

**Preliminary White Paper: Small Business Parity Act – House Bill 1219
Protect Florida Small Business Act – Senate Bill 1076**

(Note: All section numbers refer to Chapter 686, Florida Statutes)

Background and Purpose

HB 1219 proceeds under the impression that franchises are good for the state's economy, the relationship between a franchisee and a franchisor deserves to be protected, and franchisors seek to impose unfair treatment on franchisees. § 102. The bill was introduced January 9, 2018, by Heather Fitzenhagen (District 78, Ft. Myers). While this White Paper focuses on HB 1219, the Committee should also be aware Senator Greg Steube (District 23, parts of Sarasota, Charlotte) introduced the related Senate Bill, SB 1076, known as the Protect Florida Small Business Act, on January 9, 2018. The proposed legislation was previously introduced as the Florida Franchise Growth Act, HB 1069, and Protect Small Business Act, SB 750, in 2017.

The congressmen behind the previous House and Senate bills gave interviews regarding their rationale behind the proposed legislation. Senator Steube, speaking on the sister Senate Bill 1076, stated in a January 23, 2018 interview with www.floridapolitics.com, "Florida's hard-working franchise owners typically invest more than \$375,000 of their own personal savings in order to pursue their dream of owning a small business, and we must do our part to help protect these investments in our local communities. These dedicated small business owners employ more than 404,000 Floridians, and I am proud today to do my part to file common sense legislation that would protect the livelihoods of these men and women." Representative Fitzenhagen stated, "We simply want to level the playing field for these small business owners. The unfortunate truth is that many of these large, out-of-state corporations are taking advantage of the tremendous imbalance in the franchisor-franchisee relationship. This is wrong, and this bill provides an opportunity to level the playing field."

Summary of the Proposed House Bill 1219 and Senate Bill 1076

This proposed bill covers a very broad range of franchises given the definition of "franchise" as any contract or agreement where a franchisee is granted the right to engage in the offering, selling, or distributing of goods or services under a marketing plan prescribed in substantial part by a franchisor, the operation is associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol, and the franchisee is required to pay a franchise fee. § 103. The definition is the same for SB 1076 in Section 103. The bills are specifically concerned with the three main ways in which a franchise agreement ends: termination, nonrenewal and sale (or other transfer or assignment).

The franchisor cannot impose unreasonable restrictions on the franchisee's ability to sell, transfer, or assign his interest in the franchise. § 104. The franchisee can sell, transfer, or assign its franchise with the prior written consent of the franchisor, who can only withhold her consent for good cause. However, the purchaser, transferee, or assignee of the franchisee's interest must still meet all requirements and submit all forms required by new franchisees. This requirement also applies following the death of a franchisee. If the heir, surviving spouse, estate representative,

etc., of the decedent meets all requirements of new franchisees, then the franchisor cannot terminate the franchise agreement with that person for 180 days after the death of the franchisee. This provision corresponds to Section 105 of SB 1076.

Any agreement which is a violation of any other provision in the bill is deemed against public policy and is void and unenforceable. An aggrieved party can only seek to void the portion of the agreement that is unenforceable, not the entire agreement, while continuing to enforce the remainder of the agreement or contract. § 106. This provision corresponds to Section 107 of SB 1076.

The bills also restrict venue to the state of Florida, and any other provision attempting to select a forum or choice of law outside of the state is void so long as the claim involves a franchisee that was a resident of the state. § 107. However, an agreement between a state-based franchisor and a franchisee who is a resident of Florida, or business entity established in Florida, is not subject to the provisions of the bill. This provision corresponds to Section 108 of SB 1076.

The bills provide several remedies for franchisees. A person injured in business or property in violation of §§ 101-109 can bring an action in the appropriate state or federal court and recover damages sustained and the costs of the action, including attorney fees. § 108. An injured person can also bring a declaratory judgment action and seek injunctive relief enjoining a franchisor that has violated, is violating, or otherwise is likely to violate §§ 101-109. The remedies provided for in the bill are in addition to any other remedies provided for in the Florida Deceptive and Unfair Trade Practices Act. § 108. This provision corresponds to Section 109 of SB 1076.

Section 109 concerns applicability of HB 1219 and states that any person or franchisor engaging directly or indirectly in an agreement or contract within Florida, in connection with a franchise or any franchise whose franchisee is a resident of Florida, domiciled in Florida, or whose franchise business is intended to operate in Florida, is subject to the provisions within the bill. Section 109 makes it expressly clear that the proposed provisions apply to future franchise agreements as well as current agreements so long as the proposed provisions do not significantly impair any existing contract rights.

Section 109 of HB 1219 makes it clear that Section 817.416 continues to govern the claims of franchisees and others covered by that section. SB 1076, on the other hand, chooses to amend Section 817.416 to include a definition for “area franchise” and amend Section 817.416 to have the same applicability as the provisions within SB 1076.

