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FRANCHISE RELATED VICARIOUS LIABILITY – WAIT, WHAT?

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FRANCHISE-RELATED VICARIOUS LIABILITY – WAIT, WHAT?

1. INTRODUCTION

The fact patterns of third-party suits against franchisors are familiar: a customer is injured at a franchised location, or a member of the public is injured by a delivery driver.[1] In addition to presenting complex legal and factual issues, courts also reckon with the reality that the franchisor may be the only party with the ability to pay substantial damages. As a result, these difficult cases can lead to the making of bad law.

Franchising works because it allows the franchisor and the franchisee to pull the oars in the same direction while devoting their respective energy and resources to controlling different portions of the enterprise. The franchisor focuses on developing the system and protecting the brand, while the franchisee controls the day-to-day operations of the individual unit location. Some franchisor control over the presentation of the product or service by the franchisee is necessary in franchising. While some amount of franchisor control over the presentation is necessary, too much control over how the franchisee operates can lead the franchisor into legal jeopardy.

For several years, the conventional wisdom among many franchise practitioners was that the trend was toward franchisors not being held liable for acts occurring at the franchisee location in the absence of excessive control over the particular instrumentality or undertaking of a direct duty to the third party. But recent cases demonstrate that courts are willing to hold franchisors liable to third parties. We consider recent trends in the law and offer practical suggestions for mitigating risks.

2. LIABILITY THEORIES APPLICABLE TO THE FRANCHISOR

2.1. Vicarious Liability

Vicarious liability typically arises through the application of one or both of the following theories: (1) actual agency; and/or (2) apparent agency. Third parties frequently pursue both theories. And a franchisor can win the apparent agency battle, but still lose the war on actual agency or vice versa. The following section summarizes how these theories have been applied in franchise cases over the years.

2.1(i). Actual Agency

In deciding whether a franchisor may be held vicariously liable under the actual agency theory, courts consider whether the franchisor controls, or retains the right to control, the day-to-day operations of the franchisee's business.[2] The tricky part with this seemingly straightforward test is determining when, exactly, a franchisor retains or exercises the requisite amount of control required to push the franchisor over the line to

[1] Vicarious liability can also arise in the joint employer context. The discussion in this paper is limited to non-joint employment third-party claims.

[2] *See* Restatement (Second) of Agency § 220 (1958).

being vicariously liable for the franchisee's acts. This determination is often fact intensive and may prevent summary adjudication.

Courts applying this rule to very similar franchise systems can arrive at very different conclusions. *Compare, e.g.*, *Martinez v. Higher Powered Pizza, Inc.*, 841 N.Y.S.2d 526 (N.Y. App. Div. 2007) (characterizing franchisor rights to enforce standards in areas such as food quality and preparation, hours of operation, menu items, employee uniform guidelines and packaging requirements along with inspection rights as "the typical franchise agreement" and concluding the franchisor could not be held liable) with *Parker v. Domino's Pizza, Inc.*, 629 So. 2d 1026, 1029 (Fl. Ct. App. 1993) ("veritable bible for overseeing a Domino's operation" ad holding franchisor's right to control left issues of fact for a jury to decide).

Prior to 2020, a trend seemed to emerge toward unwillingness to find franchisors vicariously liable for the acts of the franchisee. The Texas Supreme Court in *Exxon Corp. v. Tidwell*, 867 S.W.2d 19 (Tex. 1993), refined the traditional test of actual agency in the franchisor vicarious liability context to hold that the proper inquiry is focused upon whether the franchisor had control over the instrumentality causing the harm — in that case, control over the security of the franchise location. That trend generally continued in the following years. *See, e.g.*, *Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83 (E.D.N.Y. 2000), *aff'd* 4 Fed. Appx. 82 (2d Cir. 2001); *Vandemark v. McDonald's Corp.*, 904 A.2d 627 (N.H. 2006) (narrowing inquiry to "the defendant's level of control over the alleged 'instrumentality' which caused the harm"); *Thomas v. Freeway Foods, Inc.*, 406 F. Supp. 2d 610 (M.D.N.C. 2005).

