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Welcome to Mohajerian Law Corp’s monthly Franchise Newsletter. Each month we will provide our readers with pertinent industry, legal, and business information related to the Franchise industry. Your suggestions and interests are always valued; please forward all comments or suggestions to:
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Overtime and Non-Exempt Employees

California and federal law both provide for Payment of overtime compensation based on a multiple of the employee’s ‘regular rate’ of pay (generally time-and-a-half) for hours above the statutory maximum (generally over 40 hours in a week under federal and state law, but also over eight hours per day under California law.

Under both federal and California law, a ‘workweek’ means seven consecutive days beginning with the same calendar day each week.

State law requires employers to authorize rest periods of specified minimum duration (generally 10 minutes of paid rest for every four hours worked). No employer may require an employee to work during any meal or rest period under IWC Wage Order mandates.

Employees who work more than five hours in a day are entitled to a meal period of at least 30 minutes and a second meal period of at least 30 minutes if they work more than 10 hours in a day. An employer who fails to provide meal or rest periods as required by an applicable Wage Order must pay the employee one additional hour of pay at the employee’s regular rate of pay for each work day that the meal or rest period was not given.

When Does Overtime Start?

In California, the IWC Wage Orders broadly define ‘hours worked’ to include ‘the time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.’

How Are Overtime Pay and Other Penalties Calculated?

When Does Overtime Start?

Who Is Responsible For Recordkeeping?

How Can Unauthorized Overtime Be Prevented?



The critical issue in determining hours worked is whether the employee was ‘suffered and permitted’ by the employer to work. It is irrelevant whether it was necessary for an employee to work long hours in order to complete an assignment, or whether another employee could have done the work in less time. ‘It is immaterial whether it was necessary for (the employee) to work long hours, so long as he did, with the actual or constructive knowledge of his employer.’ Donovan v. Kentwood Develop. Co., Inc.; see also Skipper v. Superior Dairies, Inc. – fact another employee could or did perform same duties in less time does not negate claimant’s right to overtime pay; Davis v. Food Lion – no overtime pay where employer had no actual or constructive knowledge of employee’s ‘off the clock’ work.

An employee must be paid for time considered to be on duty while on the employer’s premises. See Bartholomew v. Heyman Properties. Preparatory activities that are an integral part of the employee’s principal activity are compensable as time worked. Examples include: Mitchell v. King Packing Co. – in meatpacking plant, time spent sharpening knives before and after work considered integral and compensable; Alvarez v. IBP, Inc. – time spent donning and doffing unique protective gear, walking to job station and waiting for assembly line to begin, were ‘integral and indispensable’ to job and therefore compensable; but see Tum v. Barber Foods, Inc. – employer not required to compensate employees for time spent walking to place where safety gear was stored and a ‘short amount of time’ waiting in line to obtain protective gear.

Employers need not compensate employees for activities preliminary or postliminary to their principal duties unless those activities are an ‘integral and indispensable part’ of the principal activities for which the workers are employed. See Alvarez v. IBP, Inc. – donning and doffing required by law and done for the benefit of employer is integral and indispensable part of workday; compare Turner v. Barber Foods, Inc. – time spent donning and doffing of non-required gear not compensable.

Some activities that may qualify as ‘work’ and nevertheless do not require compensation because the activities involve such little time that they are adjudged de minimis: ‘A few seconds or minutes of work beyond the scheduled working hours ... may be disregarded.’ Anderson v. Mt. Clemens Pottery Co. Whether the additional time spent on preliminary and postliminary activities is ‘de minimis’ may depend on:

- The aggregate amount of time spent on such activities;
- The activity’s regularity;
- The ‘practical administrative difficulty of recording the additional time.’ Reich v. Montfort, Inc.

As little as 10 minutes spent on preliminary and postliminary activities ‘goes beyond the level of de minimis.’ Reich v. Montfort, Inc. – time spent in donning and removing safety gear and cleaning knives at meat processing plant.



Who is responsible for record-keeping?

Every employer is required to make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records' for specified periods of time.

