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ANNUAL JOINT CONFERENCE

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A New Era

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NEWS FROM AROUND THE WORLD: UNITED STATES OF AMERICA

May 9, 2018

Washington, D.C. U.S.A.

Mark A. Kirsch
Gray Plant Mooty
Washington, D.C.
United States of America

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Franchising continues to be a thriving, successful and growing business model in the U.S., and continues to add to the overall economic growth of the country. That is not to say, however, that there are not headwinds facing franchising. For example, the unsettled joint employer standard continues to threaten the fundamental business model. In addition, new threats and challenges arise every year — such as the multiple-prong attack on employee anti-poaching provisions in franchise agreements, or discriminatory minimum wage legislation. We will address these and other issues that arose or evolved in 2017 and into 2018. However, despite areas of concern, franchising appears strong heading into the second quarter of 2018.

1. Franchising and the US Economy

Franchising as a business model, and as an economic sector, experienced another year of growth in 2017, and is expected to continue to grow in 2018. While there is debate among policy makers, academics, and political pundits regarding the strength of the US economy, and who should get credit (good or bad), the U.S. economy has been growing in 2017, and is forecast to continue its expansion in 2018.

According to IFA's "Franchise Business Economic Outlook for 2018," the following facts and figures suggest a robust franchising sector for 2018:

- The number of franchised outlets increased by 1.6% in 2017, and the expectation is a further increase of 1.9% in 2018, to reach almost 760,000 franchised outlets or establishments by the end of 2018.

- Franchise employment in 2018 is expected to grow by 3.7% (beating 2017's 3.1% growth rate), with over 8 million people employed in the franchise sector.

- Franchise business output grew 5.6% in 2017, and is expected to grow another 6.2% in 2018, to $757 billion.

- The gross domestic product ("GDP") of the franchise sector is expected to increase to $451 billion in 2018, and this will account for approximately 3% of U.S. GDP.

While all industry sectors within franchising grew in 2017, and are expected to expand in 2018, some sectors have experienced more rapid expansion than others have, as measured by the increase in the number of outlets. One of the fastest growing sectors is franchise personal services, which includes healthcare, education, personal services and selected financial activities.

Despite what should be viewed as a successful business model, and an engine for economic growth in the U.S., there are regulatory and legal issues that are creating a rocky road for franchising in general, and for some businesses or industries in particular.

2. Joint Employer Standard: Flip-Flop and "Do-Over"

One of the most significant challenges facing franchising in the U.S. is the joint employer issue. While much has been written on it (and there is a plenary session at this conference on the joint employer standard in the U.S. and several other countries), there have been a number of developments in the past year. The following is a summary of where things stand, as of April 2018.

For over 30 years (until 2015), the joint employer test, based on U.S. National Labor Relations Board ("NLRB") cases and policies, was that two different entities could be considered joint employers of one party's employee if a second party had "direct and immediate" control over the terms and conditions of employment of the first party's employee. However, in 2015, the NLRB reversed 30 years of policy in Browning-Ferris Industries of California, Inc.[1] ("Browning-Ferris"), and stated that a joint employment relationship could exist if there is "potential" control over a workers' terms and conditions of employment, including control over "the processes that shape an employee's daily work." This shift exposed many businesses – particularly franchised business, and franchisors – to greater risks for workplace liabilities for an employer's action for workers it does not employ.

As a result of this shift in policy, and other challenges to the exercise of franchisor control over franchised business operations, for the past several years, many franchisors began re-evaluating their franchise agreements, FDDs, operating manuals, policies, and field staff practices. In addition, many documents and practices were modified to reduce actual control, limit control to essential brand standards and the delivery of the "customer experience," and to reduce even the appearance of control or potential control.

It should be noted that the joint employment standards do not exist under only the NLRB cases, and the work place rules that the NLRB enforces. The joint employment standard or test may arise in cases under the Fair Labor Standard Act ("FLSA"), which proscribes wage and hour rules for employees. In 2017, an FLSA case was decided that could have significant impact on the joint employment test, and therefore, an impact on franchising. In Salinas v. Commercial Interiors, Inc.,[2] the U.S. Court of Appeals for the 4th Circuit articulated a joint employment standard under the FLSA that is arguably broader than that of the NLRB standard in Browning-Ferris in 2015. The Court found that there is one fundamental question: whether "two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or informally – directly or indirectly – the essential terms and conditions of a worker's employment." The language in the opinion was broad, and if applied to franchising, could call into question whether many typical franchisor and franchise system controls, which are generally imposed to assure compliance with brand standards and not to impose controls over terms of employment, would create the appearance of a joint employment arrangement.