2.1(ii). Apparent Agency

Apparent agency is another common theory asserted by vicarious liability plaintiffs. Under this doctrine, the court examines whether an agency relationship between the franchisor and franchisee was "apparent" to the plaintiff or was such that the franchisor is estopped from denying the existence of such a relationship.[3]

These claims are often predicated on the notion that the franchisor holds out the franchisee as its agent through its national adverting and common trademarks, which lead a third party to believe that the franchised operations are operated by the franchisor. Courts typically apply some variation on the following three elements: (1) the franchisor consciously or impliedly represented the franchisee to be its agent; (2) the third party detrimentally changed his or her position in reliance on the representation; and (3) the third party reasonably relied on the representation. No matter how the test is phrased, the common element is the requirement of reliance by the third party.

[3] The test is articulated in the Restatement (Second) of Agency § 267 (1958), which provides:

> One who represents that another is his servant or other agent and thereby causes a third person justifiable to rely upon the care or skill of such apparent agent is subject to liability to the third person or harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Like actual agency cases, apparent agency cases seem to go in both directions on indistinguishable facts. *Compare, e.g.*, *Brooks v. Collis Foods, Inc.*, 365 F. Supp. 2d 1342 (N.D. Ga. 2005) (holding Waffle House did not hold out its franchisee as an agent, applying Georgia state law of apparent agency, in a racial discrimination claim brought by restaurant patrons because the franchisee used the logo and signage rather than the franchisor representing the franchisee was its agent) with *Thomas*, 406 F. Supp. 2d at 618-19 (jury to decide whether the franchisor held out the franchisee as its agent, because the franchisee used the Waffle House name and mark throughout the restaurant and because Waffle House didn't distinguish between franchised and company-owned stores on its website). That said, the consensus was among those practitioners that courts were increasingly reluctant to hold franchisors liable on an apparent agency theory.

2.2. Direct Liability

Franchisors may also be held directly negligent for injuries occurring on the franchisee's premises where the franchisor is found to have assumed and breached some sort of duty to the third party, by causing the injury.

Allen is instructive on the analysis applied. 409 F. Supp. 2d 672. *Allen* involved claims made against a hotel franchisor for injuries resulting from an arson. With respect to direct liability, the plaintiff argued that franchisor Choice Hotels had assumed a duty to require its franchisee to install sprinklers at the franchised location, even though there was no dispute that the building complied with all applicable building codes without the sprinklers, by requiring the franchisee to make certain renovations when it joined the Choice Hotels system. *Id.* The plaintiff also cited system standards as an alleged assumption of a duty to the plaintiff.

The court first noted that it had located no case in which a franchisor was held to have a duty to require a hotel which complies with the relevant fire and building codes to retrofit the building with sprinklers and concluded that the franchisor had no such duty. The court next considered the controls put in place in the franchise agreement and operations to determine whether Choice Hotels had assumed a duty through its controls. The court concluded it had not, reasoning that the purpose of the franchise agreement and operating manuals was "to ensure a similar experience at all . . . franchise locations" and "maintain uniform service within, and public good will toward the . . . system." *Allen*, 409 F. Supp. 2d at 677. The court characterized Choice's actions in requiring renovations as "merely guard[ing] its trademark by assuring uniform appearance and operations of hotels operating under the [system's] mark.

