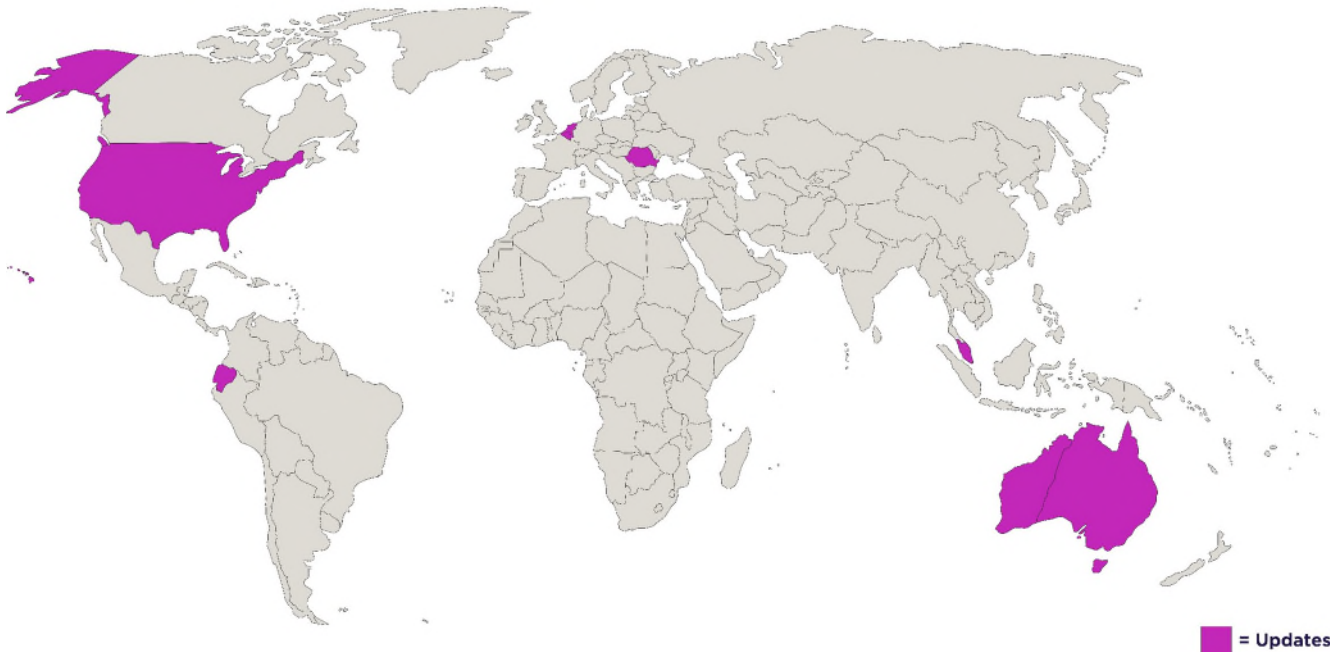


Global Franchise Regulation Update*

Regulatory Developments and Proposals since 2019
By: Carl E. Zwisler and Hannah H. Fotsch

Updated February 2, 2021

Regulatory Development and Proposals



*Does not include pandemic-related regulations.

European Union

European Commission

[Proposed Contract Language to Address Schrems II \(November 2020\)](#)

- In November 2020, the European Commission published proposed contractual language regarding the transfer of personal data between the EU and other countries, in an attempt to address the Schrems II holding. The proposed contract language also attempts to help those transferring data incorporate safeguards for data transfers above and beyond the current contract language. The comment period closed December 10, 2020.
- In the Schrems II opinion issued by EU Court of Justice on July 16, 2020, the court ruled that the EU-U.S. Privacy shield does not adequately protect personal data, in part, because any of it is accessible by the U.S. National Security Agency. EU and U.S. Department of Commerce are attempting to negotiate a resolution.
- Fines and penalties of up to the greater of €20 million or 4% of a company's global annual sales are permitted for violations.
- Class action lawsuits and other judicial relief is also available.

EU Vertical Block Exemption Regulation (VBER) Evaluation

European Commission Launches Impact Assessment of Issues Raised in Vertical Guidelines Evaluation (October 23, 2020)

- EU competition law prohibits contracts that restrict competition within the EU under Article 101 of the Treaty on the Functioning of the European Union, and this prohibition applies to franchise agreements. Franchisors can avoid Article 101 by drafting their franchise agreements so that they qualify for the Vertical Agreements Block Exemption (Block Exemption), which is set to expire on May 31, 2022. In anticipation of the expiration of the Block Exemption, the European Commission (EC) is in the process of reviewing the Block Exemption and determining whether to let it expire, let it continue without changes, or let it continue with revisions.
- On September 8, 2020, the EC released its evaluation of the Block Exemption. The evaluation found that the Block Exemption is still necessary and relevant, but that it should be modified to adapt to the changing commercial landscape. Specifically, the evaluation found that the Block Exemption needs to be updated to provide a more robust structure regarding e-commerce, online sales and sales platforms, and whether price fixing or “most favored nation” clauses should remain a hardcore offense.
- On October 23, 2020, the EC initiated an Impact Assessment to review and analyze the issues raised by the evaluation. It appears that the EC is inclined to renew the Block Exemption, with some significant changes which will relax some of its restrictions to adapt the law to modern forms of doing business.

