



## INSIGHTS

### Key Legal Considerations For Franchised Businesses Reopening During COVID-19

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#### Highlights

Franchise systems, regardless of location, should stay abreast of rapidly changing guidance, legislation and regulations regarding COVID-19 reopening plans and best practices and adapt their franchise materials and operations as needed

As franchised businesses reopen, they can expect a surge in COVID-19 related workplace litigation

The use of technologies by franchised businesses to monitor and ensure employee and customer safety raises data privacy concerns

With businesses reopening throughout the country comes the realization that "business as usual" is no longer the norm in the era of COVID-19. What are some of the key legal considerations as franchised businesses reopen?

#### Employment and Joint Employment

Franchised businesses, like many other businesses, have implemented

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layoffs, furloughs and pay cuts in an attempt to deal with the financial devastation of COVID-19. As these businesses are reopening, they will need to adapt their workplaces to ensure employee safety. Litigation challenging employment practices in response to the pandemic is expected to surge and involve claims about workplace safety, personnel cuts, and changes in wages, compensation, and benefits, including:

- Discrimination regarding inconsistent application of workplace practices and policies
- Failure to pay time worked, including donning and doffing protective equipment and time spent on temperature checks
- Failure to comply with the federal and state WARN Acts in conducting layoffs and plant closings
- Leave policies and practices, including failure to approve leave requests related to medical issues or caring for sick family members
- Misclassification of workers as independent contractors
- Mishandling of employees' health information in connection with medical screenings such as temperature checks, including failure to provide compliant notices to employees before collection of employee health information
- Retaliation for making or participating in workplace complaints.

These claims are expected to rise on an individual and class action basis. We have developed a [COVID-19 Related Workplace Litigation Tracker](#) to share up-to-date information on individual, class and collective actions.

In franchising, employment claims can reach not only the individual franchise that directly employs the workers, but also the franchisor due to the increase of joint employment litigation in recent years. While there have been new limits on joint employer liability through rulemaking by the [National Labor Relations Board](#) and the [Department of Labor](#), several states are challenging those rules in court. Federal legislation has also been introduced to expand joint employer liability.

With joint employer liability in a state of constant flux, it remains a threat to franchise systems.

In the era of COVID-19, franchisors and franchisees should tread carefully around employment issues. Franchisors should consider going a step further and taking prompt and appropriate steps to mitigate the risk of being deemed a joint employer. Careful planning and auditing of franchise materials is critical.

## **Data Privacy**

Franchises looking to reopen are considering or implementing new technologies as a way to keep their employees and customers safe.

These technologies can range from temperature checks and hand scanners to social distancing and contact tracing apps. With the use of any of these technologies, however, come concerns over data privacy and protection.

For example, will the use of the technology be voluntary or a precondition for employees returning to work or for customers patronizing the business? What specific data will be collected and how will it be used or shared? How long will the data be stored? When and how will the data be destroyed? Many of these questions are being addressed in [recently introduced federal legislation](#) related to COVID-19.

Franchises seeking to implement new technologies in response to the COVID-19 pandemic should monitor legal developments in the data privacy arena and remain vigilant in maintaining the confidentiality and security of any personal data they collect.

## **Contractual Obligations**

The COVID-19 pandemic has materially affected franchise systems around the country, and some industries, including restaurants, hospitality, health and fitness, and personal care services, have been particularly hard hit. The extent of the impact varies by location, as different jurisdictions move to reopen in phases with no uniform consensus.

As a result, some franchises may not be able to reopen for some time and will struggle to pay operating expenses, royalties and other franchisee-related fees to the franchisor, which may cause those businesses to fail to meet specific franchise obligations. Franchisors may not be able to provide services required under the franchise agreements to their franchisees. Facing this business disruption, both franchisees and franchisors may seek to be excused from their contractual obligations.

To ameliorate the risk of breach of contract claims, consider reviewing the specific terms of the parties' franchise and related agreements to assess what events might excuse performance and whether a dispute falls within that scope. This assessment should be undertaken before nonperformance.

For example, do the agreements include a force majeure clause and, if so, what is its scope and application to the matter at hand? Do other doctrines such as commercial impracticability, frustration of purpose, and impossibility of performance apply? What does the franchise agreement say with respect to a contractual limitations period, applicable law, alternative dispute resolution, and recovery of attorneys' fees and costs? Or is negotiating new or modified terms a possibility or a good idea?

This analysis will depend on the contract terms, facts and jurisdiction. In the event the parties agree to make any changes to their contractual obligations, consistent handling and proper documentation is necessary.

Even if compliance is not an issue, now is the time to be proactive, review, and improve future franchise and related agreements. This review can be done from the lens of including events like COVID-19 as force majeure events and evaluating dispute resolution provisions to ensure they provide appropriate mechanisms to resolve disputes in a timely and cost-efficient manner.

Such review can also examine whether the agreements contain the

appropriate language to ensure that franchisors can implement brand standards to adapt in times of crisis and that they can enforce those standards against actions that threaten damage to the brand.

## Compliance

Franchise systems with locations in various states should stay abreast of rapidly changing legislation regulations, and guidance issued at the federal, state and local level. Indeed, some government officials are requiring businesses to have a COVID-19 plan in place before they may reopen to ensure that appropriate policies and protocols are in place to safeguard personal health and safety. Others have issued guidelines and toolkits by industry sectors such as retail, health and fitness centers, personal care services, youth sports, restaurants and bars. We have been [actively monitoring legislative, regulatory, and executive developments](#) in response to COVID-19, at both the federal and state levels.

Ultimately, whether a COVID-19 plan is required or not, franchises should consult applicable laws, regulations, and guidance. Careful planning now may help minimize potential legal exposure to franchises navigating pandemic risks to their employees and customers upon reopening.

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