Consequently, in 2017, it appeared that the joint employer test was becoming more strict and more challenging to franchisors. Then came several events that many thought would change, or could change, landscape.

2.1 NLRB: The Browning-Ferris Flip-Flop and the Hy-Brand Case

On December 14, 2017, in a case Hy-Brand and Brandt Construction Co.[3] ("Hy-Brand"), the NLRB overruled the Board's 2015 Browning-Ferris decision, by a 3-2 vote. In Hy-Brand, the NLRB stated that a joint employer determination will be found if there is proof of another entity's exercise of control over essential employment terms, and that the pre-Browning-Ferris standard would be restored. No longer would parties need to evaluate "potential" control, or parse through contractual provisions and operating manuals to divine if a franchisor could control a franchisee's employee. But this "victory" for franchising was short-lived. On February 9, 2018, the NLRB Inspector General issued a memorandum stating that one Board Member who participated in the Hy-Brand decision should have recused himself

[1] 362 N.L.R.B. No. 186.
[2] 848 F.3d 125 (2017).
[3] 365 N.L.R.B. No. 156.

because his former law firm represents a litigant in the Browning-Ferris action. The Hy-Brand decision was vacated, and the NLRB standard reverted back to the Browning-Ferris joint employment standard, in which "potential" control may be sufficient to find the existence of a joint employment relationship. However, as discussed below, a new composition of the NLRB may mean an increased possibility that the NLRB may yet overturn the Browning-Ferris standard in the future.

2.2 NLRB: Impact of NLRB Board Composition on the Joint Employer Test

The NLRB is comprised of five Board Members appointed by the President, but the NLRB may not have more than three Board Members from the same party. From 2007 until mid-2013, the NLRB limped along without a full complement of Board Members. While there has been a full complement of Board Members since mid-2013, there has been significant turn-over due to term limits, and therefore the NLRB was subject to inconsistent or shifting decisions due to the composition of the Board. In early 2017, shortly after President Trump was inaugurated, President Trump appointed a new Board Member. And on April 10, 2018, the Senate confirmed President Trump's nominee, John Ring, to chair the NLRB. So, with two new, or relatively new, Board members, both appointed by the same Republican President, there is the possibility for greater stability and consistency of NLRB decisions. Further, in August 2018, one Democratic Board Member's term will expire, and President Trump will have an opportunity to appoint a new member, albeit another Democrat. (Democrats are generally thought to be less pro-business and more pro-labor than Republicans are). However, President Trump could appoint a more centrist Democrat. Political observers, public policy organizations, and business organizations, including IFA, believe that a different composition of the NLRB, with a more "pro-business" perspective, will bode well for franchising, with the possibility that when the Browning-Ferris matter is reheard, an NLRB with a more pro-business composition may act to shift the joint employment test back to the pre-Browning-Ferris standard.

2.3 U.S. Congress: An Attempt at Clarifying the Standard

As noted above, the joint employment standard or test is evolving, and is subject to different interpretations from the NLRB, the courts, the U.S. Department of Labor, and states. In an effort to try to bring clarity to this issue, in November 2017, the U.S. House of Representatives passed legislation, supported heavily by IFA, called the "Save Local Business Act," HR 3441, that was designed to clarify the joint employer standard. It stated that a joint employment relationship will exist only if a potential employer "directly, actually and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment" which would include hiring, firing and disciplining employees. While this legislation was passed by the House of Representatives, it did not clear the Senate, and was not part of any bill passed by Congress and sent to the President. Consequently, despite strong efforts by pro-franchise groups (including IFA), there is not a uniform federal legal standard for joint employment. A federal law, with a clear standard, would help resolve uncertainty, and could minimize (but not eliminate) inconsistent agency and court opinions. However, despite the Republican control over the House of Representatives and the Senate, it appears that a federal solution to this dilemma is unlikely to occur in the near future.