Australia

Proposed Franchise Regulations (January 2021)

- One November 10, 2020, the Department of Industry, Science, Energy and Resources published a draft of proposed changes to the Franchising Code of Conduct and a supporting guide of the proposed changes. The proposed changes include the creation of a “key terms” sheet with a franchise agreement, disclosure requirements, prohibitions on the franchisor’s actions, regulations regarding the end of the franchise relationship, required dispute resolution mechanisms, and doubling the penalties for violating the Franchising Code of Conduct. Public comment was open until December 4, 2020.
- In March 2019, the Australian Parliamentary Joint Committee on Corporations and Financial Services published its report, *Fairness in Franchising*, which, among other things, suggested that the Australian Government create an inter-agency Franchising Task Force to examine the feasibility and implementation of the 71 recommendations in the Fairness in Franchising report. By July 2019, the Franchising Task Force was convened.
- After seeking and receiving input about the relative costs and benefits of the various options for addressing some of the issues identified in the *Fairness in Franchising* report, in August 2020 the Australian Government released its proposed changes to the franchise laws and regulations, which include:

- doubling the current penalties for breach of the franchise laws;
 - requiring additional dispute resolution provisions in franchise agreements;
 - adding pre-sale disclosure requirements relating to supply arrangements, marketing funds, exit or termination arrangements, and significant capital expenditure); and
 - creating a public register and website for franchises, and much more.
- On September 2, 2020, the Labor Party announced its desire to further increase the penalties a franchisor would face for violating the franchise laws and regulations from \$133,200 to \$10 million per violation. The Labor Party argued this is necessary to “effectively deter poor conduct and exploitative behavior.”

Belgium

Unfair Contract Terms and Abuse of Economic Power Acts (Effective June 1, and December 1, 2020)

- Abuse of power over the economic dependence of a company is a part of the B2B Relationships Act adopted by the Belgian Parliament in March 2019. Economic dependence can be created through distributorship or franchise agreements. For an abuse to be actionable, it must affect a significant part of the relevant Belgian market. It became effective June 1, 2020.
- Unfair contract terms in B2B agreements will become void and unenforceable, while the remainder of the agreements will remain enforceable, if that is practical. Focused on the balance of rights and obligations of the parties, the law prescribes a “black list” and a “gray list” of “unfair terms.” Whereas the unfairness of terms on the gray list may be rebutted, terms on the black list are automatically null and void.
- Included on the black list is language granting a franchisor the unilateral right to interpret any clause of the agreement and a requirement that a franchisee waive any remedy it may otherwise have against a franchisor. The Unfair Contract Terms Law became effective December 1, 2020.

Brazil

New Franchise Law (Published December 27, 2019; Effective March 26, 2020)

- Amends existing franchise law:
- Clearly states that the franchisee/franchisor relationship is not a consumer relationship, and is not an employment or joint employment relationship.
 - Creates eight new categories of information that must be included in Franchise Offering Circulars (“COF”).

- Changes the waiting period, in most instances, between delivering the COF and when the franchisee may sign the franchise agreement or payment of fees to 10 days.
- Allows franchisors to lease or sublease the commercial space to franchisees and to charge rent that exceeds the amount paid by the franchisor to the landlord, if the parties agree to this in the COF and franchise agreement, and the rent does not impose an excessive burden on the franchisee.
- Requires franchise agreements that affect only Brazilian territory to be written in Portuguese. International agreements must either be drafted in or translated into Portuguese at the franchisor's expense.
- Requires franchise agreements that affect only Brazilian territory to be governed by Brazilian law. The governing law of international agreements may be negotiated by the parties.
- Permits the use of arbitration as an alternative dispute resolution mechanism.
- Removes the requirement that franchise agreements be signed in the presence of two witnesses.

Cambodia

Franchise Agreements Must be Registered with the Cambodian Ministry of Commerce (January 13, 2020)

- Beginning January 2020, franchise agreements must be recorded with the Cambodian Ministry of Commerce in order for the agreement to be enforceable against a franchisee or licensee.
- The parties must submit a notarized, fully-executed franchise or license agreement that includes the following finalized terms: (a) information about the parties, including the names, addresses and country of incorporation, (b) details about the marks, including the registration or application numbers, classification or marks, and any specifications about the marks, (c) whether the agreement is exclusive or non-exclusive and whether the license is a sublicense, (d) the term of the agreement, and (e) conditions on control of effectiveness and quality of goods or services. Additionally, a copy of the trademark registration or renewal must be filed with the franchise agreement and a copy of the business registration information.

