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Hot Topics in Franchising:
The Accidental Franchise, Joint Employer Issues and Data Security

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1. Abstract

With relationships subject to the Petroleum Marketing Practices Act[1] ("PMPA") exempt from the FTC Disclosure Requirements and Prohibitions Concerning Franchising[2] (the "FTC Franchise Rule"), it is easy to overlook that not all relationships a petroleum marketer has with its "franchisees" are exempt from the FTC Franchise Rule. This paper reviews what it means to be subject to the FTC Franchise Rule regime and related state franchise laws, and also looks at issues that more broadly are affecting franchising today. These issues include the joint employer standard under the National Labor Relations Act[3] (the "NLRA"). That standard has been broadly discussed following the National Labor Relation Board permitting claims brought against McDonald's franchisees to go forward not only against the franchisees, but also against the franchisor. There is significant concern in the franchise community about the impact a stricter joint employer standard may have on the franchise model. Another issue discussed is data security. In the last few years, stories about data breaches litter the evening news and franchisors need to take a serious look at preventing such breaches within their franchise systems and also be ready to react if a breach occurs.

2. The Accidental Franchise

"But we don't franchise. Our program is a dealership/licensing/distribution program." That is something that most franchise practitioners have heard one time or another from a client or a prospect. The layman's view of what constitutes a franchise is often quite different from both federal and state franchise laws. U.S. franchise laws date back to the 1970s when legislative efforts began to counteract fraudulent behavior by some franchisors.[4] The original FTC Franchise Rule was adopted in 1979 and similar state franchise laws became common around the same time. Both the current and the original FTC Franchise Rule have the same goal: to prevent fraud by requiring franchisors to share certain information about the franchise system and the franchisor. State franchise laws do the same thing, but in addition to regulating pre-contractual disclosure, just as the FTC Franchise Rule, they also regulate the ensuing relationship between franchisor and franchisee. With limited exceptions, a franchisor subject to state franchise disclosure laws will have to register its offering in the states it is offering franchises in.

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[1] 15 U.S.C. §2801 et seq.

[2] 16 16 C.F.R. § 436 (2007)

[3] 29 U.S.C. §§ 151 et seq.

[4] DAVID J. KAUFMANN AND DAVID W. OPPENHEIM, FTC DISCLOSURE RULES FOR FRANCHISING AND BUSINESS OPPORTUNITIES 11 (Wolters Kluwer Law & Business 2007)

a. What is a Franchise

Generally, both the FTC Franchise Rule and state franchise laws use three elements or factors to identify a franchise relationship. There must be: (1) trademark association between the franchisor and franchisee; (2) significant control or assistance by the franchisor of the franchisee/a marketing plan/community of interest; and (3) payment of a fee from the franchisee to the franchisor. If all three elements or factors are present in a relationship, it is a franchise.

i. The Trademark Element

For there to be a franchise relationship, the franchisor must license a trademark to the franchisee. Exactly what that trademark license must entail differs under the different rules and laws. The FTC Franchise Rule for example, requires that the "franchisee will obtain the right to operate a business identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services or commodities that are identified or associated with the franchisor's trademark."[5] The state laws are generally similar: some require there to be a license – an express or implied grant to use the franchisor's trademark. Other state franchise laws require that there be a substantial association with the franchisor's trademark.

ii. Significant Control or Assistance Concerning Franchisee's Method of Operation, Marketing Plan or Community of Interest

For purposes of the FTC Franchise Rule, the second element of a franchise is that the franchisor may exercise significant control or offer significant assistance to the franchisee. For example, site approval requirements; site design or appearance requirements; controls over hours of operation; sales, repair or business training programs; establishing an accounting system; or offering systemwide networks and websites all are factors that would constitute significant control or assistance.[6]

For purposes of state laws, many states instead require the franchisor to offer a marketing plan or system.[7] Whether a marketing plan exists is a matter of the degree of control over the franchisee's business that is exercised by the franchisor. For example, courts have looked at if the marketing plan is required (as opposed to optional), if the franchisor has power over the franchisee's pricing or power over hiring and firing the franchisee's employees, if the franchisor may require franchisee employees to undergo training or the power to examine the franchisee's financial records.[8]

Other states adopt a community of interest approach, requiring that there be a community of interest between the franchisor and franchisee.[9] Under this approach, courts will look to whether there is a continuing financial interest between the parties in their business relationship

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[5] 16 C.F.R. §436.1(h) (2007).

