Managing Personal Information in the Franchise Relationship

Bret Permesly | PermeslyB@gtlaw.com | T: +1 212.801.30523
Tyler Thompson | ThompsonTy@gtlaw.com | T: +1 303.685.7473

OCTOBER 10, 2023

Presenters:

Breton H. Permesly

Shareholder, Franchise & Distribution Practice, New York

PermeslyB@gtlaw.com

Tyler J. Thompson

Shareholder, Data Privacy & Cybersecurity, Denver

ThompsonTy@gtlaw.com

GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

Agenda

1. Introduction
2. What Happens If We Get This Wrong?
3. Example Data Flows
4. Data Processing Roles
   A. Effects of Processing Roles
5. Franchise Agreement Issues
   A. General Data Rights, Ownership
   B. Franchise Operations Manual
6. Compliance Obligations
   A. Privacy Policies
   B. Data Subject Requests
   C. Marketing & Loyalty Programs
   D. Employee Data
7. Final Thoughts
   A. Top 5 Take-aways
   B. Contact & Further Information

GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

Introduction

- Whether personal information is customer data, employee data, or otherwise, managing personal information is a crucial part of the franchise relationship.
  - Comprehensive privacy laws take effect this year in California, Colorado, Connecticut, Utah, Virginia, and various international jurisdictions like Quebec.
  - Privacy enforcement has never been greater.
  - These laws impose compliance obligations and restrict how data can be used, shared, stored, or otherwise "processed". This is often done via assignment of processing roles which determines rights and compliance obligations of the entities in the relationship.
- Beyond regulatory concerns, there are practical concerns such as ownership of customer and marketing data and security concerns such as data breach.

GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

What Happens If We Get This Wrong?

- Regulatory penalties
  - California Consumer Privacy Act: $7,500 per violation, $1.2 million biggest penalty to date
  - GDPR: up to the greater of 4% of global gross revenue or 20 million euros.
- Data breach
  - Incorrect personal information handling increases the likelihood of data breach.
  - If done poorly enough, such handling can itself constitute a data breach in certain jurisdictions.
- Useless marketing data
  - Data may not have proper consents to be used or be inaccessible for marketing purposes.
- Reputational harm
  - Consumers and news agencies are more data focused than ever before.

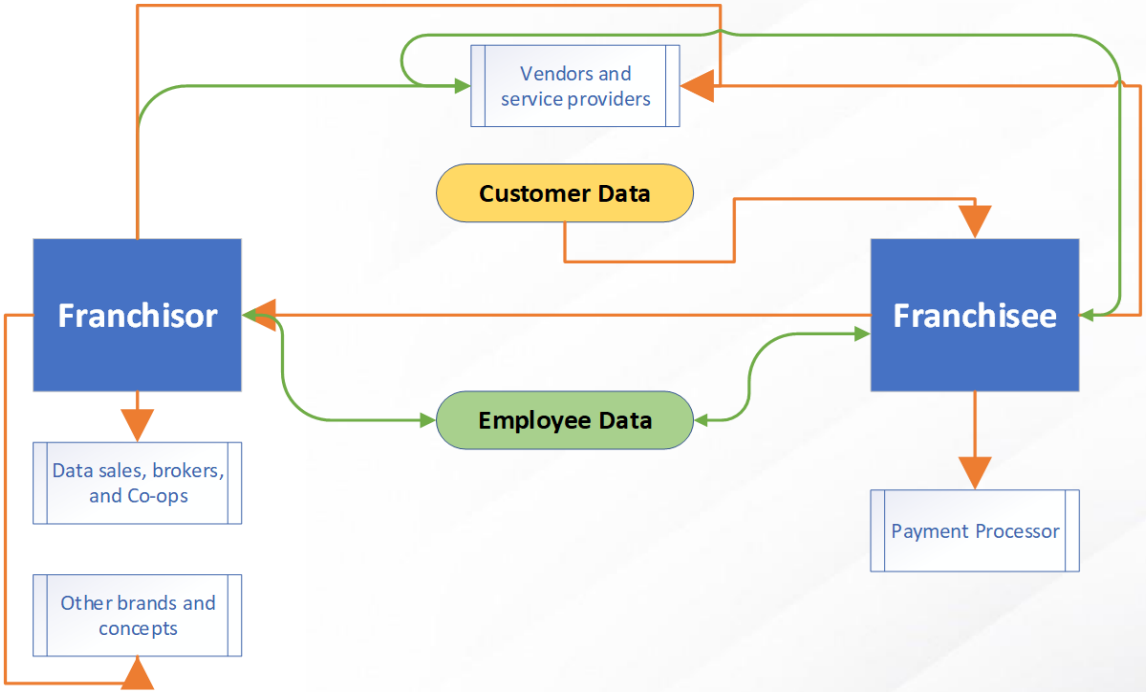
GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

What Happens If We Get This Wrong?

