



2024 > LEGAL
SYMPOSIUM

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Survey of Franchise Sales Programs

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Today's Agenda

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The Survey Says: Incentive Programs

2

Best Practices/Key Pressure Points

3

Anti-Discrimination Challenges: The Cases

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Anti-Discrimination Challenges: The Statutes

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Other Franchise Considerations

Incentives are not a Panacea

- Too many Franchise Offerings; Not enough Qualified Candidates
- Incentives will not fix Problems with Unit Level Economics
- Incentives are not an Emerging Franchisor's Golden Ticket
- Franchise Brokers many not be the Answer



Franchise Disclosure Requirements

- Item 5 – Initial Fees
- Item 6 - Other Fees
- Item 11 – Franchisor Support



Traditional Incentive Programs

- Typically include Discounts for New Franchisees, Existing Franchisees and Franchisee or Franchisor Employees
- Franchise Referral Incentives
 - Don't turn Franchisees into Franchise Brokers



VetFran/First Responder Incentives

- IFA's VetFran program; over 600 franchisor members
- Do not Overlook the Potential Gaps in Small Business Ownership Experience



Diversity Incentives

- Consider Key Factors to Enhance Likelihood of Success
- Diversity Incentives are open to Legal Attacks and PR Attacks



Anti-Discrimination Case Law for Franchising

- Analogize to private employment law for reverse discrimination legal analysis in franchise context
- Section 1981 of the Civil Rights Act of 1866 bans racial discrimination in contracting
 - Includes reverse racial discrimination
 - Excludes other bases for discrimination



Racial Discrimination Claims under § 1981

- Intentional discrimination can be proven through direct or circumstantial evidence
- Rigorous standard for direct evidence
- *McDonnell-Douglas* burden-shifting framework for circumstantial evidence



The *McDonnell-Douglas* Framework

- First, plaintiff must establish prima facie case of discrimination:
 - Member of protected class;
 - Qualified for job;
 - Suffered adverse employment decision; and
 - Replaced by person outside protected class or treated differently than similarly-situated non-protected employees
- “Stronger showing” required for reverse discrimination



The *McDonnell-Douglas* Framework

- Next, burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision
- The existence of an affirmative action plan provides such a rationale



Racial Discrimination Claims under § 1981

- Affirmative action plan is invalid if:
 - Not designed to eliminate manifest racial imbalances in traditionally segregated job categories; or
 - Unnecessarily trammels interests of white employees
- Also possible to prove intentional discrimination using circumstantial evidence without satisfying *McDonnell-Douglas* framework



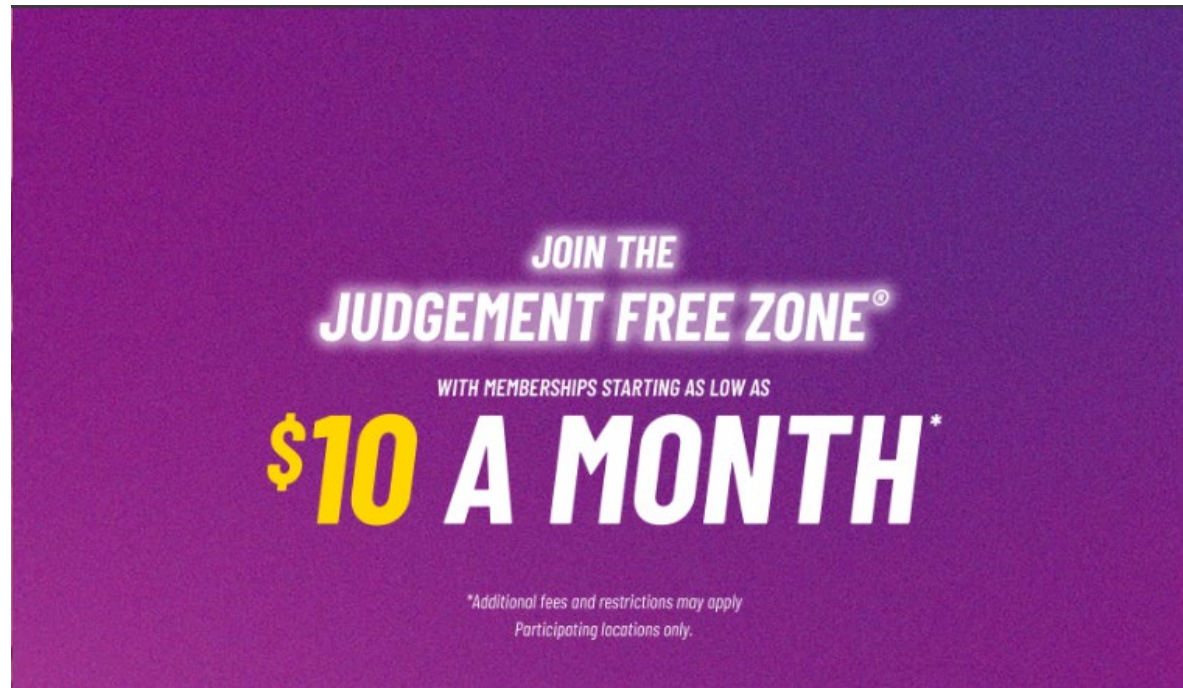
Anti-Discrimination Case Law Takeaways

- Reverse discrimination liability in franchising can only exist in the context of race
- A valid affirmative action program can neutralize reverse discrimination liability in franchising



State Franchise Anti-Discrimination Laws

This part of the presentation is not very exciting and you can get a great workout just a short walk from here...



Limited Application of State Franchise Anti-Discrimination Laws

- Only in a minority of states
- Standing issues
- Safe harbors
- Similarly situated franchisee

General Landscape

- Only California and Iowa provide standing to prospects
- Other states with broad franchise anti-discrimination provisions:
 - Hawaii, Illinois, Indiana, Washington, Connecticut, Minnesota
- Some states have anti-discrimination restrictions limited to termination and non-renewal
- General good and faith dealing requirements

Standing

- Prospects
- Prospective transferees
- Other similarly situated franchisees



State Safe Harbor Laws

“Nothing in this section shall be interpreted to prohibit a franchisor from granting a franchise to prospective franchisees as part of a ***program or programs to make franchises available to persons lacking the capital, training, business experience, or other qualifications ordinarily required of franchisees, or any other affirmative action program adopted by the franchisor.***”

Cal. Civ. Code § 51.8

Similarly-situated Franchisees



Questions

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