The following records must be maintained for at least three years from the last date of entry:

- Payroll records, including each employee's name, address, occupation hours worked each day and week, wages paid and date of payment, amounts earned as straight-time pay and overtime, and deductions;
- Plan, trusts and collective bargaining agreements;
- Employee notices; and
- Sales and purchase records.

The following additional records must be retained for a minimum of two years from the date of last entry:

- Basic time and earning cards;
- Wage rate tables;
- Work schedules;
- Order, shipping, and billing records; and
- Records of additions to or deductions from wages.

Employees are not penalized because of their employer's failure to keep adequate records. They can meet their burden of proof in wage actions by their own testimony showing that they have in fact performed work for which they have not been properly compensated. They need not prove the precise hours worked; they need only produce sufficient evidence to show the amount and extent of such work as a matter of a just and reasonable inference. Beliz v. W.H. McLeod & Sons Packing Co. – 'Because precise evidence of the hours worked by each individual is not available due to the failure of (employers) to keep adequate records, the workers may satisfy their burden with admittedly inexact or approximate evidence'; see also Mumbower v. Callicott – court properly relied on plaintiff's own recollections to determine number of hours she worked where employer failed to maintain adequate records.

The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or that negates the reasonableness of the inference the employee's evidence supports. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result is only approximate. Anderson v. Mt. Clemens Pottery Co.

The employer must provide an employee or former employee copies of his or her payroll records within 21 days after a request, or permit the employee to inspect those records. (Failure to comply results in a \$750 fine, and the employee may sue to obtain the information and recover



costs and fees). Also with each pay check the employer must give an itemized wage statement showing the hours worked by the employee. A knowing failure to comply can result in a \$100 penalty per an offense and a maximum statutory penalty of \$4,000.

How can unauthorized overtime be prevented?

Courts examine the employer's personnel documents to determine if there is an implied agreement. Tomlison v. Qualcomm, Inc., Thus, an employee handbook may give rise to an implied-in-fact contract, by setting self-imposed limitations, such as discipline and termination procedures. Foley v. Interactive Data Corp. When an employer promulgates formal personnel policies and procedures in handbook, manuals, and memorandua disseminated to employees, a strong inference may arise that the employer intended workers to rely on these policies as terms and conditions of their employment, and that employees did reasonably so rely. Guz v. Bechtel Nat. Inc.

Failure to have a handbook will not necessarily prevent a finding o an implied-in-fact contract since the implied contract may be based in part on employer policies and procedures. Whether those procedures have been memorialized in a handbook does not seem to be determinative. See, for example, Harden v. Maybelline Sales Corp. (no discussion of handbook, yet court concluded that employee could state action based on implied-in-fact contract based in part on oral representations from personnel department of just cause for standard for termination.)

The first step to prevent employees from taking unauthorized overtime is to have a firm policy stated in an employee handbook prohibiting overtime or permitting overtime only if certain requirements are met. Although an employee's failure to follow the procedures in an employee handbook may not be able to defeat a wage and hour claim, the employee handbook should help greatly when it comes time to determine what the employer's stated policy regarding overtime was. Obviously you must be sure to enforce your own written policies and not make regular informal exceptions to the written policy.

||| Case Law Review |||

Charges Not Indirect Franchise Fee Under California Act:

A fleet surcharge and a refueling charge that a rental car company withheld from its commission payments to a rental car agent did not constitute an "indirect franchise fee" under the meaning of the *California Franchise Relations Act (CFRA)*, the U.S. Court of Appeals in San Francisco decided. Since there was no franchise relationship, the Act could not be applied to invalidate a contract provision allowing termination by either party upon 30 days' written notice. Summary



judgment in favor of the rental car company on the CFRA claim was affirmed. Adees Corp. v. Avis Rent-a-Car System, Inc.

The trial court observed that although there was little authority on what constituted a franchisee fee under California law, other states considered a number of interrelated factors to determine whether a payment was a franchise fee. Those factors included: (1) whether the party making the payment received something of value in exchange for the payment, (2) whether the payment was an ordinary business expense of an unrecoverable investment, and (3) whether the party making the payment put its own money at risk.

