

2021's Top Twenty-Five Legal Trends for Automobile Dealers

By Eric L. Chase[©]

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NOTE: 2020 Rankings are in parentheses; NR (Not Rated in 2020).

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Introduction

For only the second time in 27 years, this publication places two annual trends in a tie for first place. Both the Coronavirus pandemic and the now completed 2020 election cycle will predictably have the most legal impact on dealers in 2021. Together, and singly, these two top trends affect a number of the other Top 25 issues as well. Ironically, despite the many unprecedented challenges of year 2020, America's franchised auto dealers should see a continuing positive sales and service outlook for 2021. The legal assessment, though, is mixed. That is because dealers must contend with the consequences of the pandemic and anticipated changes in governance and policies.

The Coronavirus pandemic hit the United States (and the world) with a vengeance, starting in early 2020. Even though the disease itself may be mostly eradicated by now-proven vaccines by mid-summer 2021 or sooner, its continuing effects and repercussions make it one of the two runaway trends for legal impact on dealers in 2021. This awful and sometimes deadly disease has already changed dramatically the way auto dealers conduct retail operations in sales and service, and in the conduct of employees in the workplace. Along with the retail auto business

itself, many legal implications flowing from the "pandemic year" will be enduring and profound.

In the Covid-19 era and its aftermath, dealers must fully comply with all government requirements, including the expected adjustments to applicable rules. They should adhere to – and advertise – their meticulous compliance. The political classes and regulators at federal, state and local levels will be furthering legislation, rules and actions tied to the receding pandemic, and steady vigilance is prudent and necessary.

From operational, economic and legal perspectives, the results of the 2020 election cycle (including the January 5, 2021 runoff in Georgia and effective Democratic Senate control – Vice President Kamala Harris breaks 50-50 splits) will also impact dealers. The other #1 issue – the pandemic and its fallout – also became the most controversial part of the presidential campaign, quite possibly the winning issue for President Biden. The new president will preside over a seriously divided Congress and nation. The Georgia runoff results assure at least two years of Democrat control of the legislative branch, as well as Biden administration for four years.

The third major trend for 2021 is also not unrelated to issues #1. Dealers now depend heavily on a virtual world to survive and thrive.

Cyber dealing is not just for the present; it is a permanent wave of the future. Number 4, the future of franchised auto dealers, has been a topic of discussion for years. For the coming year and beyond, however, the size and scope of facilities, along with where and how new car deliveries are made, will be profoundly affected by recent events. At Number 5 is an issue that now pervades every area in American life: "Identity" which includes race, gender and sexual orientation. Although dealers have witnessed it before, dramatic changes to employment based on identity in dealerships are moving fast, and President Biden promises more attention to racial and gender equity.

The ranking of the top twenty-five legal issues/trends is based on three factors: (1) the likely number of dealers affected; (2) the probability of change from the current situation; and (3) the seriousness of a trend/issue impact on the lives of dealers.

1. TIE: The Extraordinary Legal Reach of Covid-19 for Dealers in 2021 (NR)

NADA Chairman Rhett Ricart almost certainly had it right in suggesting that Covid-19 has changed the way dealers will do business, not just in the short term, but also for the long haul. Addressing the Automotive Press Association on November 17, 2020, he summarized a NADA survey, saying that "we know the pandemic accelerated customer adoption on a fully digital

sale, [but also that many will] still want to go to the store at some point to complete the transaction." He is right, but we will also see some, perhaps many, customers who opt for entirely remote transactions, even long after the pandemic subsides. It is a certainty that many will do so for all of 2021.

In 2019 and into early 2020, American businesses and stock markets enjoyed the fruits of an unprecedented financial boom. Unemployment percentages were so low that economists told us that, effectively, there was full employment. Minority populations and women scored their best employment numbers ever. There were more open job positions than there were people seeking employment. According to many economists, good times would roll for the foreseeable future. Auto dealers had every reason to expect profitability and soaring dealership values for the most of year 2020, and for years to come.

With the advent of Covid-19, however, everything changed at warp speed. Within a period of three months in the winter/spring of 2020, national unemployment levels soared from record lows to record highs. Many dealers were closed, or nearly so, for a while. Buy-sell activity died. The Congress took unprecedented action, spending trillions of dollars to pay both people and businesses during short closures and slowdowns.