Canada

Ontario Disclosure Laws Revised for Less Rigid Disclosure Requirements (Effective September 1, 2020)

- Ontario recently amended the Arthur Wishart Act, Ontario's franchise disclosure law. The most notable changes include the following:
 - Permits franchisors to sign an agreement with a prospective franchisee *before* providing the prospective franchisee with an FDD if that agreement either

(a) requires the prospect to keep the information confidential, (b) prohibits the prospect from using the franchisor's confidential information, or (c) designated a territory or specific location for the prospect.

- Permits franchisors to accept a deposit from a prospective franchisee *before* providing the prospect with an FDD so long as the amount is fully refundable, does not exceed 20% of the initial franchise fee and does not exceed \$100,000, and is committed under an agreement that does not require the prospect sign a franchise agreement.
- Requires franchisors to provide a statement of material change to prospective franchisees if a material change happens between providing the prospect with an FDD and signing a franchise agreement. The statement of material change must include two receipt pages that are signed by at least two officers or directors of the franchisor, where one of the receipt pages is for the franchisee to keep and one for the franchisor to receive once it's been signed.
- Revises the fractional franchise exemption, large franchisor exemption, small investment exemption, and exemption of pre-sale disclosure to franchisor's officers and directors.
- Expands the types of financial statements can be included in the FDD, including financial statements that were prepared in accordance with U.S. GAAP or IFRS standards, as well as standards set out in the CPA Canada Handbook – Accounting.

Ecuador

Franchise Regulation Adopted in Commercial Code (May 29, 2019)

- On May 29, 2019, Ecuador adopted a new Commercial Code which incorporated franchise regulations. The franchise regulations appear to be designed to define franchising under national law, but impose few regulations on either franchisors or franchisees, beyond maintaining confidentiality about the franchised business. The Code sets out elements required to be in a franchise agreement which are typically found in franchise agreements. The law specifically authorizes reasonable noncompete covenants. Moreover, franchisees must indemnify franchisors for damages arising from "incorrect use of the franchise." Franchisors are required to provide franchisees with operating manuals to assist them in the operation of their businesses.

Egypt

Revised Proposed Egyptian Franchise Law (January 2019)

- Introduced as part of a Regulatory Reform and Development activity initiative. Involves a unique comprehensive Regulatory Impact Assessment.
- Designed to "enhance the business environment through a better regulatory framework."

- All franchises must be registered with the Minister of Trade and Industry (MOTI). Franchisors must submit essential data, but there is no standard for reviewing documents or data submitted for registration.
- Franchisors must notify both prospective franchisees and existing franchisees of possible changes in conditions that could adversely affect the franchisee's business.
- Legislation is so ambiguous that knowing how to comply would be impossible.
- Post-term non-compete covenants may prohibit franchisees from "competing with the franchise," but what that means is unclear.
- All disputes must be resolved through arbitration. Franchisors and franchisees could not pursue injunctions or other remedies in courts—anywhere.
- Despite concern about facilitating access to financing for franchised businesses, the proposal fails to address actual barriers to franchise financing or actions that could be adopted to motivate lenders to finance franchises.
- Comments were solicited on the proposal until March 2019, but as of the date of this update, no further information has been shared.

Guatemala

[Discussions in the Works for Guatemala Franchise Act \(March 2020\)](#)

- Government officials in Guatemala are in discussions to craft a franchise law to regulate franchising in the country. No legislation has been drafted.

Indonesia

[Franchise Registration \(Effective September 3, 2019\)](#)

- On September 3, 2019, the Minister of Trade Regulation issued Franchise Regulation, Number 91 of 2019 (MoTR 17/2019). MoTR 71/2019 which includes the following provisions:
 - Common control relationships are no longer prohibited. This allows franchisors to enter into franchise agreements with their own affiliates.
 - Removes the cap on the maximum number of units a franchisee may own.
 - Removes the requirement that 80% of raw materials, equipment or products by used in the franchise must be locally sourced; however, retailers still must use at least 80% domestic products for inventory.
 - Requires franchise agreements be offered in Indonesian language and must be governed by Indonesian law.
 - Permits franchisors to name more than one master franchisee so long as there is a clear separation of territory.

- Foreign franchisors must now register through the Online Single Submission System to obtain a Registration Number in order to submit disclosure documents to obtain a Franchise Registration Certificate.

Malaysia

Amendment of Malaysian Franchise Act (March 2020; Awaiting Effective Date)

- On March 6, 2020, the Franchise (Amendment) Bill was published in the Gazette after receiving its royal assent on February 20, 2020. The Ministry has yet to set an effective date for Amendment. The Amendment provides that a foreign franchisor that has already obtained approval under section 54 of the Act before the effective date of the Amendment is deemed to have registered its franchise under section 6(1) of the Act. However, if a section 54 application is still pending on the effective date of the amended Act, the foreign franchisor must comply with the new registration requirement and subsequently register its franchise under § 6(1) of the Act. The registrations are essentially the same.

The Amendment makes it a criminal offense for a franchisor to grant a franchise without first registering the franchise with the proper authorities, or for a franchisee of a foreign franchisor to fail to register the franchise agreement within 14 days of signing.

