

STATE OF NEW YORK

3823

2021-2022 Regular Sessions

IN ASSEMBLY

January 28, 2021

Introduced by M. of A. DeSTEFANO, SALKA, MANKTELOW -- read once and referred to the Committee on Economic Development

AN ACT to amend the general business law, in relation to requiring fair business practices in franchises

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The general business law is amended by adding a new article 33-C to read as follows:

ARTICLE 33-C

FAIR FRANCHISING PRACTICES ACT

Section 698. Short title.

698-a. Definitions.

698-b. Procedural fairness.

698-c. Private right of action.

698-d. Duty of good faith.

698-e. Duty of competence.

698-f. Negotiated changes permitted.

698-g. Independent sourcing.

698-h. Termination and non-renewal.

698-i. Transfer of a franchise.

698-j. Anti-competitive covenants.

698-k. Freedom of association.

698-l. Encroachment.

698-m. Discrimination prohibited.

§ 698. Short title. This article shall be known and may be cited as the "fair franchising practices act".

§ 698-a. Definitions. As used in this article:

1. "Affiliate" shall mean any natural or legal person controlling, controlled by or under common control with a franchisor.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

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1 2. "Franchise" shall mean a contract or agreement, whether expressed
2 or implied, and whether written or oral, between two or more persons by
3 which:

4 (a) a franchisee is granted the right to engage in the business of
5 offering, selling or distributing goods or services pursuant to a
6 marketing plan or system prescribed in substantial part by a franchisor;

7 (b) operation of the franchisee's business pursuant to such plan or
8 system is substantially related to the franchisor's trademark, service
9 mark, trade name, logotype, advertising or other commercial symbol
10 designating the franchisor or its affiliate; and

11 (c) the franchisee pays or is required to pay, directly or indirectly,
12 a franchise fee.

13 3. "Franchise fee" shall mean a fee or charge for the right to enter
14 into or maintain a franchise, including any payment for goods or
15 services, but not including:

16 (a) payment, at a bona fide wholesale price, for a reasonable quantity
17 of inventory;

18 (b) payment of a reasonable service charge to the issuer of a credit
19 or debit card by a person accepting or honoring such a card; and

20 (c) payment at fair market value for a reasonable quantity of real
21 estate, fixtures, equipment or other tangible personal property to be
22 utilized in and necessary for the operation of a franchised business.

23 4. "Franchisee" shall mean a person to whom a franchise is granted.

24 5. "Franchisor" shall mean a person who grants or has granted a fran-
25 chise.

26 6. "Good cause" shall mean the failure by a party to a franchise to
27 correct a default of a material provision of the franchise within thirty
28 days of receipt of a written notice from the other party which specifies
29 the default, or within forty-eight hours of receipt of a written notice
30 which specifies a default constituting a clear and present danger to the
31 public health, welfare or safety, and in either instance describes the
32 corrective action required to be taken. Such term shall also include the
33 complete withdrawal of the franchisor from conducting business in this
34 state.

35 7. "Good faith" shall mean honesty in fact and the observance of
36 reasonable standards of fair dealing in the trade.

37 8. "Outlet" shall mean a place of business, whether temporary or
38 permanent, fixed or mobile, from which goods or services are offered for
39 sale.

40 9. "Trade secret" shall mean information, including a formula,
41 pattern, compilation, program, devise, method, technique or process,
42 which:

43 (a) derives independent economic value, actual or potential, from not
44 being generally known to and not being readily ascertainable by proper
45 means by other persons who can obtain economic value from its disclosure
46 or use; and

47 (b) is the subject of efforts which are reasonable under the circum-
48 stances to maintain its secrecy.

49 § 698-b. Procedural fairness. 1. The provisions of this article shall
50 apply to any franchise any part of the performance of which is to occur
51 in this state, or to be operated in whole or in part in this state and
52 to the parties to such franchise. These provisions shall not be waived,
53 and their application to a franchise or a party thereto shall not be
54 avoided, in whole or in part by agreement or by conduct, except pursuant
55 to a settlement of a bona fide dispute.

1 2. Any party to a franchise may commence a civil action or, if agreed
2 to by the parties, initiate an arbitration proceeding for a violation of
3 any provision of this article.