Then the lights soon came back on in a very big way for most dealers. As business for dealers roared back in the summer, the way of operating was nevertheless quite different than ever before. Buy-sells also snapped back with robust transaction activity in the last half of the year. Unemployment dipped under 8%. By the fall of 2020 most dealers had come full circle. Sales and service were brisk. “The U.S. auto industry, hobbled in the spring by the Covid-19 crisis, has bounced back stronger and faster than many expected with some [manufacturing] companies reporting record profits in the third quarter.” Mike Colias and Nora Naughton, *The Wall Street Journal*, Oct. 29, 2020. On the legal side, adherence to changing health guidelines and requirements became a serious daily ritual. Dealers did a stellar job in adapting to the new Covid world.

NADA president and CEO Peter Welch issued high praise to dealers for how they responded to the emergency in 2020, and he predicted an optimistic case for the future: “Dealers see these adaptations as overly positive to their operations and their customer interactions, which is why I have no doubt that this innovation and flexibility will endure long past the pandemic.” NADA blog, Dec. 7, 2020.

In the final months of 2020, the pandemic re-exploded to record or near-record numbers of cases and deaths, along with re-impositions of

limitations on certain businesses and other activities in several states. As this article goes to press, total U.S. Covid cases exceed 22 million, and related deaths number more than 360,000. To put this 10-month mortality number in perspective, Covid-19 has already taken the lives of over seven times the number of Americans who died during the years of the Vietnam war era.

Amidst this swirl of negative news, a number of pharmaceutical companies, with considerable federal financial help, developed approved vaccinations in record time (Project “Warp Speed”). As of early 2021, a few millions of Americans have been vaccinated, with an accelerated pace expected within the initial weeks of 2021. The expectation for the year is that everyone desiring vaccinations will get them for free, perhaps by mid-summer.

Realistically, no one should expect that American ways of life and ways of doing business will soon return to “normal,” if “normal” is defined as the pre-Covid era. Instead, rigid precautionary measures will continue well into 2021. Even after that, American dealers will continue with standards of hygiene, masking and distancing developed during the infectious stages of the pandemic. Dealers now readily serve customers at their homes upon request. Pick-ups and deliveries may become as commonplace in dealership sales and service as home delivery of meals in the restaurant business.

***Bottom line:** For the foreseeable future, Americans will adhere to many of the health-connected habits of the pandemic year, notwithstanding the likely end of the contagion through mass vaccinations during 2021, and dealers must take care to enforce with rigor rules mandated by their states. Good hygiene, to include frequent handwashing, temperature checks, masking, distancing, and continuing check-ups will be ingrained – becoming part of the culture. A rising number of consumers vow to do their car shopping and deliveries at home -- a phenomenon that already was taking hold before the pandemic struck (in much smaller numbers). The Coronavirus pandemic also assured that the “cyber era” for dealers is here to stay. That fact is a key take-away from the pandemic, as virtual business transactions accelerate. See Trend #3. In addition, dealers should now operate as if the next pandemic is coming, with strong safety measures and an enhanced virtual capability.*

1. TIE: The Legal Significance of the 2020 Election Cycle to America’s Dealers. National and Local Politics Still Threaten America’s Dealers (2)

Elections in 2020 were like no others in American history. This annual article, however, tries mightily to steer clear of general political commentary, but instead focuses on relevant foreseeable political impacts on franchised dealerships in America. Those impacts in 2021 and beyond will be profound. The Senate majority remained in limbo until the January 5, 2021 runoff elections for the two senators from Georgia. Now, with a 50-50 split between the parties, Democrats have control, with the Vice President as a tie-breaker. Democrats enjoy a narrower edge than before in the House of Representatives.

With dust still settling, the biggest win, of course, was President Joe Biden’s as he ascended to the White House. But the much ballyhooed “Blue Wave” did not happen. Instead, Republicans gained seats in the House (although they are still the minority there). They no longer have Senate majority, but both the House and the Senate lack anything like a clear majority. Across the country, state electoral offices saw a continuation of Republican dominance.

