



# The Franchise Valuations Reporter



## Our Expertise

Within the franchise, distribution and dealership context, we are experts in:

- Damages, Valuations & Expert Testimony
- Finance, Accounting and Tax
- Cyber Security



Bruce S. Schaeffer, Editor  
[Bruce@FranchiseValuations.com](mailto:Bruce@FranchiseValuations.com)  
 212.689.0400

## Have a Question About Succession Planning for Franchise Owners?

Call us for a free, confidential consultation. And we're always interested in your comments about the newsletter.

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## We Write the Book

**Franchise Regulation and Damages**, the only treatise that covers damages in franchise disputes and valuations of franchises, is updated 3 times a year.

For more details, to see a Table of Contents or to place an order, go to the Wolters Kluwer Law & Business web page [here](#).

## Valuations: Restaurant Operations

### *Restaurant Research's 16th Annual Restaurant Finance Overview*

Wally Butkus and Phil Mangieri of Restaurant Research LLC have just issued their Industry Data Report "Finance and Valuations - 2018" listing (among other data points) EBITDA Multiples by Chain, Factors Implicating Valuations, Public Company Valuations, and Real Estate Cap Rates for the restaurant space. The report notes that franchisee unit level valuation "multiples have been trending slightly lower since" the second half of 2016 "which reflects higher labor costs, commodities and interest rates." It is a comprehensive and well-designed publication. We cannot recommend their service too highly. More information on this and other reports available by subscription may be found [here](#).

## Joint Employer and Vicarious Liability

### *A Legal Setback for Jimmy John's in Wage-Theft Case*

Workers in a class-action lawsuit against Jimmy John's, the sandwich chain, won a victory recently when a Chicago appeals court ruled workers can sue both the corporate entity of Jimmy John's and its restaurant franchisees for denying them overtime wages. The ruling, by the 7th Circuit Court of Appeals, reverses a previous district court order that prevented plaintiffs from suing franchisees. Jimmy John's had argued that workers should not be allowed to sue franchisees because of the risk of duplicative litigation and inconsistent rulings.

The decision to hold franchisees responsible could dramatically affect Jimmy John's, which generates more than \$2 billion in annual sales from more than 2,600 restaurants in the U.S.-98 percent of which are franchisee-owned. It has far broader implications, as well: At least 13 similar wage-theft cases against fast-food companies are currently winding their way through 12 federal districts across the country. Those include two in Illinois: one against Fox Restaurant Venture, a Champaign-based company owned by Peter Fox that includes 26 Jimmy John's franchises in Indiana, North Carolina and South Carolina; and the other against Kidd Restaurants, based 40 minutes outside of St. Louis in Highland, Ill.

Coverage of the case in [Chicagobusiness.com](http://Chicagobusiness.com) may be found [here](#).

### *IHOP Not Employer of Sub-Franchisee's Worker for Purposes of ADEA*

A restaurant employee who alleged age discrimination could not show that restaurant franchisor IHOP or its regional licensee, Sunshine Partners, were her employers for purposes of the Age Discrimination in Employment Act, the federal district court in Valdosta, Georgia, has decided. Neither IHOP nor Sunshine Partners exercised any control over employment-related matters at the specific IHOP restaurant, which was operated by a third entity, Clark Foods, which was a sub-franchisee of IHOP. Because the only relationship between the sub-franchisee of the individual restaurant to IHOP and Sunshine Partners was that of a franchisee/sub-franchisee, only the

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individual restaurant operator could be considered the "employer"[1]

### ***NLRB Inspector General Raises Concern on William Emanuel's Involvement in Joint Employer Decision***

On Feb. 9, NLRB Inspector General, David Berry, sent a report to fellow board members arguing that board member, William Emanuel, should not have participated in a Dec. 14 decision known as Hy-Brand Industrial Contractors Ltd., which reversed the previous joint employer ruling. The argument comes due to Emanuel's former employer, Littler Mendelson's direct involvement in the Browning Ferris Industries (BFI) Case. The inspector general said the deliberations that led to the Hy-Brand ruling were essentially a direct continuation of the BFI case, and that Emanuel's participation in those deliberations "exposes a serious and flagrant problem and/or deficiency" in the board's process adjudicating the matter.