3. RECENT DECISIONS

3.1. Actual Agency Cases

In a case decided in January 2025, a Pennsylvania Superior Court upheld a jury verdict holding Domino's Pizza LLC liable under an actual agency theory for injuries caused by a delivery driver employed by a Domino's franchisee. *Coryell v. Morris*, 330

A.3d 1270, 1284 (Pa. Super. Ct. 2025). Although Domino's argued that it did not have, and did not exercise, authority to recruit, hire, train, or supervise the franchisee's employees, the court found that the franchise agreement and operating standards left the franchisee with "practically no discretion how to conduct the day-to-day operations of its franchise store." *Id.* at 1282. The court noted that Domino's governed areas of operation including the topics that must be covered in employee training, how much cash drivers were allowed to carry in delivery vehicles, acceptable computer and server models, recordkeeping of weekly or monthly sales, and dealing with customer complaints. *Id.* at 1282-83. A key factor in the court's analysis was the fact that "violation of these operating standards… subjected [the franchisee] to termination of its franchise." *Id.* at 1283. The court ultimately found that Domino's "used its operating standards to continuously subjugate [the franchisee] to Domino's will as to the minutia of the store's staffing and daily operation far beyond the minimum quality threshold addressed by the product standards." *Id.*

However, in a very similar case, the Kentucky Court of Appeals reversed summary judgment for the plaintiff, finding that Domino's was not liable for the plaintiff's injuries under an agency theory because it did not exercise the requisite level of control over deliveries. *Duram v. Domino's Pizza, LLC*, 2024 WL 1122350, at *8 (Ky. Ct. App. Mar. 15, 2024). There, the court noted that Domino's unilaterally set the delivery boundaries for the franchisee and required the franchisee to adhere to the Domino's operating standards, which included minimum requirements for the hiring and training of delivery drivers and general delivery procedures. *Id.* at *4. Domino's contended that these minimum standards were imposed on franchisees "to protect the integrity, public perception, and reputation of its brand," and it did not maintain day-to-day control over the franchisee's driving operations. *Id.* The court agreed with Domino's that these factors were insufficient evidence of Domino's control over daily delivery operations and found that Domino's was not vicariously liable for the delivery driver's negligence. *Id.* at *6.

Franchisor vicarious liability can extend beyond just tort claims. The Western District of North Carolina recently allowed breach of contract claims to proceed against the franchisor for Extended Stay America. *Brittian v. Extended Stay America*, 2024 WL 1841600, at *5 (W.D.N.C. Apr. 26, 2024). Plaintiff, who had been denied access to her hotel room based on her placement on a "Do Not Rent" list, plausibly alleged an actual agency relationship between the franchisors and the hotel where the franchisors maintained a nationwide "Do Not Rent" list through its central reservation and property management system, maintained a nationwide policy and practice of using the list to refuse accommodation to guests, and permitted hotel staff to place complaining customers on the list. *Id.*

Franchisors may also be vicariously liable under an agency theory for statutory claims including, for example, the Trafficking Victims Protection Reauthorization Act ("TVPRA"), under which a hotel franchisor might be liable if it knowingly benefits from and fails to prevent trafficking. For example, the Eastern District of North Carolina has found that a TVPRA plaintiff plausibly alleged a hotel franchisor's agency control over its hotel where it controlled all details of the reservation, check-in, and payment process,

maintained reservations through a central system that it controlled, restricted the ability of hotel staff to refuse or cancel a reservation, and controlled policies related to reported suspected crime on franchisee premises. *Doe (L.M.) v. 42 Hotel Raleigh, LLC*, 2024 WL 4204906, at *8-9 (E.D.N.C. Sept. 16, 2024).

3.2. Apparent Agency Cases

A recent decision by the California Court of Appeal found that for a franchisor to be vicariously liable under an ostensible agency theory, the appearance of agency "must be based on the acts or declarations *of the principal* and not solely upon the agent's conduct." *Pereda v. Atos Jiu Jitsu LLC*, 85 Cal.App.5th 759, 768 (2022) (citations omitted). In *Pereda*, a jiu jitsu league was not liable for the plaintiff's injury sustained at an affiliate's studio under the ostensible agency theory of liability where the league never had "an affirmative advertising campaign" conveying its relationship with affiliates, nor did it "do or say anything to give rise to a reasonable belief that [the league] was in control of the [affiliate's] sparring sessions." *Id.* at 773. The only facts supporting the plaintiff's belief that the league controlled the affiliate were that the affiliate displayed the league's banner in its studio, the league's website listed the affiliate under its trade name, and the league never affirmatively disclaimed its control over the affiliate. *Id.* at 772. These facts were insufficient to establish ostensible agency.