Engine Distributor Had Good Cause to Terminate Dealer:

A distributor of a particular brand of truck engines had “good cause” under the Minnesota heavy equipment dealer law to terminate its dealer agreement with a truck dealership because the dealership failed to substantially comply with the agreement, the Minnesota Supreme Court has held. The agreement required the dealership to “actively and effectively” promote the sale of the brand of engines to its customers. However, in 2002 the manufacturer of the type of trucks sold by the dealership decided to no longer offer the particular brand of engines in new truck sales. Therefore, the dealership’s resulting inability to sell new trucks equipped with the brand of truck engine prevented it from “actively and effectively” promoting the sale of such engines as required by the parties’ agreement, the court decided. The fact that the dealer was able to comply with some other essential requirements of the agreement – i.e. selling replacement engines to current owners – did not eliminate good cause for renewal. Therefore, a decision by a Minnesota appellate court was affirmed. River Valley Truck Center v. Office of App.

Class Arbitration Ban Unconscionable Under California Law:

A ban on class-wide arbitration in an arbitration clause within several mailing service business franchise agreements was unconscionable and unenforceable under California law, a California appellate court has decided. Additionally, certain limitation of remedies provisions in arbitration clauses within some of the group's agreements were unconscionable and unenforceable to the extent that they deprived the franchisees of statutorily authorized remedies or relief in court that would otherwise be allowable to them.

Specifically, limitation of remedies provisions found in some of the agreements restricted an arbitrator from awarding punitive, consequential, or incidental damages, lost wages and/or profits, attorney fees and/or costs, and specified that, "in no event shall any monetary damages be recovered by a franchisee in excess of the amount of the franchise fee and the cost of building" its franchised location. The franchisees brought suit against their franchisor challenging the conversion of their stores into a new format and alleged violations of the California Franchise Investment Law, the California antitrust and "little FTC" acts, along with breach of contract, tortious interference, and defamation.



The trial court's denial of the franchisees' motion for consolidation of the claims and its ruling that the ban on classwide arbitration in some of the agreements was not unconscionable was substantively incorrect because it disregarded applicable law governing adhesion contracts in the franchise situation, where broad statutory arguments implicating the public interest were raised, the appellate court ruled. The franchisees made a statutory showing that there were separate arbitration agreements, that their disputes arose from the same facts or series of related transactions, and that there were common issues of law or fact. Indep. Assn. of Mailbox Center Owners v. Super. Ct., Cal.

Termination Did Not Violate Illinois, Minnesota Laws:

A dealer's claims that a company that provided background music through a network of dealers violated the Illinois Franchise Investment Act and the Minnesota Franchises Law by terminating their agreement were without merit, a federal district court in Chicago has ruled. Furthermore, the dealer was not permitted to amend its complaint to allege a violation of the Illinois "little FTC" Act. The company terminated the parties' agreement upon 12 months' notice of its decision to exit the background music business.

The dealer's claim that the company violated the Illinois Act by terminating their 1995 dealership agreement without "good cause" was barred by the Act's one-year statute of limitations, the court determined. However, contrary to the impression created by the dealer's claims, the putative franchise fees were far from being hidden, according to the court. The fees were located in the parties' previous dealer agreement, executed in 1988.

The dealer's claim that the company violated the Minnesota Franchises Law by terminating their agreement was waived because the agreement contained a clause explicitly stating that the dealer was not a franchisee, the court decided. Although the Minnesota law contained an anti-waiver provision, it was limited to Minnesota franchisees and the dealer was located in Illinois. It was undisputed that the dealer was neither a Minnesota resident nor "a franchise to be operated" in Minnesota under the meaning of the Minnesota statute.

The dealer was denied leave to file an amended complaint adding a claim under the Illinois "little FTC" Act against the company because such a claim would be futile, the court held. The agreement stated in unequivocal terms that the corporation could exit the business at any time on 12 months notice and that the agreement would last, at the latest, until December 31, 1999. During the negotiations for the parties' agreement, when the company told the dealer that it would not agree to a 60-month notice period, that was a clear warning sign, the court observed. Sound of Music Co. v. Minnesota Mining and Mfg. Co.



