefings and requir[ing] all workers to attend" is "more probative" of joint employment. *Id.* at 62248. The line drawing exhibited by the department's examples is not particularly helpful for franchisors seeking more concrete guidance.

Commenters argued that rescinding the 2020 rule "would make companies less likely to offer assistance to related companies, such as a franchisor offering sexual harassment training materials to a franchisee, for fear of becoming a joint employer." Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 FR 40939-01, 40953 (July 30, 2021). The department responded that "the commenters did not cite any court decision finding that a company is a joint employer primarily on this basis, while at least some courts have not regarded the provision of training assistance as strong evidence of a joint employer relationship." *Id.*

With these comments, the department seems to suggest that the mere implementation of harassment or anti-discrimination standards would likely not move the needle significantly in the joint-employment analysis. But the department's failure to provide clear guidance leaves franchisors in a lurch. So, what to do?

Key Takeaways

In the face of this uncertainty, franchisors are on the safest ground in approaching harassment and anti-discrimination standards the same way as minimum service standards: with caution and care. In the service standard setting, the law remains generally well-settled that a franchisor might perform a quarterly or annual quality assurance evaluation without a court finding that it controls the day-to-day operations. *See* William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 Franchise L.J. 162, 165 (2005). A similar approach to anti-discrimination and harassment practices represents a possible middle ground between actively regulating franchisee workplaces (which will almost certainly create joint-employment liability) and doing nothing (which is just as likely to create brand problems).

More specifically, franchisors would likely be on solid footing to require franchisees to comply with applicable anti-discrimination and anti-harassment laws. To effectuate that requirement, franchisors may suggest "best practices" to franchisees, without going so far as to mandate those best practices or specifically instruct franchisees on how to comply with the law.

This is not without risk, as plaintiffs will no doubt continue to point to any form of guidance as evidence of control. But, until the courts or the Department of Labor issues clearer guidance, franchisors will have to determine for themselves whether it is a risk worth taking to ensure the protection of their brand. ■

Remembering the Late David Gurnick, a Franchise Law Specialist and Professor, and Much, Much, More

The members of the Franchise Professors' Committee of the ABA Forum on Franchising are deeply saddened by the passing of David Gurnick in January. David served the Forum in many capacities over his career, including as a member of the Governing Committee, an Annual Developments author and speaker, and a leader of the Franchise Professors' Committee. We all enjoyed his jovial presence at the Forum in San Diego last November and co-chairing our group. Now we commiserate about the loss of a long-time friend, a great lawyer, an intellectual giant, and a leader.

David was a franchise law maven people turned to for advice concerning issues ranging from the simple to the insoluble. He was a great writer for the Forum. His more recent articles include: *Franchise Law Jury Instructions*, 39 Franchise L.J. (2019) and *Nuts, Bolts, and Outline for Teaching Franchise Law, Would Socrates Approve?*, 40 Franchise L.J. 449 (2021 with Peter C. Lagarias as co-author). He also wrote treatises on Distribution Law and another on Franchising Depositions (both with Juris Publishing).

David was a tremendous mentor. Anyone who knew David knew him as a consummate professional. He worked tirelessly on behalf of clients and was always available to colleagues to provide advice and assistance. He was certified by the State Bar of California, Board of Legal Specialization as a specialist in Franchise and Distribution Law—the very first year the specialization became available. He has the single distinction of serving not once but twice as the San Fernando Valley Bar Association President. And for our Forum's Franchise Law Professors' Group, he walked the walk by serving as an adjunct professor of law, teaching franchising at the UC Irvine Law School and other places. David's impact on and contribution to franchising will be felt for years to come, and we will deeply miss his contagious smile and friendship.

David was a tenacious advocate. Opposing attorneys knew him as a formidable opponent but one with whom afterward you could remain good friends and refer clients to each other. David always

held his ground and was a zealous advocate for his clients but was never uncivil, unfair, or nasty. To call him a "mensch" and a scholar doesn't do him justice.

David was a teacher and professor. David was a leader in advocating the teaching of franchise and distribution law at law schools and colleges. His leadership was manifested in leading the Forum's Franchise Law Professors' Committee the last few years and singlehandedly setting up committee meetings, recruiting speakers, compiling syllabi, and more. He was an encourager for those who thought they might want to teach such a course as an adjunct professor or add such a course to a curriculum. He was also a mentor for those who undertook the teaching of franchise law, offering advice and help that reflected his deep insight into the subject. Under his watch, more courses were offered, and more members of the Forum became teachers of franchise law. David's influence will continue to be felt in the next generation of franchise lawyers.

This article is an amalgamation of members of the Franchise Law Professors' Committee and other colleagues including, Tal Grinblat, Peter Lagarias, the late Sandy Meiklejohn (past Co-Chair with David), Arthur Pressman, Harold See, and Shelly Spandorf.

Cookies Are Delicious, But Boy Are They Complex! Evolving State Privacy Legislation

By Jackie Romano, Self Esteem Brands LLC

In the fall of 1994, a young entrepreneur named Lou Montulli invented the "cookie." You may be thinking perhaps that Montulli was employed by Mrs. Fields®, Great American Cookies®, or any other famous franchise brands recognized for their delicious cookies. While his relation to a franchise brand could be true, this article considers a very different type of cookie: a cookie that was originally created by Montulli, ironically, to preserve online privacy by providing consumers a private way to select and save their preferences for an individual website. However, the advertising industry leveraged this cookie construct by collecting and sharing additional details about consumers, which is now the target of privacy laws.

What Is a Cookie? (Not the Chocolate Chip Kind)

While it may seem like a relatively straightforward concept, the cookie that is the subject of this article is not so simple. So, what is a "cookie" and why is it complicating not only the regulatory landscape but also marketing activities?

A cookie is a small text file or short lines of software code. The file includes small pieces of text, such as letters, numbers, and other symbols. This text also includes an identification code unique to that consumer's computer or device. A webpage uses the identification code contained within this cookie to track a consumer's activity on the webpage.

There are two main categories of cookies. The first category includes cookies that are essential to the proper functioning of the webpage. These cookies are known as first-party cookies, and they belong to the organization that owns the webpage, such as the franchisor. First-party cookies are innocent when it comes to privacy legislation.