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[1] *Boone v. Clark Foods, Inc.*, December 28, 2017, Lawson, H.

## Tax Nexus

### ***SCOTUS to Hear Appeal on Sales Tax Nexus - Economic Presence or Physical Presence***

One of the first states to enact a sales tax economic nexus statute was South Dakota, whose law went into effect on May 1, 2016. Many states enacted similar laws knowing that they were unconstitutional, with the express purpose of trying to get an appeal to the United State Supreme Court and to get that Court to overrule the National Bellas Hess/Quill physical presence requirement. South Dakota's statute specifically provided an expedited appeals process for challenges to the constitutionality of the law. And it was challenged, by online giant Wayfair promptly.

On March 6, 2017, the South Dakota Sixth Judicial Court ruled that the legislation was unconstitutional. The state appealed, and on Sept. 13, 2017, the South Dakota Supreme Court agreed with the lower court. Then the state filed a petition with the United States Supreme Court, and the Court granted the petition on Jan. 12, 2018. It is expected that the Court will hear the case in April, with a decision issued in June. With the fate of the physical presence nexus requirement in the balance, this is the most significant sales tax nexus case in 25 years.

### ***Texas-Sales and Use Tax: Out-of-State Service Provider Had Nexus With Texas***

An out-of-state corporation that provided repair and maintenance services to Texas retail stores by using a network of local independent contractors had sales tax nexus with Texas. Therefore, the taxpayer was liable for collecting and remitting tax from Texas customers on services performed by the contractors. The taxpayer oversaw the bidding process, monitored performance, ensured timely completion of the work, and resolved any disputes. The independent contractors provided their own equipment and tools and billed the taxpayer directly. After invoicing and receiving payment from the customer, the taxpayer paid the independent contractors. At no point did the contractors bill or receive payment from the customers.

The taxpayer established, operated, and maintained a presence and market in Texas even though it had no property, employees, or representatives in the state. The taxpayer was engaged with Texas customer locations and Texas independent contractors on a regular and systematic basis. Through these activities, the taxpayer had both the minimum contacts and physical

presence in Texas required by the Due Process and Commerce Clauses of the U.S. Constitution to establish nexus for tax collection purposes. The Comptroller rejected the taxpayer's contention that it merely provided non-taxable consulting services in Texas and that it was the local contractors, and not the taxpayer, that provided the taxable repair and maintenance services.[1]

### ***Washington -- Business and Occupation Tax: Economic Nexus Thresholds Announced***

The Washington Department of Revenue has announced that for calendar year 2018, the economic nexus thresholds applicable to apportionable activities for business and occupation (B&O) tax purposes will be:

- receipts threshold, \$285,000;
- property threshold, \$57,000; and
- payroll threshold, \$57,000.

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[1]Decision, Hearing No. 111,156, Texas Comptroller of Public Accounts, September 29, 2017, released December 2017 maintenance services.[1]

## **Attorney's Fees**

### ***Franchise Agreement Allowed Franchisor to Forbid Advertising Halal Food. Attorneys' Fees Denied***

A franchise agreement between KFC Corporation and a franchisee allowed KFC to forbid the franchisee from telling customers that his franchises offered Halal chicken, a federal district court in Illinois has ruled. But while dismissing the franchisee's suit the Court also dismissed KFC's counterclaim for attorney fees because the franchise agreement allowed KFC to recover attorney fees only for suits it initiated and won.[1]

### ***Daycare Center Franchisor Denied Attorney Fees Resulting from Franchisee's Suit***

An agreement between a franchisor of children's daycare centers and a franchisee did not provide for recovery of attorney fees incurred by the franchisor where the franchisee filed a complaint based on misrepresentation, fraud in the inducement, and defamation and withdrew the complaint two days after the franchisor's motion to dismiss was filed. The contract did not explicitly provide for attorney fees to the franchisor in the situation where the franchisee first brought a lawsuit alleging such tort claims. Nor did the parties negotiate for fee shifting in this situation[2].

