

1 SB129
2 200588-4
3 By Senator Elliott
4 RFD: Governmental Affairs
5 First Read: 19-MAR-19

1 SB129

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4 ENGROSSED

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7 A BILL
8 TO BE ENTITLED
9 AN ACT

10
11 To create the Protect Alabama Small Businesses Act;
12 to provide legislative intent; to regulate the conduct of
13 franchisors and their representatives to prevent fraud, unfair
14 business practices, unfair methods of competition,
15 impositions, and other abuses upon franchisees in the state;
16 to address requirements for the sale, transfer, or assignment
17 of franchises, and for the mandatory repurchase by a
18 franchisor of a franchise or an interest in a franchise, and
19 for the repurchase of certain assets, including inventory,
20 supplies, equipment, goodwill, and furnishings, upon
21 termination, nonrenewal, or expiration of a franchise; and to
22 require the compensation of a franchisee for the fair market
23 value of the business upon termination or nonrenewal without
24 good cause by the franchisor of the franchise.

25 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

26 Section 1. This act shall be known and may be cited
27 as the Protect Alabama Small Businesses Act.

1 Section 2. The Legislature finds and declares that
2 the welfare of franchisees, including the success and failure
3 of their franchise businesses, greatly affects the general
4 economy of this state, the public interest, and the public
5 welfare. The intent of the Legislature is to promote fair
6 business relations between franchisees and franchisors and to
7 protect franchisees against unfair treatment by franchisors.

8 Section 3. For the purposes of this act, the
9 following terms shall have the following meanings:

10 (1) AFFILIATE. A person controlling, controlled by,
11 or under common control with another person or, in the case of
12 a business entity, the officer, director, or other person in
13 control of the activities of the business entity.

14 (2) AREA FRANCHISE. A contract or agreement, in
15 writing, through which a person is granted the right, for
16 consideration in whole or in part, to do any of the following:

17 a. Sell or negotiate the sale of a franchise in the
18 name or on behalf of the franchisor.

19 b. Become an area developer and develop a franchise
20 for the benefit of that person or affiliates of that person.

21 (3) AREA FRANCHISEE. The owner of an area franchise.

22 (4) FAIR MARKET VALUE. The price at which the
23 property will change hands between a willing buyer and a
24 willing seller, neither being under any compulsion to buy or
25 sell, and both having a reasonable knowledge of relevant
26 facts.

27 (5) FRANCHISE or FRANCHISE AGREEMENT.

1 a. A contract or agreement, in writing, between two
2 or more persons for which all of the following are provided:

3 1. A franchisee is granted the right to engage in
4 the business of offering, selling, or distributing goods or
5 services under a marketing plan or system prescribed in
6 substantial part by a franchisor.

7 2. The operation of the franchise business pursuant
8 to that marketing plan or system is substantially associated
9 with the trademark, service mark, trade name, logotype,
10 advertising, or other commercial symbol of the franchisor
11 designating the franchisor or its affiliate.

12 3. The franchisee is required to provide, directly
13 or indirectly, a franchise fee.

14 b. The term franchise or franchise agreement
15 includes an area franchise.

16 (6) FRANCHISE BUSINESS. A business unit that is
17 owned or operated by a franchisee and that is subject to a
18 marketing plan or system prescribed by the franchise.

19 (7) FRANCHISE FEE. A fee, charge, or the provision
20 of a service, which a franchisee agrees to pay or provide,
21 directly or indirectly, to or for the benefit of the
22 franchisor for the right to enter into or continue a
23 franchise.

24 (8) FRANCHISEE. A person to whom a franchise is
25 offered or granted.

26 (9) FRANCHISOR. A person who grants a franchise to a
27 franchisee.

1 (10) FRAUD. Actual fraud or constructive fraud as
2 normally defined, in addition to the following:

- 3 a. A misrepresentation of a material fact.
- 4 b. A promise or representation not made honestly and
5 in good faith.
- 6 c. An intentional failure to disclose a material
7 fact.