The second category of cookies is called a third-party cookie, and it is the subject of this article and privacy legislation. These cookies are used in the context of digital marketing. In digital marketing, organizations use cookies to collect data about the consumer which enables these organizations to provide relevant advertising to the consumer. For example, the cookie may collect data on the interests of consumers via widgets such as a "like" button. Organizations, such as social media platforms, also use these cookies to build a profile of consumers' interests based on the consumers'

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online browsing behaviors across multiple websites. Then, the social media platforms show relevant advertisements to the consumers when they next visit the social media platforms based on what they glean from the consumers' online activities.

The following example may help clarify the difference between first-party cookies and third-party cookies: A consumer browses Mrs. Fields' webpage searching for the perfect chocolate chip cookie. The webpage has a button hosted by a social media platform that is embedded into Mrs. Fields' webpage to "like" a double chocolate chip cookie. The consumer eagerly clicks the "like" button. However, the consumer may not realize that this "like" is communicated back to the social media platform. Mrs. Fields places the social media platform cookie on Mrs. Fields' webpage so that the social media platform receives this communication. It may come as no surprise that the consumer, when next visiting the social media platform, sees an advertisement for Mrs. Fields' cookies. The social media platform cookie is a third-party cookie. Mrs. Fields pays the social media platform to help market its cookies. This is merely one example, as there are many other ways in which organizations leverage third-party cookies to assist in their marketing efforts.

In addition to third-party cookies, there are other online tracking technologies that are similar to these cookies. For example, a tracking pixel is a text file that also allows organizations to gather information about their consumers. This article refers collectively to pixels and similar technologies as "cookies." Third-party cookies are one of the reasons that states are promulgating privacy legislation.

Franchises Should Consider Evolving Privacy Legislation When Designing Marketing Programs

Privacy legislation may be the most important regulatory framework to consider when it comes to third-party cookies. Franchisors and franchisees may fall within the scope of privacy laws, perhaps without even knowing it. Franchisors that meet the statutory thresholds (described below) must comply with these requirements. Franchisees may also need to comply if the franchisees engage directly with local digital marketing vendors. There are two state privacy laws already in effect today: the California Consumer Privacy Act (CCPA), Cal. Civ. Code §§ 1798.100–1798.199; Cal. Code Regs. tit. §§ 7000–7304, and the Virginia Consumer Data Protection Act (VCDPA), Va. Code Ann., tit. 59.1, Ch. 53, § 59.1-575. States have passed additional privacy laws that consumers can enforce in 2023: the California Privacy Rights Act of 2020 (CPRA), which amends the existing CCPA, Cal. Civ. Code §§ 1798.11–1798.199; Cal. Code Regs. tit. §§ 7000–7304; the Colorado Privacy Act (CPA), Colo. Rev. Stat. Ann. §§ 6-1-1301–6-1-1313; the Connecticut Data Privacy Act (CTDPA), Conn. Gen. Stat. Ann. §§ 42-515–42-525; and the Utah Consumer Privacy Act (UCPA), Utah Code §§ 13-61-101–13-61-404. Additionally, during the years 2024, 2025, and 2026, the following states are expected to implement privacy laws: Washington (pertains to health data only) (H.B. 1155); Texas (H.B. 4); Montana (S.B. 384); Iowa, Iowa Code Ann. §§ 715D.1–715D.9, and Iowa Senate File 262; Tennessee, Tenn. Code Ann., tit. 47, Ch. 18, § 47-18-3201-3213; and Indiana, Ind. Code § 24-15.

More states are expected to follow suit with their own privacy legislation. In addition to other requirements regulating the way in which personal information is processed, these laws grant state residents certain rights when it comes to cookies and similar technologies. Third-party cookies collect personally identifiable information under privacy legislation because, among other reasons, they collect a unique identification number. For this reason, they fall within the definition of "personal information" under the privacy laws referenced in this article. *See, e.g.,* Cal. Civ. Code § 1798.140(v)(1); Va. Code Ann. § 59.1-575. These laws ensure that consumers have more control over their personal information. One way they do this is by giving users the ability to "opt out" of certain third-party cookies.

Outside of the United States, privacy regulations have been in effect for quite some time. In certain respects, these regulations may have more stringent requirements when it comes to how businesses use third-party cookies. The European General Data Protection Regulation (EU 2016/679), effective on May 25, 2018 (GDPR), governs how the personal data of European residents can be processed. The GDPR provides strict requirements related to what constitutes valid consent when it comes to the placement of third-party cookies. Following the withdrawal of the United Kingdom from the European Union on January 31, 2020, the United Kingdom implemented its own version of the GDPR, which went into effect on January 1, 2021 (UK GDPR). The Privacy and Electronic Communications Directive 2002/58/EC, updated by Directive 2009/136/EC (Directive on privacy and electronic communications, otherwise known as the ePrivacy Directive), complements the GDPR by offering citizens and residents specific privacy rights in relation to third-party cookies. The GDPR, UK GDPR, and the ePrivacy Directive require affirmative "opt-in" consent prior to the placing of certain third-party cookies rather than "opt-out" consent, as required under the United States' state privacy legislation.

What is an "Opt-Out" Request?

The state privacy laws referenced in this article include provisions that require organizations to put controls in place related to third-party cookies. These provisions are referred to as the consumer's right to "opt out" of cookies and related technologies used for certain types of marketing activities (such as behavioral and/or targeted advertising). Franchisors may also hear this referred to as the "right not to sell or share consumer's personal information" with other organizations. Complexities arise because these privacy laws have different requirements related to cookies. Under the amended California law (CPRA), the "opt-out" requirement applies in the context of sharing personal information with another organization for cross-context behavioral advertising. *See, e.g.*, Cal. Civ. Code § 1798.185. Under the Virginia privacy law, this requirement applies in the context of sharing personal information with another organization for targeted advertising. Va. Code Ann. § 59.1-573(5). Franchisors may need to honor "opt-out" requests where a consumer tells the franchisor that it does not want to receive marketing advertisements. So, how should a franchisor honor an "opt-out" request and, therefore, avoid facing potential enforcement action?

