

LEGISLATIVE BILL 942

Approved by the Governor April 07, 2016

Introduced by Scheer, 19.

A BILL FOR AN ACT relating to marketing plans and trade practices; to amend sections 59-1724, 87-402, and 87-404, Reissue Revised Statutes of Nebraska; to provide a disclosure requirement to the Department of Banking and Finance for seller-assisted marketing plan contracts as prescribed; to define a term; to provide for reformation of a franchise agreement which unreasonably restrains competition; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 59-1724, Reissue Revised Statutes of Nebraska, is amended to read:

59-1724 (1)(a) Before placing any advertisement, making any other solicitation, making any sale, or making any representations to any prospective purchaser in Nebraska, the seller shall file with the Department of Banking and Finance a copy of a disclosure document prepared pursuant to sections 59-1733 to 59-1740 and pay a filing fee of one hundred dollars.

(b) The seller shall file an amended document with the department whenever a material change in the information occurs and shall pay a fee of fifty dollars for filing each such document.

(c) If the seller continues to solicit seller-assisted marketing plans in Nebraska, he or she shall annually file an updated disclosure document and pay a renewal fee of fifty dollars on or before the anniversary date of the initial filing for the particular seller-assisted marketing plan. In addition to the updated disclosure document, if a seller requires a purchaser to enter into a noncompete agreement in a side agreement or ancillary agreement, the seller shall include a disclosure of the existence of such side agreement or ancillary agreement in the updated disclosure document.

(d) In addition to the disclosure document, the seller shall file a list of the names and resident addresses of those individuals who sell the seller-assisted marketing plan on behalf of the seller. The list of sales representatives shall be updated through a new filing every six months. No fee shall be required to be paid for any filing which includes only an updated list of sales representatives.

(2) All funds collected by the department under this section shall be remitted to the State Treasurer for credit to the Securities Act Cash Fund.

Sec. 2. Section 87-402, Reissue Revised Statutes of Nebraska, is amended to read:

87-402 For purposes of the Franchise Practices Act, unless the context otherwise requires:

(1) Franchise ~~means shall mean~~ (a) a written arrangement for a definite or indefinite period, in which a person grants to another person for a franchise fee a license to use a trade name, trademark, service mark, or related characteristics and in which there is a community of interest in the marketing of goods or services at wholesale or retail or by lease, agreement, or otherwise and (b) any arrangement, agreement, or contract, either expressed or implied, for the sale, distribution, or marketing of nonalcoholic beverages at wholesale, retail, or otherwise. Franchise shall not include any arrangement, agreement, or contract, either expressed or implied, for the sale, distribution, or marketing of petroleum products at wholesale, retail, or otherwise;

(2) Person ~~means shall mean~~ every natural person, firm, partnership, limited liability company, association, or corporation;

(3) Franchisor ~~means shall mean~~ a person who grants a franchise to another person;

(4) Franchisee ~~means shall mean~~ a person to whom a franchise is offered or granted;

(5) Franchise fee ~~includes shall include~~ any payment made by the franchisee to the franchisor other than a payment for the purchase of goods or services, for a surety bond, for a surety deposit, or for security for payment of debts due;

(6) Sale, transfer, or assignment ~~means shall mean~~ any disposition of a franchise or any interest therein, with or without consideration, which shall include, but not be limited to, bequest, inheritance, gift, exchange, lease, or license;

(7) Place of business ~~means shall mean~~ a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services. Place of business shall not mean an office, a warehouse, a place of storage, a residence, or a vehicle; ~~and~~

(8) Good cause for terminating, canceling, or failure to renew a franchise ~~is shall be~~ limited to failure by the franchisee to substantially comply with the requirements imposed upon him or her by the franchise; ~~and -~~

(9) Noncompete agreement means any agreement between a franchisor and a

franchisee, a guarantor, or any person with a direct or indirect beneficial interest in the franchise that restricts the business activities in which such persons may engage during or after the term of the franchise. Noncompete agreement includes any stand-alone agreement or any covenant not to compete provision within a franchise agreement or ancillary agreement.

Sec. 3. Section 87-404, Reissue Revised Statutes of Nebraska, is amended to read:

87-404 (1) It shall be a violation of the Franchise Practices Act sections 87-401 to 87-410 for any franchisor directly or indirectly through any officer, agent, or employee to terminate, cancel, or fail to renew a franchise without having first given written notice setting forth all the reasons for such termination, cancellation, or intent not to renew to the franchisee at least sixty days in advance of such termination, cancellation, or failure to renew, except (a 1) when the alleged grounds are voluntary abandonment by the franchisee of the franchise relationship in which event the written notice may be given fifteen days in advance of such termination, cancellation, or failure to renew; and (b 2) when the alleged grounds are (i a) the conviction of the franchisee in a court of competent jurisdiction of an indictable offense directly related to the business conducted pursuant to the franchise, (ii b) insolvency, the institution of bankruptcy or receivership proceedings, (iii c) default in payment of an obligation or failure to account for the proceeds of a sale of goods by the franchisee to the franchisor or a subsidiary of the franchisor, (iv d) falsification of records or reports required by the franchisor, (v e) the existence of an imminent danger to public health or safety, or (vi f) loss of the right to occupy the premises from which the franchise is operated by either the franchisee or the franchisor, in which event such termination, cancellation, or failure to renew may be effective immediately upon the delivery and receipt of written notice of the same. It shall be a violation of the Franchise Practices Act sections 87-401 to 87-410 for a franchisor to terminate, cancel, or fail to renew a franchise without good cause. This subsection ~~section~~ shall not prohibit a franchise from providing that the franchise is not renewable or that the franchise is only renewable if the franchisor or franchisee meets certain reasonable conditions.

(2) If restrictions in a noncompete agreement are found by an arbitrator or a court to be unreasonable in restraining competition, the arbitrator or court shall reform the terms of the noncompete agreement to the extent necessary to cause the restrictions contained therein to be reasonable and enforceable. The arbitrator or court shall then enforce the noncompete agreement against the franchisee, the guarantor, or any person with a direct or indirect beneficial interest in the franchise in accordance with the reformed terms of the noncompete agreement. The arbitrator or court may reform and enforce the restrictions in a noncompete agreement as part of an order for preliminary or temporary relief. This subsection applies to any noncompete agreement entered into before, on, or after the effective date of this act.

(3) If a franchisor is also a seller of a seller-assisted marketing plan as defined in section 59-1705 and has previously filed a disclosure document pursuant to section 59-1724 with the Department of Banking and Finance, and such franchisor subsequently executes a noncompete agreement in a stand-alone or ancillary agreement with a franchisee, a disclosure of such stand-alone or ancillary agreement shall be included with the annual updated disclosure document required to be filed under section 59-1724.

Sec. 4. Original sections 59-1724, 87-402, and 87-404, Reissue Revised Statutes of Nebraska, are repealed.

Sec. 5. Since an emergency exists, this act takes effect when passed and approved according to law.