8 (11) GOOD CAUSE. Includes any of the following:

- 9 a. The current use of illegal drugs.
- 10 b. Indictment for any crime involving moral
11 turpitude, fraud, or misrepresentation.
- 12 c. Commission of any act that would constitute a
13 felony and that would adversely impact the business or
14 reputation of a franchisor.
- 15 d. Fraud.
- 16 e. Misappropriation or embezzlement of franchisor
17 funds or property.
- 18 f. Willful conduct that is materially injurious to
19 the reputation, business, or business relationships of the
20 franchisor.
- 21 g. Material violation of any provision of the
22 franchise agreement.

23 (12) PERSON. A natural person, corporation, limited
24 liability company, association, partnership, trust, or other
25 business entity and, in the case of a business entity, any
26 other affiliate of that business entity.

1 (13) SALE. The issuance, transfer, agreement for
2 transfer, exchange, pledge, hypothecation, or mortgage in any
3 manner or form, whether by transfer in trust or otherwise, of
4 any goods or interest therein, or of any franchise related
5 thereto, for a consideration, and any option, subscription or
6 other contract, or solicitation, looking to a sale, or offer
7 or attempt to sell in any form, whether in written or oral
8 form, for a consideration.

9 Section 4. (a) Except as otherwise provided in this
10 act, a franchisor may not terminate or refuse to renew a
11 franchise except for good cause. The termination or nonrenewal
12 of a franchise without good cause constitutes an unfair
13 termination. Except as otherwise provided in subsection (b), a
14 franchisor may not terminate a franchise except for good
15 cause. A written notice specifying the reasons for termination
16 must be given to the franchisee. A franchisee shall have not
17 less than 90 days after receipt of a notice of noncompliance
18 to cure the failure, except for a good cause listed in
19 paragraphs c. to f., inclusive, of subdivision (11) of Section
20 3. If the franchisee cures the failure within the time given
21 to cure, the termination notice is void and unenforceable.

22 (b) A franchisor may give to a franchisee an
23 immediate notice of termination without an opportunity to cure
24 if, during the period in which the franchise is in effect, any
25 one of the following events relevant to the franchise occurs:

26 (1) The franchisee has been judicially determined to
27 be insolvent, has had all or a substantial part of its assets

1 assigned to or for the benefit of any creditor, or has
2 admitted its inability to pay its debts as they come due,
3 which materially affects the ability of the franchisee to
4 remain in business, or for a good cause listed in paragraphs
5 c. to f., inclusive, of subdivision (11) of Section 3.

6 (2) The franchisee abandons, by failing to operate,
7 the franchise business for 60 consecutive days during which,
8 under the terms of the franchise, the franchisee is required
9 to operate the franchise business unless such failure to
10 operate is due to an act of God; a work stoppage; a strike or
11 labor difficulty; a fire, flood, hurricane, or sinkhole; or
12 other causes beyond the control of the franchisee.

13 (3) The franchisor and franchisee agree in writing
14 to terminate the franchise.

15 (4) The franchisee fails, for a period of 60 days
16 after a notice of noncompliance, to comply with any federal,
17 state, or local law or rule including, but not limited to, any
18 health, safety, building, and labor law or rule applicable to
19 the operation of the franchise.

20 (5) Insolvency of the franchisee, the filing of any
21 petition by or against the franchisee under any bankruptcy or
22 receivership law, or the assignment for the benefit of
23 creditors or dissolution or liquidation of the franchisee
24 which materially affects the ability of the franchisee to
25 remain in business.

1 (6) The franchisee is convicted of a felony that
2 significantly, directly, and adversely affects the operation
3 of the franchise business.

4 (7) The franchisor makes a reasonable determination
5 that continued operation of the franchise business by the
6 franchisee will result in imminent and substantial danger to
7 public health or safety.

8 Section 5. A franchise agreement, regardless of its
9 stated term of years, is deemed to be continuing unless either
10 of the following occur:

11 (1) Termination of the franchise agreement is
12 authorized under Section 4.

13 (2) The franchisor completely withdraws from
14 directly or indirectly distributing its products or services
15 in the geographic market then being served by the franchisee,
16 provided that in any such instance in which the franchisor
17 subsequently reintroduces its products or services into the
18 same geographic market the franchisee may resume the franchise
19 and the terms and conditions of the agreement between the
20 franchisee and franchisor shall continue in full force and
21 effect.

22 Section 6. (a) A franchisor may not deny the
23 surviving spouse, heir, or estate of a deceased franchisee or
24 of the person controlling a majority interest in the
25 franchisee the opportunity to participate in the ownership of
26 the franchise or franchise business under a valid franchise
27 agreement.