2.4 State Actions: Separate Attempts to Set a Standard

While actions to enforce employee rights and to prevent unfair labor practices are generally the preserve of the NLRB, states are not prohibited from pursuing actions. For example, New York, which is generally recognized as more liberal than other states, has taken action in this area. In May 2016, the New York Attorney General's Office pursued actions against Domino's Pizza, and, relying on joint employer theories, alleged that the franchisor's mandated use of its employee scheduling software by franchisees, and its failure to fix the system's bugs, contributed to "systemic wage theft" to the detriment of franchisees' employees. In May 2017, the targeted franchisees settled with the New York Attorney General, and paid $480,000 in restitution to workers. However, a lawsuit with Domino's, the franchisor, is ongoing. The New York Attorney General has also pursued FLSA claims against Papa John's Pizza and McDonald's. One element of the New York actions is that the franchisor is exercising control over the franchisee's workplace and the franchisees' employees wages and benefits through the imposition of system-wide scheduling software. These business and operational practices, which are intended to improve efficiencies at the franchised outlets, are alleged to be elements of a joint employment arrangement where the franchisor controls the critical aspects of a worker's employment.

Other states, however, have gone in the other direction, enacting laws to clarify the joint employer standard, by establishing, or seeking to establish, that a franchisee's employee is not an employee of the franchisor. This process began in 2015 in Louisiana and Texas – with considerable efforts by IFA – and has continued through the present. In 2016, six states enacted legislation; in 2017, nine more states enacted such laws; and in 2018, another state followed suit. Also two other states (Missouri and Ohio) are considering such legislation. According to IFA, there are 19 states with "positive" or "proactive" joint employment laws. These are (and the years of enactment):

Alabama	(2017)	North Carolina	(2017)
Arizona	(2017)	North Dakota	(2017)
Arkansas	(2017)	Oklahoma	(2016)
Georgia	(2016)	South Dakota	(2017)
Idaho	(2018)	Tennessee	(2015)
Indiana	(2016)	Texas	(2015)
Kentucky	(2017)	Utah	(2016)
Louisiana	(2015)	Wisconsin	(2016)
Michigan	(2016)	Wyoming	(2017)
New Hampshire	(2017)		

While these 19 states (and possibly 21) are less than one-half of the country (by number of states and by population), and they do not include certain heavily populated Democrat-leaning (or "blue") states, such as California, Illinois, or New York, this is nonetheless significant progress. It may be the forerunner for further efforts to establish a single nationwide standard, or wider national legislative action.

The shifting sands of the joint employer test are still moving under the feet of franchisors and franchisees, and are expected to continue to do so. And there is no guaranty that a re-constituted NLRB will overturn Browning-Ferris and revert back to the long-held standard. But the good news for franchisors is that more policy makers at the federal and state levels are becoming more knowledgeable about franchising, so that the debate, and therefore the decisions and actions, will likely be based on better information and more thorough analysis of the practical business realities of franchising. No matter a person's business or political perspective, an increase in certainty regarding the definition of joint employment is progress, and will be better for franchisors and franchisees to plan for the future and manage their businesses.

3. Anti-Poaching and No-Hire Provisions in Franchise Agreements Under Attack

A typical element of many franchise agreements is a provision that prohibits a franchisee from hiring employees of another franchisee or employees of the franchisor or its affiliates, during the term of the franchise agreement or during a post-termination (or post-expiration) non-competition period. These provisions are referred to as "anti-poaching" agreements or "no-hire" restrictions. Generally, most franchisors that have anti-poaching provisions in their franchise agreements do so to protect their franchisee's investment in their employee training costs. In some industries with high employee turnover, it is estimated that the cost to recruit, hire, train and retain an employee is equal to 40% of that employee's salary. In addition, employee turnover causes disruption in the business operations. Consequentially, there are valid, pro-competitive, pro-franchisee reasons for these restrictions.

In the past two years, these types of provisions have come under attack through private lawsuits, state actions, and proposed federal legislation. The legal theories used to challenge the anti-poaching agreements, which are sometimes called "anti-switching" agreements, fall into three broad categories: (1) violation of the Sherman Act, which is the federal antitrust law; (2) violations of state antitrust laws which have restrictions and prohibitions analogous to the Sherman Act; and (3) violations of state consumer protection and/or unfair and deceptive practices. These attacks had grown more numerous during the past 18 months.