Honoring "Opt-Out" Requests and Avoiding Enforcement Action

Franchisors (and franchisees in some cases) should consider the following:

1. These laws only apply to organizations that meet certain statutory thresholds. The franchisor should complete an analysis to determine which laws apply.
2. The franchisor should consider completing a cookie audit. Franchisors may complete the cookie audit using an automated tool via a third-party vendor or manually. This will provide the franchisor with information to determine whether third-party cookies are placed on its webpage. The cookie audit finds and records all cookies for the franchisor. The franchisor may need to understand the purpose of the cookie, where it is placed, who owns it, and all other relevant information. The franchisor needs this information to comply with the "opt-out" requirement.
3. The franchisor should ensure that it has the necessary agreements in place with the organizations that own the third-party cookies. The agreements need to include "service provider" obligations (under California privacy legislation) and "processor" obligations (under other state privacy legislation). For a comprehensive discussion of these roles, see Tyler Thompson and Colin Krull, *Managing Personal Information Roles in the Franchise Relationship: New Privacy Laws Mean Ensuring the Right Processing Roles Is More Important Than Ever*, Vol. 26, No. 02, The Franchise Lawyer, at 14–17 (Spring 2023).
4. The franchisor should provide adequate notice to consumers, for example, through its online privacy notice. The franchisor will need to tell consumers that they have the right to "opt out" of certain third-party cookies as well as provide other information as required under the legislation.
5. As part of this notice, the franchisor should communicate the methods for the consumer to submit their "opt-out" request. There are different ways to do this depending on the privacy legislation. The amended California privacy law (CPRA) includes prescriptive requirements, stating that the business needs to provide a clear and conspicuous link on its webpage titled "Do Not Sell or Share My Personal Information." Cal. Civ. Code § 1798.135(a)(1); Cal. Code Regs. tit. 11, § 7013(f). Virginia and other state privacy laws do not require a specific title. Under these laws, franchisors should give consumers the ability to "opt out" on their webpage via a hyperlink titled "cookie settings," "cookie preference," or similar wording. Notwithstanding the "opt-out" requirement under these laws, the franchisor may choose instead to give consumers the ability to "opt in" rather than "opt out" of cookies. The franchisor may take this "opt-in" approach for a number of reasons, including to comply with more stringent regulatory

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What's Old Is New Again: Updates to the American Arbitration Association Commercial Arbitration Rules

By Lisa Romeo, Assistant Vice President, American Arbitration Association-International Centre for Dispute Resolution

Last updated as of October 1, 2013, the American Arbitration Association, Inc. ("AAA") revised its Commercial Arbitration Rules and Mediation Procedures ("Rules"), effective September 1, 2022. Based on feedback and contributions from both internal and external constituencies, including users and arbitrators, the revision process took two years. The updated Rules include several major changes, as well as updates that codify certain existing policies or informal procedures.

"Orderly, Economical, and Expeditious"

Since the AAA's founding, it has been focused on providing speedy, cost-effective processes for its clients. The 2022 revisions to the Rules are designed to continue that tradition.

The AAA has updated the Rules in several key areas, including technology, speed, economy, security, and privacy. Expanding the use of technologies in arbitration and reaffirming the arbitrators' authority to manage the process are some of the hallmarks of this most recent update.

Updates to the new Rules include:

- Providing greater arbitrator discretion to decide the method of hearing;
- Adding new procedures for consolidation and joinder requests;
- Confirming the AAA's commitment to the confidentiality of the arbitration process;
- Highlighting the safety and security of user and case information by stressing the importance of discussions between the parties and the arbitrator about cybersecurity, privacy, and data protection; and
- Reinforcing the AAA's commitment to efficiency and economy through changes to the "Expedited Procedures."

Lisa Romeo
American Arbitration Association-International Centre for Dispute Resolution

Expedited Procedures Updates

The AAA designed its "Expedited Procedures" for use in cases with lower claim amounts to maximize time and cost savings for the parties. They provide for limited information exchange, a single day of hearing, arbitrator service at a set, flat rate, and shorter timeframes in which an arbitrator should hold a hearing and render an award.

Updates include:

- **Rule R-1(b), Agreement of Parties ("Expedited Procedures" eligibility)**—increasing the upper limit for the application of the Expedited Procedures from $75,000 to $100,000 and expanding the number of cases eligible for these procedures.
- **Procedure E-5, Discovery, Motions, and Conduct of Proceedings**—in an Expedited Procedures case, adding a prohibition on discovery, other than the exhibit exchange two days before the hearing under E-5(a), and a provision noting that, should the arbitrator allow additional discovery, the AAA may remove the case from the Expedited Procedures; additionally, in E-5(c), absent the arbitrator's determination of good cause shown, prohibiting motions.
- **Procedure E-8, The Hearing**—providing that, if a second day of hearing is scheduled, the AAA, in consultation with the arbitrator, may remove the case from the Expedited Procedures.
- **Procedure E-10, Arbitrator's Compensation**—on cases removed from the Expedited Procedures, providing for arbitrator compensation in accordance with Rule R-57 at their regular hourly rate (as opposed to the lower flat fee).

These updates strengthen the Expedited Procedures to ensure a prompt and economical resolution of cases in this bracket. Parties who wish to expand discovery and timelines may still do so by agreement, with certain conditions.

Large, Complex Case Track/Rules Updates

The Large, Complex Case ("LCC") Procedures comprise rules that supplement the standard rules and apply to the larger arbitration claims filed with the AAA. Recent updates include:

- **Rule R-1(c), Agreement of Parties ("Large, Complex Commercial Disputes" case tracks)**—increasing the threshold from $500,000 to $1 million for application of the "Large, Complex Case" procedures.
- **Procedure L-2, Arbitrators (large, complex case procedures)**—increasing the minimum claim/counterclaim amount from $1 million to $3 million for a panel of three arbitrators, absent any number specified in the parties' agreement.