1 (b) A franchisor may not deny the assignment of the
2 franchise agreement, upon the death of the franchisee or
3 person controlling a majority interest in the franchisee, to
4 any other person who meets all of the existing
5 nondiscriminatory, material, and reasonable qualifications for
6 a purchaser of a franchise.

7 (c) (1) A franchisee may sell, transfer, or assign a
8 franchise, all or substantially all of the assets of the
9 franchise business, or an interest in the franchisee with the
10 prior written consent of the franchisor. The consent of the
11 franchisor may not be withheld unless the purchaser,
12 transferee, or assignee does not meet the qualifications for
13 new or renewing franchisees described in subdivision (2) or
14 the franchisee and the purchaser, transferee, or assignee fail
15 to comply with other reasonable and material transfer
16 conditions specified in the franchise agreement.

17 (2) A franchisor may not prevent a franchisee from
18 selling, transferring, or assigning a franchise, all or
19 substantially all of the assets of the franchise business,
20 including the assignment of the rights of the franchisee under
21 the agreement, or an interest in the franchisee to another
22 person or entity if the purchaser meets the nondiscriminatory,
23 material, and reasonable qualifications of the franchisor for
24 the approval of new or renewing franchises in effect at the
25 time the franchisor receives notice of the proposed sale,
26 transfer, or assignment.

1 (d)(1) To invoke the protections under this section,
2 a franchisee shall provide the franchisor with prior written
3 notice of its intent to sell, transfer, or assign the
4 franchise, all or substantially all of the assets of the
5 franchise business, or an interest in the franchisee.

6 (2) The franchisor, within 60 days after receipt of
7 all of the written notice or any shorter period required by
8 the franchise agreement, shall notify the franchisee of the
9 approval or disapproval of the proposed sale, transfer, or
10 assignment. If the proposed sale, transfer, or assignment is
11 disapproved, the franchisor shall include in the notice of
12 disapproval a statement specifying the reasons for the
13 disapproval. A proposed sale, transfer, or assignment is
14 deemed approved unless disapproved by the franchisor in the
15 manner provided in this subdivision. The reasonableness of the
16 decision of the franchisor shall be a question of fact
17 requiring consideration of all existing circumstances.

18 (e) Nothing in this section shall prohibit a
19 franchisor from exercising its contractual right of first
20 refusal to purchase a franchise, all or substantially all of
21 the assets of a franchise business, or an interest in a
22 franchisee.

23 Section 7. (a) A franchisee shall have the
24 opportunity to monetize any equity that the franchisee may
25 have developed in the franchise business before the effective
26 date of any termination or nonrenewal without good cause, or
27 expiration of the franchise agreement pursuant to this act.

1 Therefore, upon termination or nonrenewal without good cause,
2 or expiration of a franchise agreement, a franchisor shall
3 repurchase at fair market value the inventory, supplies,
4 goods, fixtures, equipment, and furnishings of the franchise
5 business. The franchisor shall also either purchase the
6 goodwill of the franchise business or waive any and all
7 noncompete obligations of the franchisee so that the
8 franchisee, at its option, may continue in business.

9 (b) This section does not apply if the franchisee
10 declines a bona fide offer of renewal from the franchisor
11 which is consistent with the franchise agreement between the
12 franchisor and franchisee, provided the terms of the renewal
13 are not in violation of this act.

14 (c) This section does not apply if the franchisor
15 and franchisee agree in writing within 30 days before the
16 termination, nonrenewal, or expiration of the franchise to
17 terminate or not renew the franchise, or to allow the
18 franchise to expire.

19 (d) This section does not apply to inventory,
20 supplies, goods, fixtures, equipment, or furnishings sold by
21 the franchisee between the date of the notice of termination,
22 nonrenewal, or expiration and the date the franchisee ceases
23 to operate the franchise business pursuant to a termination,
24 nonrenewal, or expiration.

25 Section 8. The following rights and prohibitions
26 govern the relations between a franchisor or subfranchisor and
27 its franchisee:

1 (1) The parties shall deal with each other in good
2 faith and in a commercially reasonable manner.