3.1 Multiple Assaults on Anti-Poaching Provisions

In October 2016, the U.S. Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") issued a joint "guidance" for companies seeking to establish or enforce anti-poaching or wage-fixing agreements. The FTC/DOJ press release stated that "workers are entitled to the benefits of a competitive market for their services. They are harmed if companies that would ordinarily compete against each other to recruit and retain employees agree to fix wages or other terms of employment or to enter into so-called 'no-poaching' agreements by agreeing not to recruit each other's employees." The underlying theory of this guidance was that such agreements were anti-competitive and a violation of the Sherman Act, which is the principal U.S. federal antitrust law. Further, in January 2018, the DOJ's antitrust chief issued a press release stating that the DOJ is reviewing potential violations of the antitrust law prohibiting anti-poaching agreements, and is preparing to file enforcement actions against employers for entering into these sorts of agreements. The DOJ has said that it will bring civil actions for violations occurring prior to its 2016 guidance, but will "treat the conduct as criminal" if a company continues to engage in no-hire practices after the 2016 policy guidance. As of the date of writing this paper, no such DOJ actions have been filed.

In 2017, several large QSR franchisors were sued by employees or former employees of franchisees challenging the no-hire or anti-poaching provisions of their franchisee/employer's franchise agreements. In the matter Deslandes v. McDonald's USA, LLC,[4] a former McDonald's restaurant manager claimed that McDonald's no-hire or anti-poaching policy is anti-competitive, and caused her to lose out on a higher paying job at another McDonald's restaurant. In Bautista v. Carl Karcher Enterprises, LLC,[5] one former employee and one current employee of two different Carl's Jr. franchisees filed a class action lawsuit against Carl Karcher Enterprises, LLC (CKE), alleging that the CKE's no-hire clause is an unfair market restriction and a violation of antitrust laws. In November 2017, a Pizza Hut shift manager filed a class action suit against the franchisor, Ion v. Pizza Hut LLC,[6] alleging that the no-hire clause in the franchise agreement was an unreasonable restraint of trade, a violation of the Sherman Act, and a violation of the Texas Free Enterprise and Antitrust Act of 1983. More recently, in January 2018, a former Jimmy John's employee filed a class action claim against Jimmy John's, the sub sandwich franchisor, Butler v. Jimmy John's Franchise, LLC[7], alleging claims similar to the plaintiffs in the actions against other franchisors — namely, the franchisor's anti-poaching provisions in the franchise agreements violate the antitrust laws. To date these cases are in preliminary stages. And even if the plaintiffs cannot achieve class certification, or if they proceed but eventually lose their cases, the legal costs to, and the adverse publicity for, these franchisors can be significant.

[4] *See* Amended Complaint, No. 1:17-cv-04857 (N.D. Ill. Sept. 18, 2017); Complaint, No. 1:17-cv-04857 (N.D. Ill. June 28, 2017).
[5] *See* Complaint, No. BC649777, (Los Angeles Cnty. Super. Ct. Feb. 8, 2017).
[6] *See* Complaint, No. 4:17-cv-00788 (E.D. Tex. Nov. 13, 2017).
[7] *See* Complaint, No. 3:18-cv-00133 (S.D. Ill Jan. 24, 2018).

In the midst of this mini-wave of employee class action suits, the media and academics jumped into the fray. On September 27, 2017, the New York Times published an article "Why Aren't Paychecks Growing? A Burger Joint Clause Offers a Clue," which sought to tie low wage growth in certain industries to these anti-poaching or no-hire clauses. The NY Times article relied heavily on a study by two economists. The following day, the two Princeton economists cited in the NY Times article, Alan Krueger and Orley Ashenfelter, published a paper entitled "Theory and Evidence on Employer Collusion in the Franchise Sector,"[8] which claimed that the anti-poaching provisions of franchise agreements are responsible for lack of employee movement and depressed wage growth. While neither the NY Times article, nor the economists' paper, hold any legal weight, their arguments and positions provided fodder for lawsuits and for proposed legislative action.

While we are waiting to see what the DOJ may do, states are moving at their own pace. The Washington State Attorney General ("Washington AG") has been investigating franchisors who have anti-poaching or no-hire clauses in their contracts. In February 2018, the Washington AG began to issue Civil Investigative Demands ("CIDs") to franchisors with more than 500 franchisees, and is requesting information regarding these companies' policies and practices surrounding the use, implementation and enforcement of anti-poaching agreements, due to a concern over the potential anti-competitive impact and harm to employees. Interestingly, it appears that the Washington AG is using a list of franchisors with no-hire or anti-poaching agreements from the paper published by Krueger and Ashenfelter. The Washington AG is requesting information from franchisors about their agreements, policies and practices, including among other things, (a) a statement as to whether any franchise agreements during the past five years contain an anti-poaching or no-hire agreement, (b) the reasons for having, or changing, a no-poaching agreement during the last five years, and (c) the identity of each outlet in Washington owned by a franchisee or franchisor.

