

2023 LEGAL SYMPOSIUM

MAY 7-9, 2023 | WASHINGTON, DC





JUDICIAL UPDATE



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Register at: franchise.org/events

Recent Developments in Independent Contractor Classification and Joint Employer Status

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Independent Contractor Classification and Joint Employer Status

- NLRB Developments
- DOL/FLSA Developments
- State-Level Developments
- Future Outlook



NLRB Developments

- New Joint Employer Rule (proposed Sept. 2022)
- IFA Comments: “wreaks havoc on the franchise business model”
- Would impose joint employer liability based on “indirect, potential” authority over essential terms of employment
- Would adopt an extremely broad definition of “essential terms”
- Final rule expected this year; litigation challenge highly likely

Atlanta Opera case also expected to change NLRB’s independent contractor standard; “employee” status more likely already



USDOL/FLSA Developments

- New Independent Contractor rule proposed Oct. 2022
- Second attempt to rescind Trump DOL's more "business friendly" standard; would return to vague "totality of circumstances" test
- Limiting IC's to "independent businesses" not "central"
- Legally obligated "control" factors to be given new weight

- Biden DOL already rescinded Trump joint employer rule last year
- Litigation confusion reigns in wage and OT class actions



State Developments

- AB 5 continues to spread from California
- The blurry line between JE and IC standards
- The importance of joint employer “shield” laws in many states
- A “sigh of relief” in Massachusetts: *Patel v. 7-Eleven (2022)* (franchisees found not to be “employees”)



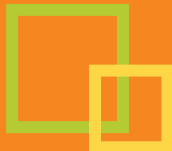
Future Developments

- NLRB expansion of JE test remains an existential threat to franchising
- DOL expansion of IC test expected to continue also
- Can the industry “run out the clock” in the courts?
- Countdown to 2025



New Developments in International Law

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International Aspects

- International franchising is on the increase in 2023. Despite high levels of inflation, rising interest rates, fears of recession and the war in Ukraine, I remain optimistic that the rest of this year and into next year will be good for international franchising.
- According to the IFA's 2022 Franchising Economic Outlook, the industries most likely to franchise are new car dealers, private mail centers, hotels and motels, limited service restaurants, automotive oil change and lubrication shops, diet and weight-reducing centers, soft drink manufacturing, and electronic stores.
- Artificial intelligence known as AI is already present and will continue to expand. Drive through takeaways like Carl's Jr have been trialling AI for some time. This is likely to be rolled out even more in 2023 including apps for use by a particular consumer. Also IT systems are continuing to develop for the benefit of franchisees. There is no replacement for robust systems which work and make life a bit easier for franchisees and their employees and contractors. In addition, several major fast food and convenience store chains have recently announced a big push into electronic vehicle (EV) charging. Convenient store chain 7-Eleven recently launched its own EV fast-charging network called 7Charge.



International Aspects (continued)

- **Australia:** It is one of the world's most franchised countries but there are considerable regulatory issues with bringing a franchise into the country. It seems to me that Australia has more franchise legislation and complications than the US. There are also mandatory laws in relation to good faith.
- **New Zealand:** There is no franchise specific legislation and it is the most franchised country in the world per head of population with 580 franchise systems. There are no good faith laws but since August 2022 there are unfair contract terms and unconscionability which is a good thing in my opinion.
- **Singapore:** There is no legislation and it is a great market to operate in. It has a robust contract law and there is no mandatory duty of good faith. Singapore is an attractive market for franchisors as it is an open economy with one of the most liberal trading regimes in the world. Foreign franchisors are welcomed and the US is the dominant supplier of foreign franchises there. I could find no litigation cases involving franchising.
- **United Kingdom:** There are no franchise laws and it is an excellent market with strict controls imposed by the British Franchise Association. For new food and beverage brands wanting to enter, investors and funding banks want to see skin in the game from the foreign franchisor.



Covenants against Competition

- All of the cases which I have commented upon in my paper involve covenants against competition, except for one case
- Restraint during the term of a franchise agreement
- Restraint following termination or expiration or sale
- Courts have recognised that it is reasonable both for a person/franchisee to be restrained from any competitive conduct
- Restraint – restrictive covenants or agreements in restraint of trade must not exceed the boundaries of the notion of reasonableness
- Restraints on competition clauses must be carefully drafted after considerable thought for otherwise they could be unenforceable by the courts



Water Babies International Ltd v Williams & Ors

- Water Babies is a UK franchisor operating in New Zealand and Ms. Williams was the franchisee in Wellington
- The franchise agreement was for 5 years and the agreed end date was October 7, 2019. However, Ms. Williams “did the dirty”
- Water Babies turned into Swim Baby and the baddy was Ms. Tizzoni who was Ms. Williams’ cousin
- Swim Baby Limited conducted swimming classes for babies just like Water Babies did
- Breach of IP and breach of restraint of trade
- High Court granted an interim injunction which restrained both Ms. Williams and Ms. Tizzoni
- Parties settled the dispute soon after. Judgment confirms importance of restraint on competition clauses in franchise agreements



Dwyer (UK Franchising) Ltd v Fredbar Ltd & Anor [2021]

- Dwyer is the franchisor of the Drain Doctor, a plumbing and drain repair services franchise
- In October 2018 Fredbar entered into initial 10 year franchise agreement with Dwyer, with Mr. Bartlett as guarantor
- In March 2020 Bartlett told Dwyer that he would have to self-isolate due to his son being clinically vulnerable because of COVID-19
- After discussion it was agreed that Dwyer would suspend all franchise fees while Bartlett was self-isolating
- During suspension Bartlett began to work under Fredbar trading as Daily Drains, and not Drain Doctor
- Dwyer terminated the agreement and brought a claim seeking damages from Fredbar
- The Court confirmed that the termination was lawful