Preliminary Hearing Procedures Updates

The Preliminary Hearing Procedures comprise just two rules, but they help the parties and arbitrators achieve a thorough and well-conducted preliminary hearing conference. Recent updates include:

- **Procedure P-2(vi), Checklist (preliminary hearing procedure; cybersecurity, privacy, and data protection)**—now includes as an agenda item that the arbitrator and parties discuss cybersecurity, privacy, and data protection during every preliminary hearing. This supplements the cybersecurity resources the AAA provides to the parties at case initiation: AAA-ICDR's *Best Practices Guide for Maintaining Cybersecurity and Privacy* and *Cybersecurity Checklist*.
- **Procedure P-2(xii), Checklist (preliminary hearing procedure, third-party funding)**—adds as a potential topic for discussion at preliminary hearings the existence and identity of sources of third-party funding, with the goal of complete arbitrator disclosures.

General Rule Updates

Updates to the general Rules include two new Rules (R-8 Consolidation and Joinder and R-45 Confidentiality) and Rules codifying certain policies or informal procedures previously in place:

- **Rule R-2(d), Administrative Review Council**—providing in the Rules that the Administrative Review Council (the "Council") has decision-making authority for the specified administrative issues for cases administered pursuant to AAA's Large, Complex Case Procedures. For LCC Procedure cases, the Council has the authority to determine whether the initiating party met the filing requirements contained in the Commercial Arbitration Rules, challenges to the appointment or continuing service of an arbitrator, and disputes of the locale of the proceedings. This rule reflects the Council's *Review Standards* and *Overview and Guidelines*, available on the AAA's website at www.adr.org/arc.
- **Rule R-8, Consolidation and Joinder**—providing a procedure for a party to file a request to consolidate two or more existing arbitrations into a single proceeding or to request the joinder of additional parties to an ongoing arbitration. Rule R-8(a)(iii) grants the AAA the authority to appoint a consolidation arbitrator for the limited purpose of determining the consolidation request. This rule also includes a framework for the arbitrator to decide the consolidation or joinder request and, if granted, outlines the authority of the arbitrator to make decisions about any previously appointed arbitrators or arbitrator selection on the newly consolidated case or as to joined parties.
- **Rules R-22 (former Rule R-21), R-25 (former Rule R-24), R-33 (former Rule R-32) and Expedited Procedure E-7, Use of Video, Audio, or Other Electronic Means**—updating Rules R-22, R-25, R-33 and Expedited Procedure E-7 to reflect the now widespread use of meeting technology that may make the arbitration process more effective and efficient. Rule R-22 includes the use of videoconference as a method for conducting the preliminary hearing, and Rule R-25 and Expedited Procedure E-7 similarly include video, audio, or other electronic means as a method of hearing, when appropriate and agreed upon by the parties or ordered by the arbitrator. While the AAA had previously interpreted the prior version of the Rules to allow the arbitrator to order the use of technology to facilitate hearing attendance, the new Rules now specifically provide for this authority.
- **Rule R-34 (former Rule R-33), Dispositive Motions**—requiring the arbitrator to consider the time and cost associated with the briefing of a dispositive motion when determining whether to allow a party's request to file such a motion. The arbitrator also is

empowered to assess fees, expenses, and arbitrator compensation as part of a decision on a dispositive motion.

- **Rule R-39 (former Rule R-38), Emergency Measures of Protection**—authorizing the emergency arbitrator to consider whether a party moved for emergency relief in good faith when deciding cost allocation under new Rule R-39(i), and updating the Rule to exclude from the Emergency Measures of Protection procedures cases administered pursuant to the Expedited Procedures, in keeping with the AAA's commitment to administering smaller cases in the most economical manner.
- **Rule R-45, Confidentiality**—reinforcing that AAA staff and arbitrators have always been required to keep arbitration matters confidential, new Rule R-45(a) codifies those obligations, stating the AAA and the arbitrator will keep confidential all matters relating to arbitration or an award. Also, building upon the arbitrator's authority under Rule R-24 to issue orders preserving the confidentiality of documents, Rule R-45(b) explicitly authorizes the arbitrator to issue any confidentiality orders necessary for the case.
- **Rule R-48 (former Rule R-46), Form of Award**—unless applicable law requires otherwise, allowing an arbitrator to electronically sign an award.
- **Rule R-52 (former Rule R-50), Modification of Award**—permitting an arbitrator, upon a party's request, not only to modify an award for clerical, typographical, or computational errors but also how to interpret the award.

Other Changes

Lastly, the updated Rules include various changes to administrative and similar matters:

- **Rule R-2(c), Standards of Conduct for Parties and Representatives**—incorporating the AAA-ICDR's Standards of Conduct for Parties and Representatives.
- **Rule R-4, Filing Requirements and Procedures**—clarifying differences between filing requirements and the filing process, as well as including, as Rule R-4(b)(vi), an explicit provision that the AAA has the authority to determine whether filing requirements have been met.
- **Rule R-12 (former Rule R-11), Fixing of Locale**—emphasizing that the locale provision in an arbitration agreement governs unless the parties agree to, or the arbitrator determines applicable law requires, a different locale. New Rule R-12(c) addresses arbitration agreements that have multiple locale options.
- **Rule R-13 (former Rule R-12), Appointment from National Roster**—allowing the AAA to limit the number of strikes the parties may use on a Rule R-13(a) list of arbitrators, where appropriate. This addition will help avoid situations where one or more parties struck all of the potential arbitrators on a list, leaving none available for the AAA to appoint.
- **Rule R-17 (former Rule R-16), Number of Arbitrators**—addressing both party agreement and arbitration clauses as they pertain to the number of arbitrators.
- **Rule R-29 (former Rule R-28), Official Record of Proceedings**—allowing a party to arrange for any form of transcribed record or other recording, reflecting the myriad technology options now available.
- **Rule R-40 (former Rule R-39), Closing of Hearing**—extending the deadline to close the hearing to no more than seven days after the receipt of post-hearing submissions, to allow arbitrators time to determine if additional submissions are needed.
- **Remedies for Non-Payment, Rule R-59(a) (former Rule R-57(a))**—providing further detail regarding the optional measures a party may request the arbitrator order to address a delinquent party's non-payment of administrative fees or arbitrator compensation or expense deposits.