Finally, Section 105 of HB 1219 and Section 106 of SB 1076 create a laundry list of rights and prohibitions governing the relationship between a franchisor and its franchisee:

- The parties must deal with each other in good faith and in a commercially reasonable manner.
- The franchisor cannot terminate or fail to renew a franchise agreement in violation of §§ 101-109.
- The franchisor cannot prevent a sale, transfer, or assignment of a franchise in violation of § 104.

- The franchisor cannot violate the Florida Deceptive and Unfair Trade Practices Act in connection with its business as a franchisor, an officer, an agent, or another representative thereof.
- The franchisor cannot require a franchisee to assent to a release, assignment, novation, waiver, or estoppel that would relieve any person from liability imposed under §§ 101-109 including the use of disclaimers or checklists.
- The franchisor cannot require a franchisee to assent to the use of a choice of law provision.
- Any violation of this section entitles the injured party to seek the remedies set forth in Section 106 of HB 1219 or Section 109 of SB 1076.

The primary difference between the two bills is that SB 1076 includes Section 104 which deals with termination or nonrenewal. HB 1219 does not include this provision and would need to be reconciled. Section 104 makes it a violation to terminate or refuse to renew a franchise except for good cause. A termination or nonrenewal without good cause constitutes an actionable unfair termination. Good cause is limited to the failure of the franchisee to substantially comply with reasonable and material requirements imposed upon by the franchise by the franchise agreement after being given notice at least 90 days in advance of the termination. The franchisee is then given a reasonable opportunity, which cannot be less than 60 days after the notice date, to cure the failure. If the failure is cured, the termination notice is void. A franchisor can give an immediate notice of termination without opportunity to cure under five situations:

- 1) The franchisee is judicially determined to be insolvent, has had all or a substantial part of its assets assigned to or for the benefit of a creditor, or has admitted its inability to pay its debts as they come due.
- 2) The franchisee abandons, by failing to operate, the business for 10 consecutive days during which the franchisee is required to operate the business unless the failure to operate is due to an act of God, work stoppage, strike or labor difficulty, fire, flood, hurricane, sinkhole, or other cause beyond the franchisee's control.
- 3) The franchisee fails for 10 days after a notice of noncompliance to comply with any federal, state, or local law or regulation.
- 4) The franchisee is convicted of a felony if that felony significantly, directly, and adversely affects the operation of the franchise business.
- 5) The franchisor makes a reasonable determination that continued operation of the franchise by the franchisee will result in imminent and substantial danger to public health or safety.

Why Proposed House Bill 1219 and Senate Bill 1076 Should Not Pass

The proposed legislation will likely convert Florida from one of the most franchise friendly states to one of the most restrictive. Specifically, this legislation would institute unnecessary government overreach as privately negotiated franchisor-franchisee relationships, which are voluntary, arms-length contractual relationships, will become extremely regulated.

Franchisees already do not enter into franchise agreements blindly. Franchisees receive full disclosure about material aspects of a franchise opportunity and the franchise agreement prior

to entering into the franchise agreement. Franchisees are able to be represented and advised by legal counsel prior to entering into the franchise agreement. Franchisees automatically receive names of other franchisees whom they may contact for due diligence prior to entering into the franchise agreement. Thus, currently, franchisees are already positioned to make informed business decision before executing any franchise agreement.

If enacted, many existing franchise agreements will be disrupted. This legislation will create two classes of franchisees going forward. There will remain existing franchisees not covered by the new legislation and new franchisees covered by the legislation. The resulting franchisor-franchisee landscape can result in inherent discriminatory structure and potential internal conflict and disruption among franchisees.

Beyond the potential negative impact that the proposed legislation may have on franchising in Florida generally, some of the specifics of the bill appear to be contrary to established law. For example, under the proposed legislation, a franchisor loses control over who to contract with and as part of this loss the franchisor also cannot control who may use its trademark.

Under both federal and Florida State trademark law, goodwill is acquired in a trademark based on recognition the trademark obtains with consumers resulting in additional earning based on the goodwill developed. Any goodwill created by a franchisee inures to the benefit of the franchisor, and the franchisee never acquires any goodwill, though the franchisee may benefit from it.

If this legislation is enacted into law, the franchisor loses rights within its bundle of rights associated with the trademark, such as the right of control, right of exclusion and right of disposition. This legislation actually results in weakening of the franchisors' ability to protect the goodwill in the trademark since the franchisor's right to terminate or discontinue relationships with substandard and dishonest operators will not exist. Not only will this loss of the ability to protect the goodwill associated with the trademark directly affect the franchisor's business, but other Florida franchisees in a relationship with the particular franchisor will also be damaged. Thus, this legislation will effectively allow the goodwill in the trademark to be usurped away from the franchisor which will not only hurt the franchisor, but also the other franchisees working with the franchisor.