

Utilizing the Franchise Agreement and Operations Manual to Protect the System and Appropriately Define the Roles and Responsibilities of the Parties

Franchisors rightly impose requirements and system standards to assure uniformity in the franchise system and protect their trademarks and the goodwill associated with those trademarks. Those fundamental requirements should not be twisted by regulators or courts to deem franchisors joint employers with franchisees or impose liability on franchisors for wrongdoing by franchisees or franchisees' employees.

To minimize this risk, the franchise agreement should expressly declare that any required standards exist to protect the franchisor's interests in the system and the trademarks and not for the purpose of establishing any control or duty to take control over those matters that are reserved to the franchisee. The franchise agreement should reiterate within particular subject areas — such as employment-related provisions, technology, training, and elsewhere — that any particular

standard is not intended to exercise control and that the franchisee is responsible for such control and the day-to-day operations of the business.

The operations manual should appropriately balance the roles and responsibilities of the franchisor and franchisee and accurately frame the nature and scope of the franchisor controls and system standards. The franchisor's role is to grow, protect and evolve the brand and system. The franchisee is responsible for the day-to-day operation of the business.

Establishing system standards and requiring franchisees to meet system standards is appropriate, but franchisors should also recognize the distinction of recommendations or suggestions as to the means and manner of meeting the standards rather than mandating particular actions the franchisee must take to meet the standards.

Example Franchise Agreement Provisions

Any required standards exist to protect our interests in the System and the Trademarks and not for the purpose of establishing any control or duty to take control over those matters that are reserved to you. The required standards generally will be set forth in the Operations Manual or other written materials. The Operations Manual also will include guidelines or recommendations in addition to required standards. In some instances, the required standards will include recommendations or guidelines to meet the required standards. You may follow the recommendations or guidelines or some other suitable alternative, provided you meet and comply with the required standards. In other instances, no suitable alternative may exist. In order to protect our interests in the System and Trademarks, we reserve the right to determine if you are meeting a required standard and whether an alternative is suitable to any recommendations or guidelines.

It is your responsibility to make sure that you are in compliance with all laws that are applicable to the POS System or other technology used in the operation of your Business, including all data protection or security laws as well as PCI compliance. *[NOTE: This provision is in addition to the standard provisions obligating the franchisee to comply with all applicable laws.]*

Any evaluation or inspection we conduct is not intended to exercise, and does not constitute, control over your day-to-day operation of the Business or to assume any responsibility for your obligations under this Agreement.

No employee of yours will be deemed to be an employee of ours for any purpose whatsoever, and nothing in any aspect of the System or the Trademarks in any way shifts any employee or employment related responsibility from you to us. You alone are responsible for hiring, firing, training, setting hours for and supervising all employees.

As between us and you, you are solely responsible for the safety and well-being of your employees and the customers of the franchise business. *[NOTE: Consider adding to the compliance with law or indemnification sections.]*

Example Operations Manual Language

General disclaimer on the first page of the manual:

As a _____ franchisee, you alone are responsible not only for following the system, but also for the day-to-day operation of your individual Store. For example, only you are responsible for the control of your employees in the daily operation of the Store, as well as the safety and security of the Store, your employees, and customers. In this Operations Manual, we identify a number of recommendations or suggested practices related to various operational aspects of the Store, which we recommend that you implement at your Store. Our experience is that following the recommended or suggested practice will enhance the likelihood that you will be in compliance with system standards relating to the operation of your Store. We also in some instances outline required standards rather than recommendations or suggested practices. In those instances the required standards exist to protect our interests in the _____ system and the _____ trademarks and not for the purpose of establishing any control or duty to take control over those matters that are reserved to you.

As outlined in your Franchise Agreement with us, we have established a number of system standards that Store owners must meet. For example, one such system standard is the requirement that owners adhere to all laws related to the operation of the Store. This requirement to adhere to all applicable laws is a key system standard of the system. However, we do not establish specific “steps” or “controls” that an owner must take to meet this system standard. Rather, in this section, we identify a number of recommendations and suggested practices concerning compliance with laws. Please note that compliance with applicable laws and regulations deserves special attention because they clearly are your sole responsibility. We always recommend that you contact your own lawyer to make sure you understand and comply with all laws applicable to your business. No information that we provide to you in these areas shifts any part of this responsibility from you.

Special language for the employee/human resources section of the manual:

As the owner of your business, you alone are responsible for the daily operation of the Store, including selecting and training your employees, developing employee relations, and establishing your own policies and practices in a manner that complies with all applicable federal, state and local employment laws and ordinances. We always advise that you consult with your own employment attorney to determine the scope of your rights and responsibilities regarding employment matters.

Accordingly, any employment-related information contained herein is merely a compilation of suggestions and is intended to serve only as an aid to you in operating your business. Any recommendations or suggestions we provide in this Operations Manual or any other writings do not negate your sole responsibility for all employment matters related to the Store. You are not required to adopt any suggestions or to use any of the sample forms contained in these policies, but we invite and encourage you to read the materials and incorporate into your own practices any suggestions you feel are appropriate for your operation. You are free to modify the materials, of course, to reflect your individual business. Remember that employment laws and practices vary significantly from state to state, so you should consult an employment law attorney in the state(s) in which you operate to determine the appropriateness of the practices and forms for your business. When you prepare your own personnel forms, policies or handbooks, do not label any such documents with the _____ logos or other trademarks, so that it is clear to your employees that they are employed by you and not by us or any of our affiliates.

Contact Us



Brian Schnell

Partner ■ Minneapolis
+1 612 766 7699
brian.schnell@faegredrinker.com



Lauren Linderman

Partner ■ Minneapolis
+1 612 766 7251
lauren.linderman@faegredrinker.com

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