The goals of the AAA's revised Commercial Arbitration Rules—to ensure parties achieve a resolution to their disputes through an orderly, economical, and expeditious process—remain the same now as they were in 1950. These amended Rules strengthen the arbitrator's authority; reinforce the speedy and economical resolution of all cases; harness technology advancements that can make the arbitration process more streamlined and cost-effective; and continue to ensure the integrity, security, and confidentiality of the arbitrations administered pursuant to these Rules. ■

The Franchisee's Ownership Changed, Now What?

By Kyle T. Orne and Kate L. Benveniste, DLA Piper LLP (US)

Courts have long recognized that "a franchise agreement is a contract of a personal nature," giving the franchisor "the right to choose those whom they will treat as franchisees and to whom they will be obligated under agreements and statutes in light of the fact that franchisees are bearers of the franchisors' trademarks in the world of commerce." *Iannuzzi v. Exxon Co., USA, Div. of Exxon Corp.*, 572 F. Supp. 716, 721 (D. N.J. 1983).

Today, franchisors generally permit (and some require) their franchisees to operate their franchises through legal entities rather than in a personal capacity. However, because legal entities can be bought, sold, and readily transferred through the sale of stock or membership interests, the franchisee entity can technically remain the same while those who own it—and, by extension, usually control it—can change entirely. That is increasingly true as more private equity firms invest in franchisee companies, resulting in an explosion of multi-unit franchisees operating more like big businesses than individual franchise owners or sole proprietorships. *See* Helen Bond, *Partners in PE? Private equity, meet multi-unit franchisees!*, Multi-Unit Franchisee Mag. (2022) https://www.franchising.com/articles/partners_in_pe_private_equity_meet_multiunit_franchisees.html.

So how does a franchisor protect its "right to choose" its franchisee in this new landscape? Enter: change-of-control requirements.

Change-of-Control Requirements

To protect the franchisor's "right to choose" its franchisee, franchise agreements have historically included anti-assignment and/or anti-transfer provisions that preclude the franchisee from transferring or assigning the franchise agreement to another person or entity without the franchisor's consent. But imagine the franchisee is ABC Corporation with 100 shares of stock wholly owned by a single individual. At some point, that stockholder may seek to sell all or a majority of her shares in ABC Corporation, whether to another company, or simply to another individual. Because the owner sells her shares and not the assets of ABC Corporation, the corporation remains the franchisee under the franchise agreement. This scenario, unlike the case of an asset sale, may not implicate the typical anti-assignment or anti-transfer provision to preclude a sale of stock or membership interests. *See Vantage Mobility Int'l LLC v. Kersey Mobility LLC*, 836 F. App'x 496, 498 (9th Cir. 2020) (holding that an anti-assignment provision was not applicable because the deal "involved the purchase of membership interests and not assets").

To avoid being stuck with a new franchise controller that they may not want and may have legitimate reasons to not approve, many franchisors now include change-of-control consent requirements in their franchise agreements. Such requirements generally require a franchisee entity to obtain the franchisor's consent before effecting a change of control of the franchisee entity.

A typical change-of-control provision in a franchise agreement broadly prohibits the franchisee from changing, selling, or transferring its ownership to an unaffiliated third party without the consent of the franchisor, which the franchisor usually cannot unreasonably withhold. The exact application of such provisions, however, depends on the language in the particular franchise agreement.

Codifying this trend, a handful of states, including Arkansas, California, Iowa, Nebraska, and New Jersey, have adopted provisions expressly regulating a franchisee's (and in some cases, the franchisee owner's) transfer of an interest in the franchise. Those laws generally preclude such a transfer without the franchisor's consent. *See, e.g.*, Ark. Code § 4-72-205(a); Cal. Bus. & Prof. Code § 20028(b); Iowa Code § 523H.5(1), (11); Neb. Rev. Stat. § 87-405; N.J. Stat. Ann. § 56:10-6.

For example, Section 20028(b) of the California Franchise Relations Act, added in 2016, provides that "a franchisee shall not have the right to sell, transfer, or assign the franchise, all or substantially all of the assets of the franchise business, or a controlling or noncontrolling interest in the franchise business, without the written consent of the franchisor." Cal. Bus. & Prof.

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Code § 20028(b). This law effectively functions as a change-of-control provision in a franchise agreement, even where the franchise agreement is silent on the issue or is limited to provisions that merely restrict the transfer or assignment of the franchise agreement.

At the same time, these statutes frequently provide protection for the franchisee and its owners to preclude the franchisor from unreasonably withholding consent to a transfer by requiring the franchisor to, among other things, fairly apply established standards to its consent decision, to provide an explanation of any denial, and to timely make a decision. *See, e.g.*, Ark. Code § 4-72-205(b); Cal. Bus. & Prof. Code §§ 20028(b), 20029(b); Iowa Code § 523H.5(1), (7)-(10); Neb. Rev. Stat. § 87-405; N.J. Stat. Ann. § 56:10-6. Some franchise agreements provide similar protections and, even where they do not, the implied covenant of good faith and fair dealing could provide franchisees further protection. *See Larese v. Creamland Dairies, Inc.*, 767 F.2d 716, 717–18 (10th Cir. 1985) (holding that franchisor may not act unreasonably or arbitrarily in withholding consent to transfer franchise rights, even where the franchise agreement did not expressly provide that protection).

So long as the franchisor does not run afoul of the franchisee's statutory or contractual protections and has a legitimate reason to withhold its consent to a new owner, franchisors may take advantage of these contractual or statutory change-of-control consent provisions to dictate who gets a stake in a franchisee entity.

Remedies for a Breach or Violation

If an unlawful transfer of an interest in a franchisee entity occurs, the rarely addressed question is: What happens next?

In the context of a restriction in a franchise agreement, the parties can specifically agree on the remedy for a breach. For example, the franchise agreement could prescribe that any change of control in breach of the franchise agreement's consent requirement is a basis for termination, or more broadly provide that breaches of material provisions of the agreement authorize termination—either immediately or absent a cure, depending on the nature of the breach.