4 3. No franchisee shall be deprived of the application of the
5 provisions of this article by any provision of a franchise which desig-
6 ates the law of another jurisdiction as governing the provisions of
7 such franchise, or designating a venue outside of this state for the
8 resolution of disputes.

9 4. Provisions of a franchise providing for liquidated damages,
10 confessions of judgment or like provisions shall be unenforceable.

11 5. The provisions of this article are declaratory of the public policy
12 and law of the state of New York. To the extent permitted by the consti-
13 tution of the United States and of this state, this article shall apply
14 to franchises granted, transferred, renewed, amended, replaced or in
15 existence after the effective date of this article. A provision of a
16 franchise designating the law of the state of New York as governing the
17 franchise, or by which the franchise is to be interpreted or construed
18 shall be construed as incorporating the law of this state as in effect
19 from time to time during the term of the franchise.

20 § 698-c. Private right of action. Any party to a franchise who is
21 injured or likely to be injured by a violation or impending violation of
22 this article or any rules or regulations of the Federal Trade Commission
23 shall have a cause of action for rescission of the franchise, damages,
24 injunctive relief or other appropriate relief. The prevailing party may
25 recover its costs, including reasonable attorney's fees, in any such
26 action or proceeding. The court shall presume the existence of irrepara-
27 ble harm based on a violation of the provisions of this article or of
28 any rule or regulation of the Federal Trade Commission, and may award
29 preliminary injunctive relief without bond or other financial security.

30 § 698-d. Duty of good faith. Every franchise shall include an implied
31 duty upon all parties to exercise good faith in the performance and
32 enforcement of the terms of the franchise. Such duty of good faith obli-
33 gates each party to a franchise, when making a decision or exercising a
34 reserved power or discretion which directly affects the interests of
35 another party or parties to the franchise, to give due and equal regard
36 to the interests of such other party or parties to the franchises that
37 are likely to be affected.

38 § 698-e. Duty of competence. Unless a franchisor represents that it
39 has greater skill or knowledge, or conspicuously disclaims that it has
40 such skill or knowledge, the franchisor shall, in its undertaking with
41 the franchisee, be required to exercise the skill and knowledge normally
42 possessed by franchisors in good standing in similar communities or
43 trade areas. The provisions of this section shall not be waived or qual-
44 ified by agreement or by conduct; provided, however, that the franchisor
45 may by written agreement particularly define the nature and scope of its
46 skill and knowledge, and of its undertaking with the franchisee.

47 § 698-f. Negotiated changes permitted. A franchisor, who has lawfully
48 delivered an offering to a prospective franchisee, may negotiate the
49 terms of a franchise with such prospective franchisee, and may execute a
50 franchise containing negotiated terms which are different from the
51 initial offering.

52 § 698-g. Independent sourcing. 1. Except as otherwise provided in
53 subdivision two of this section, a franchisee may obtain equipment,
54 fixtures, supplies and services used in the establishment and operation
55 of a franchised business from sources of the franchisee's own choosing,

1 provided that such goods and services shall meet reasonable standards,
2 as to their nature and quality, as promulgated by the franchisor.

3 2. Subdivision one of this section shall not apply to a requirement by
4 a franchisor that reasonable quantities of inventory goods or services
5 (including display and sample items) be obtained from the franchisor or
6 its affiliate, if such goods or services are a central feature of the
7 franchise business and:

8 (a) are actually manufactured or produced by the franchisor or its
9 affiliate; or

10 (b) are manufactured solely on behalf of the franchisor or its affil-
11 iate and incorporate a trade secret owned by the franchisor or its
12 affiliate.

13 § 698-h. Termination and non-renewal. No franchisor shall terminate or
14 refuse to renew a franchise without good cause.

15 § 698-i. Transfer of a franchise. 1. A franchisee shall have the right
16 to transfer the franchised business and the franchise to another person
17 who meets the franchisor's current reasonable, essential and nondiscri-
18 minatory standards for new franchisees or transferees. A franchisor may
19 not withhold its consent to a transfer of a franchise without good
20 cause.

21 2. A franchisor may exercise a right of first refusal in relation to a
22 proposed transfer, if the franchisor has reserved such right in the
23 franchise. However, a right of first refusal shall not be invoked more
24 than thirty days after receipt of the franchisee's request for consent
25 to the transfer. Such right of first refusal may not be exercised if
26 the result would be to leave the franchisor holding a partial ownership
27 interest in the franchise or franchisee. A franchisor shall only base
28 its decision to exercise a right of first refusal in a proposed transfer
29 of a franchise, upon the merits of the proposed transfer and the partic-
30 ular circumstances of the proposed transfer.

