



**May Dinner Meeting
May 12, 2009**

**Legal and Legislative
UPDATE**

LEGISLATIVE

- **Same Sex Marriages – Benefits/Coverage**
 - On Tuesday May 6, 2009 Maine became the 5th state to recognize same-sex marriages when Governor Baldacci signed the bill passed earlier in the spring by the Maine legislature. That same day, the New Hampshire legislature passed a similar bill, which awaits signature from Governor John Lynch. The other 4 states that presently recognize same-sex marriages or civil unions include Massachusetts, Connecticut, Vermont, and Iowa.
 - The Maine law goes into effect 90 days after the legislature adjourns in June, unless impeded by a people's referendum (which requires the gathering of 55,000 signatures within 90 days of the legislature adjourning).
 - For businesses, this means that employee benefits for spouses (health care, life insurance, etc.) must be provided to all couples, regardless of gender.

- **Massachusetts Identity Theft Prevention Regulation Deadline Extended (Reminder)**
 - As mentioned in last quarter's meeting, the Office of Consumer Affairs and Business Regulation extended the date for businesses to meet new security guidelines aimed at protecting consumer information. That deadline was extended to January 1, 2010.
 - Gift card programs, loyalty programs and other similar customer-information-gathering initiatives should be reviewed to confirm they comply.
 - Make sure all of your company data sent over the Internet and stored on any storage devices (such as laptops, servers, flash drives, anything someone could physically break in and steal or hack into for customer data) has physical access safeguards, is encrypted properly, and that customer receipts and other retained information is properly stored. Also, make sure third parties are capable and contractually required to protect personal information. Finally, review record retention policies and employee handbooks for compliance.

- Do not wait until the last minute! For the specific requirements visit:
<http://www.mass.gov> and search “CMR 17.00.”

- **Credit Card Reform**

- Last quarter we discussed the Credit Card Fair Fee Act, whereby merchants will be entitled to seek arbitration if unable to negotiate fees for processing credit cards. This bill is still under consideration by Congress.
- In other credit card news, the House passed bill # 627 aimed at protecting consumers (and business owners) from predatory practices by the credit card companies that include double-cycle billing, applying payments towards low interest balances before high interest balances, and exorbitant over-limit and late fees. The bill heads to the Senate later this month where it is expected to pass.
- The Federal Reserve and the Office of Thrift Supervision (OTS), and the National Credit Union Administration (but not the FDIC) have proposed long-anticipated regulations on unfair or deceptive credit card practices. The areas proposed to be regulated include the following:
 - *Reasonable Time to Make Payments:* prohibits treating a payment as late unless consumers have been provided with a reasonable amount of time to make payment - proposed safe harbor for institutions that ensure that statements are mailed/ delivered at least 21 days before payment is due.
 - *Payment Allocation:* When different annual percentage rates apply to different balances, prohibits issuers from allocating amounts paid above the minimum payment in a manner less beneficial to consumers than one of three prescribed methods.
 - *Interest Rate Increases on Outstanding Balances:* Would prohibit increasing the annual percentage rate on an outstanding balance unless certain exceptions apply.
 - *Balance Computation Methods (Double Cycle Billing):* Would prohibit computing finance charges on outstanding balances based on balances in billing cycles preceding the most recent billing cycle. Also would

prohibit reaching back to the prior billing cycle when calculating the amount of interest charged in the current cycle.

- *Firm Offers of Credit:* Any firm offers of credit advertising multiple annual percentage rates or credit limit ranges would have to disclose in the solicitation the factors that determine how to qualify for the lowest rate and the highest credit limit advertised.
 - *Overdraft Programs-Opt Out:* Would prohibit assessing a fee for paying an overdraft unless a consumer gets the right to opt out of payment of overdrafts; a reasonable opportunity to exercise the opt-out; and the consumer does not opt out. The rule would apply regardless of whether the transaction is, for example, a check, an automated clearinghouse (ACH) transaction, an ATM withdrawal, a recurring payment, or a debit card purchase at a point of sale.
- Shop around for the best terms and rates for your merchant account agreements.
 - Be aware as you use credit cards: for – examine your statements, be mindful of interest rates, look at whether the credit card company has increased or decreased your credit limit, which can affect your credit to debt ratio and credit score.

