

Avoiding the Franchise Landmine Hiding in Your License Agreements

September 17, 2025

Paul F. Woody & Dawn M. Johnson

Introduction and Roadmap

- I. Introductions
- II. A quick test
- III. The basics of franchise law
- IV. Why non-franchise lawyers need to know the basics
- V. Litigating franchise and licensing disputes

Who are we?



- **Dawn Johnson:** Litigator, Certified Franchise Executive (“CFE”)



- **Paul Woody:** Transactional counsel, former ACC member, CFE

What are we doing here?

- Making your professional liability insurer happy;
- Helping you be one of the smartest attorneys in your network;
- Revealing a blind spot, helping you avoid landmines, helping you issue spot, [fill in your own metaphor here];
- Helping you protect your clients;
- Helping you avoid a lawsuit or regulatory action;
- All of the above.

Pop Quiz: Question 1

- In contract law, which of the following is not required for a valid contract?
 - A) Offer
 - B) Acceptance
 - C) Consideration
 - D) Written document

Question 1: ANSWER

D) Written Document

Pop Quiz: Question 2

- What is the primary source of law in the United States?
 - A) The Constitution
 - B) Judicial Opinions
 - C) Statutes
 - D) Executive Orders

Question 2: ANSWER

A) The Constitution

Pop Quiz: Question 3

- What is the only element on the periodic table that was named after a fictional character?

- A) Ytterbium
- B) Neodymium
- C) Einsteinium
- D) Thorium

Question 3: ANSWER

E) Samarium

Franchise laws = Samarium

- Blind spots are scarier than legal topics that are outside of your expertise.
- You can address problems that you know exist.
- But you can't avoid the landmines you can't see.

This Matters Because ...Licensing Is Common

- Licensing is a common and attractive legal arrangement.
- When businesses find aligned third parties, they recognize the opportunity for collaboration.
- They assume they can license their names, look and business models to those who want to assist in their expansion.



This Ain't Just Fast Food, Baby

- The number of brands using the franchise model — intentionally and unintentionally — continues to expand.
- You will find franchising in industries that may surprise you:
 - › Recreational sports
 - › Health care
 - › Education
 - › Home services
 - › Crime scene clean-up (I'm not kidding)
- If you think of it as just big-named QSRs, you might not recognize it when it hits your desk.

Franchising: Not Just for Fast Food Restaurants

- There is a disconnect between businesses who think that the franchise model applies to them, and those who may be franchising under the various definitions applicable to them.
- You can unintentionally become a franchise.



Let's Get Some Definition

- Generally, any arrangement that meets these criteria will fall under the definition of a franchise:
 - › Commercial relationship
 - › License of the right to use a trademark/service mark for operation, or to sell products
 - › Licensee pays money
 - › Licensor provides:
 - Significant degree of control of licensee's method of operation, or
 - Provides significant assistance in the operation.

Don't Be Deceived: Franchise Agreements Aren't Always Called Franchise Agreements



What Did We Not See on the Other Page:

- An intent requirement
- Anything that makes “labels” or “titles” material
- Size requirements
- An “I had no idea” safe harbor



Why does this matter to you?

Franchise Compliance

- 2 general types of regulations
 - › Pre-signing obligations
 - › Post-signing obligations
- Franchising exemplifies the “beauty” of Federalism
 - › Federal regulations by the FTC
 - › State regulations (but not all states)
 - › Similar but different
 - › No preemption



FTC Franchise Rule Sec. 436.2

“...it is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act ...[f]or any franchisor to fail to furnish a prospective franchisee with a copy of the franchisor’s current disclosure document ... at least 14 calendar-days before the prospective franchisee signs a binding agreement with, or makes any payment to, the franchisor or an affiliate in connection with the proposed franchise sale.”

Consequences

- Personal liability for management if the franchisor doesn't comply:
 - Partners, principal officers, directors, controlling persons and others who participate in sales or compliance process or have authority to control the franchisor
 - Up to \$51,744 per violation under federal law
 - Criminal liability for willful violations
- The Franchisor may be held liable for:
 - Damages, rescission, prohibited to sell, franchises, fines/penalties