- Creates a period of effectiveness for franchise disclosure documents once it has been registered.
 - Requires franchisors and franchisees to display their franchise registration information conspicuously.
 - Creates a new requirement that franchise agreements must include language regarding renewing or extending the term of the agreement.
 - States that search warrants which are issued under the Franchise Act will be valid and enforceable, and the information obtained pursuant to the search warrants will be admissible as evidence under the Franchise Act.
- This amendment to the Malaysian Franchise Act was passed to create clarity after the High Court's decision in the *Brainbuilder* case, which held that both the franchisor and franchisee were responsible for registering a franchise agreement in accordance with the 1998 Franchise Act, and that since the foreign franchisor had failed to register the franchise under section 6 of the Act and the franchisee had failed to register the franchise agreement with the Minister of Commerce, the agreement was void and unenforceable. *Malaysia – Dr. H K Fong Brainbuilder Pte Ltd v Sg-Maths Sdn Bhd & Ors [2018] MLJU 682*. The Malaysian Appeals Court has affirmed the High Court's decision. *Malaysia – Dr. H K Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors [2021] 1 CLJ 155*.

Ministry of Domestic Trade and Consumer Affairs Considers Further Amendments to the Malaysian Franchise Act (September 2020)

- The Malaysian Ministry of Domestic Trade and Consumer Affairs has been reported to be considering a proposal that would limit the start-up capital needed to “start a new franchise business” to RM 50,000 (\$12,038 USD). The goal is to facilitate “micro-entrepreneurship” by lowering the capital needed by franchisees to start a franchised business and to spur entrepreneurship.

Myanmar

Trademark Registration (Passed January 30, 2019; Effective 2020)

- Myanmar has adopted a trademark registration law where, once a trademark is registered, the trademark will be valid for a period of 10 years from the filing date and renewable every 10 years. Registration is a first-to-file.
- The law introduces criminal penalties for trademark infringement and counterfeiting, with penalties as much as three years’ imprisonment and a fine of up to MMK 5 million (USD 3,250). The new law also gives the judiciary the power to establish specific intellectual property courts; there is no word whether the Myanmar courts will establish such courts.
- Regulations are now being prepared and are expected to be published sometime in 2020.

Namibia

Namibia Competition Commission Director of Economics Proposes Franchise Regulation (October 4, 2019)

- The Government should develop a franchising regulatory framework and the goal is to reduce barriers to ending easy access to franchise brands for local entrepreneurs, and encourage ethical conduct of master licensees (Namibia Economist – October 4, 2019).

Netherlands

Dutch Parliament Passes Franchise Legislation (Effective January 1, 2021)

- The new Dutch Franchise Law requires:
 - Franchisors to deliver a disclosure document to prospects at least 4 weeks before a sale may be concluded, prohibits any amendments to the franchise agreement during the cooling off period, except those which benefit the prospective franchisee.
 - Franchisor’s to refrain from inducing a prospect to make payments or investments associated with the franchise agreement until the 4 weeks after an FDD has been delivered.

- FDDs to include many customary discrete disclosures, plus “all other information that he/it knows, or can reasonably assume, to be relevant for conclusion of the franchise agreement.”
- “Within the bounds of reasonableness and fairness, the prospective franchisee will take measures that are necessary to prevent him/it from concluding the franchise agreement under the influence of incorrect assumptions.”
- After 4 weeks from date of delivery of FDD, franchisors must disclose:
 - any proposed amendments to the draft agreement;
 - an explanation the investment that the change would require of the prospective franchisee; and
 - other information that the franchisor knows or can reasonably assume, to be relevant to the performance of the franchise by the franchisee.
- Franchisors to provide franchisees with assistance and support that may be reasonably be expected. If a franchisee notifies its franchisor that it is not receiving expected assistance, the franchisor and franchisee must consult about the franchisee’s expectations.
- Franchisors to make annual disclosures to franchisees about the extent to any surcharges or other financial contributions made by franchisees during the preceding fiscal year covered the costs or investments that the franchisor intends or intended to cover with the payments.
- Franchisors to consult with their franchisees at least once yearly.
- Franchisors to set a maximum investment cap or minimum loss cap that a franchisee will incur as a result of new programs, new fees, surcharges or other investments franchisees can be required to make without amending the franchise agreement.
- If the fees or costs exceeds the caps, the changes may not be enforced against franchisees established in Netherlands unless a majority of them consents to the changes. If no caps are established, each franchisee established in the Netherlands must give its prior consent to the new requirement. This provision applies 2 years after the effective date of the law even to franchise agreements in existence before the effective date (January 1, 2023).
- Franchisors to disclose financial information regarding the intended location of each franchisee’s business. If the franchisor lacks such information, it must disclose financial data of one or more businesses it considers to be comparable to the proposed franchisee’s location, accompanied by an explanation of why the franchisor considers the locations comparable.
- Franchisors and franchisees to behave towards one another “as befits a good franchisor and a good franchisee.”

- Franchise agreements to state how much goodwill be attributable to the franchisee and reimbursed by the franchisor at termination or expiration of the franchise agreement.