3 (2) A person, during the selling or establishing of
4 a franchise, may not intentionally misrepresent or fail to
5 disclose any of the following:

6 a. The prospects or chances for success of the
7 proposed or existing franchise.

8 b. The known required total investment for such
9 franchise.

10 c. Any effort to sell or establish more franchises
11 than is reasonable to expect the market or market area for the
12 particular franchise to sustain.

13 (3) It is prohibited and deemed an unfair and
14 deceptive act or practice, or an unfair method of competition,
15 and a violation of this section for a franchisor or
16 subfranchisor, or an officer, agent, employee, or other
17 representative thereof, to directly or indirectly do any of
18 the following:

19 a. Terminate or fail to renew a franchise agreement
20 in violation of this act.

21 b. Allow a franchise agreement to expire without
22 complying with this act.

23 c. Prevent a sale, transfer, or assignment of a
24 franchise in violation of Section 6.

25 d. Fail to repurchase inventory, supplies, goods,
26 fixtures, equipment, goodwill, and furnishings in violation of
27 Section 7.

1 e. Violate the Deceptive Trade Practices Act in
2 connection with its business as a franchisor, or an officer,
3 agent, or other representative thereof.

4 f. Without prior written disclosure to a franchisee,
5 obtain vendor rebates, kickbacks, or other similar payments
6 from another person with whom the franchisee does business or
7 employs on account of or in relation to the transactions
8 between the franchisee, the franchisor, and the other person.

9 g. Require a franchisee to assent to a release,
10 assignment, novation, waiver, or estoppel that would relieve
11 any person from liability imposed under this act including,
12 but not limited to, through the use of a disclaimer or
13 checklist designed to avoid a protection or to limit damages
14 under this act.

15 h. Require a franchisee to assent to the use of a
16 choice of law provision by selecting the law of a different
17 state to govern the relationship of the parties.

18 i. Restrict or inhibit, directly or indirectly, the
19 right of a franchisee to join a franchisee association or the
20 free association for any lawful purpose among franchisees.

21 j. Impose upon a franchisee, by contract or rule,
22 written or oral, any unreasonable standard of conduct.

23 k. Require a franchisee to waive its rights to a
24 jury trial or waive any procedure or remedy otherwise
25 available in this state; however, a binding arbitration clause
26 is enforceable if it complies with Section 11.

1 1. Impose upon a franchisee, by contract or rule,
2 written or oral, any unreasonable or overbroad noncompetition
3 agreement. If a judge or jury finds that a noncompetition
4 agreement is in violation of state law, the entire
5 noncompetition agreement is void and unenforceable.

6 (4) A person who shows in a civil court of law a
7 violation of this section is entitled to the remedies in
8 Section 12.

9 Section 9. A franchise agreement or other contract,
10 a part thereof, or practice thereunder which is in violation
11 of this act is deemed against public policy and is void and
12 unenforceable. An aggrieved party may choose to seek to void
13 only the portion of the agreement that is unenforceable and
14 continue to enforce the remainder of the agreement.

15 Section 10. A provision in a franchise agreement
16 restricting the venue to a forum outside of this state or
17 selecting the law of any other state or jurisdiction other
18 than Alabama is void with respect to any claim arising under
19 or relating to a franchise agreement involving a franchisee
20 that, at the time of signing, was a resident of this state or
21 a business entity established in this state or involving a
22 franchise business either operating or planning to be operated
23 in this state.

24 Section 11. This act does not limit the right of a
25 franchisor and franchisee to agree, before or after a dispute
26 arises, to binding arbitration to settle a claim under this
27 act if the standards applied and the remedies available in the

1 arbitration are not less than the requirements specified in
2 this act.

3 Section 12. (a) If a franchisor terminates a
4 franchise agreement without good cause or otherwise in
5 violation of this act, or fails to consent to a proper
6 assignment of the franchise, or fails to renew a franchise, or
7 allows a franchise to expire in violation of this act, the
8 franchisee is entitled to receive from the franchisor the fair
9 market value of the franchise business and franchise assets in
10 addition to any other damages caused by the violation. The
11 franchisor and franchisee, in order to determine fair market
12 value, shall mutually select an appraiser. If the franchisor
13 and franchisee are unable to mutually agree on an appraiser,
14 either of them may petition the court to appoint an appraiser.
15 If the franchisor and franchisee do not agree on the fair
16 market value determined by the appraiser, the determination is
17 nonbinding and remains a question of fact.