Pre-signing Obligations

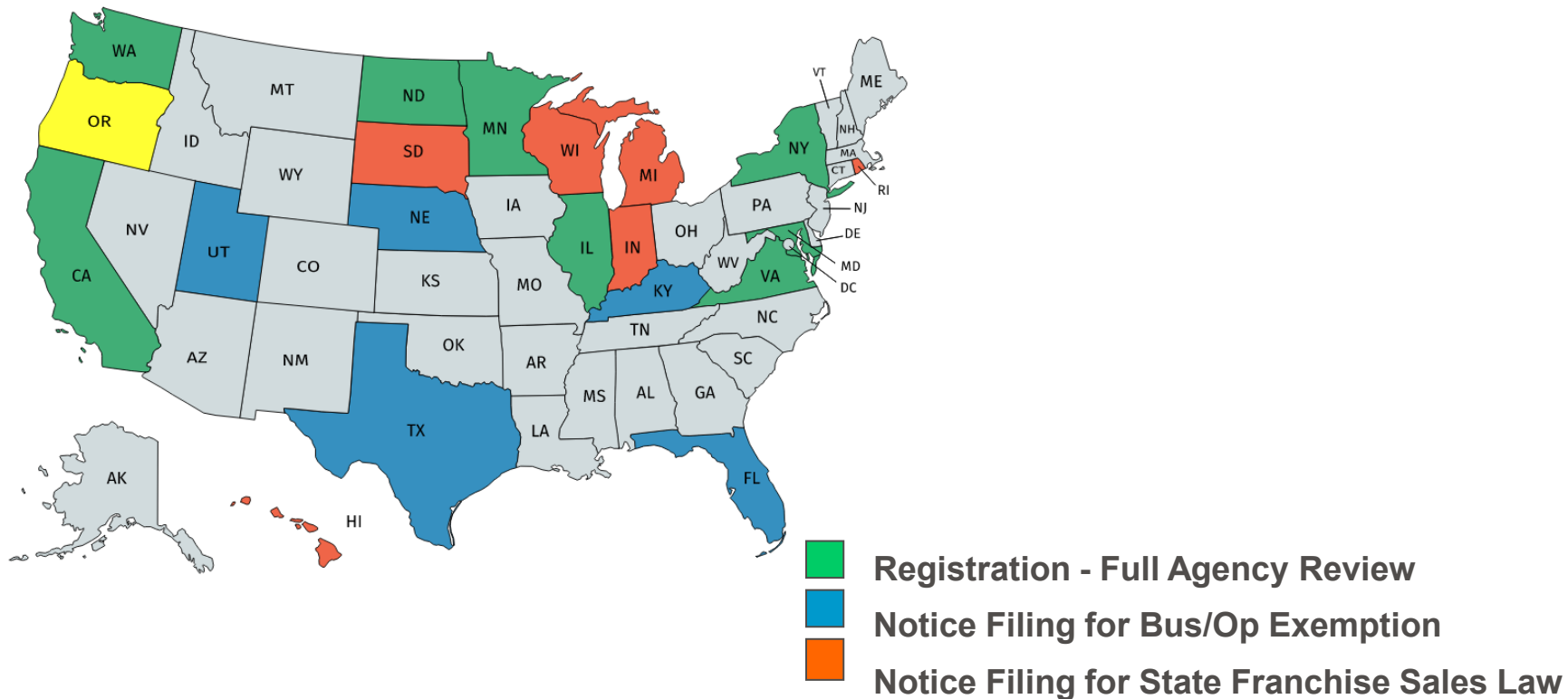
- Disclosure (federal regulations and state laws)
- Registration (state laws)



Pre-sale Disclosure

- Required by the Federal Trade Commission's Franchise Rule
 - › Applicable to franchise sales throughout the United States and its territories
- Also required by the statutes of 15 states
 - › CA, HI, IL, IN, MI, MD, MN, ND, NY, OR, RI, SD, VA, WA, WI

State Disclosure Laws



Wait, what did you tell them?

- Disclosures are made in a Franchise Disclosure Document (FDD)
 - › FDD has 23 sections, referred to as “Items.” A sample:
 - General background information on the licensor and affiliates
 - Profiles of management
 - Litigation, arbitration
 - Bankruptcy
 - Fees
 - Cost estimates
 - Limitations on the licensee
 - **Strict limitations on financial projections**

Timing is Everything

- In most places, you have to provide the FDD at least 14 days before any money is paid, or any binding agreement is executed by the franchisee.
 - › Unless the prospect makes a reasonable request for the FDD
- Some states have their own timing obligations:
 - › 10 Business Days: MI
 - › Earlier of First Personal Meeting or 10 Business Days: NY, RI
 - › First Personal Meeting: IA
- Also, in addition to the disclosure, franchisors have to give a final draft of the franchise agreement to the prospect at least 7 days ahead of execution.

