KILPATRICK TOWNSEND

3 KEY TAKEAWAYS

Is Franchising Doomed?

On September 14, Kilpatrick Townsend's Marc Lieberstein, Franchise and Licensing Partner, and Chris Caiaccio, Labor and Employment Counsel, spoke for Celesq, a leading provider of legal education, on the topic of whether franchising was doomed in light of the new laws and pending legislation that may significantly impact the manner in which franchising parties operate.

Below are takeaways from their presentation.

1

Franchising is not doomed. The data is very clear that even when the laws were not favorable to franchising under prior administrations, franchising still saw growth, along with employment growth. Certainly, franchising saw contraction in some sectors like travel and hospitality, but it also saw expansion in other sectors like commercial and residential services; real estate; retail food products and related services. Yes, some pending legislation and possibly some case law may motivate franchises to make operational changes, maybe even charge higher prices and pay higher salaries, but none of this spells doom for franchising.

2

Current legislative threats to franchising include: (a) Amendments to the National Labor Relations Act – the Protecting the Right to Organize Act (PRO Act), including its adoption of the more expansive "direct" + "indirect" control standard to determine whether a franchisor is a Joint Employer; (b) the ABC Test – a test that makes it very difficult for a franchisee to avoid being deemed an employee of the franchisor; (c) California AB-5 Law which codified the ABC Test in California, recent case law which found that Proposition 22 (approved by voters to get around AB-5 for "gig" workers) was unconstitutional resulting in making it impossible or Lyft or Uber drivers to remain independent contractors; and the California FAST Recovery Act – which was not passed into law, but which would have required fast food franchisors/franchisees to create a Fast Food Sector Council to establish industry-wide minimum standards on wages, working hours and other working conditions. If all that wasn't enough you also have the Department of Labor, now operating under the Biden Administration, that has essentially decided to open things up and apply the "economic realities" test to determine whether an employee/franchisee is in fact an independent contractor or whether a franchisor is a joint employer with its franchisee over the franchisee employees. And last, there's a case still pending in Illinois, *Acuna v. McDonald's Corp.*, which seeks to employ the negligence and vicarious liability standards to bring franchisors under the liability umbrella for local franchisee actions (or inaction).

3

To avoid the potential liabilities franchisors now face, and which current and future franchisees face if franchisors start to pull back on franchising to avoid such liabilities, franchising parties should carefully monitor the current and pending legislation so they can adapt to the new standards that may apply to their business. Franchisors should open lines of communication with their franchisees in order to see where practical, fair and amicable solutions can be implemented to avoid labor and safety complaints, and try to ensure a living wage for the community in which their business operates and employees live. Review, update and/or modify franchise agreements and operations manuals to accommodate for legal changes and marketplace trends. And last, investigate your options for insurance to cover some of the liability risks associated with the new or pending legislation, including a broader joint employer standard.

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