[6] Federal Trade Commission, *Franchise Rule Compliance Guide*, at 2-4.

[7] California, Illinois, Indiana, Maryland, Michigan, New York, North Dakota, Oregon, South Dakota, Rhode Island, Virginia, Washington, and Wisconsin follow the marketing plan approach.

[8] *Harford Electric Supply Co. v. Allen-Bradley Co., Inc.*, 736 A.2d 824 (Conn. 1999).

[9] Hawaii, Minnesota, Mississippi, Missouri, Nebraska, New Jersey and Wisconsin (in its relationship statute) follow this approach.

and if there is an interdependence between them which requires "a likeness or similarity of interest" in the common business.

iii. Fees

The last element in the franchise definition is that the franchisee must pay the franchisor a fee or other required payment for the right to do business as a franchisee. The fee element is broadly defined, and usually payments to affiliates will be considered, as well as fees paid directly to the franchisor. The FTC Franchise Rule considers as a required payment "all consideration that the franchisee must pay to the franchisor or an affiliate, either by contract or by practical necessity, as condition of obtaining or commencing operation of the franchise."[10] Several courts have also interpreted the fee element broadly to included "hidden" franchise fees. Fees can, for example, include royalty payments, equipment purchases, inventory purchases, training fees and rent payments. However, not every payment is considered a franchise fee, even if it is a payment from a franchisee to the franchisor. The most common example is the exclusion of the purchase of a reasonable amount of goods at a bona fide whole sale price. Likewise, where a franchisee happens to pay the franchisor for a typical business expense, such as a phone line, that is not considered a franchise fee.[11]

b. Disclosure and Registration Obligations

Barring the availability of exclusions or exemptions, such as the one for relationships subject to the PMPA,[12] a franchisor that fits within the federal and state law definitions of a "franchise" will have to prepare a franchise disclosure document ("FDD") and most likely register that FDD in at least some states. Far from all states have franchise disclosure and registration laws, but many of the more populous states do. Today, 15 states specifically regulate the pre-contractual relationship between franchisors and prospective franchisees.[13]

The state franchise disclosure laws all vary slightly regarding what information needs to be disclosed. The FTC Franchise Rule does not pre-empt the state laws, except to the extent it sets stricter standards. Thus, franchise disclosure by a franchisor acting on a national scale could be a real headache. Fortunately a high level of disclosure uniformity has been accomplished through the North American Securities Administrators Association, Inc. ("NASAA"). The states regulating franchising are members of NASAA and have jointly developed guidelines for franchise registration and disclosure.[14] With some minor amendments, NASAA has adopted the

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[10] 16 C.F.R. §436.1(h)(3) (2007).

[11] *Thueson v. U-Haul Int'l, Inc.,* 50 Cal. Rptr.3d 669 (Ct. App. 2006).

[12] 16 C.F.R. §436.8(a)(4) (2007).

[13] California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington and Wisconsin have franchise disclosure laws. All of those states, except for Oregon, also require registration. In addition, there are several additional states that have business opportunity laws which broadly define "business opportunities" and often include franchises in that definition. While these laws often expressly exempt relationships subject to the FTC Franchise Rule and that comply with that rule, not all laws are drafted the same, and may sometimes catch franchisors unawares.

[14] The North American Securities Administrators Association, Inc. 2008 Franchise Registration and Disclosure Guidelines (Amended and Restated UFOC Guidelines).

FTC Franchise Rule disclosure format as its own, and as such it is possible for franchisors to use one FDD throughout the U.S.