Pre-sale Obligation: Registration

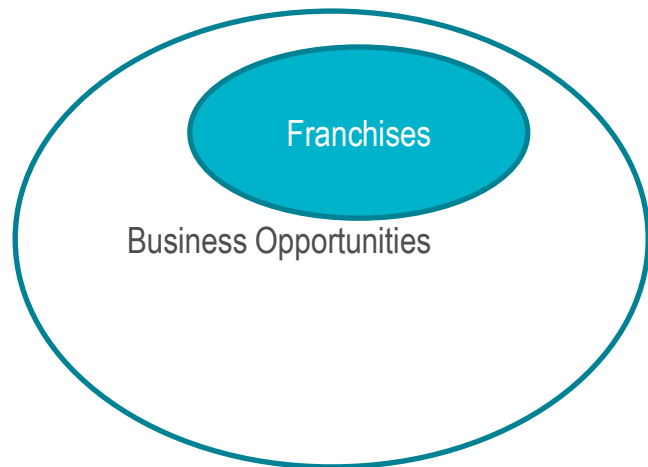
- The FTC just wants franchisors to do what they are told. They don't want to see these FDDs.
- Fourteen of those fifteen states? They want to see them.
 - › Some just want to collect the fee.
 - › Others want to read, comment and review (and collect that fee).

When Do the State Laws Apply?

- It depends on the state.
 - › Remember, each state has its own definition of what constitutes a franchise.
 - › Each state also defines the scope of its franchise registration and disclosure laws.
- Most state laws apply if:
 - › The prospective franchisee owners reside in the state.
 - › The proposed franchise will be located in the state.
 - › The franchisor is located in the state or offered to sell the franchise while in the state.
- It is possible for multiple state laws to apply to a single transaction.

But Wait ... There's More! Business Opportunity Laws

- There is a whole separate body of state and federal laws called business opportunity sales laws.
 - › These too require disclosures, but they vary.
- Franchise opportunities are business opportunities in most states.
 - › Most states exempt compliant franchises from having to comply with the biz opp laws.
 - › BUT noncompliant businesses can violate both franchise laws, and biz opp laws
- 26 states have biz opp sales laws.



Mess Around and Find Out

- If you prepare a license agreement, and the license arrangement unintentionally meets the elements of a franchise, guess what?
- Your client has violated the federal disclosure obligations, and any applicable state laws.
- There is no going back in time.
- And when it comes time to get out ...



Post-sale Obligations: Franchise Relationship Statutes

- Twenty-four states regulate how franchisors treat their franchisees after the franchise agreement has been signed.
- Many states have franchise relationship statutes.
- And counting...



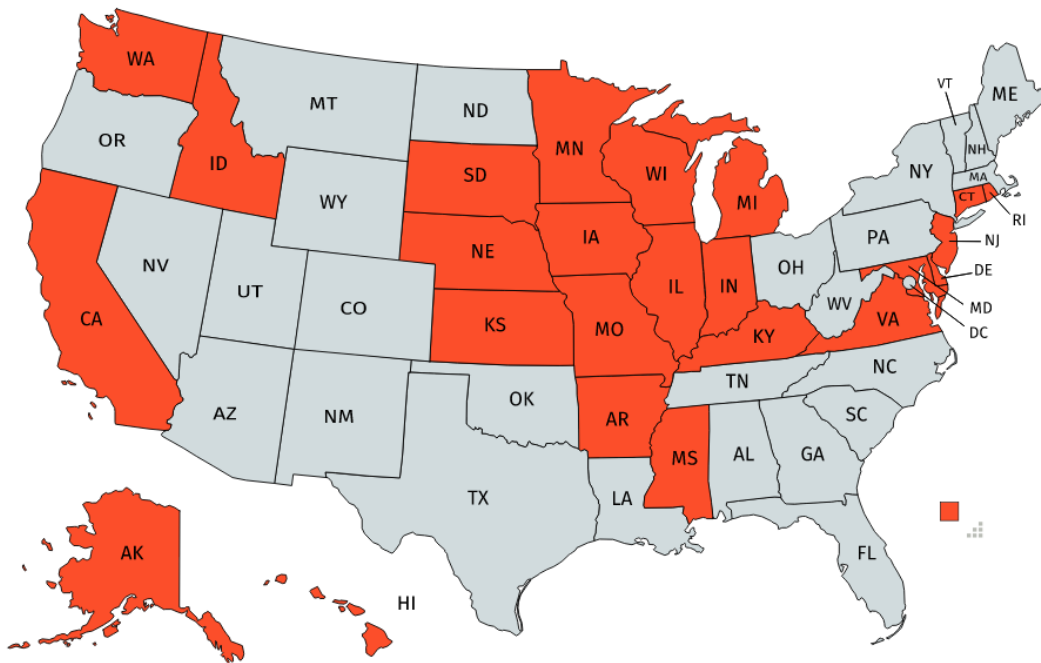
Why does this matter to you?

