

Provisions of a franchise agreement

There are numerous factors that should be taken into account when deciding to structure a business relationship as a franchise. To be successful, many types of business need to have affiliates on a nationwide or regional basis. Unless a company has sufficient capital to open many business locations, franchising may be its only alternative. Adequately structuring a franchising agreement requires substantial time and attention. The following checklist outlines the provisions and the underlying considerations involved in a franchise agreement.

Because franchise agreements are usually prepared by the franchisor's attorneys, they will often contain clauses favoring the franchisor.

Identification of the franchisor

- Name
- Principal place of business
- State of incorporation

Identification of the franchisee

- Name
- Principal place of business
- State of incorporation
- Statement of franchisee's qualifications to do business in the state in which the franchised business is to be conducted if it is not the franchisee's state of incorporation
- Documentation that the franchisor should obtain from the franchisee
- Certificate of incorporation
- Certificate of good standing or qualification to do business
- Resolutions adopted by board of directors authorizing corporation to enter into franchise agreement

Preambles

- Product, service, or method of conducting business that has been created by the franchisor
- Trade names, trademarks, symbols, and emblems used to identify the franchised business
- Distinctive architectural designs in the structure within the franchised business is conducted
- Color schemes, designs, and patterns found in furnishings and fixtures used in the franchised business
- Operating manual describing the franchisor's method of conducting business

Grant of the franchise

- Conditioned on compliance with all terms of the franchise agreement.
- Right to use the franchisor's special method of conducting business:
- The franchisee's acknowledgment that the franchisor has exclusive ownership rights in the method
- List of general restrictions on the right of use

- Trade names and trademarks:
 - The franchisee's right to use trade names and trademarks
 - The franchisee's duty to report wrongful use of these or confusingly similar trade names and trademarks by local competitors

- Trade secrets:
 - List of all aspects of business that constitute trade secrets
 - Franchisee's right to use trade secrets
 - Franchisee's duty of confidentiality toward trade secrets

[] Location of the franchised business

- Whether premises exist or are to be constructed
- If already in existence, whether owned or leased by the franchisor
- If owned by the franchisor, whether premises are to be sold or leased to the franchisee; terms and conditions of the sales contract or lease
- If leased by the franchisor, whether premises will be assigned or sublet to the franchisee; terms and conditions of assignment or sublease
- If premises are to be constructed, who owns the underlying land?
- If land is owned by the franchisor, whether land will be sold or leased to franchisee; terms and conditions of the sales contract or lease
- If land is leased by the franchisor, whether land will be assigned or sublet to the franchisee; terms and conditions of the assignment or sublease

[] Territory covered by the franchisee

- Whether the franchisee has the exclusive right to conduct the franchised business within the territory
- Whether the franchisor's consent is required before the franchisee can run additional franchised businesses within the territory

[] Construction and design of the business premises

- Delivery to the franchisee of the franchisor's plans, specifications, and drawings for construction of the premises
- Schedule of submission by the franchisee of its plans, drawings, and specifications
- Commencement and completion dates of construction
- Whether time is of the essence

[] Fixtures—whether the franchisor requires uniformity

- Colors, designs, patterns, and other specifications
- Furnishings, machinery, equipment, and signs
- Whether the franchisee must purchase or lease fixtures from the franchisor

[] Operating procedures

- Requirement that the franchisee comply with the franchisor's standards of operation as set forth in the operating manual
- Whether the franchisor will provide training; if so, description of the training to be provided
- Whether any information disclosed in the course of a training program constitutes a trade secret of the franchisor; if so, description of the franchisee's duty of confidentiality
- Benefits that the franchisee must provide for employee- trainees:
 - Wages or salaries
 - Living allowances, meals, lodging, and transportation

The franchisor's right to supervise and to inspect premises

Consultation services of the franchisor

Uniform products and supplies

- Whether all franchisees must use and sell designated products and supplies
- Whether these must be purchased from the franchisor or from a seller designated by the franchisor. If products and supplies must be purchased from the franchisor:
 - Franchisor's duty to make reasonable efforts to satisfy requirements of all franchisees
 - Price of products and supplies (whether based on official price list, at franchisor's cost, or at franchisor's cost plus an additional amount)
 - Time by which franchisees must pay for products and supplies

Advertising

- Whether the franchisor makes all policy decisions concerning advertising programs
- Whether the franchisee is required to contribute funding for the purpose of an advertising program
- Whether advertising of the franchisee's business by the franchisee is mandatory or discretionary

Insurance that the franchisee is required to maintain

- General public liability
- Fire, casualty, and extended coverage
- Products liability
- Business interruption
- Plate glass
- Required coverage of each type of insurance
- Insurer must be acceptable to franchisor

Amount of coverage required for each type of insurance

Requirement that insurer be acceptable to the franchisor

Indemnification of the franchisor by the franchisee

Covenant not to compete with the franchisor; application to all shareholders

The franchise fees and royalties

— Fixed, variable, or combination?

— If variable:

- Formula
- Accounting period and method
- Floor ceiling
- Adjustments

- Records of paid and unpaid royalties

- Accounting method to be adopted by the franchisee
 - Reference to a description of the required method in the operating manual
 - Accounting information to be delivered to the franchisor
 - Form
 - Schedule of submissions

- Term of franchise agreement
 - Date on which it takes effect
 - Specific termination date or date to be designated in the future
 - Right to extend the term

- Termination
 - Events
 - Notice of and opportunity to cure default
 - Waiver of termination right
 - Rights and obligations of the parties upon termination

- The franchisee's compliance with law
- The assignment of rights and duties
- Arbitration of disputes
- Notices and consents
- Modifications and additional agreements; integration clause
- Severability of invalid provisions
- Governing law
- Other interpretive provisions