The FDD is not an insignificant document. It is usually several hundred pages long. It covers categories that are likely to be of interest to most prospective franchisees. It can be compared to the type of due diligence memoranda often produced in mergers and acquisitions, except that in this instance it is prepared by the "seller"/franchisor for the "buyer"/prospective franchisee. Pursuant to the FTC Franchise Rule, the FDD covers: (1) general corporate information about the franchisor, its predecessors, its parent and affiliates; (2) the business experience of the franchisor's management; (3) litigation and arbitration; (4) bankruptcy matters; (5) initial fees payable to the franchisor; (6) ongoing fees payable to the franchisor; (7) the estimated initial investment of a franchisee into a new franchise; (8) restrictions on products and services the franchisee must purchase; (9) an overview of the key provisions in the franchise agreement; (10) financing available through the franchisor; (11) the assistance the franchisor must offer with respect to site selection and other pre-opening matters, operation of the franchised business, advertising and marketing, training, and also computer system requirements; (12) territory rights and restrictions; (13) trademark matters; (14) patent and copyright matters; (15) the franchisee's obligation to participate in the franchised business; (16) restrictions on what the franchisee may sell; (17) information about renewal, termination, transfer and dispute resolution; (18) the involvement of public figures in the sale of franchises; (19) financial performance representations; and (20) data on existing locations within the franchise system. The franchisor must also attach audited financial statements and all agreements that the franchisee will have to enter into with the franchisor and its affiliates.

The FDD is a living document and must be updated at least annually, but also during the year, if there is a material change in the franchise system that affects the information disclosed in the FDD or that should be disclosed. There is no clear definition of what constitutes a material change, but generally it is any change that may affect the decision of a prospective franchisee whether to buy a franchise. Material changes include litigation, changes to management, changes to fees or to training requirements. A significant change to the financial situation of the franchisor can also be a material change.

The FDD needs to be registered with 14 states. Depending on the state, the registration ranges from simple notice filings to full reviews of the FDD. Once a franchisor has registered its FDD in a state it can start offering and selling franchises there. Understanding the scope of state franchise laws is important in this regard. The laws are often written so that they apply to any sale or offer of a franchised location in the state but they may also apply to citizens of the state, even if they are opening a franchised location out of state.

The disclosure process is regulated both by the FTC Franchise Rule and by state franchise laws. Under the FTC Franchise Rule the franchisor must give the prospective franchisee the current FDD at least 14 calendar days before it accepts a signed agreement or any payment from the prospective franchisee. Some states laws instead require that the FDD be given 10 business days in advance,[15] and in some instances it has to be given at the first personal meeting between the franchisor and the prospective franchisee.[16]

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[15] Michigan, New York and Rhode Island.

[16] New York and Rhode Island.

With one significant exception, the FTC Franchise Rule does not prohibit a franchisor from providing additional information to prospective franchisees. Such additional information may not be included in the FDD, but separate documents with additional information could be provided. The exception from the right to provide more information outside of the FDD is financial performance representations. With limited exceptions, information about historic financial performance or about projections for the future may only be made if they are included in the FDD. If a financial performance representation is included in the FDD it does somewhat open the door for franchisors to offer supplemental financial performance representations.

c. Relationship Laws

The state franchise relationship laws vary in scope, but generally will regulate the franchisor's right of termination and non-renewal, and often also prohibit discrimination. 23 states, and two U.S. territories, have passed relationship laws.[17]

The scope of these statutes varies significantly, with some applying to most distribution relationships, and others only to franchise relationships. The limitations that these laws set on relationships between franchisors and franchisees also vary. Some simply set minimum notice requirements for termination and non-renewal, while others prohibit termination and non-renewal of an agreement except for good cause. Some will require the franchisors to repurchase the franchisee's inventory, and some prohibit discrimination amongst franchisees.

In the last few years there have been several attempts made to broaden relationship statutes, i.e. in Maine, Massachusetts and Pennsylvania. Many of these attempts have focused on creating a statutory obligation of good faith and fair dealing between the franchisor and franchisee, while other bills have gone significantly further, trying to regulate minutiae of the franchise relationship, such as franchisee operating hours.

3. The Joint Employer Standard

Whether it is to outsource call-center services to India, or to have headquarters mail room services managed by a third party provider, the concept of companies outsourcing specific functions to third party providers has become a standard practice. These measures are often taken in an effort to cut costs. In recent years, there has been a counter-reaction to the outsourcing movement, especially from parties focused on workers' rights.[18] One way of attacking the perceived evils of outsourcing has been through extending employer liabilities to the outsourcing business under theories of "joint employment." Even though a business' decision to franchise usually arises out of very different motivations than the decision to outsource, the two business models are frequently lumped together for purposes of this analysis.