State Relationship Laws

- These laws usually put standards on when:
 - › Franchisors can terminate the franchise/license agreement.
 - › Franchisors can refuse to renew a franchise/license agreement.
 - › Franchisors are required to buy back inventory following a termination/non-renewal.
 - › Franchisors can treat franchisees/licensees differently.
 - › Franchisor can engage in business that hurts franchisees/licensees.

Franchise Relationship Laws

- Alaska
- Arkansas
- California
- Connecticut
- Delaware
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Maryland
- Michigan
- Minnesota
- Mississippi
- Missouri
- Nebraska
- New Jersey
- Puerto Rico
- Rhode Island
- South Dakota
- Virgin Islands
- Virginia
- Washington
- Wisconsin



Your Client Wants to Terminate a License Agreement

- You look at the terms of the contract and tell the client what the contract allows them to do.
- The licensee's attorney is looking at state law, claiming the license agreement is a franchise agreement or a business opportunity, and state law prohibits your client from terminating.

Potential Franchisee Claims

- “Little FTC Act” – deceptive trade practices
- Unlawful FPRs
 - › “You told me how much money I would make!”
 - › “I never would have signed the license agreement ...”
- Initial Investment Estimates
- Fraud/misrepresentation/fraudulent inducement
- Breach of contract
- Discrimination/unequal treatment
- Bad motive – corporate store or favored franchisee
- Unlawful termination
- Business opportunity
- Other industry-specific law violations

Other Ramifications

- Licensor may also be:
 - › Required to pay damages
 - › Offer rescission
 - › Prohibited from selling in that state
 - › Required to pay state fines/penalties
 - › FTC Reporting Tool



Attorney Consequences for Non-compliance

- Jeffrey L. Orr — the franchise attorney's best friend
 - › Believed preparing a franchise agreement “was simply ‘a matter of contract drafting ...’ ”
 - › Instead, he was found to have “violated the Nebraska Rules of Professional Conduct, as well as his oath of office as an attorney.”
 - › He was publicly reprimanded.



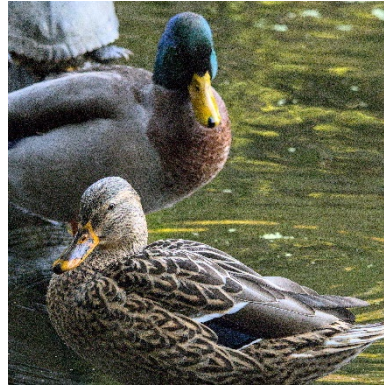
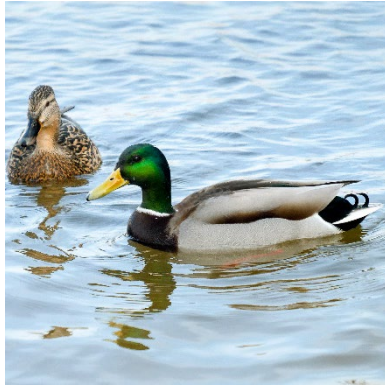
Other Potential Landmines

- Alternative Business Structures:
 - › Distributorships or distribution cooperatives
 - › Joint Ventures
 - › Strategic Branding Alliances/Marketing Affiliations
 - › Sales Representatives/Commissioned Sales Agreements
 - › Direct Sales and Multi-Level Marketing Sales
 - › Dealerships
 - › Technology Licenses

Key Takeaways

- When a client asks for a “simple license agreement,” it may be a franchise agreement without ever using the word “franchise.”
- Franchise laws are complicated and multi-layered.
- Failing to consult with franchise counsel can cause you to lead your client to violate franchise laws and incur liability.
- Listen for:
 - › “They are going to help us open a new location;”
 - › “They are going to operate under our trademarks;”
 - › “I just need you to prepare a basic license agreement so this person or company can sell our products;”
 - › “We’re working with some new investors to expand our brand.”

“If it looks like a duck, walks like a duck, it is a duck.”



Contact Us



Dawn Johnson
djohnson@ubglaw.com



{ Scan for
full bios }



Paul Woody
pwoody@ubglaw.com