31 3. A franchisor may require as conditions of a transfer that:

32 (a) the transferee successfully completes a reasonable, essential and
33 nondiscriminatory training program;

34 (b) a reasonable transfer fee be paid to reimburse the franchisor for
35 its reasonable and actual expenses directly related to the transfer; and

36 (c) the franchisee pay or make reasonable provisions to pay any amount
37 due the franchisor or its affiliate.

38 4. A franchisor shall not withhold its consent to a public offering by
39 a franchisee of its securities, provided that the franchisee or owners
40 of the franchise retain more than fifty percent of the voting power in
41 the franchise. A franchisor shall not withhold its consent to a pooling
42 of interests or exchange of assets of its existing franchisees.

43 5. A franchisee may assign its interest in its franchise for the unex-
44 pired term of the franchise without any change in the terms of such
45 franchise. Furthermore, the franchisor shall not require the franchisee
46 or the transferee to enter into any new or different terms during the
47 unexpired term of the franchise.

48 6. For the purposes of this section the following shall not constitute
49 a transfer and a franchisor shall not interfere with:

50 (a) the succession to ownership or management of a franchise upon the
51 death or disability of a franchisee, or an owner, officer or director of
52 a franchisee, by the spouse, children, partners or fellow shareholders
53 of such deceased or disabled person;

54 (b) incorporation by a franchisee;

1 (c) transfer of interests within an existing group of owners of a
2 franchisee when such transfers do not result in a change in the control-
3 ling interest in the franchise;

4 (d) transfers of less than a controlling interest in the franchise to
5 the spouse or children of the franchisee, or owners, officers or direc-
6 tors of the franchisee;

7 (e) transfers of less than a controlling interest in the franchise
8 pursuant to an employee stock ownership plan, employee incentive compen-
9 sation plan or deferred benefit plan;

10 (f) a grant or retention of a security interest in the franchise, the
11 franchised business or its assets, or an ownership interest in the fran-
12 chisee, provided that the security agreement creates an obligation on
13 the part of the secured party, which is enforceable by the franchisor,
14 to give notice to the franchisor simultaneously with notice to the fran-
15 chisee of the secured party's intention to foreclose on the collateral,
16 and granting a reasonable opportunity to redeem the interest of the
17 secured party and release the secured party's lien upon the franchise
18 and the franchised business by satisfying the franchisee's obligations
19 to the secured party; or

20 (g) the franchisee's use of management consultants or hiring of a
21 professional manager.

22 7. Subject to the provisions of paragraph (f) of subdivision six of
23 this section, no franchisor shall prevent a franchisee, who has trans-
24 ferred the franchise, from retaining or foreclosing upon a security
25 interest in one or more assets transferred, including the franchise,
26 created to secure the obligations of the transferee to the transferor.

27 8. Every franchisee shall give its franchisor not less than thirty
28 days' notice of a proposed transfer and upon request shall advise the
29 franchisor, in writing, of the ownership interests of all persons hold-
30 ing or claiming an equitable or beneficial interest in the franchise or
31 the franchisee.

32 9. No franchisor shall transfer its interest in a franchise unless it
33 makes reasonable provision for the performance by the transferee of its
34 obligations pursuant to the franchise. A franchisor shall provide its
35 franchisees with notice of the proposed transfer at such time as such
36 disclosure would be required pursuant to applicable securities and
37 exchange laws, if securities of the franchisor were publicly traded.

38 10. A franchisor shall be objectively reasonable in determining to
39 withhold its consent to a proposed transfer of a franchise. Every trans-
40 fer shall be deemed approved thirty days after the franchisee submits
41 the proposed transfer for consent to the franchisor, unless the franchi-
42 sor shall earlier provide written notice of its disapproval, or exercise
43 of right of first refusal. All such notices stating the bases of disap-
44 proval shall be privileged against claims of defamation.

45 11. No franchisor shall discriminate against a proposed transferee of
46 a franchise on the basis of race, color, national origin, religion, sex,
47 or disability.