- **COBRA Benefits**

- The Department of Labor released a new model COBRA notice to explain to employees who are laid off or terminated their new rights under the American Recovery and Reinvestment Act of 2009.
- At last quarter's meeting we discussed the new COBRA benefits extended to Americans who were laid off between September 2008 to present – most notably how they may elect to enroll in COBRA and bear 35% of the cost of the premium while the employer bears 65% of the cost but receives a payroll tax credit for its share of the cost.
- The new model COBRA notice is available at www.dol.gov/COBRA

- **New Hampshire Law – Auto Dealer Franchises**

- New Hampshire Governor John Lynch signed an updated Auto Dealer Bill of Rights on May 7, 2009. Aimed at protecting franchise owners of car dealerships, their employees and consumers, this new law is meant to ensure that dealers are given reasonable compensation for their operations and their inventory as well as the ability to continue to service vehicles that have already been sold.
- Analysts project that GM will terminate 15 franchise agreements with various NH dealerships over the next few months. GM is expected to close around 40% (i.e., 2,600) of its 6500 dealers nationwide. Chrysler is expected to terminate 10 franchise agreements in the Granite State and plans to close more than 800 nationally (it has already terminated around 400 nationwide since January 2008). Because it has filed for bankruptcy, Chrysler will be able to cancel franchise agreements (since they are treated as “executory contracts” in bankruptcy). Franchise holders are allowed to sue Chrysler to block the action and bankruptcy proceedings can take years, but bankruptcy does afford Chrysler protections that may result in the dealers losing out.
- Be mindful and conduct due diligence into the economic well-being of your franchisors, franchisees, vendors, landlords (if you lease rather than own your property), lenders and others you do business with. Understand how their liquidity or solvency issues could affect you – and prepare for it legally and operationally.

- **Hawaii’s legislators Are considering menu labeling.**

- Following New York City and the state of California, legislators in Hawaii are considering a bill to require restaurants with locations in 15 states or more nationwide (thereby targeting chain restaurants) to post calorie information on restaurant and drive-thru menu boards starting January 1, 2012.
- As we mentioned at last January’s meeting, the Massachusetts Department of Public Health is still considering a similar measure. The MA plan targets chain restaurants with at least 15 locations in the state. To contact the Department of

Public Health Commissioner John Auerbach to voice your opinion on this proposed regulation, call 617-624-6000.

- Federal lawmakers plan to revisit the Labeling Education and Nutrition Act (the “LEAN Act”), which would create a national standard for menu-labeling mandates. If passed, the bill, which is sponsored by Sens. Tom Carper, D-Del., and Lisa Murkowski, R-Alaska, would require chains with more than 20 units to post calorie contents for all menu items. In addition, more municipalities are looking to jump on the nutrition disclosure bandwagon.

COURT DECISIONS

- **UPDATE - Atlanta Bread Co. Int’l, Inc. v. Lupton-Smith (Ga. Ct. App. May 14, 2008)**
 - Last September we discussed this case in which a franchisor terminated franchisee’s four bakery and deli franchises when franchisee operated a competing coffee business using the franchisor’s methods and proprietary information in alleged violation of an in-term non-compete clause in the franchise agreement.
 - The trial court found the restrictions contained in the franchise agreements were invalid. The franchisor. appealed and the Appellate Court held that the in-term non-compete provision was too broad to be upheld, prohibiting franchisee from participating in any business “similar to” franchisor’s business. The Court noted that “if [franchisee] were to take a position of janitor in a deli, he also would be in violation of [the franchise agreement].” The trial and appeals courts said that in-term covenants not to compete must be reasonable.
 - The appeals court noted that, unlike a non-compete provision in a sale-of-a-business context, Georgia courts would not “blue-pencil” (proactively adjust and uphold a narrower version) a non-compete provision in a franchise agreement context. “Therefore, if one provision of a covenant not to compete is found to be unenforceable, the entire covenant will be struck down.”