New Zealand

[Cartel Law Amendments \(August 19, 2019\)](#)

- Department of Economic Development, Science and Innovation rejected proposal to exempt franchises from cartel legislation. (October 2018)
- Rather than exempting franchises per se, the report focused on the substance of agreements between franchisors and franchisees, and recognized that those agreements will often fit within the “collaborative activity; vertical supply contract and joint buying” exemptions of the law. The law criminalizes acts that violate the law.
- Franchise agreements should include explanations about why “collaborative activities” such as territorial and customer restrictions and non-compete covenants are necessary.

Nigeria

[Chartered Franchise Executives \(August 19, 2019\)](#)

- Proposed bill creating the “Institute of Chartered Franchise Executives of Nigeria” had its first reading on July 17, 2019, and as of September 15, 2020 has not had a second reading.

Romania

[Amendment to Franchise Ordinance No. 52/1997 \(Effective October 14, 2019\)](#)

- Amendments to the Romanian franchise disclosure law require franchisors to disclose information about their “pilot units” in their FDDs. A “pilot unit” is the equivalent of a prototype unit, at which the franchise system is tested. The Amendment does not require that it be established in Romania.
- The Amendment also authorizes the Romanian Franchise Association to establish a National Franchise Register, which is to compile information provided by franchisors in their FDDs. Although franchisors may register their FDDs with the Association, without charge, the law does not require registration. However, according to one lawyer reporting on the law, if the Association requests that a franchisor register its FDD, it must do so—but the law does not establish any sanctions for failing to comply with the request. A review of English translations of the Romanian Franchise Association’s website on January 29, 2021 revealed no information about the Franchise Registry.

Saudi Arabia

[Regulations Implementing the Saudi Franchise Law Released \(Effective June 2020\)](#)

- In June 2020, the Saudi government published the regulations that clarify and implement the new franchise law. The regulations include the following terms:

- At least 14 days before a franchise agreement is signed or the prospect pays any monetary consideration regarding the franchise, franchisors must provide an FDD, written in Arabic, to the prospect.
- Franchisors must file the FDD with the Ministry of Commerce and Investment (Ministry) before filing the franchise agreement with the Ministry.
- Franchise agreements must be written in Arabic and be filed with the Ministry within 90 days of signing.
- Requires franchisors to provide information about any material changes that occur between date the prospect receives the FDD and signing a franchise agreement.
- Defines “material change” as “any change in information or circumstance that would be materially effective on the value of a franchise or a decision by a prospective franchisee to enter into a franchise agreement.”
- Requires franchisors to file disclosure documents with the Ministry every year, within 6 months of the franchisor’s fiscal year end. Sets the filing fees as (500) SR for an initial filing and (100) SR for a renewal filing.
- Filings are effective for the full term of an agreement, but may be cancelled if the franchise agreement terminates or expires and both franchisor and franchisee submit a cancellation request.
- FDDs need not be updated if a franchisor does not intend to grant more franchises in the Kingdom during the next year, but must be updated before being provided to a prospective franchisee.
- In the absence of any terms in the franchise agreement, sets rules about the how an advertising fund must be administered.
- Restricts how franchisors can limit a franchisee’s transfer of the agreement or control of the franchisee entity.
- States what information must be included in the disclosure document. Financial Performance Representations are optional, but must comply with restrictions similar to the U.S. FTC Franchise Rule’s FDD Item 19 requirements.

Saudi Franchise Law (Approved October 8, 2019)

- Applies to all franchises to be performed in Saudi Arabia.
 - A franchise may not be granted unless the franchise has been operated on the basis of the same franchise operation manual by at least two entities and for at least one year.
 - A master franchisee of a foreign franchisor may not grant subfranchises unless the master franchisee has operated in KSA for at least one year.

- Franchisor must provide franchisees with comprehensive FDDs.
- Franchisors must train, transfer know-how, provide franchise operations manuals and not compete with the franchisee in the same geographical areas, unless they agree otherwise in franchise agreements.
- Franchisor must accept a change of control over the franchisee and the assignment of the franchise agreements unless the refusal is based upon conditions specified in the law or in the regulations.
- Unless a franchise agreement provides otherwise, or a basis outlined in the Act exists, a franchisee may renew the franchise agreement on the same terms as the expiring agreement.
- Franchisors may not terminate a fixed-term agreement except for causes specified in the Act.
- Upon the termination or non-renewal of a franchise agreement, franchisees may require franchisors to purchase physical assets purchased from sources designated by the franchisor for losses suffered by the franchise.

South Africa

[Franchise Association of South Africa Proposes to Make its Code of Ethics Law \(November 25, 2019\)](#)

- In cooperation with the South Africa Department of Industry and Trade, a task force is drafting a proposal, advocated by the Franchise Association of South Africa to codify the association's code of ethics so that it applies to all franchisors. It would establish a regulator of franchising.
- The proposed code establishes a "Franchise Industry Ombud," or "FIO," which is intended to help franchisors and franchisees resolve disputes with each other in an informal, cost-effective and efficient manner. The draft code has been submitted to the Consumer Protection Commission for consideration.