48 12. As a condition of a transfer of a franchise, no franchisor shall
49 obligate a franchisee to undertake other obligations or forgo other
50 rights outside the scope of the franchise proposed to be transferred, or
51 to enter into release of claims broader in scope than a counterpart
52 release of claims offered by the franchisor to the franchisee.

53 13. No franchisor shall enforce against the transferor of a franchise
54 after a transfer, any covenant in the transferred franchise prohibiting
55 the transferor from engaging in any lawful occupation or enterprise.
56 However, the provisions of this subdivision shall not limit the right of

1 the franchisor to enforce contractual covenants prohibiting the transfe-
2 ror from exploiting the franchisor's trade secrets or intellectual prop-
3 erty rights.

4 14. For the purposes of this section:

5 (a) "Transfer" shall mean any change in ownership or control of a
6 franchise, franchised business or franchisee.

7 (b) "Franchise" shall include franchisee as appropriate in context.

8 § 698-j. Anti-competitive covenants. No franchisor shall prohibit or
9 enforce a prohibition against a franchisee from engaging in any lawful
10 business at any location after expiration, termination for good cause or
11 transfer of a franchise, unless not less than ten days before such expi-
12 ration, termination or transfer the franchisor offers in writing to
13 purchase the franchised business for its fair market value as a going
14 concern. Such an offer may be conditioned upon ascertainment of the fair
15 market value by an impartial appraiser. The provisions of this section
16 shall not prohibit enforcement of provisions of a franchise requiring a
17 franchisee, after expiration or termination of the franchise to:

18 1. Alter the appearance of the premises and the manner of operation of
19 the formerly franchised business to avoid the likelihood of confusion as
20 to the affiliation of the business with its former franchisor or the
21 origin of the goods or services it offers; or

22 2. Cease and refrain from using a trade secret of the franchisor or
23 its affiliate.

24 § 698-k. Freedom of association. 1. No franchisor shall directly or
25 indirectly inhibit its franchisees from forming an association or from
26 associating with other franchisees for any lawful purpose. Nor shall any
27 franchisor penalize, in any way, its franchisees for such activities.

28 2. Every franchisor which has more than five hundred franchises or
29 more than three hundred franchisees, within the United States, shall
30 have a duty to bargain in good faith with an organization of its fran-
31 chisees which represents in general or on a specific issue or set of
32 issues a majority of its franchisees in this state.

33 § 698-l. Encroachment. 1. Subject to the provisions of subdivision
34 three of this section, no franchisor shall place or license another to
35 place a new outlet in an unreasonable proximity to an established fran-
36 chised outlet which offers goods or services identified by the same
37 trademark as the new outlet, if the intent or probable effect of estab-
38 lishing the new outlet is to cause a diminution of gross sales by the
39 existing outlet of more than ten percent in the twelve months following
40 the establishment of the new outlet.

41 2. A franchisee injured or likely to be injured by violation of the
42 provisions of this section may enjoin the violation or pending violation
43 and recover damages caused by the violation, which may include a reason-
44 able estimation of the plaintiff's profits lost as a consequence of the
45 violation, and other appropriate relief.

46 3. The provisions of this section shall not apply to the establishment
47 of a new outlet if, before the new outlet opens for business the fran-
48 chisor offers in writing to the franchisee of the established outlet or
49 outlets to pay to the franchisee, if the sales of the established outlet
50 or outlets decline by more than ten percent in the twelve months follow-
51 ing establishment of the new outlet as a consequence of opening the new
52 outlet, an amount equal to ten percent of the gross sales (net of sales
53 taxes, returns and allowances) of the new outlet for the first twenty-
54 four months of the new outlet's operation.

55 4. If the franchisor makes a written offer under the provisions of
56 subdivision three of this section, or in an action or proceeding under

1 subdivision two of this section, the franchisor has the burden of proof
2 to show that, or the extent to which, a decline in sales of the estab-
3 lished franchise outlet or outlets occurred for reasons other than the
4 opening of the new outlet.

5 § 698-m. Discrimination prohibited. In granting franchises, consider-
6 ing approval of transfers of franchises, and in administering its fran-
7 chise system, a franchisor shall not discriminate against a franchisee
8 or prospective franchisee on the basis of race, color, religion,
9 national origin, sex, or disability.

10 § 2. This act shall take effect on the thirtieth day after it shall
11 have become a law.