

# Protecting Against Franchising Vicarious Liability Claims

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## Franchise Agreement Language To Protect Franchisors From Claims

- The Parties are independent contractors, no agency relationship exists and neither Party shall have the right to bind the other
- The Franchisee shall submit to the Franchisor, for its prior approval, copies of all advertising and promotional materials it plans to use
- Franchisor and Franchisee are independent contractors, no agency relationship exists
- Franchisee is prohibited from making representations that have the potential to establish any agency, employment, or joint venture relationship with Franchisor
- Franchisee is solely responsible for day-to-day operations of its business
- In all agreements and contract forms used by the Franchisee, the Franchisee shall enter into contracts only in its own business entity name, and shall include a bold disclaimer:
  - This business is operated pursuant to a franchise agreement between Franchisee and Franchisor. The parties are independent contractors. Franchisor is not liable for Franchisee's debts or for fulfilling Franchisee's obligations under this Agreement
  - Franchisee shall not open any bank account, incur any debts or apply for credit in the name of or using the name of the Franchisor
- Franchisee has sole control over Franchisee's employees, including their hiring, their wages and their terms of employment
- In all employment applications and employee manuals, the Franchisee shall include, in bold, the following notice: This business operates pursuant to a franchise agreement between Franchisor and Franchisee. Only Franchisee is your employer. Only Franchisee may hire or fire you, set your wages, establish the hours and terms of your employment and resolve any employment related disputes you may have. You will not be/are not an employee of Franchisor
- Franchisee shall post a notice on its premises, which is in plain view of its customers, which reads:
  - This business is operated pursuant to a franchise agreement between Franchisee and Franchisor. Franchisee alone is responsible for conducting this business
- Franchisee agrees to indemnify Franchisor and its affiliates and their respective representatives and their employees and agents against all claims arising out of the manner in which Franchisee has conducted its business
- Franchisee shall carry all such insurance policies as Franchisor shall prescribe, with at least the minimum coverage prescribed by Franchisor, and shall name Franchisor and its affiliates and their representatives, directors, agents and employees as an additional insured on all such policies
- Franchisee shall cause its insurance carriers to provide notices of all such policies and notices of any modification or cancellation at least 30 days before any such coverage changes or is terminated
- If Franchisee fails to carry any insurance prescribed by the Franchisor, at Franchisor's option, in addition to any other remedies available to Franchisor, Franchisor may purchase such insurance coverage and charge Franchisee 150% of its cost of procuring

the coverage, and Franchisee shall promptly pay Franchisor such amount upon receipt of its demand for payment

- Franchisor will not be held liable for injury, death, or property damage of any person caused by the Franchisee's negligence, action, failure to act, or misconduct whether or not covered by the Franchisee's insurance
- Franchisee shall, at all times, operate the business in full compliance with applicable laws. Franchisee is responsible for understanding and complying with all laws relating to the operation of the franchised business. Franchisee shall not rely upon any forms or suggestions from Franchisor as legal advice
- The franchised business shall, at all times, be operated by a manager who has been approved by Franchisor and who has satisfactorily completed Franchisor's mandatory training program. Franchisee alone shall decide whom to hire as a manager, and shall be solely responsible for the terms of the manager's employment

## **Practical Advice To Protect Franchisors From Claims**

### Put the World on Notice

- Purchase order forms should not bear the trademarks of the franchise network without also including the Franchisee's company name
- Purchase order forms should clarify that the Franchisee is independent and autonomous from the Franchisor (e.g. by stating: "*The trademark [...] together with the stamp of the firm (Franchisee) exclusively indicates that the firm is part of the franchising network operating under the Trademark, but in no circumstances can the activity carried out by the firm affect the Franchisor*" Tribunal of Fermo, Italy November 3, 2002)
- Consumers/customers/employees must be advised that the Franchisee is independent of the Franchisor
- Advertising and marketing should clarify – implicitly or explicitly – the nature of the relationship
- Customers must appreciate which entity they are dealing with
- Notices can be included on signs, business cards, receipts, advertisements, letterhead, contracts, cheques, etc
- Franchisors should review all advertising and marketing materials prepared by Franchisees
- The Franchisee's company name should not include the Franchisor's name
- Franchisor should avoid using language that suggests that it guarantees the goods/services of its Franchisees
- In the franchise agreement, avoid incorporating any provisions that the Franchisor will be unable or unwilling to monitor and enforce
- Franchisors should monitor and enforce standards required by the franchise agreement and operations manuals

Franchisors should:

- Avoid mandating comprehensive employment standards and procedures
- Avoid prescribing forms for use in the employment context
- Resist the urge to direct Franchisees on employment issues
- Carefully consider any hands-on involvement with Franchisees' businesses

**THANK YOU**

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