South Korea

[Korea Fair Trade Commission Provides Relief to Franchisor's that in Turn Provide Relief to Their Franchisees \(September 2020\)](#)

- The Korean Fair Trade Commission (KFTC) make franchisors which implement at least one of the following cooperative measures for franchisees eligible to apply for a reduction of interest rates and / or guarantee fees to ease the impact of COVID-19: (i) reduction / exemption from royalties; (ii) reduction of the price of products that franchisees are required to purchase for the franchise business; (iii) provision of support for marketing and advertising costs; (iv) provision of compensation for losses suffered by franchisees; and (v) provision of cash support to franchisees.

Korea Franchise Law Amended (January 1, 2019)

- New franchise agreements must contain the following statement:
 - “The franchisor will compensate the franchisee for any harm caused by unlawful acts by the franchisor or its executives, or acts by them that go against the rules of society and that cause damage to the reputation or credit of the franchise business.”
- If a franchisor acts with “malicious intent” when it (1) provided false and exaggerated information; (2) unreasonably refused to renew or unreasonably terminating a franchise agreement; or (3) engaged in retaliatory measures, such as “discontinuing any transactions or otherwise disadvantaging the franchisee...” the franchisor is liable for punitive damages of up to 3 times the damages suffered by the franchisee.

Thailand

Guidelines on Unfair Trade Practices in the Franchise Business (Effective February 4, 2020)

- Under the Guidelines, issued by the Office of the Trade Competition Commission, prior to entering into a franchise agreement, franchisors must disclose information to prospective franchisees, such as details on (1) the royalty fee and other mandatory payments relating to the operation of the franchise business, (2) the franchise business model, (3) the intellectual property rights, and (4) the renewal and termination of the franchise agreement.
- Franchisors must notify and offer the right of first refusal to the nearest franchisee if they intend to open and manage a new branch in the vicinity of a franchisee’s area of operations.
- Franchisors are prohibited from engaging in the following trade practices that may cause damage to franchisees:
 - Setting restrictive conditions for the franchisee without justifiable reasons, such as forcing the franchisee to exclusively buy products or services that are irrelevant to the operation of the franchise business from a designated business operator;
 - Setting additional conditions for the franchisee to comply with, after the franchise agreement has already been executed. Exceptions may apply if franchisors can justify their reasons, or if new conditions are agreed in writing;
 - Restricting the franchisee, without justifiable reasons, from purchasing products from other business operators that offer products with comparable quality, but at a lower price;
 - Restricting franchisees, without justifiable business reasons, from offering discounts on perishable goods or products close to their expiration; and
 - Setting discriminatory conditions among franchisees, without justifiable reasons.

- Setting any conditions for a purpose other than to maintain the reputation, quality, and standards of the franchise brand, in accordance with the franchise agreement.
 - Besides allowing franchisees to sue for damages, administrative fines of up to 10% of the franchisors annual revenue may be imposed.
- A draft Franchise Business Act is also said to be under consideration.

United States

Joint Employer

[Trump Justice Department Sues to Overturn Federal Court's Ruling Vacating Labor Department's Joint Employer Rule \(January 20, 2021\)](#)

- The day before President Trump left office, his Justice Department filed a brief with the U.S. Second Circuit Court of Appeals, seeking to reinstate portions of the Labor Department's Joint Employer Rule which a District Court had vacated on September 8, 2020. The District Court opinion had vacated the application of the Rule to franchise relationships, and other vertical employment relationships, in a challenge to the Rule brought by the Democrat attorneys general of sixteen states and the District of Columbia.
- The International Franchise Association and a coalition of business groups intervened in the case and filed their own appeal. *State of New York et al v. Scalia*, No. 1:2020cv01689 - Document 74 (S.D.N.Y. 2020)

[Department of Labor Announces New Joint Employer Rule \(January 2020\)](#)

- On January 12, 2020, the U.S. Department of Labor (DOL) published its final rule to revise and update its regulations interpreting joint employer status under the Fair Labor Standards Act (FLSA).
- In the final rule, DOL:
- specifies that when an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee;
 - provides a four-factor balancing test to determine when a person is acting directly or indirectly in the interest of an employer in relation to the employee;
 - clarifies that an employee's "economic dependence" on a potential joint employer does not determine whether it is a joint employer under the FLSA;
 - specifies that an employer's franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely; and

- provides several examples applying the Department's guidance for determining FLSA joint employer status in a variety of different factual situations.

Independent Contractor or Employee?

- California AB-5 (Effective January 1, 2020) characterizes all workers as "employees," rather than as "independent contractors," unless each factor in its "ABC Test" is met. The law is of special concern to franchisors which collect fees from customers, and pay proceeds to franchisees. Many fear that franchisees could claim that these are "workers," who have been misclassified by their franchisors. In November 2020, the citizens of California voted to except the "gig workers" of Uber, Lyft and other similar companies from the application of AB-5.
- International Franchise Association's (IFA's) efforts to obtain an exclusion from the law for franchisors was unsuccessful during the most recent session of the California legislature.
- The California Supreme Court unanimously ruled on January 14, 2021 that the independent contractor standard set out in *Vasquez v. Jan-Pro Franchising, Inc.*, 2021 WL 127201 (Cal.), (Jan 14, 2021) is retroactive. *Vasquez* is the case that articulated the employee/independent contractor standard which was adopted by AB-5. Thus, questions about the enforceability of the retroactive application of AB-5 to relationships which pre-dated the enactment of the law appear to be resolved.
- The California Supreme Court's opinion did not address whether either *Vasquez* or AB-5 apply generally to franchise relationships.

