

3 KEY TAKEAWAYS

Is Franchising Doomed (2024 Version)?

On June 12, [Kilpatrick'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.

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Franchising is not doomed. Despite the numerous obstacles franchise businesses have faced in recent years including high inflation, governmental regulation, labor shortages, and to a lesser extent, supply chain issues, franchising has persevered and continues to stand strong and grow. While franchising saw contraction in certain sectors, it also saw growth in other sectors like quick service restaurants, commercial/residential services, real estate, and personal services. Current and pending legislation/case law may compel franchises to make operational changes and adapt to the existing environment, but such laws will not likely doom the franchise model.

Current legislative threats to franchising include: (a) National Labor Relations Board's ("NLRB") Final Joint Employer Rule, which makes it significantly easier for franchisees and their employees to establish that the franchisor under which they serve is their joint employer and potentially jointly liable; (b) NLRB Case Decisions impacting franchise businesses, including a decision which significantly lessened the standard for finding that a worker (i.e., franchisee) is an employee and not an independent contractor; (c) Federal Trade Commission's ("FTC") Non-Compete Ban striking non-compete clauses from all agreements for nearly all workers nationwide (although the franchisor-franchisee agreement was exempt); (d) Department of Labor's ("DOL") Final Overtime Rule, which substantially increases the salary threshold to take advantage of one of the white collar exemptions (administrative, executive, and professional employee exemptions); (e) DOL's Final Independent Contractor Rule, which makes it more likely that franchisees and their employees will be deemed employees and not independent contractors for purposes of the Fair Labor Standards Act, opening the floodgates for wage and hours claims and nullifying the independent contractor relationship; and (f) California AB 1228, which, among other things, establishes a minimum wage of \$20 per hour for employees of National Fast Food Chains (more than 100 locations), and provides that the minimum wage can be adjusted annually.

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To avoid the potential risks and liabilities franchisors now face, and which current and future franchisees may face if franchisors start to pull back on franchising, franchise parties should: (a) carefully monitor the current and pending legislation so they can adapt to the new standards that may apply to their business; (b) franchisors should open lines of communication with their franchisees to implement practical, fair and amicable solutions to avoid labor and safety complaints and try to ensure fair wages and benefits and safe workplaces; (c) to the extent possible, franchisors should leave business operations to the franchisee, and instead focus on brand-related controls and brand standards to maintain brand consistency and value; (d) franchisors should also review, update and/or modify franchise disclosure documents, franchise agreements and operations manuals to account for the legal changes and marketplace trends; (e) beware and consider striking the non-compete and non-solicitation provisions in your franchise and employment agreements, and instead employ retention policies, NDAs and/or trade secret policies to incentivize employee loyalty and to protect your marketplace advantage and proprietary information; and (f) franchisors should look into their options for better insurance coverage to cover the liabilities associated with the recent legal developments, including the potential for a much broader joint employer standard.

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