Labs Could Sue for Resale Price Fixing, Not Exclusivity Pacts:

Dental laboratories could pursue a resale price fixing claim against an artificial tooth manufacturer and 26 of its authorized dealers, the U.S. Court of Appeals in Philadelphia has ruled. The laboratories first filed suit in 1999, claiming that the manufacturer monopolized, attempted to monopolize, conspired to monopolize, and unreasonably restrained trade in the market for artificial teeth by entering into agreements with nearly all of its dealers setting their resale prices and prohibiting them from also selling teeth made by its competitors. Standing to pursue damages was denied under the *Illinois Brick* doctrine. In *Illinois Brick Co. v. Illinois* (431 U.S. 720, 1977), the U.S. Supreme Court held that indirect purchaser plaintiffs did not have statutory standing to recover damages for "passed-on overcharges." The laboratories filed another suit in 2001 making substantially similar claims of wrongdoing, but additionally naming the dealers as co-conspirators and asserting that the labs were direct purchasers from the dealers. Again, however, a federal district court ruled that *Illinois Brick* barred the labs from pursuing damages and the claims were rejected. [Howard Hess Dental Labs v. Dentsply Int'l, Inc.](#)

Exclusive Dealing (New Petition for Review):

A maker of artificial teeth has asked for U.S. Supreme Court review of whether a manufacturer's exclusive dealing arrangements with some --but not all --of its distributors would violate Section 2 of the Sherman Act, even if the arrangement neither impeded nor precluded rival manufacturers from reaching consumers and had been found to have no anticompetitive effects under the Clayton Act. At issue is a ruling of the U.S. Court of Appeals in Philadelphia granting a government request for injunctive relief against the manufacturer's exclusivity policy. The petition for review (*Dentsply Int'l, Inc. v. U.S.*, Dkt. No. 05-337) was filed September 14, 2005.

Taxation (Denial of Review):

The U.S. Supreme Court has declined to review a decision of a North Carolina appellate court holding that nine Delaware corporations, which had no physical presence in North Carolina but licensed trademarks to related retail companies operating stores within the state, were subject to North Carolina franchise and income taxes. The petition for review (*A & F Trademark, Inc. v. Tolson*, Dkt. No. 04-1625) was denied October 3, 2005.

Naked Licensing (Denial of Review):

The U.S. Supreme Court will not review a ruling by the U.S. Court of Appeals in Cincinnati that a company that sold retrofitted school buses to people wishing to enter the mobile gymnastics instruction market was likely to succeed on its claim of infringement despite a defending bus purchaser's affirmative defense that the company had abandoned the unregistered service mark through naked licensing. The petition for review (*Cranmer v. Tumblebus, Inc.*, Dkt. No. 04-1684) was denied October 3, 2005.



Relationship & Termination (Denial of Review):

The U.S. Supreme Court also declined to review a decision by the U.S. Court of Appeals in Philadelphia that a motor vehicle dealer's failure to substantially comply with its franchise agreement was a complete defense to the dealer's claim that the franchisor violated the New Jersey Franchise Practices Act by imposing unreasonable standards of performance on the dealer. Specifically, the appellate court determined that the plain meaning of Section 56:10-9 of the Act, which provided that it "[i]t shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it be shown that said franchisee has failed to substantially comply with requirements imposed by the franchise," as a complete defense to "any action" under the Act, was consistent with the Act's stated legislative purpose. The petition for review (*Coast Automotive Group, Ltd. v. Volkswagen Credit, Inc.*, Dkt. No. 04-1737) was denied October 3, 2005.

Procedure (Denial of Review):

A decision by the U.S. Court of Appeals in Denver holding that sandwich shop master franchisees were entitled to only \$1 as nominal damages under Colorado law for a franchisor's breach of a termination agreement will not be reviewed by the U.S. Supreme Court. The petitioning master franchisees asked the Court to consider whether the moving party in a cross-motion for summary judgment should bear the same burden of proof as the moving party in the initial motion for summary judgment. The petition for review (*Mollinger-Wilson v. Quizno's Franchise Co.*, Dkt. No. 04-1306) was denied August 1, 2005.