Employee Anti-Poaching Provisions Under Attack

State Attorneys General Investigations (November 2019)

- "No Poach" provisions prohibit franchisees franchising employees of other franchisees of the same brand; and sometimes apply to the franchisor's employees.
- Beginning in early 2018, 15 state attorneys general announced that they were investigating anti-poaching language in franchise agreements. Since then the investigation has been extended too many other industries.
- The Washington State Attorney General has announced that at least 227 franchisors have entered into an "assurance of discontinuance" whereby they have agreed to no longer enforce no-poach agreements and to delete anti-poaching language from their future franchise agreements throughout the U.S. (June 2020).

FTC Commissioner Slaughter Advocates Trade Regulation Rule to Address Competition in Labor Markets (January 9, 2020)

- It would regulate non-compete covenants in employment agreements, prohibit anti-poaching and arbitration agreements in franchise agreements. In January 2021, President Biden named Commissioner Slaughter Acting Chair of the FTC.

U.S. Department of Justice (December 7, 2020)

- The Department of Justice filed an amicus curiae brief with the Eleventh U.S. Circuit Court of Appeals in *Arrington v. Burger King Worldwide, Inc.*, challenging the U.S. District Court's ruling that Burger King was incapable of conspiring with its franchisees in a case challenging anti-poaching language in Burger King's franchise agreements. DOJ argued that the District Court had applied the wrong standard in dismissing anti-poaching claims under the Sherman Antitrust Act.
- The Antitrust Division of the Department of Justice (DOJ) is investigating franchisor's anti-poaching agreements. In January 2019, DOJ filed a "Statement of Interest" in three franchise class action law suits, indicating it would argue that anti-poaching agreements should only be analyzed under a "rule of reason" standard, which requires the employees to demonstrate the anti-poaching clauses had a material adverse effect on the entire labor market in the areas in which they had been employed. After DOJ filed statement of interest, each of these cases was settled.
- At least ½ dozen franchisors have faced class actions from franchisees' employees who have claimed to received reduced wages because of anti-poaching language in their employers' franchise agreements. In at least three cases where the courts denied the franchisors' motions to dismiss, the courts indicated the cases could proceed under a "per se" or "quick look" standard, which does not require an analysis of competitive impact. In one case, court has insisted upon applying a rule of reason analysis to anti-poaching clauses. *Ogden v. Little Caesar Enterprises, Inc. et al.*, 18-cv-12792 (E.D. Mich. July 29, 2019)

State Franchise/Independent Contractor Laws (September 18, 2019)

- IFA supports state laws that confirm franchisees and franchisors are independent contractors. Twenty-one states have passed similar laws. Although they apply only to decisions affecting independent contractor status in the states, they are expected to provide evidence of a groundswell of opposition to federal regulations and decisions finding that franchisors are joint employers with franchisees.

FTC Franchise Rule Review (December 2020)

- The ten-year review of the entire franchise disclosure rule slated for 2018 has been authorized. Comments were requested in a notice filed February, 2019. Comment period closed May 13, 2019.
- The FTC hosted a public workshop in November 2020 to discuss the potential issues with the current Franchise Rule, which was last amended in 2007. The FTC also re-opened public comments regarding potential changes to the FTC Franchise Rule until December 2020.

Non-Compete Covenants

U.S. Congress

- In 2017, HR 5631 and S 2782 were introduced to prohibit the use of non-compete covenants in employment agreements, and would apply equally to both in-term and post-term covenants. This did not pass the U.S. Congress and was not enacted into law. This did not pass the U.S. Congress and was not enacted into law.
- In January 2019, Senator Marco Rubio introduced a bill to prohibit the enforcement of non-compete covenants in agreements with employees who are “non-exempt” (not subject to Federal wage and hours laws). This did not pass the U.S. Congress and was not enacted into law. This did not pass the U.S. Congress and was not enacted into law.
- On October 3, 2019, U.S. Senator Elizabeth Warren released a comprehensive plan to completely reform the labor laws in the United States, including a complete ban on non-compete clauses in employment contracts and no poach agreements. Additionally, on October 17, 2019, Senator Murphy reintroduced the “Workforce Mobility Act” with Senator Todd Young which seeks to limit the use of non-compete covenants. This did not pass the U.S. Congress and was not enacted into law.

