



FOCUS ON RESTAURANT / FOODSERVICE LAW



Buying or Selling a Restaurant Business: Legal Considerations FOR YOUR PLATE



Whether a first-time buyer of an existing restaurant, or an experienced restaurateur looking to expand or reduce a portfolio, restaurant owners should be mindful of the following legal considerations when buying or selling a restaurant business.

Buyers and sellers of restaurant businesses should make sure the 'Asset Purchase Agreement' – an agreement to buy or sell – clearly memorializes the agreed-upon terms between the buyer and seller. While every agreement is unique to a particular transaction, certain basic terms in any Asset Purchase Agreement to consider include: (i) the identities of the parties to the transaction, (ii) the assets to be sold (i.e., furniture, fixtures and equipment, food and liquor inventory, name, phone number, domain, trademark and other intellectual property rights), (iii) the amount of consideration for the sale and manner of payment, (iv) the liabilities to be assumed and excluded in the sale (i.e., vendor contracts, ongoing business obligations), and (v) a schedule of existing licenses and permits to be transferred.

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Contingencies

Often, an Asset Purchase Agreement will provide for certain contingencies, such as the parties' ability to obtain necessary third-party approvals (i.e., landlord approval, state liquor authority approval) and a prescribed time for doing so. An Asset Purchase Agreement for a sale of a restaurant business should also include carefully drafted representations and warranties regarding title to assets, existing liabilities, and permits held by the seller for use and occupancy of the premises. Indemnification provisions may also provide that a buyer and seller hold the other harmless for certain claims that may arise post-closing that could create a liability of the other. Sufficient escrow should be established for pre-closing tax liabilities assessed post-closing.



Landlord Involvement

Both the buyer and seller should review the restaurant's lease during the negotiation phase of the transaction. As a preliminary matter, the lease assignment provisions may govern whether a sale can be effectuated at all, or whether landlord approval of the buyer is required. Assuming the lease provides that a sale is permissible, the buyer should be familiar with what is permitted under the lease and what will require landlord consent. For example, a lease may expressly permit certain restaurant concepts, tenant construction or alterations to the premises (i.e., cosmetics, flooring, wall-covering), and signage, but also include restrictions.

Fixtures vs. Personal Property

A lease may also expressly provide which types of commercial kitchen equipment remains personal property of the restaurant and which is deemed part of the real property as a 'fixture.' A buyer should consider the remaining duration of the seller's lease at the time of the sale and whether there is an option to renew to ensure the buyer can operate for sufficient time for a

return on the funds invested into the premises. Grease trap and fire code requirements in a restaurant lease are also additional costs of operations that the parties should consider. Shopping center restaurant leases may or may not have exclusivity provisions regarding competitor leasing in nearby space. Buyers and sellers should also review the lease provisions dealing with tenant subletting, inclusion of new partners, contingencies relating to obtaining or transferring liquor licenses, as well as lease assignability upon a bankruptcy or insolvency. Finally, a seller should seek for all of its future obligations to be released by the landlord upon consummation of the sale, including any personal or 'good guy' guarantees by the seller's principals.

Consulting Agreement

Sometimes a seller's principal will enter into a consulting agreement with a buyer as part of a restaurant sale. Under a consulting agreement, a seller's principal may provide certain prescribed services to a buyer subsequent to closing to assist the buyer maintain ordinary business operations through the transition of ownership. A consulting agreement should, among others, clearly define the limited scope, a defined term, and fair consideration for the services. A consulting agreement should also clearly delineate the consultant's status as an independent contractor or employee.

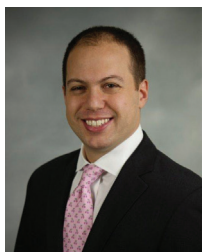
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Due Diligence

It cannot be stressed enough that buyers and sellers should perform as much due diligence as possible prior to entering into a transaction to buy or sell a restaurant business. Buyers should conduct searches for health, fire, and alcohol code violations. Sellers should be familiar with the credit-worthiness and background of a prospective buyer, which may impact a buyer's ability to obtain third party approvals to consummate a sale. Further, despite observing corporate formalities, personal liability to restaurant owners can arise under certain state and federal laws. These include, among others, obligations for unpaid payroll and sales taxes, as well as for unpaid fresh or frozen produce, meats and poultry. Principals of buyers and sellers should familiarize themselves with these laws in efforts to protect themselves from these types of liabilities. In addition, with fair labor and wage claims all too often asserted by restaurant employees against restaurant businesses and their principals, buyers should be familiar with sellers' payroll history and practices prior to purchasing a restaurant business.

Conclusion

Buyers should be familiar with these and other legal considerations to mitigate risk of legal issues arising post-closing, ensure a smooth transition of ownership and uninterrupted operations, and allow them to focus on dining concepts, delicious food and high quality service. Sellers should be familiar with these and other legal considerations to successfully consummate sale transactions, be relieved of pre-closing liabilities, and mitigate risk of post-closing issues.



- by Jonathan S. Bodner, Esq., Partner,
Ruskin Moscou Faltischek, P.C.
jbodner@rmfpc.com
(516) 663-6686

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