Dwyer (UK Franchising) Ltd v Fredbar Ltd & Anor [2021]

(Continued)

- The post-termination restrictive covenants set out that Fredbar and Bartlett should not for a period of 12 months following termination be engaged in a business similar to or competitive with the Drain Doctor business within the territory or within a radius of 5 miles from the territory
- The Court said that the covenant preventing Fredbar being engaged in any plumbing or drainage business within the Cardiff territory was unenforceable
- Dwyer appealed the judgment and Court of Appeal dismissed the appeal which concerned the enforceability of post-termination restrictive covenants
- Court of Appeal held that (1) High Court was right to conclude that on the particular facts the 12 month restriction was unreasonable and unenforceable; and (2) High Court did not err in concluding that any unreasonable part of the restrictive covenant could not be severed
- The case highlights that the enforceability of post-term restrictions in franchise agreement subject to English law depends on the specific circumstances surrounding each individual agreement



Australian Competition and Consumer Commission (ACCC) v Geowash Pty Ltd

- Geowash as the franchisor was involved in car wash services and most franchisees were located in Western Australia
- ACCC began investigating Geowash in late 2015 and subsequently launched court proceedings
- ACCC sought declaratory and injunctive relief, disqualification orders as well as costs for loss or damage sustained as a result of conduct for Geowash had made false or misleading representations on its website
- ACCC also brought proceedings against director of Geowash, Sanam Ali, and franchising manager, Charles Cameron and both Ali and Cameron were found to be knowingly involved in Geowash's unconscionable conduct and failure to act in good faith



Australian Competition and Consumer Commission (ACCC) v Geowash Pty Ltd (Continued)

- On June 22, 2021 the full Federal Court of Australia found that the unconscionable conduct complained of caused franchisees to suffer loss and damages and it was appropriate to make redress orders
- Geowash was ordered to pay \$2.5 million by way of pecuniary penalty. Ali was ordered to pay \$1.045 million by way of pecuniary penalty in respect of declared contraventions
- Cameron was ordered to pay \$656,000 by way of pecuniary penalty in respect of declared contraventions
- Ali was disqualified from managing companies in Australia for 5 years and Cameron was disqualified for 4 years, and each was ordered to pay \$500,000 as partial redress to franchisees for the losses which the franchisees had suffered



Data Security and Privacy

Lee Plave, CFE
Plave Koch PLC



Data Security and Privacy – State Legislation

- California Consumer Privacy Act of 2018 and the California Privacy Rights Act of 2020 (effective Jan. 1, 2020 as amended and effective Jan. 1, 2023)
- Colorado Privacy Act (effective July 1, 2023)
- Connecticut Act Concerning Personal Data Privacy and Online Monitoring (effective July 1, 2023)
- Iowa Consumer Data Protection Act (effective Jan. 1, 2025)
- Virginia Consumer Data Protection Act (effective Jan. 1, 2023)
- Utah Consumer Privacy Act (effective Dec. 31, 2023)



Data Security and Privacy – Federal Legislation

- 1974 – The Privacy Act of 1974
- 1996 – The Health Insurance Portability and Accountability Act (HIPAA),
- 1998 – The Children's Online Privacy Protection Act (COPPA)
- 1999 – The Gramm-Leach-Bliley Act (GLB)



Data Security and Privacy – Federal Legislation

- 1970 – The Fair Credit Reporting Act
- 1974 – The Family Education Rights and Privacy Act of 1974
- 1991 – The Telephone Consumer Protection Act of 1991
- 1994 – The Drivers Privacy Protection Act of 1994
- 1988 - The Video Privacy Protection Act of 1988
- 2003 – The Fair and Accurate Credit Transactions Act (FACTA),
- 2003 – The Do-Not-Call Implementation Act of 2003
- 2003 – The Controlling the Assault of Non-Solicited Pornography And Marketing (CAN-SPAM) Act
- 2008 – The Genetic Information Non-Discrimination Act



Potpourri: Notable Franchise Cases From the Past Year

Nina Greene
Venable LLC



Notable Franchise Cases

- Peterbrooke Franchising of Am., LLC v. Miami Chocolates, LLC -- The Language in the Franchise Agreement Matters
- JTH Tax, LLC v. Agnant -- Preliminary Injunction Denied Where Franchisee Showed Evidence Showed That Franchisor did not Have Substantial Likelihood of success on the Merits
- Doctor's Assocs. LLC v. Khononov – Preliminary Injunction Denied Because Irreparable Harm Lacking Where Liquidated Damages for Violation of Covenant not to Compete Exists
- LG2, LLC v. American Dairy Queen Corporation -- Minnesota Franchise Act Does Not Apply to Transfer or Assignment



Notable Franchise Cases

- Hofbräuhaus of Am., LLC v. Oak Tree Mgmt. Servs. -- Court Disregards Forum Selection Clause and Transfers Case for Convenience of the Parties
- Pinnacle Foods of California, LLC v. Popeyes Louisiana Kitchen, Inc. -- Development Agreement is not a Franchise Agreement
- Pinnacle Foods of California, LLC v. Popeyes Louisiana Kitchen, Inc. Rest. Brands Int'l, Inc. -- Implied Covenant of Good Faith and Fair Dealing and Unfair Trade Practice Claims Fail When They are Duplicative of Contract Claims
- Planet Fitness Int'l Franchise v. JEG-United, LLC -- Lost Profits not Allowed for Agreement to Agree
- Pizza Hut Foods, LLC v. Ronak Foods LLC -- Steritech Reports Admissible and Lost Profits Allowed