Even more recently, and not to be outdone by states or private parties, in March 2018, two Democratic senators, Cory Booker (New Jersey) and Elizabeth Warren (Massachusetts) introduced a bill in the Senate, the "End Employer Collusion Act" (S.2480), to ban anti-poaching agreements based on the theory that these agreements are a factor in wage stagnation and limited worker mobility. Many "Congress-watchers" believe that as long as the Senate and House are controlled by Republicans, this proposed legislation, and any companion bill in the House, is unlikely to get traction or move forward as a law. Nonetheless, there is legislative and popular support to eradicate these contract provisions.

3.2 Franchisor Actions and Responses

So, what does this mean for franchisors? First, it is important to note that there has never been a case that has found that these anti-poaching provisions are illegal or anti-competitive. Under U.S. antitrust jurisprudence, restraints of trade are analyzed differently if they are vertical restraints versus horizontal restraints. Horizontal restraints (that is, those between persons or entities at the same level in the distribution arrangement) are viewed as more insidious than vertical restraints (which are agreements between persons or entities at different levels of the manufacturing/sales/retail chain). Agreements between franchisees are generally viewed as horizontal, but agreements between a franchisor and its franchisees are often analyzed as vertical restraints. If the restrictions are viewed as "vertical" restraints, these agreements will be, or should be, analyzed under the "rule of reason" standard rather than the "per se" rule of illegality under the Sherman Act. If there is a pro-competitive reason or benefit, these agreements are likely to be upheld. But, the analysis may not be that simple. If franchisors and their affiliates have company-owned outlets (under a "dual distribution" arrangement) the restraints could be viewed as horizontal. Also, some franchisors may have implemented, or modified, anti-poaching policies

[8] Alan Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (Princeton U., Working Paper No. 614, 2017), http://arks.princeton.edu/ark:/88435/dsp014f16c547g

at the behest of, or in consultation with, franchise advisory councils, committees or associations. This is another factor that can suggest collusion at a horizontal level. Therefore, the existence of an anti-poaching provision in a franchise agreement may not be easily dismissed as a legitimate, pro-competitive vertical agreement.

Despite the existence of valid, pro-competitive reasons for these agreements, and despite this author's (and his law firm's) experience that these contract provisions are rarely enforced and often ignored (or not even considered by franchisors, franchisees, and employees in hiring decisions), the potential threat of a claim, a sanction, a class action lawsuit, or a government investigation is not a hypothetical risk. It is real, as evidenced by the actions of the past 18 months. The likelihood of such an event may vary based on the size of the franchise system, as it appears that the targets of class action plaintiff's lawyers and the Washington AG are large franchisors. Nonetheless, it should not be ignored. For even if an anti-poaching clause is legal and defensible, a franchisor may be subject to unwanted adverse publicity, legal costs, liability for treble damages, and administrative time and costs to address claims and investigations.

Franchisors are well advised to evaluate these provisions, as all anti-poaching are not the same. Do they apply to all employees or just a group of employees, such as management level employees who have received specialized training? Do they cover employees of only franchisees, or also employees of the franchisor and its affiliates? Is there a financial penalty imposed on a franchisee for hiring another franchisee's employees? Does the franchise agreement permit the "poached-upon" franchisee to bring a claim against the "poaching" franchisee as a third party beneficiary? Does the franchisor require that its franchisees sign non-compete agreements with some or all of its employees, and do these contracts include anti-switching restrictions on the employees? What was the original business purpose or intent of the provision, and is at still applicable today? How often has the provision been enforced within the system? All of these questions will bear on how an anti-poaching or no-hire agreement is evaluated by a court, or a state agency such as the Washington AG.

Until such provisions are found to be illegal, some franchisors may decide to continue to utilize, and seek to enforce these agreements, because they reflect critical policies intended to protect a franchisee's investment. But, a franchisor may consider dropping these clauses completely, if they are not useful or enforced. They may wish to modify them to eliminate or reduce a potential "horizontal" competitive impact. They may wish to modify them to be less restrictive, such as clarifying the purpose, and/or limiting them to management level employees. For example, some of the popular support for abolishing anti-poaching agreements is based on the assumptions that these agreements restrict wage growth at lower levels of the labor force. Also, franchisees tend to invest more heavily in management training, and suffer higher costs due to turn-over in the management ranks. Therefore, limiting the scope to only management level employees who have received specialized brand-specific training from the franchisor may reduce the risk of an adverse decision by a court or government agency.