- Regulatory penalties
  - Franchisor faced GDPR regulatory penalty for blatant misuse of personal information by Franchisee employees (sharing surveillance camera footage)
    - *Artima SA* (Romania)
- Data breach
  - Franchisee stored data in unencrypted format, Franchisor ultimately faced tens of millions in potential liability
    - *In re Sonic Corp Customer Data Sec. Breach Litigation*
  - Franchisor Wendy's settled a $50 million class action due to security practices of franchisees.
- Marketing
  - Franchisor was liable for TCPA (calling and texting) violations by local franchisees
    - *Agne v. Pap John's Int'l*

Example Data Flows



Data Processing Roles

GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

Data Processing Roles

Controllers:	***Processors/Service Providers:***
• Also called “owners” or “businesses”	• Can only process information on behalf of the controller
• Responsible for determining the purpose and means of processing personal information	• Processing activities can only be undertaken if authorized with the controller end
• Generally, have a bigger compliance burden and are responsible for breach response	• Use cases typically contained in a data protection addendum to the franchise agreement

GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

Effects of Processing Roles

- Compliance responsibility
  - Controllers:
    - Responsible for most compliance elements
    - *Examples: Providing privacy policy, ensuring accuracy of privacy, providing notice at collection of privacy practices, intake and management of data subject requests, creating and maintaining a comprehensive data inventory*
  - Processors:
    - Responsible for complying with contractual obligations set by controllers as well as breach response (to the controller), security, and providing controller with information necessary to comply with controller's obligations
    - Must strictly adhere to processing instructions from controller. **Generally, can't use information for their own purposes.**
- Data control and sharing
  - Processing roles will determine what the entity can do with personal information, who the information can be shared with, and who keeps personal information when the relationship ends.

Franchise Agreement Issues

GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

General Data Rights and Ownership

- Setting up your franchise relationship for data success requires advance forethought in the franchise agreement/manual/brand standards/etc.
  - A franchise operations manual is another valuable tool to control personal information processing
- Key considerations:
  - Paper for the correct processing roles
  - Plan for the frequent amendment to keep pace with changes in applicable law
  - Address liability and indemnification
- Key sections:
  - Limitation of liability
  - Indemnification
  - Data storage, access, connection
  - Post-termination considerations
- Data Processing Addendum (“DPA”)

GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

Franchise Operations Manual

- Handling processing operations in an operations manual rather than the franchise agreement can provide some benefits:
  - Operations manuals can typically be unilaterally modified by a franchisor with less pushback than a franchise agreement. Much more detail can be provided, and practical considerations can be addressed
- Key sections:
  - **Marketing:** *who can market using personal information, and how?*
  - **Data subject requests:** *how can the controller pass on requests to the processor for deletion or access? What happens if the processor receives a request?*
  - **Data storage/access:** *Where does a franchisee store data? How does the franchisor access it?*
  - **Inventory/data map/record of processing:** *How does the franchisor understand what data a franchisee is processing?*
  - **Incident response plan:** *What to do in the event of a breach.*
  - **Audit:** *How can franchisee compliance be checked and confirmed.*

Compliance Obligations

GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

Privacy Policies and Notices

- Ensure your privacy policy has the correct scope:
  - Are both franchisor and franchisee processing activities covered?
  - Not just digital, are *all* processing activities covered?
- Don't forget employees!
  - California and international jurisdictions require an employee privacy notice
- Provision of the notice:
  - "At the point of collection"
  - Are franchisees providing the notice at physical locations?
    - Signage, QR codes, point of sale functionality, employee handbooks

GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

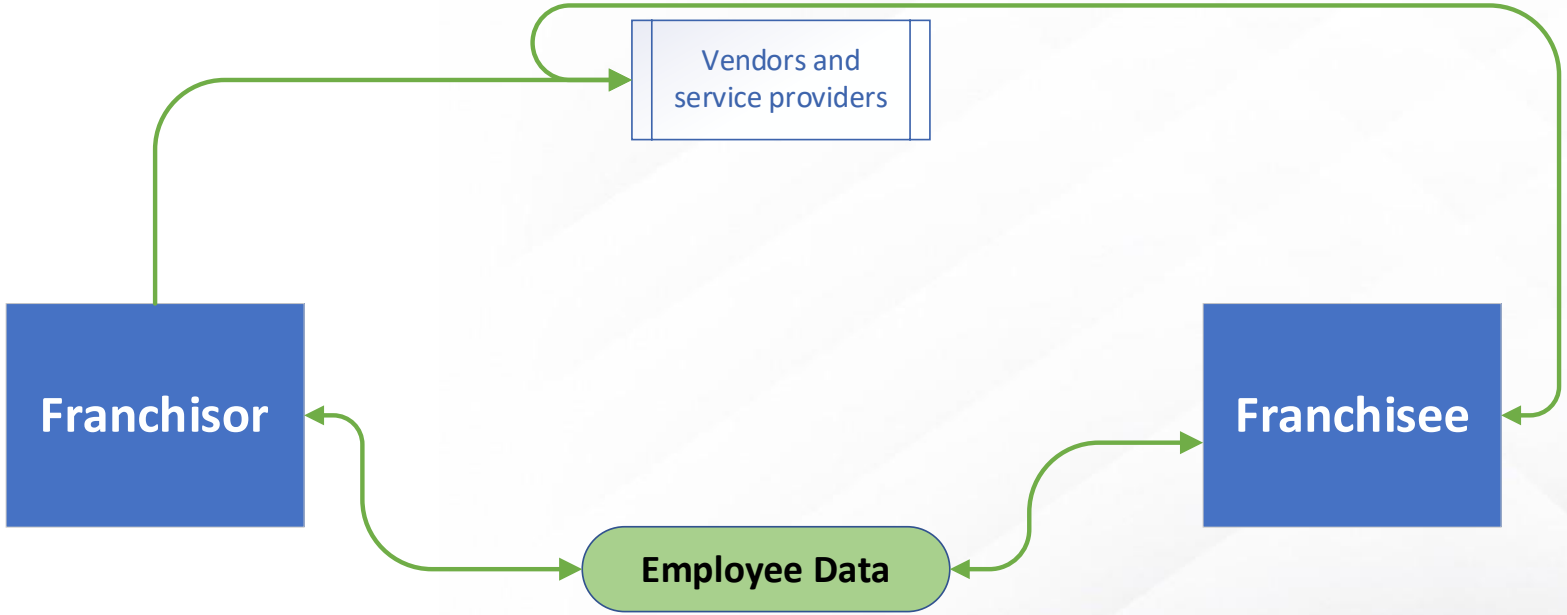
Data Subject Requests

- Data subjects should be able to make requests applicable to all their personal information processed as part of the franchise relationship
  - The franchise relationship may have multiple data subject request intake points in a separate controller relationship
  - Other relationship types should strive for a single request intake point
    - This is often a webform on the franchisor site
  - Controllers must pass requests on to processors so processors can honor them
    - This often requires a data inventory or similar so a controller understands what information a processor may have on a given data subject
- Train franchisees on how to deal with requests:
  - Direct data subjects to the appropriate request intake point
  - Honor requests passes on from the controller
- Opt-out of sale
  - Failure to have a compliant DPA can result in data “sales” between a franchisor and franchisee thus triggering the opt-out of sale

Marketing & Loyalty Programs

- Marketing Consents: Which party is responsible for:
  - Determining the need for, and designing, the marketing consent?
    - Often the franchisor, who should communicate it to franchisees if necessary. ***Franchisees should be obligated to use the consent***
    - Consent requirements vary by marketing channel and jurisdiction
  - Implementing it
    - If franchisees have personal information collection points, they may need to implement the consent at those points
  - Tracking it
    - Which party can produce evidence of the consent
- Set clear boundaries:
  - Prohibiting competing marketing lists and loyalty programs by franchises
  - Regarding what franchisees can do with loyalty program data
- *Don't forget about your financial incentive disclosure!*
  - Franchisee practices can create financial incentive disclosure inaccuracies

Employee Data



Employee Data

- **Your processing roles may differ for employee data when compared to customer data**
  - Common Structure:
    - Franchisor is the processor of Franchisee-controlled employee data
  - Separate controller structure can also occur:
    - Often means a Franchisor employee privacy notice in the employee handbook
- It gets **TRICKY**
  - While the franchisor is often a processor or separate controller, it still needs to determine franchisee employment practices via the franchise agreement and franchise operations manual.
  - Care should be taken to set up reasonable controls on the franchisee, while not grabbing some much control that it interferes with your processing roles.
  - Helpful for this data, and not as part of the same brand.

Final Thoughts

GT GreenbergTraurig

IFA INTERNATIONAL FRANCHISE ASSOCIATION

Top 5 Takeaways

1. ***Review Franchise Agreement and Operations Manual***
   - These may already have data protection provisions or an addendum setting out processing roles.
   - Modification may be necessary for existing agreements.
   - New agreements should be carefully executed with personal information in mind.
   - Don't fear complexity: the agreement and manual need real, detailed controls.
   - Include mechanisms for one party to monitor the compliance of the other
2. ***Franchise Agreement Issues***
   - Determine the flow of personal information between the parties, how each party is using the information, and what should happen to the information at the end of the relationship
   - Match each party with the role that will allow them to best facilitate compliance for the relationship.
3. ***Consult the Experts***
   - Privacy counsel familiar with the jurisdiction and the franchise relationship can assist in determining processing roles, drafting the franchise agreement, and ensuring compliance
4. ***Determine Compliance Logistics***
5. ***Memorialize***
   - Comprehensively memorialize the relationship between the parties and their respective processing roles to minimize risk and ensure parties adhere to their designated processing roles.
   - Document processing duties

Contacts and Further Information

Breton H. Permesly

Shareholder, Franchise & Distribution Practice, New York

T: +1 212.801.3052

PermeslyB@gtlaw.com

Tyler J. Thompson

Shareholder, Data Privacy & Cybersecurity, Denver

T: +1 303. 685.7437

ThompsonTy@gtlaw.com

For more information:

- Subscribe to GT's Data Privacy Blog
- Subscribe to GT's Emerging Technology Blog