In a beer distributor case out of the Sixth Circuit, the franchise agreement at issue provided that the franchisor could "initiat[e] the termination of this Agreement for cause at anytime if [the distributor-franchisee] fails to substantially comply with any of its obligations under this Agreement." *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 847 (6th Cir. 2017). The distribution agreement required the distributor-franchisee to obtain the franchisor's written consent prior to any change in ownership. *Id.* After the distributor-franchisee effected a sale of its membership interests without obtaining the franchisor's consent, the franchisor terminated the franchise agreement. *Id.* The Sixth Circuit affirmed the enforcement of the termination. *Id.* at 852.

The current change-of-control laws can, for better or worse, be much more opaque than the franchise agreement in *S. Glazer's* when it comes to remedies for an unauthorized transfer. These statutes do not specify the remedy for a violation of the change-of-control provision in particular. Instead, whatever remedies are available are in the generic remedies provisions of these franchise relationship laws, which are generally limited to the recovery of damages and/or injunctive relief—typical remedies for violations of the franchisee-protective provisions of these statutes. *See, e.g.*, Ark. Code § 4-72-208; Cal. Bus. & Prof. Code § 20035; Iowa Code § 523H.13; Neb. Rev. Stat. § 87-409; N.J. Stat. Ann. § 56:10-10. That means, besides provable damages—which may be difficult to prove or non-existent—the scope of the available injunctive relief will be left to the courts to craft.

Thus far, it appears that courts have not had the opportunity to determine what type of injunctive relief (if any) would be appropriate for a violation of a change-of-control statute. One option could be the termination of the franchise agreement, like in *S. Glazer's*. However, courts have generally held that termination is not a form of injunctive relief. *See, e.g., Senior Ride Connection v. ITNAmerica*, 225 F. Supp. 3d 528, 533 n.3 (D. S.C. 2016). Further, because the franchise relationship statutes do not expressly permit termination as an available remedy, termination is likely unavailable as a form of injunctive relief. *See Werdmuller Von Elgg v. Carlyle Developers, Inc.*, 09-cv-132, 2009 WL 961144, at *2 (M.D. Fla. 2009) ("Although rescission is a form of equitable relief, the statute specifically includes only the remedies of an injunction or declaratory relief. All of the Plaintiffs' claims for rescission will therefore be dismissed.").

Another theoretical option would be an unwinding of the change-of-control transaction in a sort of court-imposed divestiture, as may occur in the antitrust context. Even in that context, though, "divestiture is a fairly extraordinary remedy, that should not be entered into lightly or without substantial evidence that the benefit outweighs the harm. Its far-reaching effects put it at the least accessible end of a spectrum of injunctive relief." *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1172 (C.D. Cal. 2000). That is because, in the anti-trust context, "[d]ivestiture can have far-reaching effects on persons who are not parties to the litigation. It can affect the viability of otherwise profitable companies, the status of pre-existing contracts, and the fortunes of rivals." *Id.* These risks "caution great care before ordering divestiture at the behest of private plaintiffs." *Id.* Likely for these reasons, divestiture orders are exceptionally rare in cases between private litigants under antitrust law. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 703 (4th Cir. 2021) ("[T]o our knowledge, no court had ever ordered divestiture in a private suit before this case.").

Whether such a remedy is available as an "injunction" for a violation of a franchise change-of-control statute remains unclear. Beyond that, such remedies are often unfeasible or at least would significantly impact the acquiring party, thereby implicating complex issues of jurisdiction and the interests of bona fide third-party purchasers.

Conclusion

Many franchisors have implemented change-of-control provisions as tools to protect themselves from inheriting franchise owners they do not want. Even when franchisors fail to include that tool, some states provide it anyway through statutory provisions. Except where specifically laid out in the provisions of a franchise agreement, however, just how that tool works is still largely up for debate. Under the statutory provisions, can franchisors actually undo unlawful transfers of franchise ownership, or do they have a right without a functional remedy? Courts and arbitrators across the country have yet to answer that question.

In the meantime, entity franchisees should be on the lookout for change-of-control provisions in their franchise agreements as well as any applicable state laws if they want to sell any ownership stake in their franchised businesses. Franchisors, in turn, should be wary of what protections they truly have from change-of-control laws if their franchise agreements do not include such provisions and be sure to comply with any statutory or contractual requirements they have to consent to an ownership change. ■

Cookies Are Delicious, But Boy Are They Complex!

Continued from page 9

requirements if the franchisor operates globally.

6. The franchisor needs to complete a data protection assessment under California, Virginia, Connecticut, Colorado, and other upcoming state privacy laws. Where requested, the franchisor must provide this assessment to the applicable privacy authority such as the state attorney general.
7. The legal and privacy teams should consider working closely with the marketing team to understand existing and upcoming marketing strategies. For example, the marketing team should complete an "audit" of all the marketing vendors that it works with, including a description of the services offered by its marketing vendors. This audit will allow the legal and privacy teams to evaluate whether the franchisor has the necessary contractual requirements and other processes in place with these vendors. Further, the marketing, legal, and privacy teams can work together to strategize best privacy practices for engaging with these vendors, such as by deidentifying or anonymizing information prior to sending it to the vendors.
8. Franchisors should monitor congressional efforts to enact federal-level privacy legislation. A federal privacy law that overrides state privacy legislation could provide franchisors with greater uniformity and ease when it comes to meeting privacy requirements.

Conclusion

Franchisors may be faced with a delicate situation when it comes to managing consumer data privacy issues. Legal and privacy teams could feel empathy for the needs of the marketing department when it comes to fully utilizing consumers' information using third-party cookies. At the same time, the use of cookies imposes complexities when it comes to complying with the rapidly changing privacy landscape. Franchisors and franchisees should stay abreast of ongoing developments. ■

Implementing ESG for a More Sustainable Franchise Relationship

By Rachel Duffy, Smoothie King Franchises, Inc. and Sam Mallick, Haynes and Boone, LLP

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A franchise relationship presents unique challenges to the parties, but it also presents unique opportunities, including with environmental, social, and governance ("ESG") matters. ESG typically encompasses company policies, standards, and even broader philosophy, taking into consideration the well-being of "stakeholders" rather than just the profits of shareholders. This article addresses ESG within franchise relationships and considerations to help franchisors and franchisees embrace ESG initiatives successfully.