Current developments in the area of joint employment are very focused on the National Labor Relations Act ("NLRA"), but it should be mentioned that the joint employer concept exists under many different statutes. Some examples of such laws include the Fair Labor Standards Act (i.e. regulating federal minimum wage), the Family and Medical Leave Act (i.e. regulating notice

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[17] Alaska, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Rhode Island, Virginia, Washington, Wisconsin, Puerto Rico and the Virgin Islands have passed relationship statutes.

[18] *See e.g.* David Weil, the Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It.

requirements, designating leaves and maintaining health benefits during a period of leave), Title VII (anti-discrimination laws), the American with Disabilities Act (i.e. regulating rights to reasonable accommodation), the Employee Retirement Income Security Act (i.e. regulating access to employee benefit plans), as well as tax implications for employment type taxes such as FICA, FUTA, SUTA and tax withholding issues. In addition to the federal laws mentioned, there are state laws regulating many of the same and similar issues that also raise joint employer questions. It is unclear what impact a change to the joint employer standard under the NLRA would have on these laws.

a. The Current NLRA Joint Employer Test: Indicia of Control

The NLRA defines an employer to include: "…any person acting as an agent of an employer, directly or indirectly."[19] This sentence has been given different meanings since the enactment of the NLRA.

Since 1984, entities have been considered joint employers under the NLRA when they "share or codetermine those matters governing the essential terms and conditions of employment."[20] The employer must meaningfully affect matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction.[21] It is not required that the entity exercises exclusive, direct or immediate control or control over all terms of employment. This standard is referred to as the "Indicia of Control" standard.

There is no well-articulated test that all courts use, but generally courts look to factors such as the right to: hire and fire, supervise employees, deal with employee grievances and personnel issues, set working hours, give employees daily assignments, day-to-day supervision, set compensation, discipline and establish work rules. The *Laerco Transportation* case is illustrative of how high a bar the Indicia of Control standard sets. Laerco was a company that provided warehouse and trucking services to third parties. Laerco contracted with another company, CTL, to provide the necessary workers for Laerco's operations. Laerco provided the trucks for the workers, the workers had to comply with Laerco's safety regulations, Laerco could accept or refuse a worker if he/she did not meet Laerco's requirements and Laerco assigned workers specific assignments and routes. The NLRB found, however, that since CTL retained control over hiring and discharge, and the workers performed their work independently after initially being told by Laerco what to do regarding loading and unloading trucks, which routes to drive, etc., Laerco was not a joint employer.

b. The Joint Employer Test Advocated by the General Counsel – "Industrial Realities"

While we do not know exactly on what basis the NLRB may pursue McDonald's and other franchisors as joint employers, the General Counsel of the NLRB (the "General Counsel") in an amicus brief in *Browning-Ferris Industries of California*,[22] currently pending before the NLRB, argued for a return to a previous joint employer standard that is more encompassing.

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[19] 29 U.S.C. § 152.

[20] *TLI, Inc.*, 271 NLRB 798 (1984); *Laerco Transp.*, 269 NLRB 324 (1984).

[21] Id.

[22] Case 32-RC-109684

The pre-1984 test that the General Counsel is advocating is referred to as the "Industrial Realities" test. It looks to the economic dependence of the two alleged joint employers. The presumption under that test is that where one company controls or dictates the standards by which the other company operates or has the *right* to do so, it at least indirectly also controls labor decisions. Under this standard or test there is no distinction between direct, indirect or potential control over working conditions.

The General Counsel suggests that the standard should consider whether the tentative joint employer has control over terms and conditions of employment that would make it an essential party to collective bargaining, such as: wages; employee personnel issues; the number of employees needed to perform a job or task; establishing employee work hours, schedules, work week length and shift hours; employee grievances; administration of collective bargaining agreements; authorizing overtime; safety rules and standards; production standards (i.e. enforcing specific employment criteria or requiring purchase of efficiency enhancing equipment); break and lunch periods; assignment of work and determination of job duties; work instructions relating to the means and manner to accomplish a job or task; training employees or establishing employee training requirements; vacation and holiday leave and pay policies; discipline; discharge; and hiring.