Motor Vehicle Dealers (Denial of Review):

The U.S. Supreme Court will not review a decision by the U.S. Court of Appeals in Boston ruling that a vehicle distributor did not commit coercion under the federal Automobile Dealer's Day in Court Act by engaging in an option-packing scheme. The dealers asked the Supreme Court whether "coercion" under the federal Automobile Dealer's Day in Court Act was limited to violation of a dealer's contractual rights. The petition for review (*George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, Dkt. No. 04-1465) was denied October 3, 2005.

Internet Kiosks (FTC Franchise Rule Enforcement):

There was good cause to believe that two companies and their principals had engaged and were likely to engage in practices that violated the FTC's Franchise Rule and the FTC Act through their operation of an Internet kiosk business opportunity scheme. Therefore, the allegedly illegal scheme was temporarily restrained and the assets of the defendants frozen pending a preliminary injunction hearing. The complaint was filed in a federal district court in Miami on September 26,



2005 and the court granted a temporary restraining order, froze the defendants' assets, and appointed a receiver on September 27, 2005. The defendants told consumers they could use the kiosks to start their own business, promising them a substantial income and help finding high-traffic, high-volume profitable locations for the machines. According to the FTC, consumers typically lost the money they invested, and the defendants rarely, if ever, delivered the terminals to profitable locations. The FTC alleged that the business opportunity ventures marketed by the defendants were "franchises" under the meaning of the Rule and that the defendants made earnings claims without a reasonable basis and provided inaccurate and incomplete disclosures (*FTC v. Transnet Wireless Corp.*, DC Fla., Case No. 05-61559-Civ-Marra/Seltzer).

ATMs & Internet Kiosks (FTC Franchise Rule Enforcement):

A company and its principal have agreed to a stipulated final order, entered August 30, 2005, settling FTC charges that their sales of ATMs and Internet kiosks violated the Commission's Franchise Rule. The FTC alleged that the defendants sold consumers cashless ATM and Internet kiosk franchises without providing them with disclosures identifying prior franchisees or justifying purported earnings. The Department of Justice filed the complaint on behalf of the FTC in February 2005, as part of Project Biz Opp Flop, a multi-agency law enforcement sweep targeting fraudulent business opportunities (*U.S. v. American Merchant Technologies, Inc.*, DC Fla., Case No. 05-20443-Civ-Huck).

Tortious Interference & Unlawful Actions (Optometrists):

A nonprofit corporation that contracted with optometrists to provide prepaid vision care services to beneficiaries of its insurance plans did not tortiously interfere with business relations by terminating an optometrist's membership in its plan after it discovered that the optometrist had entered into a franchise agreement with a franchisor of optometrists. The optometrist contended that the corporation intentionally caused him damages without justifiable reason when it terminated their relationship and engaged in a campaign to discourage current and prospective patients from patronizing his business. However, his complaint failed to detail which actions, if any, the corporation unlawfully engaged in to damage his business after the termination. The agreement between the nonprofit corporation and the optometrist required the optometrist to maintain majority ownership and complete control of all aspects of his practice, including his dispensary. Unbeknownst to the corporation, the optometrist had previously entered into a franchise agreement prior to his contracting with the nonprofit corporation. The optometrist's actions in entering into the franchise agreement conflicted with the plain language of his agreement with the nonprofit corporation that he retain control of all aspects of his practice because the franchise agreement required the optometrist to operate his business in a manner that strictly adhered to the franchisor's standards and policies. Thus, the nonprofit corporation had justifiable cause to terminate its contract with the optometrist (*Hardy v. Vision Service Plan, Inc.*, Mont. Sup. Ct.).



