Dunkin’ Donuts’ Loss Prevention Department Wants You! Now What?

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From time time DDIFO is please to present Guest Commentary from valued contributors. The following is an article written and submitted by Robert Zarco and Robert Salkowski attorneys at law, from Zarco Law Bank of America Tower at International Place, 100 S.E. 2nd Street, Suite 2700, Miami, FL 33131, Telephone:(305) 374-5418

From left to right, Robert Zarco, Robert M. Einhorn, Himanshu M. Patel,

It starts simple enough. You receive a letter from a “Loss Prevention Analyst” at Dunkin’ Donuts that begins with the following introduction:

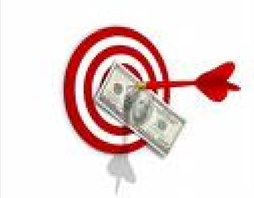
Dear Franchisee: We have selected your above-mentioned shops for a Document Examination. The purpose of the examination is to ensure that you are in compliance with the franchise agreement, including the reporting of royalties and Dunkin Brands Incorporated’s records keeping policy. Please mail to us copies of all of the documents listed below. Please also complete and return the enclosed Document Collection Checklist and Receipt, postmarked no later than [date]. Please forward Documents to:

It is possible that Dunkin’ Donuts simply wants to ensure that you are accurately paying your royalties and maintaining your required records. More often, however, a more nefarious reason is behind the letter. It could be the result of a tip received from an anonymous e-mail or phone call, or from a disgruntled current or former employee.

Or, because Dunkin’ Donuts questions your attitude or lifestyle, including the cars your drive or the vacation home you own. Regardless of the reason, Dunkin’ Donuts suspects that you have engaged in some type of questionable conduct in the operation of your shops, and is using its Loss Prevention Department to find “proof” necessary to justify the termination of your franchise agreement.

You are now the “target” of an open loss prevention investigation case.

Dunkin’ Donuts’ Loss Prevention Department employs certified public accountants, former FBI and IRS agents and investigators, financial analysts, and others whose mandate and purpose is to investigate you, the franchisee, for violations of state and federal law. Overseeing this department is Dunkin' Donuts' General Counsel, who is himself an attorney and former prosecutor for the federal government. The enforcement of the franchise agreement is the claimed purpose for the investigation. However, this is often a mere pretext. Dunkin' Donuts wants to increase its revenues and, when a violation of law is discovered, no matter how technical, Dunkin' Donuts uses that purported violation as a basis to extract large monetary penalties from you as a condition to allow you to sell your store or to remain in the system. Notably, these penalties are not disclosed in Dunkin' Donuts' Franchise Disclosure Document.



Target of Loss Prevention

The Loss Prevention Department, which typically is an expense item on a company's balance sheet, has now become a profit center for Dunkin' Donuts.

Dunkin' Donuts' franchise agreements almost all uniformly obligate the franchisee to provide Dunkin' Donuts with all financial documents and materials related to the operation of the shop. However, what comes next could very well determine your ability, or that of your legal counsel, to protect and defend your interests in any future termination case.

Once Dunkin' Donuts receives the requested documents and financial records, its trained financial analysts and investigators scour the records looking for anything that could trigger a non-curable default under the franchise agreement's "obey all laws" clause. Of significant interest to the Loss Prevention Analyst is evidence which he or she believes supports:

1. your failure to pay the proper amount of overtime wages to your hourly employees;
2. your failure to properly document the eligibility of your employees to work in the United States through the preparation and retention of form I-9s;
3. your failure to properly report and pay all taxes due to the United States and to your respective state agencies;
4. your issuance of form 1099s to individuals who you claim are independent contractors, but who instead should be categorized as employees whose compensation is recorded through form W-2s;
5. the transfer of an interest in your franchise without the prior consent of Dunkin' Donuts, as evidenced by the issuance of form K-1s to individuals who are not identified on the franchise agreements; and
6. improperly expensing personal expenses through your business.

After its review, the Loss Prevention Analyst will ask to interview you and possibly your manager, your accountant or tax preparer, or one or more current employees, all without you or your attorneys present. This interview is designed to allow the Loss Prevention Analyst to gather as much evidence against you as possible, allowing the analyst to build his or her case. Often, the Loss Prevention Analyst downplays the importance of these interviews, by misleadingly suggesting that he or she simply wants to ask a "few simple questions" about the contents of your documents or the manner in which your "business is run."

Almost always, the Loss Prevention Analyst is accompanied by another Dunkin' Donuts' employee or Dunkin' Donuts' outside counsel, whose presence is intended to corroborate the testimony of the analyst in any future court proceeding.

During the interview, you will be asked a series of questions prepared well in advance by the Loss Prevention Analyst based on the documents you have provided, as well as other aspects of the analyst's investigation. Never will you be given the opportunity to review these questions before the interview. Instead, you will be asked to answer the analyst's questions off the top of your head and explain the contents of numerous documents, many of which you may not have seen in months or years.

After the interview, which is analogous to a criminal interrogation, the Loss Prevention Analyst prepares a document entitled "Memorandum of Interview" that is used to support the findings of the Loss Prevention Analyst in a Loss Prevention Report provided to Dunkin' Donuts' General Counsel. Consider the Memorandum of Interview as your "confession," as the interview may contain admissions that you, your employees, or accountants made during the interview that will serve to negatively impact your position, or will otherwise suggest your participation in some type of questionable conduct. This is not to say however, that you in fact engaged in any questionable conduct. Instead, the Loss Prevention Analyst, who may very well have years of training and experience in interrogating individuals based on his or her former law enforcement training, may have lulled you into a false sense of security, and may have otherwise coerced you into making statements and admissions that you would otherwise not have made if you were adequately prepared.