It is not completely clear if it is enough that the tentative joint employer controls one of these terms, or if it requires a review of the totality of the circumstances. While the amicus brief submitted by the General Counsel indicates that control of work assignments alone may be enough to consider a party a joint employer, the cases cited in support of the Industrial Realities standard all refer to situations where the deemed joint employer exerted significant control over several factors listed in the previous paragraph.

c. Consequences to Franchisors of Potential New Standard

Would the joint employer standard under the NLRA be broadened as the General Counsel has argued, this may have significant consequences for franchise systems. A significant section of the General Counsel's amicus brief in the *Browning-Ferris* matter focused on franchising. However, if read carefully it does not appear that the General Counsel intends to treat all franchise systems alike. In fact, the amicus brief points out that the NLRB should continue to exempt franchisors from joint employer status to the extent the indirect control franchisors assert over franchisee employee working conditions is related to the franchisor's legitimate interest in protecting the quality of its products and brand. For example, in *Love's Barbeque Restaurant*,[23] a case cited in the amicus brief, the controls imposed over franchisee employees involved initial training of employees, precise food preparation and portion requirements in the operations manual, requirements that franchisee employees wear uniforms, and similar controls. The NLRB in that case found that none of these types of control impacted the franchisee employee's labor relations.

But the General Counsel also highlighted in the amicus brief the increased insight and control that franchisors can have in their franchisees' operations through new technology. Where franchisors keep track of data on sales, inventory, and labor costs; set and police employee work schedules; track franchisee wage reviews; track how long it takes for employees to fill

[23] 245 NLRB 78 (1978).

customer orders, accept employment applications and screen applicants, in the General Counsel's view a joint employer relationship may have been created.

d. Expected Time-Line of Implementation of Potential New Standard

It is likely that there will be a long time of relative uncertainty regarding the joint employer standard under the NLRA as it relates to franchisors. There has been little reported about the McDonald's matters since last fall. Even were the parties to conclude the process before the NLRB administrative law judge this year it is likely that some of the parties may appeal the decision to federal appellate courts, and some aspects of these decisions may go to the U.S. Supreme Court. The process will likely take many years. In addition, as NLRB board members are appointed by the U.S. President for 5 year terms, it is also possible that next presidential election will affect the composition and leanings of the NLRB.

e. Vicarious Liability

Another legal issue closely related to the joint employer issue is vicarious liability. It is unclear what potential changes to the joint employer standard under the NLRA would bring to a vicarious liability analysis. Traditionally, different standards have been applied when analyzing whether an employer is liable for the actions of its employees (under the *respondeat superior* theory employers are liable for negligent acts and omissions of employees), than whether a franchisor is liable for actions by its franchisee's employees (franchisors generally are not liable unless they control the franchisee's day-to-day operations). Were a franchisor deemed a joint employer with the franchisee it opens the door to argue an employment-based theory for vicarious liability claims.

2. Data Security Challenges

a. What is a Data Breach?

When thinking of data security the mind often goes unbidden to the big news stories about Target and other retailers whose point of sales systems have been breached by the surreptitious installation of malware, leading to unauthorized third parties gaining access to customer credit card information. While this type of security breach is very serious and is often discussed by news media, data security is a much broader subject for businesses. Any data that is maintained electronically by a business is subject to a potential data security breach. This includes employee data, confidential information and trade secrets of the business – really any data that a business maintains.

The breach also doesn't have to be the malicious action of a third party. The misplacement of a USB stick with sensitive information, the loss of a laptop or a smartphone can all be data breaches. Even an email unintentionally directed to the wrong recipient, or that accidentally includes a sensitive attachment can be a data breach.

b. Regulation of Data Security

The U.S., as opposed to other countries, has not taken an all-encompassing approach to data privacy issues. Instead we have chosen to regulate especially sensitive industries, such as health care and financial services. The FTC is also claiming authority under the Article 5 of FTC Act to indict companies that have not taken appropriate steps to protect customer data, no matter what industry the business is in. 47 states have also enacted data breach notification legislation.

Article 5 of the FTC Act prohibits unfair and deceptive practices. In many instances, the FTC has enacted regulations under Article 5, such as in the case of the FTC Franchise Rule. In the case of consumer data security the FTC has not done so, but has chosen to simply bring actions under the act itself. One much discussed matter of FTC action in this space involves the Wyndham hotel chain.[24] According to the FTC, Wyndham had ignored warning signs that their network had been compromised and did not address repeated security lapses. Hackers were able to steal customer credit card information which was then used to incur millions of dollars of fraudulent charges. The case raises interesting issues regarding the FTC's regulatory powers but from a franchise perspective, the most interesting part of the action is that the FTC has chosen to pursue the franchisor for breaches that may involve franchisee-operated hotels. In its complaint, the FTC points out that under the franchise agreements with its franchisees, Wyndham has the right to set the policies for the computer networks.