Vicarious Liability & Agency (Auto Repair Shops):

An Alabama trial court did not abuse its discretion in denying further discovery on the issue of whether an automobile repair shop franchisee was an actual or apparent agent of an automobile repair shop franchisor. A minor passenger in an automobile was injured when the automobile experienced a malfunction that caused it to collide with another vehicle. The automobile had been repaired at the franchisee's business and the minor passenger and her mother sued the franchisee and the franchisor, alleging that the franchisee had negligently or wantonly failed to properly repair the automobile and that the franchisor was liable because the franchisee was the franchisor's actual or apparent agent. Under the undisputed facts, the plaintiffs could not claim that the franchisee exhibited to them any apparent authority as an agent of the franchisor, and could not claim that they were misled to their detriment by any appearances that the franchisee was the franchisor's agent. Even if the plaintiffs had been able to develop the names of witnesses who could testify to the indicia of apparent authority, that indicia would be irrelevant because the plaintiffs would have been ignorant of it. Moreover, given the significant expenditure of attorney fees and expenses by the franchisor over the long course of the litigation, the trial court did not exceed its discretion in concluding that the plaintiffs had a full and fair opportunity to ascertain facts pertaining to both the apparent and actual agency theories (*Rosser v. AAMCO Transmissions, Inc.*, Ala. Sup. Ct.).

Racketeering & Pattern of Activity (Predicate Acts):

Two shareholders of a water purification systems distributor who sued a manufacturer of water purification systems and its president for violation of the federal RICO statute sufficiently alleged both the relationship and continuity prongs of a pattern of racketeering for purposes of surviving a motion to dismiss. The shareholders alleged that for at least 18 months, on numerous occasions, and in furtherance of their scheme to defraud the shareholders, the defendants committed: (1) mail fraud; (2) wire fraud; and (3) travel fraud. Violations of all three of those statutes served as predicate acts for a RICO violation. Taken together, the allegations demonstrated that the defendants sought to defraud the shareholders through multiple, related predicate acts which were committed over a closed-end period of conduct. The defendants argued that any predicate acts occurring after the parties executed a dealership agreement in October 2001 should not be considered. However, the shareholders did not allege the existence of any dealership agreement which was central to their RICO claims; and, on a motion to dismiss, matters outside of the complaint which were not central to a plaintiff's claim were not considered (*Mougrabi v. Covenant Air & Water, LLC*, DC Ill.).

Good Faith & Open Price Terms (Gasoline Dealers):

A gasoline station franchisor could have breached its contractual obligation with several franchisees to set an open price term for gasoline in good faith by setting gasoline prices



unreasonably high. Although the evidence submitted by the plaintiff franchisees was weak, it was enough to submit the issue to a jury. There were genuine issues of material fact over whether there was a substantial difference in price between what the franchisor charged the franchisees for gasoline and what it charged independent or franchisor-owned dealers, and over whether the franchisees genuinely competed with such independent or franchisor-owned dealers. The evidence proffered by the franchisees could demonstrate to a jury that the franchisor made it impossible for their businesses to survive and that it set prices in an attempt to drive them out of business (*Bob's Shell, Inc. v. O'Connell Oil Associates, Inc.*, DC Mass.).

Injunctive Relief & Irreparable Harm (Purified Water Business):

A purified water business franchisor was not entitled to a preliminary injunction enjoining a franchisee from operating its business pending resolution in arbitration of the franchisor's claims against the franchisee for various breaches of the parties' agreement as well as breaches of a noncompetition agreement between the parties. The franchisor alleged that the franchisee relocated its franchise without the requisite approval, failed to timely pay royalty and advertising fees, failed to provide monthly sales reports, and improperly used the franchisor's trademarks in a manner causing injury to the franchisor. The franchisor did not terminate the parties' franchise agreements, but merely brought suit, and invoked the arbitration clause in the parties' agreement three days later by filing a demand for arbitration of its claims and the instant motion for a preliminary injunction. The franchisor failed to establish that it would suffer any irreparable harm as a result of the franchisee's continued operation of his franchise, that any imminent breach of the franchise agreements would occur, or that the status quo of the parties' relationship had been altered to such an extent that court intervention was required. The only evidence of irreparable harm offered by the franchisor consisted of conclusory claims about the theoretical harm that could result from the continued operation of the franchise. Moreover, the franchisor provided no substantiation to sharply disputed, vague references in the franchisor's affidavit referring to the possibility that the franchisee could attempt to transfer his franchise to an unapproved third party (*H2O to Go, LLC v. Martinez*, DC Fla.).