- The Court added that other areas of the in-term non-compete provision were overly broad: specifically that the non-compete area had variables (i.e. don't open a competing business within 20 miles of a franchise, not taking into account that a franchisee could subsequently open additional franchises, expanding the territory then covered by the non-compete) that a signer could not foresee or adequately agree to when signing the initial agreement.
 - The Georgia Supreme Court has agreed to hear an appeal. IFA filed a brief asserting that the lower courts wrongly applied tests for post-term noncompete covenants (which the IFA merits should get a more stringent judicial review in Georgia) to in-term covenants (which the IFA has stated should get a less stringent review in Georgia).
- **Mears v. Zeppé's Franchise Dev., 2009-Ohio-27 (Case No. CV-5 83721, January 8, 2009)**
 - Dale Mears entered into a franchise agreement in spring of 2001 with Zeppé's, a pizza franchise. After some disagreements with the franchise, Mears began operating as an independent pizzeria in January, 2006. Mears filed a complaint against Zeppé's in February 2006, alleging that he felt he was given misleading and/or incorrect sales projections from Zeppé's before signing his franchise agreement. Zeppé's filed a counterclaim for injunctive relief and asked for the claims to be transferred to arbitration, in accordance with the franchise agreement.
 - The court granted Zeppé's motion to have the dispute resolved by arbitration, and dismissed Zeppé's counterclaims without prejudice. Mears appealed the court's decision to send the case to arbitration, as stipulated in the franchise agreement. The Court of Appeals of Ohio affirmed a lower court's decision.
 - Be aware of arbitration clauses in your franchise agreements – they are hard to overcome.

- **Citigroup Global Markets Inc. v. Bacon, 5TH Circuit, No. 07-20670 CVO
March 5, 2009.**

- *The Citigroup* case dealt with an arbitration regarding an individual retirement account where a husband had withdrawn money by forging his wife's signature. The arbitration panel had granted the wife damages and attorney fees. Citigroup filed a motion to vacate the arbitration award with a U.S. District judge in Houston. The judge granted the motion, finding that the award was made in manifest disregard of the law because the wife was not harmed by the withdrawal because her husband used the money for her benefit and he promised to pay her back; her claims were barred by Texas law because they were lodged too late; and Texas law required apportionment among the liable parties, which included the wife's husband. She then appealed to the 5th Circuit.
- The Circuit Court of Appeal overruled the lower court. The appeals court opinion noted that, under §10 of the Federal Arbitration Act courts are only permitted to vacate an arbitration award for four reasons written in the FAA. They are:
 1. if the award was procured by corruption, fraud or undue means;
 2. if there was evident partiality or corruption by the arbitrators;
 3. if the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced or;
 4. if the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made.
- The Court of Appeal looked at a 2008 Supreme Court Case (Hall Street Associates v. Mattel) and noted there were disagreements among the Circuit Courts on this issue. The 5th Circuit held that under the Hall case, there were only the above 4 reasons to vacate an arbitrator's award: Since manifest disregard of the law is not listed, it is not a basis to throw out an arbitrator's award. Other federal Circuit Courts have held the opposite.

- **Peterson et. al. v. Sprock et. al., 2009 – U.S. District Court for the Northern District of Georgia Atlanta Division, (Case No. CV-3087-RWS March 10, 2009)**
 - Peterson and other franchisees sued Raving Brands, its owners and corporate directors, alleging fraud and misrepresentations in the sale and development of Mama Fu’s Noodle House, Inc., restaurants. Their franchises did not do as well as they had expected and they sued Raving Brands. They alleged that the franchisors misled them in order to get them to sign franchise agreements. There was evidence of some franchisor statements in the franchise sale that turned out to be untrue.
 - The judge found in favor of the franchisor, Raving Brands, noting there are always risks in starting up a franchise. The failure of Peterson’s and other franchisees was not caused by any misrepresentation or fraudulent statements on the part of Raving Brands.

