

ARTICLES

How Franchise Owners Can Be Liable for Wrongful Acts of Franchises in Oregon

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In Oregon, franchise owners (“franchisors”) can be held liable to the negligent acts of franchisees and franchisee employees under certain circumstances. Franchise agreements are routinely framed as an independent contractor relationship between franchise owners and franchisees. The 2019 case *Viado v. Domino’s Pizza*, 230 Or. App. 531 (Or. Ct. App. 2009) shows how despite a franchise agreement, a franchisor can be on the hook for the negligent acts of employees of the franchisee. But the case also provides a road map of how franchisors can limit the risk.

In *Viado*, a pizza delivery driver struck and injured a motorcyclist. The pizza delivery driver worked for a local franchise of the franchisor, Domino’s Pizza (Domino’s). The motorcyclist sued the pizza-delivery driver, the local franchise and Domino’s.

Domino’s asked the court to dismiss the case. Domino’s argued that it was a franchisor and had no liability. The local franchise employed the pizza-delivery driver, not Domino’s. Domino’s submitted its standard franchise agreement with the local franchise that identified the local

franchisee as an “independent contractor” of Domino’s. Domino’s argued that because it had an independent-contractor relationship with the local franchise, and the local franchise employed the pizza-delivery driver, Domino’s could not be held responsible for any of the driver’s negligent acts.

The court explained that under Oregon law, franchisors may be held liable through “vicarious liability,” a legal principle that allows employers to generally be held liable for the negligent acts of employees who are acting within the scope of their work. The court found that just as employers could be held vicariously liable for the negligent actions of their employees, franchisors could also be held vicariously liable for the negligent acts of a franchisee’s employees under certain circumstances.

Despite this, the court ultimately found that Domino’s was not liable for negligent actions of the pizza-delivery driver. The court used a three-part test in reaching its conclusions:

1. Agency

The court considered whether there was an “agency” relationship between Domino’s and the local franchise. Agency happens when the franchisor’s franchise agreement goes beyond simply setting standards for the franchisee. An example of merely setting standards would be a franchise agreement that simply requires a franchisee to perform tasks in a “workmanlike manner.” Agency occurs when the agreement instead gives the franchisor the right to exercise control of “day-to-day operations.”

2. Type of Agent

The court next considered whether the local franchise was an “employee” agent or a “non-employee” agent. A franchisee is an “employee” agent of a franchisor if the franchisor controls the details of how the franchisee performs the work. On the other hand, a franchisee is a “non-employee” agent of the franchisor if the franchisee controls the details of how it performs the work. Merely imposing uniform standards for franchisees isn’t enough to make a franchisee an “employee.” Whether the franchisee is an employee agent vs. a non-employee agent depends on numerous factors, including but not limited to:

- a. extent of franchisor’s control over the details of the franchisee’s work;
- b. method of compensation;
- c. advertisement responsibilities;
- d. whether the franchisee can assign away rights;
- e. level of supervision; and
- f. skill required to perform the particular kind of work.

Reviewing Domino's franchise agreement, the court found that the local franchise was a "non-employee" agent of Domino's.

3. Scope of Liability

According to the court, the type of agency in the second step determines the scope of the franchisor's potential vicarious liability. If a franchisee is determined to be an "employee" agent of the franchisor, the franchisor becomes vicariously liable for all negligent acts performed by the franchisee (or its agents) as long as the franchisee or its agents were acting within the scope of their employment. On the other hand, if a franchisee is determined to be a "non-employee" agent of the franchisor, the franchisor is ordinarily not liable for the franchisee's (or its agents') actions unless the franchisor controlled the specific conduct that gave rise to the claim.

The court found that while Domino's franchise agreement set hiring standards for the local franchisee drivers, those standards didn't give Domino's control over the specific conduct that caused the injury — the way the pizza-delivery drivers drove their vehicles in delivering pizza. Because Domino's did not control the specific negligent action, the court found that Domino's was not liable.

There are some key takeaways for franchisors looking to reduce their risk of liability for the actions of a franchisee's employee.

First consider whether simply setting workmanship standards is sufficient for the business relationship with a potential franchisee. A franchise agreement that simply sets standards on cleanliness, uniformity of appearance and presentation of services, and performing of work in a "business-like" manner may be able to reduce the risk of a franchisee being an agent of the franchisor.

Second, consider limiting control of a franchisee's operations that have a higher liability risk. A franchisee's transportation of goods and maintenance of its premises are business activities that present considerable risk for negligence. If these areas of business activities are not critical to the uniformity of the franchise, allowing the franchisee to control these areas can help limit the franchisor's liability.

Third, review the terms of the franchise agreement and consider key contractual provisions including the following:

- a. an "independent contractor" or "non-partnership" provision that makes clear that the franchisor's relationship with the franchisee is that of an independent contractor, not a partnership, joint venture or employer-employee;
- b. a "non-assignability" provision for certain business functions, which makes clear that the franchisee cannot assign key business operations (i.e., driving, maintaining the premises) to others; and



c. a “required insurance” provision that requires the franchisee to name the franchisor as an additional insured on a significant liability policy.

Whether a court will find a franchisor liable for the negligence of a franchisee’s employee is highly dependent on the facts of a given case. However, keeping these factors in mind when drafting or revising a franchise agreement can enable a you as a franchise owner to understand these risks and strategically craft a relationship that reduces the franchisor’s exposure to liability.

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