STATE OF NEW YORK

3413

2023-2024 Regular Sessions

IN ASSEMBLY

February 3, 2023

Introduced by M. of A. DeSTEFANO, 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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2. "Franchise" shall mean a contract or agreement, whether expressed or implied, and whether written or oral, between two or more persons by which:

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

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

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

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

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

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

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

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

5. "Franchisor" shall mean a person who grants or has granted a franchise.

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

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

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

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

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

(b) is the subject of efforts which are reasonable under the circumstances to maintain its secrecy.

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

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

3. No franchisee shall be deprived of the application of the provisions of this article by any provision of a franchise which designates the law of another jurisdiction as governing the provisions of such franchise, or designating a venue outside of this state for the resolution of disputes.

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

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

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

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

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

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

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

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

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

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

(b) are manufactured solely on behalf of the franchisor or its affiliate and incorporate a trade secret owned by the franchisor or its affiliate.

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

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

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

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

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

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

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

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

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

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

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

(b) incorporation by a franchisee;

(c) transfer of interests within an existing group of owners of a franchisee when such transfers do not result in a change in the controlling interest in the franchise;

(d) transfers of less than a controlling interest in the franchise to the spouse or children of the franchisee, or owners, officers or directors of the franchisee;

(e) transfers of less than a controlling interest in the franchise pursuant to an employee stock ownership plan, employee incentive compensation plan or deferred benefit plan;

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

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

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

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

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

10. A franchisor shall be objectively reasonable in determining to withhold its consent to a proposed transfer of a franchise. Every transfer shall be deemed approved thirty days after the franchisee submits the proposed transfer for consent to the franchisor, unless the franchisor shall earlier provide written notice of its disapproval, or exercise of right of first refusal. All such notices stating the bases of disapproval shall be privileged against claims of defamation.

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

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

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

the franchisor to enforce contractual covenants prohibiting the transferor from exploiting the franchisor's trade secrets or intellectual property rights.

14. For the purposes of this section:

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

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

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

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

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

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

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

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

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

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

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

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

§ 698-m. Discrimination prohibited. In granting franchises, considering approval of transfers of franchises, and in administering its franchise system, a franchisor shall not discriminate against a franchisee or prospective franchisee on the basis of race, color, religion, national origin, sex, or disability.

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