For many decades, most companies have prioritized maximizing shareholder profit over competing priorities, often informed by a theory of corporate governance based on a fiduciary duty by the board of directors to the shareholders and the shareholders alone. More recently, however, many companies have implemented ESG to consider their impact on "stakeholders" beyond shareholders. Stakeholders include anyone whom the company's actions impact—customers, employees, suppliers, communities, and others.

In most cases, altruism generally lies at the core of ESG considerations—taking care of others in a community is simply the right thing to do. Increasingly, however, stakeholders demand that businesses adopt ESG policies and philosophies. Some shareholders consider corporate values before investing, and some consumers refuse to patronize businesses whose values do not align with their own. Advocacy groups, proxy advisors, and other ESG ratings groups compile data about corporate carbon emissions, employee well-being, political contributions, and human rights records. As such, while ESG initiatives may be rooted in altruism, they are also often prudent considerations from a financial perspective.

The Interplay between ESG and Existing Law

Beyond altruism, the law often imposes obligations on companies that have a byproduct of achieving ESG objectives. For example, minimum wage laws ensure a baseline of financial well-being for employees. Health and safety codes prevent profit-motivated corner-cutting that could hurt customers. Importantly, but often forgotten, common law also protects stakeholders. For example, tort liability can protect customers (who may well be "business invitees") from harm on a company's premises, and contract law protects franchisors and franchisees from the brunt of broken promises.

In some states and municipalities, these laws go further and more explicitly relate to what many people previously considered within the realm of private ESG initiatives. For example, bans on single-use, non-biodegradable straws seek to create a cleaner environment. Additionally, carbon neutrality deadlines should lead to stronger commitments by companies to reduce their impact on climate change. Collectively, these and other laws implement ESG-motivated public policy. Naturally, companies must follow these laws. But some companies wish to go above and beyond the law's requirements by implementing additional voluntary ESG-motivated initiatives.

Franchised businesses within the same system may face different state, local, or even national laws. Franchisors, therefore, need to consider what state and local laws impact their franchisees across the system and identify any potential brand standards, supply requirements, or other system obligations that may conflict with the applicable law or other public policy. Given that most franchise agreements include provisions requiring franchisees to comply with all applicable laws, such circumstances might require a compromise by the franchisor. For example, franchisors may need to approve an alternative style of takeaway container for certain franchisees or consider modifying the system-wide brand standard to better align with more ESG-sensitive jurisdictions. With this consideration comes a potential impact on costs for franchisees, especially increased costs to franchisees that operate in less ESG-sensitive jurisdictions.

Franchisor and Franchisee Actions

Organizationally, franchise parties with formal ESG programs often house them under the supervision of their general counsel, as ESG goals often overlap with legal mandates, and formal reporting of ESG initiatives (which shareholders, consumers, watchdog groups, and governmental entities increasingly want to see) can look much like regulatory compliance reporting. For many franchisors and larger franchisees, models typically followed by non-franchise companies can serve as suitable foundations upon which they can layer franchise-specific considerations.

Smaller franchisees, especially those operating only one location, will often have fewer resources or less robust infrastructure to implement ESG policies. Despite that, even single-unit franchisees or those operating within tight resource constraints may consider dedicating some time within owners' or board meetings to the discussion of ESG policies, perhaps starting with the basic objective of listing stakeholders and prioritizing potential ESG policies that can serve each stakeholder's needs. Furthermore, franchisors may consider creating or facilitating programs that can assist franchisees in implementing their own ESG policies.

Substantively, a particular company's ESG policies often depend on that company's industry. As an example, many franchise systems in the food service and restaurant industry have considered the environmental impact of plastic straws and their alternatives. Whether replacing plastic straws with paper straws or other compostable alternatives, instituting a policy of requiring customers to ask for straws rather than simply giving them to customers alongside a beverage, or eliminating straws altogether, food service and restaurant franchise companies should expect that their use of plastic straws will continue to face ESG scrutiny.

An example of a food service business making a pivot in response to ESG concerns is how Starbucks redesigned the lid for its iced beverages, reducing the need for straws. Smoothie King, meanwhile, aimed to reduce nonrecyclable waste use by shifting from Styrofoam cups to recyclable plastic. Some franchisees questioned the change, however, voicing that customers in their area preferred Styrofoam to plastic. Smoothie King responded by partnering with a Vio Foam supplier and ordering specially made cups that biodegrade 92 percent in four years under conditions that simulate both wetter and biologically active landfills. Customers now have a choice between a recyclable cup and one that will significantly biodegrade.

Food waste also receives significant ESG attention. The U.S. Department of Agriculture estimates that about one-third of food planned for human consumption in the United States goes to waste, and the U.S. Environmental Protection Agency estimates that food waste in the United States results in CO2 emissions equivalent to that of 42 coal-fired power plants. Jean Buzby, *Food Waste and its Links to Greenhouse Gases and Climate Change*, U.S. Dep't of Agric., https://www.usda.gov/media/blog/2022/01/24/food-waste-and-its-links-greenhouse-gases-and-climate-change. Food service and restaurant systems can address food waste in a variety of ways, from portion sizing to careful tracking of sales patterns to ensure a restaurant does not order too much from a supplier or unnecessarily prepare too much food during slower day parts. The right variety on a menu can also serve ESG ends, with meatless options often having a lower carbon output, and gluten-free, low-carb, and dairy-free options giving customers more freedom to choose options that suit their health and lifestyle needs.

Finally, in the hotel industry, hospitality companies have introduced efforts to reduce water and energy usage by replacing linens only upon request rather than on a daily basis. Other hotel system ESG efforts include sourcing electricity through renewable power sources; providing customers with EV chargers to encourage EV usage; replacing single-use plastic miniature toiletry bottles in favor of larger, refillable containers; and even recycling used guest soap and donating new bars to those in need. *See e.g., Hilton 2021 Environmental, Social and Governance Report*, https://esg.hilton.com/our-reporting. A more recent hotel innovation that may appear to simply be part of an improved guest experience also serves ESG ends: sending digital keys to guests' phones. These digital keys reduce the need for plastic cards while also saving guests from having to get a key from the front desk, encouraging the use of the franchisor's mobile app, and reducing the risk of guests getting locked out of their rooms.