State Action

- Louisiana. (Effective August 1, 2020) An amendment to Louisiana’s antitrust law expressly allows agreements between franchisors and franchisees which bar franchisees from competing with the franchisor and other franchisees during the term of the franchise agreement and for two years after it ends. The parties may require their employees to comply with such non-compete agreements. The same amendment states that neither a franchisee nor its employees shall be deemed an employee of the franchisor for any purpose. Louisiana Revised Statutes Tit. 23, Sec. 921.
- Maine. Law applying to franchise agreements entered into or renewed after September 18, 2019 makes anti-poaching agreements in franchise contracts per se unlawful. The law permits fines of “at least \$5,000” for each violation. Non-compete agreements are unlawful if applied to employees earning less than \$50,000.
- Massachusetts. (Effective January 1, 2020) Non-compete covenants in employment agreements may only be enforced against “non-exempt employees” (those not subject to minimum wage and overtime laws), must be reasonable in geographic scope, may apply for no more than 12 months following the termination of employment, may only be enforced if the employer agrees to pay the employee at least 50% of his/her highest wages averaged over the 2 years preceding the termination, and must be needed to protect the employer’s confidential information, trade secrets or goodwill. “Employee” is defined to include “independent contractors,” so the extent of its scope could include business entities which are franchisees.
- Oregon. (Introduced January 2021) H.B. 2946 would create the most comprehensive franchise relationship law in the United States. Imposes a good faith obligation in the negotiation and execution of franchise agreements, expands scope of disclosures to

include all “material facts a reasonable person would consider in determining whether to enter into a franchise agreement. Prohibits mandatory arbitration provisions in franchise agreements. Imposes good cause standards for termination and nonrenewal of franchise agreements.

- Washington. (Effective January 1, 2020). Law bans non-compete covenants in certain employment relationships in which an employee earns less than \$100,000 per year. Although non-compete covenants in franchise agreements are not governed by the law, covenants between franchisees and franchisors and owners, officers and principals of franchisees seem to be subject to the law. The legislation also outlaws anti-poaching provisions in franchise agreements.

Privacy

California Voters Adopt California Privacy Rights Act (CPRA) in Referendum (Adopted November 3, 2020, Effective January 1, 2021 (in part) and January 1, 2023 (for most provisions)

- The CPRA applies to companies which “alone or in combination” with gross annual revenues exceeding \$25 million, buys, sells or shares information of 100,000 or more consumers or households which earn more than half of their revenue from selling or sharing consumers’ personal information. Whether franchisors and their franchisees criteria will be shared for purposes of determining whether they are acting “alone or in combination” has not been clarified.
- Many requirements are similar to GDPR.
- Regulated companies suffering data breaches resulting from unreasonable data security are subject to class action claims for damages ranging between \$100-\$750 per California consumer, or actual damages, if higher.

The California Consumer Privacy Act (CCPA) Covers Many Franchisors and Franchisees Operating in the U.S. (Effective January 1, 2020)

- The CCPA applies to any for profit entity “doing business in California” with \$25 million in annual gross revenues, or that processes the personal information of 50,000 or more California devices.
- The CCPA covers any entity that shares “common branding” with another business and controls or is controlled by that business. Under the law consumers may sue a company if its ‘non-encrypted or non-redacted personal information is subject to unauthorized access and exfiltration, theft or disclosure as a result of the company’s failure to implement and maintain reasonable security procedures and practices.
- Statutory damages ranging between \$100-\$750 may be recovered by each customer or franchisee, as well as their actual damages.
- Initial regulations do not clarify how the law applies to franchising. A proposed amendment to the CCPA is expected to be on the California ballot November 2020. Further changes are anticipated on the CCPA and supplementary regulation.

About the Global Franchise Regulatory Update

The Global Franchise Regulatory Update is compiled from publications and correspondence with franchise counsel from throughout the world. Often the information we report is based upon the analysis of regulations or proposals which have been prepared by others (who are identified on the following pages), based upon their interpretation of the regulations and proposals as published in their original language. We are indebted to them for their assistance.

The Update is designed as an alert to regulatory developments, but it is not intended to be a comprehensive overview or analysis of the regulations discussed. The Update should not be considered legal analysis or advice. Despite our best efforts, we do not claim that the Update includes all franchising regulatory developments throughout the world. If you are aware of anything that we have missed or may have misinterpreted, please bring the information to our attention.

About the Lathrop GPM Franchise and Distribution Law Practice Group

International franchisors and franchising professionals need to know how legal and regulatory developments may affect business plans, negotiations and the execution of concluded agreements. In our efforts to offer value-added services to our clients, we monitor global franchise regulatory developments to provide them with the competitive edge this information may offer.

The Lathrop GPM Franchise and Distribution Law Practice Group consists of 35 franchise lawyers and paralegals, operating from offices throughout the United States.

The reputation of our international franchise team is recognized by our clients and colleagues, as represented through elite rankings in Chambers Global, the International Who's Who of Franchise Lawyers, Best Lawyers in America, Super Lawyers, Chambers U.S., and Franchise Times Legal Eagles, among other legal ranking organizations.

If you have any questions, corrections, would like to contribute information regarding franchising regulatory developments in your country, or would like to discuss expanding your franchise system internationally, please contact us:

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