If the DOJ makes good on its claims to pursue actions against companies with no-hire agreements, we will have better visibility into government enforcement protocols and policies. Further, state actions, like those of the Washington AG will provide additional guidance. But franchisors should not sit idly by, waiting to see whether a state or federal agency will investigate. Franchisors should start the process of evaluating the benefits – and risks – of these provisions, and craft sensible practices for the future.

4. The FTC Rule

Ten years flies by fast! It has been 10 years since the implementation of the FTC's Amended Franchise Rule (the Amended Franchise Rule was adopted in 2007, but it was not required for all franchisors until 2008). Consequently, under the provisions of the FTC Act and the FTC Rule, the FTC must begin the process of reevaluating the Amended Franchise Rule.[9] A federal administrative rule-making, can be a long and laborious process, which is governed by federal rules pertaining to the writing, evaluating, and adopting of new or amended federal regulations. The process involves notices to the public of a future rule-making, public comment periods in which interested parties can submit written comments and proposals, and sometimes there are public hearings (as there were in conjunction with adoption of the original FTC Franchise Rule in 1979 and the Amended Franchise Rule), written draft rules, subsequent public comment periods, and eventually an amended Rule. The process to adopt the 2007 Amended Franchise Rule took over 10 years. It is hard to imagine that the process for this current round will take another 10 years. But the franchising industry has changed over the past decade. It's more sophisticated and advanced, with a diversity of businesses, industries, and models for franchising. There is widespread use of technology. There are more experienced and sophisticated investors and franchisees, yet many franchise systems that cater to "Mom & Pop" and less experienced franchises. And the methods by which prospective franchisees obtain information and evaluate franchises is quite different then it was in 1979 (the year the first FTC Franchise Rule was adopted), or even 2007. So, whether the industry is prepared for another long rule making, or an abbreviated review, it can be a valuable exercise.

5. NASAA's Financial Performance Representations Commentary

Of all of the Items in the FDD, only Item 19 – Financial Performance Representations ("FPRs" or formerly known as "Earnings Claims") – is optional. Franchisors do not need to include FPRs in their FDDs, and if there is an FPR, there is a significant degree of latitude regarding the form and details of an FPR. This flexibility allows for variations from industry to industry, and from franchisor to franchisor. But, the flexibility can create challenges for franchisees and state examiners in evaluating and comparing FPRs from competing brands. Therefore, in an effort to try to clarify FPR rules, the North American Securities Administrators Association ("NASAA"), which is an umbrella organization that includes state franchise regulatory agencies, developed a "Commentary" of informal guidelines for FRPs. After several years of study, evaluation, draft commentary, public comments, and revisions, on May 8, 2017, NASAA issued its Financial Performance Representation Commentary for franchises. The Commentary provides guidelines for drafting the FDD Item 19 FPRs (in addition to the NASAA FDD rules and the FTC's Amended Franchise Rule). The Commentary is not a law nor is it a regulation. However, state franchise examiners will look to the Commentary to evaluate FPRs and FDDs. Also, franchisors should expect that franchisee advocates and courts may look at the Commentary for guidance on evaluating FPRs.

While the Commentary was issued in May 2017 (the day before this conference started last year), there was a six-month phase-in period, during which franchisors were not required to draft FPRs in conformity with the Commentary. Nonetheless, many franchisors were following the Commentary in 2017. However, as of 2018, all FDDs must adhere to these new guidelines. The Commentary "requires" certain new disclosures (e.g., using "median" figures in a data set, and including the highest and lowest figures in the data, along with the previously established rule for using "mean" or average figure. The Commentary also clarifies certain rules or interpretations that were not previously clear or not consistently applied (e.g., separating data of company-owned outlets from franchised-owned outlets). In

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[9] Notice Announcing Ten-Year Regulatory Review Schedule and Request for Public Comment on the Federal Trade Commission's Regulatory Review Program, 76 Fed. Reg. 134, 41150-4 (July 13, 2011) (codified at 16 C.F.R. chap. I). *See also*, Federal Trade Commission Act, 15 C.F.R. § 57a (2018); Amended Franchise Rule, 116 C.F.R. pt. 436 (2018).

