



Franchisor Vicarious Liability: Stuck Between a Rock and a Hard Place?

Last year saw continued litigation involving vicarious liability claims against franchisors based on the acts of their franchisees. In two notable cases, *Courtland v. GCEP-Surprise, LLC* and *Depianti v. Jan-Pro Franchising Int'l, Inc.*, courts in Arizona and Massachusetts adopted what is becoming the predominant (although not yet exclusive) test for determining the franchisor's vicarious liability: the so-called "instrumentality test." Under this test, a franchisor will be held vicariously liable for its franchisee's conduct only where the franchisor controls or has the right to control the specific instrumentality (i.e., policy, practice, or aspect) of the franchisee's business that caused the alleged harm. What factors will be considered to determine franchisor "control" under this test, however, varies from court to court, and courts even apply different tests in assessing franchisor vicarious liability.

For example, in a recent [Cheng Cohen Alert](#), we discussed the *Courtland* case in which the court ruled that because the franchisor did not control the instrumentality—the franchisee's general manager who allegedly discriminated against and harassed one of the franchisee's employees—it could not be held vicariously liable for the employee's misconduct. In evaluating the franchisor's control, the court looked to the franchisor's involvement in employment decisions or HR-related functions, such as compensation, scheduling, recordkeeping, performance reviews, employee training, and discipline, and found none because the franchisee had sole responsibility over those

decisions. The court was also persuaded by the franchise agreement term providing that the franchisee was an independent business person and had sole responsibility for control of the franchise.

Just last month, in *Cain v. Shell Oil Co.*, a federal court in Florida granted summary judgment in favor of the franchisor in an action seeking to hold Shell liable for a shooting and the resulting injuries to plaintiff that occurred at a franchised Circle K convenience store. However, unlike in *Courtland*, the court found the independent contractor provision “not determinative” and focused its inquiry on “Shell’s right to control the store, [] not whether control was actually exercised.” Plaintiff claimed Shell had a right to control the franchised store because of the minimum standards Shell imposed on the store regarding safety and security. The court disagreed, holding that the minimum standards simply established uniformity conditions among the franchise system and did not “give Shell control over the means by which such conditions are met.” Because Shell did not control the store’s operations, the court granted summary judgment in Shell’s favor.

These cases emphasize the importance of periodic review by franchisors of their franchise agreements, operations and training manuals, system standards, practices, and policies, as well as the significance of training and compliance monitoring, to minimize risk of or avoid vicarious liability altogether. To this end, some questions that should be asked by franchisors include:

- Do my franchise agreements sufficiently disclaim a principal-agent relationship between the franchisor and franchisee?
- Do I provide any employment-related materials to franchisees that cover in any way hiring, supervision, compensation, benefits, scheduling, timekeeping, performance reviews, training, discipline, or firing of their employees? If so, how are these materials being provided? Do they identify the correct party (for example, the name of the franchisee, NOT the franchisor)? Do they indicate that the franchisee is an independent business operating pursuant to a license? The format and content of these materials matter.
- Do I require franchisees to comply with applicable law, including labor and employment laws?
- Do I assert unnecessary control over the daily operations of the franchisee’s business, or merely over system standards?
- Do I require franchisees to disclose to the public that it is a franchise or independently owned and operated? If so, how is the disclosure made and is it enough?
- Do I distinguish in the operations manual and other guidance clearly between recommendations and requirements to franchisees?
- Are my supervisory employees and field personnel who interact with franchisees properly trained on these issues? Do they know when to make recommendations versus demand compliance? What procedures do I have in place to ensure that new hires are properly trained?
- Do my franchise agreements protect me against claims relating to the operation of the franchised business, such as requiring indemnification, contribution, and insurance?

For questions or more information regarding the issues discussed in this Alert, please contact us.

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