ESG Considerations Unique to Franchising

Franchisors and franchisees interested in implementing ESG have somewhat unique considerations that do not exist in corporate-only operations. The franchise model creates a different set of stakeholders. A franchisor's stakeholders include its franchisees, franchisees' employees, and the franchise system's guests or customers (in addition to any company's typical stakeholders, such as shareholders and board members). A franchisee's stakeholders include the franchisor and the franchisor's employees, other franchisees and their employees, and the franchise system's guests or customers.

While specific ESG considerations will vary depending on the franchisor and industry, franchising-specific considerations include:

- ESG-driven preferences for locally sourced, sustainable food create tension with historical franchisor preferences for a centralized distribution or purchasing system. Some restaurant franchisors have found a middle ground that achieves both ends: fresh produce sourced locally by franchisees and frozen produce sourced centrally by the franchisor, ensuring freshness and sustainability without unnecessarily sacrificing cost or quality considerations.
- Potential economic tensions stemming from a hotel franchisor shifting to digital keys and away from plastic keycards—a seemingly reasonable shift during favorable business conditions but much more difficult for an individual franchisee struggling with profitability or systems experiencing unfavorable macroeconomic conditions.
- Competing ESG priorities are at play when a franchisor requires shifting away from Styrofoam cups and plastic straws in an effort to prioritize environmental concerns over its own profits, but in making this switch may underappreciate certain equity considerations in requiring minority- and immigrant-owned franchisee businesses to absorb higher costs after already investing significant personal or family savings in their franchised units.
- The extent to which franchisors can reasonably implement ESG policies on an ongoing basis through modifications to brand standards or operations manuals (e.g., the addition of a new menu item to provide more meatless options) versus through amendments to the franchise agreement and franchisee consent, particularly where the ESG initiative may call for new fees payable to the franchisor or even third parties.
- Finally, situations where franchisees may demonstrate a stronger desire to pursue ESG initiatives than the franchisor. For example, a franchisee may wish to cut down on single-use plastic only to face a franchisor unwilling or reticent to make an exception to brand standards requiring certain packaging or other single-use plasticware.

While ESG programs in franchise systems certainly can present challenges, the franchise model can nevertheless flex its ESG muscle, particularly when it comes to soliciting a broad array of feedback—from customers, franchisees, and suppliers. Franchise systems have a unique ability to create ESG laboratories for determining which policies can make a real impact and which fall short.

Conclusion

In a world in which customers, governments, and investors increasingly demand sustainability and social responsibility, franchise systems must consider their commitment to ESG objectives. As franchise systems identify, set, and pursue ESG targets, thoughtful and cooperative action among franchisors and franchisees remains critical to success. ■

all navigate the intricacies (and peculiarities) of the ABA. Yolanda's involvement with the ABA began in the early 1990s. She later attended law school and, after graduating, returned to the ABA in 2004. She became the CLE Liaison for all Forums in 2010. She became the Director of the Forum on Franchising in 2013, and she has provided invaluable support and assistance in that role ever since. I have had the pleasure of working with Yolanda since I first joined the GC in 2014. Personally, and on behalf of a grateful Forum on Franchising, I thank Yolanda for her dedicated service and extend our best wishes for the future in her next chapter!

I can't head off into the sunset without making some last requests of our members, which I believe are important to keep our Forum strong going forward:

- Attend our annual meeting! In addition to being the best franchise law CLE available and providing unparalleled networking opportunities, it is the primary revenue generator that supports all our Forum activities. Please register for Dallas if you have not already done so.
- Support our important goals of expanding the membership and diversity of our Forum. If you practice in a firm or legal department, encourage or sponsor a new (especially younger or traditionally underrepresented) attorney to attend the annual meeting and get involved in our activities. If you can't do that, seek out opportunities to meet new attorneys and welcome them into our organization.
- Continue our commitment to excellence in the Forum's programs and work product. It's an essential element of our value proposition.
- Continue the Forum's tradition of collegiality and civility in law practice and personal dealings, whether on opposite sides of cases or deals, on the Listserv, or in direct interactions. More can be accomplished this way, and it makes for such a better professional experience for everyone.

Finally, I want to say thanks to the entire Forum membership for allowing me the opportunity and honor to serve as Chair for the past two years. The Forum has been by far the best and most rewarding professional organization in which I've been involved during my more than 35 years of practicing law. If I can do anything to help any Forum member get involved or get the most out of this great organization, please don't hesitate to contact me.

I look forward to seeing everyone in Dallas this November! ■

Continued from page 1

Message from the Editor-in-Chief

By Erin C. Johnsen, Garner, Ginsburg & Johnsen, P.A.

I find myself filled with gratitude as I draft this letter, which will be my last as Editor-in-Chief of *The Franchise Lawyer*. Over the past three years as EIC, not to mention a number of years as an Associate Editor before that, I have learned an immense amount from so many of you.

I have had the pleasure to work closely with many Forum members on topic brainstorming, article drafts, and (likely sometimes nitpicky) editing. I have been fortunate to work with fantastic editorial teams who have devoted their time to making this publication the best it can be. In serving in Senior Leadership with the Forum, I have seen firsthand the many, many hours that Forum leadership dedicates to making this group what it is—a space for learning, spirited debate, and collegiality.

I am very happy to leave this publication in the capable hands of our incoming EIC, Justin Sallis. Justin has served as an Associate Editor for *The Franchise Lawyer* for the past four years and will do a terrific job at the helm of this publication going forward.

I am also honored to be able to run in my last issue a tribute by the Professors' Committee to the late David Gurnick. I had the opportunity to work very closely with David on a case in California over the course of a few years before his passing. During this time, David taught me much by his example about zealous representation, communication, and taking everything in stride. I will be forever grateful to have had the chance to get to know him.

Thank you so much to all those who made my EIC term a fulfilling and educational experience. Please enjoy reading this summer issue! ■

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