2017, some states franchise examiners advised franchisors and their counsel that the state agency would evaluate FPRs in 2017 as if the Commentary was effective, and many franchisors modified their FDD Item 19 disclosures accordingly. However, with the full implementation in 2018, franchisors should expect a rigid and rigorous review of FPRs by state agencies.

6. State Legislative Actions

It seems as though each year one or more states consider adopting franchise-specific laws. This past year was no exception. Several states – Florida, New Jersey and Pennsylvania – introduced franchise relationship bills into their sessions in early 2018. Florida adjourned in early March without holding a single hearing on the proposed legislation. In Pennsylvania, the proposed legislation was referred to further study. In New Jersey, which is still in session, the proposed legislation is under consideration but it is still early in the process. If history is prologue, the franchise industry should expect additional proposed legislation to be introduced in the next year in these or other states. But, that will likely not occur until the next legislative sessions, beginning in January 2019.

7. Minimum Wage Legislation

Minimum wage laws are not franchise-specific, and generally (with some exceptions) are not intended to have a franchise-specific impact. However, many franchised businesses operate in industries with a significant number of lower wage workers (e.g., food service and hospitality). Therefore, minimum wage legislation will have an impact on many sectors in franchising. Also, many changes in minimum wage laws, at the state and local levels have been spurred by workers advocate groups (e.g., "Fight for $15" which lobbied for a $15/hour minimum wage in many states) who identify workers at franchises or chain outlets as deserving of higher wages.

The federal minimum wage ($7.25/hour) has not changed since 2009. However, there have been considerable efforts and changes at the state and local levels. Currently there are 29 states and the District of Columbia that have minimum wages that are higher that the federal minimum wage. Several states and cities have voted to raise the minimum wage to $15/hour, and those increases will be phased in over time.

Of significant concern to franchising advocates are laws that actually, or appear to, discriminate against franchise establishments. For example, in Seattle, and more recently in Minneapolis, the phase-in for the higher minimum wage requires a faster phase-in based on the size of the entity, and it lumps all owners of "chain" businesses into one category, regardless of the actual number of employees that a business employs. This ignores the practical and business realities of franchised business ownership. Therefore, the owner of one franchised sandwich shop that is part of a franchised chain will be required to phase-in higher wages at a faster rate than a similarly situated non-franchised sandwich shop owner, even though both own and operate only one business and have the same number of employees. There are other employment and wage-related laws, or pending legislation that may have a discriminating impact on franchising. For example, the City of Philadelphia is in the process of drafting legislation regarding predictive scheduling for employees (which, it is argued hinders a workers ability to obtain full-time work and forces workers to seek multiple jobs) that will apply to only "big box" retail stores and franchise establishments, regardless of employee counts. Again, these types of laws treat franchise owners as part of a larger company or organization, and ignore the realities of single-business ownership. IFA announced that it will continue to monitor, and oppose, the discriminatory aspects of these types of legislation.

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In sum, 2017 was not a turbulent year, or year of upheaval for franchising in U.S. But it was neither a year of calm seas. The joint employer issue was a key concern in 2017, and will likely continue to be a critical issue in 2018. Other issues, such as attacks in anti-poaching agreements, will likely cause ripples in the franchising waters in 2018. So while we expect that franchising will continues to grow in the U.S., there will be issues to navigate.

Mark A. Kirsch

Mark Kirsch is a principal attorney at Gray Plant Mooty, in the Washington, D.C. office, and is co-chair of the firm's Franchise & Distribution Practice Group. His practice is focused on U.S. and international franchising and distribution matters. He represents clients ranging from large national and international chains to emerging systems across a diverse range of industries, on various corporate, commercial, licensing, franchise, and business development matters. Mark's work primarily involves transactional and regulatory matters, mergers and acquisitions, as well as counseling on dispute resolution and mediation of franchise-related disputes. Mark often authors articles and speaks at industry seminars about a variety of issues including branding, licensing, franchising, and distribution issues. Mark is also an operating partner for 10 Point Capital, a private equity firm that invests in franchise businesses and brands. He is active in the franchise industry, including past service as chair of the International Franchise Association's Supplier Forum, and was a member of the IFA's Board of Directors. Mark is consistently recognized for his client service and legal prowess by clients and peers in Chambers USA, The International Who's Who, and Lexology Client Choice Awards, among others.