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[1]Lokhandwala v. KFC Corp., January 23, 2018, Blakey, J.

[2]Sumanth v. Essential Brands, Inc., January 24, 2018, Garbis, M.

## **Attacking the IRS**

### ***Don't Cheer as the IRS Grows Weaker***

Let's face it: without the IRS the government would have no money to perform its functions. And another thing: IRS employees are career civil servants and for the most part decent and hardworking people. Demonizing

and pillorying them is mindless in this author's opinion. That's particularly true as it prepares to implement the most sweeping tax overhaul in 30 years, while it is weaker than it has ever been. In 1986, the last time Congress passed major changes in the tax code, it included a budget increase for the agency, allowing it to hire 2,100 more employees to carry out the changes.

Hypocrisy is cheap though. "On behalf of the hard-working Americans across the nation who are eager to see their paychecks reflect the benefits of this historic legislation, I request that you expedite any requisite updates to the relevant guidance on withholding," reads a self-serving letter to the I.R.S. from Senator Rob Portman, Republican of Ohio. "Please keep me apprised of the process so that I may relay to my constituents what they ought to expect in the coming year and when to expect it." Since 2010, Congress has cut the agency's budget by nearly \$1 billion, or 18 percent, adjusted for inflation, as the I.R.S. processes about 10 million more tax returns. Its work force has been whacked by 21,000, or nearly one-quarter; taxpayers who need help - often individuals preparing their own returns - have a hard time getting anyone to answer the phone.

The size of the compliance staff - the professionals who go after tax evaders - has shrunk by one-third, and the ranks of criminal special investigators are thinner than at any time since the Nixon era. As in the rest of the federal government in general, the I.R.S.'s antiquated computers use the programming language Cobol, created more than a half-century ago. Every day, the agency catches a million attempts to infiltrate its computer systems by hackers and cyberterrorists intent on stealing taxpayer data. Criticizing the I.R.S. scores easy political points among Americans who associate the agency with an unpleasant April deadline. But if the agency that collects more than 90 percent of the government's money stumbles, all Americans pay, and they can look to Congress, not just the I.R.S., in assigning the blame.

For more reading on this topic I recommend:

- [Don't Cheer As the IRS Goes Weaker](#)
- [Have You Ever Felt Sorry for the I.R.S.? Now Might Be the Time](#)
- [Scandal Has Overwhelmed the IRS](#)

## **In Memoriam: Leonard Silverstein**

Leonard L. Silverstein the founder of the Tax Management Portfolios passed away on February 14, 2018. He was 96. He was the editor of the Bloomberg/BNA Tax Management Portfolio 559-3d "Finance, Accounting and Tax Aspects of Franchising" which I write.

Mr. Silverstein had a long and distinguished career as a tax attorney. In the early part of his career, he served as an attorney in the Office of Chief Counsel for the Internal Revenue Service and on the legal advisory staff of the Treasury Department during the legislative development of the Internal Revenue Code of 1954. In 1960, he founded his own firm, Silverstein and Mullens, with Richard A. Mullens. The firm later became part of Buchanan Ingersoll & Rooney PC.

## ***Quotations from World Leaders***

"They say hard work can't kill you - but I figure, why take the chance?" --

## Ronald Reagan

Winston Churchill was at a reception in Canada sitting next to a clean living Methodist bishop when a good-looking young waitress came up and offered them both a glass of sherry from a tray. Churchill took one. But the bishop declined saying, "Young lady, I would rather commit adultery than take an intoxicating beverage". With that Churchill beckoned the girl and said, "Come back lassie, I didn't know we had a choice."