All states except for Alabama, New Mexico and South Dakota have enacted laws that require companies not notify the victims of a data security breach. However, the laws are unfortunately not consistent, and doing a 50-state notification is complex.

c. Potential Risk Exposure to Franchisors

So what is the potential exposure for a data breach? There are many facets to the fallout. There is the risk of reputational harm, especially where there is extensive media coverage of the breach. There is the PR cost related to counteracting the negative media coverage. There is also direct economic impact of a breach. This includes liability to customers, the defense cost for regulatory enforcement actions, the costs of notifications required by state laws, and potential fines and penalties.

The risk of data breach is increased for a franchise system for several reasons. Often times, the franchisor and franchisees are interconnected through their computer systems. Thus, access to a single franchisee's computer system may mean access to the franchisor and all other franchisees. While the franchisor may have resources to ensure data security for itself, its franchisees may not have the same resources, sensitivity to the issue or necessary knowledge to protect against data breaches. An integrated computer network is only as strong as its weakest link. Furthermore, there is a perception, both from customers and the FTC, that the franchisor may be pursued together with its franchisees in the event of a data breach.

The question that franchisors have to ask themselves is whether they should interfere with their franchisees' data security measures. The risk is obvious: if the franchisor imposes data protection measures and there is still a breach, the risk is that the franchisor will be jointly liable with the franchisee. There are however significant benefits as well, and in most instances they will likely outweigh the risk. First of all, with the potential for media exposure in the event of a data breach, the potential damage to the brand is significant. Consumers rarely distinguish between a breach at a franchisee location or one that happens at a franchisor-owned location – the entire brand will suffer. As such, it is tantamount that the franchisor ensures that the brand is not jeopardized. Second, having policies in place and requiring implementation of those policies can be a defense if the franchisor is implicated in an action (as well as potentially in media). Third, the risk can be mitigated by training the franchisees, monitoring compliance and periodic audits.

d. Preventive Measures

[24] *FTC v. Wyndham Worldwide Corporation et al.*, Complaint for Injunctive and Other Equitable Relief, Case 2:12-cv-01365-SPL, U.S. District Court for the District of Arizona, filed June 6, 2012

While there is no way to prevent every future data breach, there are many measures a franchisor can take to help avoid breaches within its franchise system. The very first step is to evaluate what data is being kept by the franchisor and franchisees and how it is kept safe. If there is sensitive data stored that is not necessary, the franchisor may wish to stop collecting such data. With respect to keeping the data safe, this includes both ensuring that devices and servers maintaining the data are secure through password protection and encryption, and that the software used is also secure. This first step could also include a review of the franchisor's insurance policies, and the insurance franchisees are required to carry. If the general liability insurance that the franchisor and franchisees maintain excludes cyber security coverage, or has insufficient limits, it is worth considering obtaining additional insurance. For franchisors in regulated industries, such as health care or financial services, it is also important to assess the regulatory requirements that apply to data security. A second step is then to review policies and practices within the system that relate to data security. With the continuous technology changes and new threats to data security, these policies will need to be updated periodically. An important aspect of the policy is crisis readiness. Both the franchisor's staff and the franchisees need to know what to do if a data breach is discovered. The third and final step is to ensure that the policies are implemented. This will involve training, reinforcement and retraining of both the franchisor's staff and of the franchisees.

4. Conclusion

While the first part of this paper would only apply to franchises falling outside of the scope of the PMPA, the parts relating to joint employment standards and data security apply equally to any franchise offered by a petroleum marketer. There are common themes there – the NLRB is looking closely at the use of software and computer systems in assessing a franchisor's role vis-à-vis franchisee employees, while at the same time it is likely advisable for franchisors to increase their control over the franchisees' use of such resources. However, while there are common threads, that doesn't mean that being a responsible steward of one's brand and enforcing computer system standards and rules on franchisees will necessarily expose the franchisor to joint employment under the NLRA. Most of the policies and standards likely would have relatively little to do with franchisee employees' working conditions, and as such should not be relevant to the NLRA analysis.