



## Protecting Your Business

**Communication:** Best practices to help prevent commercial owners from being characterized as an employer or as a franchise

**To:** U.S. and Puerto Rico Distributors

Congratulations on having a Commercial Nutrition Club (“Commercial Club”). The purpose of this notice is to inform you of steps you can take to protect your independent Herbalife business and prevent being characterized as an employer or franchisor. This communication should not replace legal or tax advice that may apply to your individual circumstances.

### Employment

Commercial Club owners with individuals and/or downline Distributors working out of the Commercial Club could be categorized as an employer. If you or your Commercial Club is deemed to be an employer, you may have to fulfill obligations mandated by federal and state employment laws, including satisfying wage and overtime requirements, paying employment-related taxes, and providing insurance.

Although state laws vary, most states look at your degree of control to determine whether someone is an employee or an independent contractor. The more control you have over how, when, where and by whom work is performed, the more likely workers (operators) will be deemed employees. Factors bearing on control may include whether you *require* people work specific hours, wear the same or similar uniform or use the same or similar script.

California and Massachusetts have recently passed laws that potentially expand who may be classified as employees, and other states have been eyeing similar legislation. **In California and Massachusetts, workers are presumed to be employees. They will be considered independent contractors only if they meet *all* three criteria below:**

#### **1. They do not perform tasks under your control and direction**

Best Practices: People working out of your Commercial Club have freedom to direct their own work, including when and how work is done. Allow them to select their own tasks and select their own schedules and hours they work each week, if at all; don’t require a uniform; don’t require any particular training beyond what Herbalife provides to work out of your Commercial Club; don’t require a particular script or way in which they must interact with customers, although you may give examples or suggestions of what to communicate to a customer.

#### **2. Their work is outside the “usual course” of your Commercial Club business**

Best Practices: Offer services unique to your Commercial Club that are not provided by people working out of your Club, such as weight loss challenges, nutritional coaching or fit classes, that those working out of your Club do not perform. This could help show that you provide distinct services from those working out of your Club.

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**3. They are engaged in an independent business with respect to the work they perform for you.**

Best Practices: Encourage Distributors working out of your Commercial Club to pursue their own independent business by pursuing and promoting their Herbalife business outside of your Commercial Club. This helps make clear that the Commercial Club is one place – but not the only place – where they are able to service their customers and generate sales through other avenues, including social media, friends and family and any other marketing platform they wish to pursue.

**Other Best Practices:**

- ✓ Document your relationship with those who work out of your Commercial Club. If you intend for them to be independent contractors, a contract between you and them which states that they are an independent contractor and not your employee and clearly delineates the scope of work to be performed may help mitigate the risk of misclassification.

**Franchise**

Commercial Clubs also could be characterized as a franchise and their owners as franchisors. If you are deemed to be a franchisor, you may have to fulfill obligations mandated by federal and state franchise laws, including provision of a detailed disclosure document and compliance with state registration requirements. If you are deemed to be a franchisor and don't fulfill the requirements, you may be subject to penalties.

Although state laws vary, the following three elements generally must be present for a business to be considered a franchise:

**1. Association with a trademark or commercial symbol**

Best Practices: Commercial Clubs should not look and feel the same. Don't use a standard appearance, logo or name for Commercial Clubs in your organization. Likewise, don't require common attire/uniforms, menus, or set prices across Commercial Clubs in your organization.

**2. Significant control or assistance in the operation of the business**

Best Practices: Encourage people to learn about how multiple Commercial Clubs operate so they can choose a method that works for them. Even if you have suggested methods of operating a Commercial Club, refrain from making them a requirement or a condition of continued support. Let operators open Commercial Clubs where they want and don't set geographic limitations or assign territories. Don't require Commercial Clubs in your organization to purchase supplies from the same vendors or from you. Post a sign in the interior of your Commercial Club saying that each Commercial Club is independently owned and operated and that Distributors working in the Commercial Club are independent Distributors.

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### 3. Payment of a fee

Best Practices: Don't charge anyone a fee to open a Commercial Club. This includes consulting fees, site assistance fees, and training fees, even if limited to actual expenses. Be careful charging any fees, including access fees, to Distributors operating out of your Commercial Club, as such fees may be considered equivalent to a franchise fee. Instead of charging a fee, consider collecting a portion of membership/consumption fees to cover Commercial Club expenses. Consider alternative business relationships between you and Distributors operating out of your Commercial Club. Talk to your lawyer or other business advisor to find the best structure for your situation.

Visit Herbalife [Rules of the Road](#) on [MyHerbalife.com](#) to review the rules in their entirety. You will find engaging education and resources paired with each rule. For questions and support regarding this communication or any other needs, please contact Herbalife at **866-866-4744**.

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