3.3. Direct Liability Cases

In *Neely v. Great Escapes Pelahatchie*, the court found that a franchisor was not liable for the plaintiffs' contraction of E. coli at a water park franchisee's pool under direct negligence liability. 2024 WL 5126415, at *8 (S.D. Miss. Dec. 16, 2024). Although the franchisor "set many quality-assurance standards in its 800-plus page Brand Standards Manual, it prescribed no details for pool chlorination and assumed no control over the pools' day-to-day operations and maintenance." *Id.* at *1. The fact that the franchisor heard complaints about the water and had the authority to make sure complaints were addressed was insufficient to establish control, because this only implicated control "on an operational level." *Id.* at *8.

A franchisor may be directly liable to a plaintiff if its level of control over the franchisee extends to the means, methods, or details of how the franchisee conducts its business. The Texas Court of Appeals found that a franchisor owed a duty of care to a customer who had been sexually assaulted by a masseuse at one of its massage franchisees where the franchise operations manual specified "how to train masseuses; how masseuses were to earn the customer's trust; how masseuses were to interact with clients before, during and after sessions; what massages the masseuses offered; and how the masseuses were to drape undressed guests." *Massage Heights Franchising, LLC v. Hagman*, 679 S.W.3d 298, 305 (Tex. App. 2023). The fact that the franchise maintained the authority to hire, fire, and train its staff did not excuse the franchisor from

its "duty to act reasonably with regard [to] the detail over which it did retain control—providing massages to customers by masseuses." *Id.* at 305-6.[4]

In *Daniel v. Musleh Fitness Inc.*, the court denied the franchisor's motion to dismiss the plaintiff's Title VII discrimination claims. 2024 WL 983751, at *3 (N.D. Ind. Mar. 7, 2024). The plaintiff alleged that she had been denied rehire at a different location after she rejected the franchisee's manager's proposition for sexual favors in exchange for the position. *Id.* at *1. She also alleged that the franchisor retained control over the franchisee by requiring compliance with federal and state laws in employment practices, providing an operations manual, providing mandatory training to the principal operator of the franchisee, and offering sexual harassment training and reviewing the franchisee's personnel decisions. *Id.*

4. MANAGING AND MITIGATING THE RISKS

The cases discussed above teach that franchisor controls are not created equal. The key to avoid undue litigation exposure is to distinguish control over the final product or service from control over the day-to-day operations of the franchisee's business. Franchisor control over the final product or service can be accomplished through a variety of "good" controls, including:

- Defining the permissible scope of use of the trademarks;
- Requiring conditions that allow for uniformity of the system's product or service;
- Mandating steps to protect the goodwill and reputation of the trademarks; and
- Controlling the establishment of system standards.

On this last control, a franchisor should tailor its approach to the standard at issue. For example, if the standard in question involves a proprietary method of business unique to the system, a franchisor may more justifiably establish required procedures to assign the franchisee to meet the standard. With more general and nonproprietary system standards (like general cleanliness standards, for example), a prudent franchisor offers guidelines or recommended procedures to assist the franchisee with compliance but does not mandate compliance down to minute details.

Conversely, a franchisor ventures into the realm of "bad" controls when the franchisor dictates precisely how the franchisee is to undertake the daily operations of the franchised business. For example, a franchisor increases its litigation risks by:

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[4] *See also Doe v. Massage Envy Franchising, LLC*, 2024 WL 3220281, at *16 (Del. Super. June 28, 2024) (plaintiff who was sexually assaulted by a masseuse plausibly alleged franchisor owed her a duty of care where the franchisee had to operate "under the direction of [franchisor] and its operations manual" and the franchisor "retains a centralized repository for the internal management and storage of any and all sexual assault reports that occur at the franchise level.").