There are several things that you should consider in order to protect your interests in the event that you become the target of a loss prevention investigation case.

These considerations include:

1. Retain counsel to advise you during this process.
   Dunkin' Donuts comes armed to the game, backed by experienced attorneys and former federal and state agents and investigators. So should you. It cannot be said more strongly the importance of retaining competent franchise counsel to advise you during each step of the investigation, and to represent your interests should you decide to meet with the Loss Prevention Analyst. Do not wait until you receive a notice of termination or when you are served with a lawsuit. The time to retain counsel is now, even if counsel stays in the background and simply advises you of your rights while the investigation proceeds.
2. Respond timely to all document requests.
   You have an obligation under your franchise agreement to timely respond to all document requests. However, do not be afraid to ask the Loss Prevention Analyst for more time to provide the documents, if needed. Before producing the documents, discuss the categories of documents being requested with your attorney or accountant, as well as the substance of the documents themselves. Often, you or your advisor are able to identify the focus of the investigation from the documents requested, which will assist you in the future.
3. Retain copies of all documents that are provided to Loss Prevention.
   By retaining copies of all documents that you provide the Loss Prevention Department, including the date on which the documents were delivered to Dunkin' Donuts, Dunkin' Donuts would not be able to ever question your production at a later date, or claim that you otherwise failed to produce the required documents. You may also want to consider numbering each document that is provided to the Loss Prevention Analyst, as a means to further ensure no future dispute.
4. Do not meet with the Loss Prevention Analyst. Period.

Resist the temptation to talk! Regardless of whether you have anything to hide, do not meet with the Loss Prevention Analyst, no matter how routine or inconsequential you believe the interrogation may be. Although your individual franchise agreement must be reviewed for a complete understanding of its terms, Dunkin' Donuts' typical form franchise agreement does not obligate you to meet with the Loss Prevention Analyst or make yourself or your employees available for examination. The Loss Prevention Analyst should never be considered your friend, and you should not confide anything in this person. They want to win and you to lose. Moreover, in those instances where your conduct may suggest a breach of the franchise agreement, your non-participation in this interrogation will avoid you making any admissions that you will later regret. This is not the time to defend yourself or explain your actions, and do not believe that you will be able to convince the investigator of your innocence. Remember, knowledge is power, and the less knowledge the Loss Prevention Analyst has, the less ability that person has to determine whether "proof" exists to find you in violation of your franchise agreement.

5. Do not allow your accountants or employees to meet with the Loss Prevention Analyst. For the same reasons that you would not meet with an agent for the FBI without your lawyer, or an IRS agent without your accountant, you should not be meeting with a Loss Prevention Analyst without an experienced franchise attorney, and more specifically, with the Dunkin' Donuts system. You should not allow your employees or accountant to be interrogated. In addition, many states, as well as federal law, recognize the accountant/client privilege, which in the most general sense, prevents the disclosure of anything you and your accountant discuss. Think of this privilege as akin to an attorney/client privilege. By granting the Loss Prevention Analyst the right to interview your accountant, you would likely waive the right to later successfully prevent the accountant from being forced to produce documents or testify in any formal judicial setting.
6. Resist the temptation to talk. Dunkin' Donuts' Loss Prevention Department has been successful in the past because franchisees have mistakenly believed that it was in their best interest to defend themselves. This is human nature. In doing so, admissions were made by the franchisees that were directly contrary to their best interest.
7. Despite the best advice given by your accountant or legal advisor, should you decide to meet with the Loss Prevention Analyst, consider the following:

• Control the process. Before being interrogated, ask the Loss Prevention Analyst the subject of the investigation, and document the analyst's response in a letter. If necessary, this may allow you later to challenge the integrity of the analyst and the investigation. Continue to ask questions throughout the investigation, and document all comments or statements that are favorable to you.

• Ask the Loss Prevention Analyst for the written questions that will be asked of you at the interrogation. There is no reason why you should not be given these questions beforehand. If the purpose of the interview is merely to "ask a few simple questions," there is no reason why you should not be given the opportunity to be fully prepared beforehand.

• In addition to your attorney, attend the meeting with a witness, preferably someone who does not have a stake in the outcome. Do not let the witness speak during the interview. Also, never allow an employee or accountant to be interviewed outside the presence of you or your counsel.

• Advise the Loss Prevention Analyst that you want a copy of the Memorandum of Interview before it becomes final to make sure that your interview was properly documented. If the analyst refuses this reasonable request, document that refusal in a letter to the analyst, which will allow you to challenge the substance of the interview at a later date.

• Immediately after the interview, write down all questions that you recall, and provide those questions to those persons within your network who will be interviewed later in this process.

• DO NOT make any admissions of wrongdoing during the interview. Do not speculate about an answer. It is okay to simply say that "I do not remember at this time." Never adopt an answer suggested by the analyst.

• Always try and answer the analyst's questions with "yes" or "no" responses, giving as little information to the analyst as possible.

• Document anything that you find improper during the interrogation. If you believe the analyst's questions are improper, suggest a racial motive, or make you otherwise uncomfortable in any way, make sure that you retain a written record and raise those issues with the appropriate individuals.

• Always remember that the Loss Prevention Analyst is not your friend, period. Do not believe that the analyst wants to help you, and do not confide anything in that person.