- **Dunkin Donuts Franchised Restaurants, LLC et. al. v. Walid Elkhatib (N.D. Ill., E. Div. March 13, 2009)**
 - Walid Elkhatib, a practicing Muslim who objects to selling pork products because of his religious beliefs, operated a Dunkin Donuts franchise in Chicago since 1979. When he initially invested in the franchise, Dunkin Donuts did not sell breakfast sandwiches containing pork products (which were introduced in 1984) and Dunkin Donuts’ accommodated his religious beliefs for nearly 20 years, even providing him with “no meat products available” signs for his store. In 2002, Dunkin reversed its previous position and told Elkhatib they would not renew his franchise agreement in 2006 if he did not agree to sell their full line of breakfast sandwiches, including those with pork.
 - Elkhatib could not sue under federal laws that prohibit religious discrimination against employees in the workplace. Instead, he filed a lawsuit in 2006 under a claim that he was subject to racial discrimination as an Arab-American when attempting to negotiate a contract. Racial discrimination in making contracts is prohibited by federal law (in a prior case, the US Supreme Court recognized that

the federal statute, (42 U.S.C. §1981) protected a person's racial status as an Arab).

- In 2007 a Chicago federal judge dismissed the claim on the grounds he was not discriminated against based on his race (since it was a Muslim religious rule he was adhering to, not an Arab custom or practice). An appellate judge in 2007 reversed this decision and remanded the case back to federal court for trial, citing that Dunkin Donuts did not consistently apply their rules – for example, allowing some establishments in Jewish neighborhoods to sell only sandwiches that did not contain pork, and allowing other Dunkin Donuts franchisees to opt out of selling breakfast sandwiches because their locations didn't have adequate space for the required microwaves and toasters. In March 2009, however, a federal jury heard the case and found that Dunkin Donuts had not discriminated against Mr. Elkhatib because of his race when refusing to renew his franchise agreement - so the statute did not apply.
- More of the case: get “understandings” about special terms in writing.

- **(Another) Starbucks Class Action Lawsuit – Reed v. Starbucks (S.D.Fla. April 23, 2009)**

- A Starbucks employee in Florida filed a suit in April in US District Court seeking damages for Starbucks' alleged violation of the Fair Labor Standards Act (FLSA) by not paying him overtime in his role as a store manager. Mr. Reed claims Starbucks improperly classified him and other store managers as employees who would be exempt from overtime pay.
- The United States District Court of Southern Florida permitted Mr. Reed's case conditional certification for class action status - meaning a court-supervised notification of other present or former Starbucks employees can take place to enable other employees the option to join as members of the class action suit.
- Starbucks in particular has come under fire in recent years for employment law violations. Last year a judge in a San Diego County class action suit awarded \$100 million to Starbucks baristas who had been forced to share their tips shift supervisors. Starbucks is currently appealing that decision.

- LEARN FROM STARBUCKS' mistakes! Be sure to understand your obligations regarding over-time payment, exempt vs. non-exempt employees and any wage-payment issues. Remember that in Massachusetts, any violations of the Massachusetts Wage-Law Act can result in automatic TREBLE DAMAGES (no good faith excuse).
- **Burger King Franchisees File Complaints Seeking Class Action Status**
 - On May 4, 2009 the National Franchisee Association (NFA), a trade group that represents more than 75% of Burger King's US franchise operators, filed a complaint in United States District Court, Southern California after Burger King announced its plans to divert rebates for store operators from soft drink companies to a national advertising campaign.
 - Burger King entered into an agreement in 1999 with Coca-Cola Co. and Dr. Pepper Snapple Group, Inc., whereby Burger King agreed to purchase 700 million gallons of syrup through 2022. Franchise operators receive rebates from the soft drink companies based on how many gallons of soft drink each store purchases. The franchisees use these rebates from the soft drink companies for maintenance, repairs, and local marketing campaigns and promotions. According to one source, "That amounts to approximately \$1.5 billion over the balance of the contract, and is money relied on by the franchisees, which goes right to their P&L. It's \$20,000 a year per restaurant."
 - NFA contends that Burger King has no right to reallocate the rebate money from the individual franchisees into a larger national advertising campaign. The franchisees argue that they are the intended beneficiaries of the soft drink rebate agreement, not Burger King corporate.
 - A judge has yet to review the case and grant class action status. Stay tuned...

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