- Prescribing details of the franchisee's business operations, such as dictating the number of staff;

- Requiring specific safety or security measures; or

- Involving itself in the franchisee's employee relations.

Below, we lay out some types of provisions to consider for the franchise agreement, and approach to systems standards and interactions with the franchisee in order to mitigate franchisor liability risks.

4.1. Suggestions for the Franchise Agreement

4.1(i) Include a Provision that States that Franchisor and Franchisee Are Independent Contractors and Not Each Other's Agents

It is standard for franchise agreements to include provisions that state that either or both of the franchisee and franchisor: (1) are independent contractors; and (2) not agents of one another. Although such provisions do not end the inquiry, courts continue to routinely cite such provisions in rejecting contentions that the franchisor is vicariously liable for the franchisee's actions.

The *Neely* case presents a recent example:

> [N]othing in this Agreement is intended to make either party a general or special agent, joint venturer, partner, fiduciary or employee of the other for any purpose.

Yogi Bear's Jellystone Park Camp-Resort Franchise Agreement referenced in *Neely v. Great Escapes Pelahatchie*, 2024 WL 5126415, at *1 (S.D. Miss. Dec. 16, 2024).

The *Vandemark* case has another example:

> *Licensee not an Agent of Licensor.* Licensee shall have no authority, expressed or implied, to act as agent of Licensor, McDonald's . . . Licensee is, and shall remain, an independent contractor responsible for all obligations and liabilities of, and for all loss or damage to, the Restaurant and its business.

McDonald's License Agreement quoted in *Vandemark v. McDonald's Corp.*, 904 A.2d 627, 629 (N.H. 2006).

4.1(ii). Limit overly broad reservations of rights

Franchisors should also avoid contract provisions that gave the franchisor overly broad rights to control franchisee operations, except as truly needed for brand protections. Sweeping reservation clauses – for example, reserving the right to enter the

premises and assume complete control of operations under certain conditions – can be used in establishing franchisor rights of control.

In one case, a court denied summary judgment for franchisor largely because the franchise agreement allowed intrusive control over the operational details of the business. Even though the franchisor had not exercised the authority, the right to do so was held to be enough to create an issue of fact for a jury. *Estate of Anderson v. Denny's Inc.*, 987 F. Supp. 2d 1113 (D.N.M. 2013). To mitigate this risk, a franchisor should consider narrowing any step-in rights to specific events, such as health emergencies for misuse of trademarks, and clarify that such rights are temporary measures and limited to only matters necessary to protect the brand.

4.1(iii). Make it Clear that the Franchisee Operates the Business

The franchisor should build in decision-making power for local employment and operational decisions. The franchise agreement should specify that the franchisee has sole authority over hiring, firing, training, scheduling and supervision of its employees. For example, in the *Patterson* case, the franchise agreement stated that the franchisee was "solely responsible" for recruiting, hiring and training of staff and the franchisor stayed out of those functions. *Patterson v. Domino's Pizza, LLC*, 60 Cal.4th 474, 177 Cal. Rptr. 3d 539, 333 P.3d 723, 725 (2014). This was key to avoiding liability.

4.1(iv). Require the Franchisee to Comply with the Law

Vicarious liability claims often arise as a result of alleged violations of some law by the franchisee. Where the franchisee's failure to comply with the law results in a claim against the franchisee, the franchisor improves its claim against the franchisee for indemnification and its defense of the third-party claim if the franchisee has agreed to comply with all relevant laws. Thus, a franchise agreement should contain an appropriately tailored variant of language placing responsibility for compliance with all applicable laws on the franchisee.

The language can be simple. For example:

> Franchisee must at all times maintain Franchisee's premises and conduct operations in compliance with all applicable laws, regulations, codes and ordinances. Franchisee must secure and maintain in force all required licenses, permits and certificates relating to the Franchised Business.

