

Franchise Review October 2016 – Frequently asked questions (FAQs)

OCTOBER 31, 2016 7 MIN READ

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Frequently Asked Questions

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Is it sufficient if I update my disclosure document annually?

No, a disclosure document must be current as at the time of each delivery. Only certain disclosure items in franchise legislation expressly require disclosure for events occurring during specified periods (i.e., the most recently completed fiscal year). But for those disclosure items, all other information must be current as at the time of each delivery so franchisors must implement regular updating procedures.

How do operations manuals fit within a franchise program in Canada?

Operations manuals constitute an important, if not critical, part of the materials provided to a franchisee. They significantly affect the ongoing administration of a franchise system. Because it is impossible for all of the operating standards and specifications for franchised units to be included in the actual franchise agreement, franchisors create separate operations manuals to establish these standards and specifications for franchisees.

How is an operations manual enforced?

Franchisors use operations manuals to establish the standards and specifications for the operation of franchised units by franchisees. Obviously, it is impossible for all of these standards and specifications to be contained in the actual franchise agreement due to the size of the material and the frequency of changes and additions. Therefore, the practice has developed for the franchise agreement to refer to the operations manual as the source of the ongoing standards and specifications for the operation of franchised units, and to require franchisees to comply with the operations manual as if the contents of the manual were contained within the franchise agreement itself. Effectively, the operations manual constitutes a document which the parties agree will be provided by the franchisor, on one hand, and will be complied with by the franchisee, on the other hand.

A well-drafted franchise agreement should ensure that the term “operations manual” is

properly defined so as to include all specific manuals by title, as well as ongoing bulletins, newsletters, policies and other communications which are intended to provide for standards and specifications of operation. In addition, the franchise agreement must state that the franchisor has the right, on notice to its franchisees, to change, add to, delete, and/or otherwise modify the contents of the operations manual from time to time. Franchisees should acknowledge, in the franchise agreement, the importance of compliance with the terms and conditions of the operations manual for purposes of consistency across the franchise system.

Updating the operations manual

It is essential that the franchise agreement require franchisees to update their copies of the operations manual. Most franchisors today post the contents of their operations manual on internal websites rather than providing hard copies and mailing or delivering copies of changes as they occur. The franchise agreement should reserve this right and should specify that the master copy of the manual maintained by the franchisor, in hard copy, or the version posted on the franchisor's website, will constitute the ongoing official version of the operations manual.

Poor practices with operations manuals

Over a number of years, we have observed some continuing, poor practices carried on by franchisors in relation to operations manuals. A common and critical mistake that new franchisors often make is to include reference to an operations manual in their franchise agreements, but not to have the operations manual available at the time that a franchise agreement is executed, or not to provide a copy to the franchisees coincident with operation of the franchise unit. In fact, some franchisors make reference to an operations manual in their franchise agreements, but do not develop the manual for several months (or even years) after execution of the franchise agreement. Such a practice could prove to be extremely detrimental to a franchisor where a franchisee alleges in respect of an allegation by a franchisee of non-compliance by the franchisor with its obligations under the franchise agreement.

A second practice which we have seen on occasion is the failure of a franchisor to maintain its operations manual as new standards and specifications are introduced to the franchise system. Failure to keep the manual current and up-to-date may result in incomplete or insufficient compliance by a franchisee. More importantly, the franchisor may be in breach of its covenant to provide the manual to its franchisees. It is, therefore, essential that franchisors maintain their operations manuals in an up-to-date format and communicate changes as they are introduced.

A third practice which we have noted, often by a U.S. or other foreign franchisors entering the Canadian marketplace, is the failure to conform the operations manual to Canadian legal requirements and practices. Operations manuals frequently contain items of legal content such as suggested or required documents, consumer contracts, warranties, reporting forms, even tax, labour and employment advice. The laws dealing with these matters in the United States or other foreign countries are different from those in Canada. If the franchisor is providing an operations manual to its franchisees in Canada, the manual must be amended for compliance with equivalent Canadian legal or business requirements. In light of Canadian employment laws and some case law, franchisors would also be well served to consider what parts of their foreign manual should and should not be included in Canada.

Finally, we have noted on a number of occasions that franchisors take a more lenient approach to the language in their operations manual than the language of their franchise

agreements and related documents. An operations manual is a document referenced in the franchise agreement, and compliance with the terms and conditions of the manual is equivalent to compliance with the terms and conditions of the franchise agreement. Therefore, an operations manual should be reviewed by legal counsel to ensure that its contents are not inconsistent with the franchise agreement and related documents, and that the language contained in the operations manual is not ambiguous, uncertain or unenforceable. The same warning applies to significant changes or modifications to the manual over time. The cost of monitoring and updating the contents of a manual are relatively insignificant when compared to the significant adverse consequences which may result from poor practices in relation to such a manual.

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Most of our competitors are heavily into social media, but we still have not gotten around to it. What legal issues should we be taking into consideration?

Key social media issues to consider:

- **Dot your “i’s” and cross your “t’s”** — Develop internal guidelines and policies governing the franchisor’s and franchisees’ use of social media. Consider updating your franchise agreement and/or operations manual to specifically address the use of social media and other emerging technologies by your franchisees. Develop policies regarding ownership of your franchise system’s user names by employees and franchisees.
- **Take baby steps** — Start with one major social media outlet and perfect your process before expanding to other social media.
- **Protect your brand** — Misappropriation of user names on social media sites is a form of domain name cyber-squatting. Consider registering your franchise system’s trademarks and brand names with each of the social media sites. You may want to go so far as to register different variations and combinations of your system’s trademarks in order to protect your brand from misappropriation. You should also continually monitor social media sites and police the use of your trademarks in order to protect your system’s brand.
- **It’s still advertising** — Remember that any statements made on behalf of your company (by employees, franchisees, bloggers or others with whom you have a commercial relationship) must not be misleading and can attract liability as do traditional forms of advertising. Even user-generated content posted by consumers and other third parties on your social media sites may still attract liability to your company depending on the circumstances.
- **Don’t be private about privacy** — Review and revise your privacy policy to address any new collections and uses of personal information through social media. If you are collecting personal information, ensure that appropriate consents have been obtained.
- **Be prepared to police** — Decide in advance who within the organization will be responsible for monitoring your social media presence, as well as your franchisees’ use of social media, to ensure compliance with your internal policies and external terms of use

and for managing content. Conduct regular audits of your social media sites.

- **Be responsive** — Develop a strategic plan for monitoring content, dealing with negative comments posted by third parties, franchisees or employees and responding to inquiries about your products and services.

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