18 (b) In addition to any relief specified in this act,
19 any person aggrieved or injured in his or her business or
20 property by any violation of this act may bring an action in
21 the appropriate state or federal court of this state and shall
22 recover the damages sustained. The costs of such action,
23 including reasonable attorney fees, shall be awarded to the
24 party who prevails in the litigation, if required by the
25 franchise agreement. Every cause of action under this act
26 shall survive the death of the franchisee.

1 (c) Without regard and in addition to any other
2 remedy or relief to which a person is entitled, any person,
3 franchisor, or franchisee aggrieved by a violation of this act
4 may bring an action to obtain a declaratory judgment to
5 determine the issue in dispute.

6 (d) In an action for monetary damages, if a judge or
7 jury finds that the franchisor acted maliciously, or in a
8 manner not otherwise authorized by state law, the judge or
9 jury may award punitive damages as authorized by state law.

10 (e) The remedies provided in this section are in
11 addition to any other remedies provided by law or in equity
12 including, but not limited to, the Deceptive Trade Practices
13 Act.

14 Section 13. (a) Any person or franchisor who engages
15 directly or indirectly in an agreement or contract within this
16 state in connection with a franchise, or any franchise whose
17 franchisee is a resident of this state or is domiciled in this
18 state or whose franchise business is, has been, or is intended
19 to be operated in this state, is subject to this act and to
20 the jurisdiction of the courts of this state, in accordance
21 with the laws of this state, for violations of this act.

22 (b) This act applies to all of the following:

23 (1) Any written or oral agreement between a
24 franchisor and a franchisee including, but not limited to, a
25 franchise offering; a franchise agreement; a sale of goods,
26 services, and advertising; a lease or mortgage of real or
27 personal property; a promise to pay; a security interest; a

1 pledge; an insurance contract; an advertising contract; a
2 construction or installation contract; a servicing contract;
3 and any other agreement in which the franchisor has a direct
4 or indirect interest.

5 (2) Any franchise entered into, renewed, amended, or
6 revised prior to and after the effective date of this act,
7 including any existing franchise of an indefinite duration
8 which may be terminated by the franchisee or franchisor
9 without cause.

10 (3) A successor to a franchisor that continues in
11 business as a franchisor shall be bound by all terms and
12 conditions of each franchise agreement of the franchisor in
13 effect on the date of succession.

14 (c) This act is supplemental to, and does not
15 preempt, local ordinances dealing with prohibited or unlawful
16 conduct in the manufacturing, distribution, wholesaling,
17 advertising, or sale of goods if such ordinances are not
18 inconsistent with this act.

19 Section 14. This act may not be construed as
20 amending or affecting any provision of any of the following:

21 (1) The Alabama Motion Picture Competition Act,
22 Chapter 18, Title 8, Code of Alabama 1975.

23 (2) The Motor Vehicle Franchise Act, Chapter 20,
24 Title 8, Code of Alabama 1975, and the relationship between a
25 motor vehicle dealer and a manufacturer or distributor, as
26 defined in that act, shall be exclusively governed by that
27 act.

1 (3) The Tractor, Lawn, and Garden and Light
2 Industrial Equipment Franchise Act, Chapter 21A, Title 8, Code
3 of Alabama 1975.

4 (4) The Alabama Heavy Equipment Dealer Act, Chapter
5 21B, Title 8, Code of Alabama 1975.

6 (5) Chapter 21C, Title 8, Code of Alabama 1975,
7 providing for the sale of recreational vehicles.

8 (6) Chapter 9, Title 28, Code of Alabama 1975, and
9 the relationship between wholesalers and suppliers of beer, as
10 defined in that chapter, shall be governed by that chapter.

11 Section 15. This act shall become effective
12 immediately following its passage and approval by the
13 Governor, or its otherwise becoming law.

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3 Senate

4 Read for the first time and referred to the Senate
5 committee on Governmental Affairs..... 19-MAR-19
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7 Reported from Governmental Affairs as Favorable
8 with 1 amendment..... 16-APR-19
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10 Read for the third time and passed as amended 09-MAY-19

11 Yeas 21
12 Nays 2

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15 Patrick Harris,
16 Secretary.
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