Training, Site Selection, Construction, Opening, THE ANNOTATED FRANCHISE AGREEMENT . No outsiders are invited to the ceremony. Members only. Oh good. I asked Lesley about that and had her back, and I'm glad that Maria just took care of it. At 78 (Nina Greene, Dawn Newton, & Kerry Olson eds., 2018). A franchisor can also consider additional language referring specifically to laws or regulations of particular importance to the franchised business. *See id.*, *Operation of the Business* at 90-91 for an example of a more detailed clause.

4.1(v). Include Well Drafted Indemnification Provisions

The franchise agreement should contain a broad promise by the franchisee to indemnify, defend, and hold harmless the franchisor from claims of third parties relating in any way to or arising from the operation of the franchised business. The franchisor should also consider whether to include a provision that permits the franchisor to retain its own counsel, at the franchisee's expense, to defend the franchisor in vicarious liability litigation. Care is required in drafting such language, both because of the rule that agreements are construed against the drafter and because commitments to indemnify are generally construed narrowly by the courts.

The franchisor should also consider whether it will require its franchisees to indemnify the franchisor for the franchisor's own negligence. In certain states, a party cannot be indemnified for its own negligence in the absence of an explicit commitment to do so that includes the word "negligence" in the indemnification clause. Other states permit indemnification for a party's own negligence, even if the term isn't used.

Finally, courts will not enforce agreements purporting to indemnify a franchisor for the franchisor's own intentional torts, and including such language in a commitment to indemnify may increase the risk of having the entire indemnification provision being found unenforceable.

4.1(vi). Require and Enforce Insurance

Every franchise agreement should contain a provision requiring the franchisee to identify the franchisor as an additional insured on the franchisee's liability policy. The franchisor should also specify a minimum dollar value for coverage and consider setting a minimum insurance rating for the company issuing the policy. But the most thoughtful insurance clause in the world is not worth the paper that it is printed on without vigorous enforcement by the franchisor. A franchisor is well advised to have a process to ensure that a franchisee's insurance is in place and current. The franchisor should also take action against the franchisee failing to meet insurance requirements.

4.1(vii). Require Franchisee to Disclose Independence

As discussed above, franchisors must avoid representing that the franchisee is its agent. In addition to avoiding making such representations itself, a prudent franchisor requires that franchisees disclose their independent status to customers in such a way that customers will notice the disclosure. Familiar examples include requiring a franchisee to display a placard in public areas disclosing its status as an independently owned and operated business. *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672 (D.S.C. 2006). Another common practice is to require that the franchisee entity have a business name that dissimilar from the franchisor's name or marks, in order to distinguish the business entities, even if the franchisee does business under the franchisor's trademarks.

Such disclosure should also be enforced as part of the franchisor's inspection and compliance program. While there are many cases that stand for the proposition that

the presence of a sign might not always be enough, courts declining to find apparent agency routinely rely on signs and other notices of independent status both to find that the franchisor was not holding out a franchisee as its agent and that the third party could not have reasonably relied on a representation where such a disclosure existed.

Likewise, a franchisor that is silent when made aware that a franchisee is purporting to act on its behalf is at considerable peril of being deemed to be in an agency relationship with the franchisee. Thus, a franchisor should be aware of franchisee communications and step in if necessary to clear up any confusion.

4.1(viii). System Standards and Communications with Franchisees

System standards are rules that may be changed from time to time established by the franchisor to be followed by franchisees in the operation of the franchise. Franchisors consider fundamental the notions that franchisee compliance with standards is mandatory, and that the standards may periodically be changed by the franchisor. But this very control is frequently relied upon by litigants seeking to hold a franchisor vicariously liable.

Plaintiffs' lawyers routinely point to the system standards set forth in the operations manual and communications between franchisor and franchisee personnel (like periodic inspection reports) as evidence of the requisite control over the franchisee's operations. System standards are cited by plaintiff's counsel as the ultimate right of control because the test of actual agency is the right of the franchisor to control the actions of the franchisee. System standards may be argued to infringe on the franchisee's right of control of day-to-day operations (for courts applying the broader test) and are argued to constitute control over the instrumentality causing the injury (for those courts following the narrower formulation). Still, the cases provide guidance on system standards that a franchisor can proactively use.