Balance of Harms (Staffing Business):

The balance of harms tipped decidedly in favor of granting a temporary staffing business franchisee's requested preliminary injunction prohibiting a franchisor from terminating their relationship without an opportunity to cure. Even assuming that enjoining the franchisor from terminating the parties' relationship would likely damage the franchisor's reputation, the fact that termination would cause the franchisee to suffer irreparable harm combined with the fact that the franchisee was likely to succeed on the merits of its claim that the franchisor's proposed termination of the relationship was not contractually authorized, tipped the balance of harms decidedly in favor of granting the franchisee's requested injunction (*Manipower, Inc. v. Mason*, DC Wis.).



Vicarious Liability & Apparent Agency (Restaurant Franchise):

McDonald's Corporation was not the principal of one of its franchisees under theories of apparent agency asserted by a minor employee of the franchisee and her father, a Washington appellate court has determined. Therefore, the franchisor was not vicariously liable for the minor and father's claims that an assistant manager of the franchisee's business introduced the minor to drugs and sex. The franchisee hired the assistant manager as an employee despite the individual's disclosure that he had "legal problems" and had committed a bank robbery. After she was hired by the franchisee, the minor plaintiff spent the night at a hotel with the assistant manager and, four months later, ran away from home to be with the assistant manager.

The father alleged that he allowed his daughter to work at the restaurant believing that the franchisor stood for a uniform, quality, wholesome environment. Thus, he argued that a question of fact existed as to whether the franchisor, through its intentional creation of a wholesome image, held out its franchisees as its agents. However, the father pointed to no representations or acts by the franchisor upon which he relied in believing that his daughter worked for the franchisor or that the franchisor would assure a safe working environment in its franchised restaurants, the court noted. Using young people in advertisements, serving "Happy Meals," sponsoring the Ronald McDonald house, and supporting Olympic athletes were not enough to create an apparent employment relationship between McDonald's Corporation and its franchisees' employees, the court decided. *D.L.S. v. McDonald's Corp.*, Wash. Ct. App.,

Choice of Forum & Contractual Stipulations:

A distribution agreement between a Swedish engine parts manufacturer and a California distributor contained a forum selection clause selecting Sweden as the forum for resolving disputes between the parties, a federal district court in Fresno, California, has determined. The distributor contended that the parties' agreement did not contain a forum selection provision. However, a typographical error in the agreement was reformed under California law to include a missing word: "of," that had been left out of the agreement in error.

The distributor contended that the phrase "Swedish court law" in the second sentence meant that disputes would be settled according to "Swedish court law." However, it was doubtful that the distributor's construction of the phrase was a meaning to which it was reasonably susceptible, according to the court. There was no evidence that "Swedish court law" was a phrase typically used, either in contracts or generally. Moreover, under the distributor's construction, both sentences of the provision served to designate Swedish law as the governing law and, therefore, the second sentence was redundant. It was only through the addition of the word "of" that the phrase "Swedish court law" became meaningful, the court reasoned. *Whipple Industries, Inc. v. Opcon AB*, DC Cal.



||| New Franchising Laws |||

California & Equipment Dealers:

A recently enacted California law expands the definition of equipment to include all-terrain vehicles and other machinery, equipment, implements, or attachments used for specified purposes including: lawn and grounds maintenance; planting and cultivating; livestock production; and industrial, construction, maintenance or mining activities. In addition, the new law designates a person or entity primarily engaged in the retail sale of equipment as a dealer or dealership. The enactment adds definitions for "single-line supplier" and "single-line dealer" and provides that a single-line supplier shall not terminate a single-line dealer without good cause and defines certain circumstances where good cause exists. It revises and expands the provisions prohibiting dealer termination, cancellation, failure to renew and substantially change the competitive circumstances of dealer agreements as applied to dealers and suppliers who are not to single-line suppliers or single-line dealers. Assembly Bill No. 585 was approved and became effective October 7, 2005 (*Equipment dealers*).

