COVID-19 Checklist for Franchisors

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Categories:

Coronavirus Response Team

Publications

Franchisors are now in the throes of COVID-19. Accordingly, franchisors must rapidly assess the far-reaching consequences of this pandemic and implement changes that will mitigate systems risks and position the system for long-term growth. This alert provides a brief checklist highlighting some general franchise law issues that franchisors should be mindful of in light of COVID-19.

Disclosure & Registration Issues:

Omissions of material facts in a franchise disclosure document will subject franchisors to applicable regulatory and private rights of actions under franchise disclosure and registration laws ("D&R Laws"). Given this standard, franchisors must analyze how COVID-19 affects their franchise offering under D&R Laws in 2020 and beyond. This analysis should at a minimum address the following issues:

A. General

- For franchisors that only provide hard copies of their disclosure documents, in this "social distancing" era, these franchisors should consider updating their documents to allow for electronic disclosure and electronic signature.
- For franchisors that intend to negotiate the franchise offering more regularly in order to boost franchise sales, they should consider developing a tracking system to capture these negotiations and be prepared to file and disclose in certain jurisdictions the final terms of the offering.
- Identify the anticipated effects that the pandemic will have on the system.
- Identify any pandemic-specific laws relating to the system (e.g., whether or not the franchise business or its employees or services will be deemed "essential" under applicable law).
- To account for the anticipated administrative backlogs in certain franchise registration states, as applicable, franchisors should consider developing a franchise exemption strategy to try to expedite the closing of major franchise deals in a

timelier manner.

B. Financial

- Analyze and determine current initial and ongoing fees to charge franchisees.
- Analyze and determine whether there are any material changes to the initial investment costs and working capital needs to operate the franchise for a 3-month period.
- Identify any material adverse changes to the franchisor's outlook or financial statements, including any impending restructuring plans and material work-out arrangements.
- Determine whether any franchisor-created or sponsored franchisee financing programs are warranted to help franchisees defray the initial investment costs and fee requirements.
- Determine whether providing any financial performance representations for 2020 is warranted, and if so, develop a strategy to help create legally compliant financial performance representations.

C. Operations

- Identify any material changes with respect to the timeframe for franchisees to identify, build-out, and begin operations of the franchise.
- Identify any material changes to the supply chain of the system.
- Identify any changes to insurance policies requirements and whether the franchisor will require franchisees to use a specific insurer.
- Analyze and implement a standardized delivery service program and create balance encroachment policies to address territorial conflicts that may arise from the delivery service program.
- Require franchisees to have and implement business continuity plans.

- Develop franchise termination, non-renewal, and buy back strategies.
- Analyze and determine whether to create a franchise advisory council to address issues relating to business continuity, safety and sanitation, and public relations.

Other Concerns:

Like the last decade's financial crisis, many franchisors may look to implement the following initiatives to combat COVID-19 concerns:

- franchise buy-outs, terminations, non-renewals strategies; or
- provide financial assistance or negotiate fee deductions or work-out arrangements for certain franchisees.

However, these strategies or policies will need to be decided upon, documented and instituted in a fair and neutral manner in order to mitigate franchisees' claims relating to good faith and fair dealing as well as franchisors' violations of franchise relationship and anti-discrimination laws.

As always, we at Frost Brown Todd are here to help you. I have served as franchise counsel to large and small franchise brands, served as general counsel of a mid-market IT distribution company, and I was also a franchisee during the financial crisis. Given this, my team and I have a 360° view of franchising and can help you navigate through any domestic and international franchise issues.

In closing, we want to send best wishes to you and your family doing these trying times. Please know that we are here for you.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

FBT Gibbons