4.1(viii)(a). Recommendation versus Requirement

Franchisors should limit requirements imposed in system standards to those that are truly crucial to brand protection, and couch other standards as recommendations. *K.O. v. G6 Hospitality, LLC*, 728 F. Supp. 3d 624 (E.D. Mich. 2024) (collecting cases for the proposition that a franchise agreement that ensures uniformity and standardization of products and services offered did not amount to "obligations" that "affect the control of daily operations").

Couching operating standards that franchisees must meet as recommendations rather than requirements (particularly in the areas of franchisee employee relations and location safety) reduces franchisor liability risks. Courts in several cases relied explicitly and heavily on the franchisor making only recommendations about the security at the franchised locations, in concluding that the franchisor could not be held liable. *See, e.g.*, *Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83 (E.D.N.Y. 2000), *aff'd* 4 Fed. Appx. 82 (2d Cir. 2001); *Vandemark v. McDonald's Corp.*, 904 A.2d 627 (N.H. 2006) (citing cases and relying on *Wu*, 105 F. Supp. 2d 83).

Thus, the general rule is to leave all matters of safety, security and employee relations to the franchisee. The franchisor may set a system standard and make recommendations on how to achieve that standard.

If, on the other hand, a franchisor makes the means of meeting standards "requirements," then it is well advised to monitor and enforce compliance. Certainly, some aspects of a system may be so very essential to the survival of the system (like food safety for a restaurant, or background checks for certain personal service franchise systems) that a franchisor may conclude that the risk of injury arising from noncompliance is so high to justify the burden of taking control over the standard. But that determination should be made with eyes open.

Which points up a dilemma with the distinction between recommendations and requirements: sometimes, the best defense to a claim for vicarious liability is to prevent the injury from happening in the first place. Taking control of safety or security issues may prevent some injuries, but it may also virtually assure liability if an injury does happen. In other words, requiring (rather than recommending) compliance with a particular safety standard and taking steps to enforce compliance may avoid an injury. It is also evidence that the franchisor has a general right to control safety.

4.1(viii)(b). Avoid Micromanaging the Franchisee

Recent cases demonstrate that a franchisor should be wary of controlling the minutia of franchisee operations, especially internal processes that are not obvious to customers. The *Massage Heights* case is illustrative: the franchisor's operations manual controlled nearly every aspect of the spa services, from training of therapists to step-by-step client interaction protocols, which the court concluded amounted to control of the minutia of the business. Despite the independent contractor clause in the franchise agreement, the franchisor's pervasive right to control operational details led it to being held responsible for the franchisee employee's wrongdoing. *Massage Heights Franchising, LLC v. Hagman*, 679 S.W.3d 298, 305 (Tex. App. 2023); *see also Coryell v. Morris*, 330 A.3d 1270, 1284 (Pa. Super. Ct. 2025).

The lesson: don't turn an operations manual into an employee handbook or exhaustive procedural manual for running the business. Stick to high-level standards and let the franchisee fill in the details. If franchisor-created manuals or materials start to look like those that the franchisor would use to manage a company-owned store, that is a red flag.

Franchisors should also avoid requiring franchisees to seek franchisor approval for routine operational decisions. Overcontrol not only undermines the independent contractor defense but may also give rise to a duty of care on the part of the franchisor in the control areas. In short, advised, don't prescribe a granular aspect of business.