North Carolina & Motor Vehicles:

A new North Carolina law amends the requirements for franchise-related form agreements offered to motor vehicle dealers. It also adds provisions prohibiting any manufacturer or factory branch from requiring franchised dealers to enter into certain financing agreements with a captive finance source and defines "captive finance source" as any financial source providing automotive-related loans for motor vehicles in North Carolina that is owned or controlled by a manufacturer, factory branch, distributor, or distributor branch. Additionally, the measure prohibits manufacturers from requiring dealers to use certain types of computer equipment and from accessing dealer computer information under certain circumstances. House Bill No. 1527 was approved September 20, 2005 and becomes effective November 2, 2005 (*Motor vehicles*).

||| Arbitration Agreements |||

Non-Signatories & Compact Disk Store Franchisor:

Three principals of a compact disc store franchisor were entitled to enforce the arbitration clauses in four franchise agreements between the franchisor and a franchisee despite their status as non-signatories of the franchise agreements, the U.S. Court of Appeals in St. Louis has ruled. Evisceration of the arbitration clauses in the franchise agreements would be avoided only by allowing the three principals to invoke arbitration, the court reasoned. The franchisee alleged



claims of negligence, negligent misrepresentation, and fraudulent misrepresentation against all three of the principals.

The tort claims were within the scope of the broad arbitration clause in the franchise agreements, the court held. Broadly worded arbitration clauses such as the one at issue were generally construed to cover tort actions arising from the same set of operative facts covered by a contract between the parties to an agreement. *CD Partners, LLC v. Grizzle*, CA-8.

||| Pending Legislation |||

Gasoline Dealers & Petroleum Marketing Practices Act (U.S.):

Two recently introduced federal bills address the subjects of gasoline dealers and would amend the Petroleum Marketing Practices Act (PMPA). One of the bills (H.R. 3926) would prohibit a franchisor of leased marketing premises from transferring or assigning its interests in the franchise during the term of the franchise unless the franchisor, at least 45 days before the proposed transfer or assignment either: (1) made a bona fide offer to sell, transfer, or assign to the franchisee the franchisor's interests in the leased marketing premises; or, (2) if applicable, offered the franchisee a right of first refusal to purchase or acquire the franchisor's interests in the leased marketing premises. The bill would also make null and void any provision of a franchise or marketing agreement that required either party to the agreement to pay for the prevailing party's legal fees and expenses. In addition, excepting retail outlets operated by the refiner or distributor, the bill would prohibit a refiner or distributor from fixing or maintaining the retail price of motor fuel at a retail outlet supplied by that refiner or distributor. H.R. 3926 was introduced and referred to the House Energy and Commerce Committee September 27, 2005.

The other bill would amend the PMPA by providing that no franchise could include as a condition a limitation on the source from which a franchisee could obtain motor fuel, except that the franchisee could be required to obtain only motor fuels with respect to which the franchisor, or the refiner that supplied the franchisor, owned or controlled a trademark. H.R. 3964 was introduced and referred to the House Energy and Commerce Committee September 29, 2005.

||| Standing to Sue |||

Connecticut Wine Law:

The Connecticut Liquor Control Act did not convey a private right of action authorizing a group of wholesale wine distributors to sue a competing wine wholesaler for alleged violations of the Act, the Connecticut Supreme Court has ruled.

The group of distributors possessed standing to sue the competing wholesaler under the Connecticut "little FTC" Act premised upon their allegations that the wholesaler violated the Liquor Control Act, the court decided. The "little FTC" Act was designed to provide protection to businesses as well as to consumers. The fact that the Liquor Control Act did not convey a private right of action to the plaintiff distributors was irrelevant to whether they had standing to bring a "little FTC" Act claim, the court observed. *Eder Brothers v. Wine Merchants of Conn.*, Conn. Sup. Ct.

References:

CCH Franchise Business Guide, Letter No. 312, October 14th, 2005.