4.1(viii)(c). Avoid Using the Corporate Store's Manual

Because personnel operating corporate stores are employees of the franchisor, company store manuals typically contain specific and detailed controls over all manner

of security and personnel matters. Thus, a franchisor should resist the urge to create a franchise operations manual by copying the corporate store's operations manual without alteration. Indeed, in *Casey v. Ward*, the District Court for the District of Columbia cited language in the McDonald's operations manual distinguishing the manual's import for a company-owned store (company policy) and for franchisees (a recommendation) significant in reaching its conclusion that the franchisor did not maintain control over the franchisee's security arrangements. 211 F. Supp. 3d 107, 120 (D.D.C. 2016).

4.1(viii)(d). Avoid Creating Unenforced Standards

Franchisors have been known to adopt seemingly infinite rules and regulations that they then don't enforce. Excess unenforced standards only provide more grist for the vicarious liability mill. Avoid them.

A standard that exists on paper but is not monitored or enforced can create unexpected liability. Plaintiffs may argue that the franchisor undertook a duty by imposing the standard, but then breached that duty by failing to ensure it was followed. Unenforced standards can also undercut the importance of other rules.

Generally, a franchisor should limit safety-related rules to those that the franchisor can and will enforce, and explicitly state the franchisee is responsible for implementing and enforcing these rules. If an element is truly important for safety or brand reputation, consider building it into the inspection checklist. Conversely, franchisors should avoid overloading the manual with aspirational rules that they have no capacity or intention to enforce. It is preferable to omit them or include them as recommendations.

4.1(viii)(e). Avoid Directing Franchisee Employees

Franchisor personnel should avoid instructing or directing the activities of employees of the franchisee. For example, in a situation where a franchisor employee conducts an inspection and identifies an issue or deficiency, the franchisor representative should call the issue to the attention of the franchisee, rather than directing franchisee employees to address it.

In addition, the franchisor should provide clear protocols for its employees during inspections. For example, a franchisor should make clear that its employee is allowed to recommend actions to improve compliance proficiencies but may not require specific methods or action beyond the standard itself. The employee should also be trained to document that compliance and the ultimate decisions rest with the franchisee. Field staff should also refrain from becoming too enmeshed in a franchisee's daily routine. By empowering franchisees to solve operational problems themselves, franchisors reinforce the franchisee's responsibility for operations.

Similarly, franchisors are well advised to avoid directly training the employees of the franchisee. Rather, a "train the trainer" approach, with franchisor personnel training managerial employees who in turn train franchisee employees, mitigates the risk of being found to control. If a franchisor is going to require a franchisee or its

employees to attend a specific training or certification – for example, a food handling course – the franchisor should determine and document that it is justifiable as a brand or legal necessity.

4.1(viii)(f). Maintain Consistent Messages in All Communications

All the hard work of scouring an operations manual to implement a careful distinction of requirement versus recommendation and avoidance of unenforced standards can be undone with incautious periodic communications with franchisees. Franchisors are well advised to maintain the distinction between "requirements" and "recommendations" in routine system communications and take the opportunity to remind franchisees that the franchisee has an independent obligation to comply with state, local, and federal laws and is responsible for its operational decisions. Likewise, operations personnel should be sensitive to the obligation of the franchisee to retain control over day-to-day operations and should avoid giving directives to franchisees that suggest control over the details of the franchised location's operations.

A franchisor's periodic inspections are often cited as indicia of control in vicarious liability litigation. Periodic inspections should involve principally the completion of objective inspection checklists. Such checklists should reflect that the inspection is concerned with the final product or service, rather than with the details of making the product or delivering the service.

Finally, choosing appropriate channels of communication is important. Franchisor field staff should communicate with the franchisee or its manager about steps to be taken to comply with system standards and leave to the franchisee the responsibility to take the actions necessary to comply with the standard.

5. CONCLUSION

Recent decisions demonstrate the thin and shifting line between brand protection and operational control. Franchisors must tread carefully, ensuring that their system standards, training protocols, and inspection practices support brand consistency without micromanaging day-to-day franchisee conduct. By reinforcing independent contractor status, clearly allocating operational responsibilities, and carefully drafting and enforcing franchise agreements, franchisors can minimize litigation exposure while preserving the integrity of their systems.