In the legal arena, laws that could reduce dealer business and profits might be enacted. The Biden administration vows to be focused on the reinvigoration of regulations, to be consumer-oriented, and to further the “greening” of American life and business. These executive policies are also nearly certain to be furthered in controversial legislation. Higher taxes will probably be in effect within months. History shows these kinds of developments can be particularly challenging to car dealers.

Dealers must expect legislative and regulatory influence that will drive product development, choice and performance. CAFE standards will be revisited, electric vehicles will be further encouraged and incentivized; credit questions about racial disparity may see federal investigations of dealer practices; unionization will be encouraged again, and the NLRB will not be sympathetic to businesses.

***Bottom line:** President Biden will preside over many important legislative, executive and regulatory changes that will impact dealers. See, e.g., Trend #6 – Consumerism and Trend #21 – “Other” Workforce Issues. Although the trend toward electric vehicles was already happening, it will be more evident than ever before in 2021 and beyond. Japan has set in place a plan to go all-electric with an end to internal combustion engine (“ICE”) manufacturing within a couple of decades.*

3. The Cyber World Soars in Importance to Dealers: The Sea Change in Operations – Security, Opportunity and Risk. The Data, Internet, Social Media, Identity Theft, and Privacy Minefield (8)

This topic expands constantly, and 2021 will, if anything, see more expansion than ever. For dealers, it’s a moving set of targets that embrace both opportunity and risk. No dealer can operate successfully without meaningful emphasis upon cyber capability, including regular updates in hardware, software and regulatory developments. But enormous dangers and challenges loom:

Automobile dealerships are vulnerable to cybercrimes, particularly in certain areas of their business, and the risks today are higher than ever. On an average day, for instance, 153 viruses and 84 malicious spam emails are aimed at dealer computer networks and are blocked by technology.

“Retailers Prime Targets for Data Theft,” *Automotive News* (Dec. 9, 2019).

The cyber pitfalls are many for dealers. There are direct attacks by cyber criminals, and the creativity of the consumer plaintiffs’ bar knows no

limits in taking dealers to court. The rise in identity theft, ransomware and other threats is surging.

In recent times, we’ve also seen a bevy of lawsuits brought pursuant to the Americans with Disabilities Act (“ADA”), and comparable state laws. The basic theory of these litigations is that dealer websites cannot be easily accessed by consumers with certain impairments, especially vision. Therefore, many dealers paid substantial settlements in the form of attorneys’ fees, and “corrected” the “offending” websites. Thus, the dealer is under assault from two sides: First, the lawbreakers who want to steal from you; second, the lawyers who want to collect from you for your allegedly negligent cyber behavior.

On the other hand, no one disputes the importance of cyber marketing, websites and social media to every dealer’s successful operation. It is incumbent upon every dealership to have more and more employees who are “cyber savvy,” and to make sure that at least one or two personnel master this complex and growing field, with continuous access to updates in the relevant technology and associated legal developments.

***Bottom line:** Every dealer must continue to give the cyber world the very highest priority. It is a key to growth and opportunity, but it also presents ever-changing legal and security threats. 2021 will be the biggest year ever for cyber marketing by dealers, including the retailing of vehicles via the internet. Inevitably, however, cyber criminals remain on the prowl with ingenious scams and schemes targeting dealer victims. In addition, plaintiffs’ lawyers prospect for dealers who*

allegedly run afoul of good cyber practices and cause damage to consumers. Vigilance and constant updating of relevant information will be key to dealers' avoidance of being victimized by cyber criminals.

4. The Future of Franchised Auto Dealers in the United States. Threats to the Auto Dealer Franchise Model – Are Franchise Laws in Jeopardy? Retailing by Non-Dealers: Including the Tesla Phenomenon: The Beat Goes On (1, 9)

For decades franchised dealers have witnessed growing and creative efforts by both auto manufacturers and other entities to invade the realm of the retail auto business dominated by authorized, franchised dealers in every state.

Be assured, however, that the battle between franchised dealers and their associations versus a variety of aspirants for retail business will go on a pace. The NADA, state associations and others have done a stellar job in making the case that franchised dealers are indispensable to fairness, honesty and excellence in retail service and sales. Nevertheless, there is powerful public support for those who contend otherwise – *i.e.*, that factories and others should be able to sell and service directly to consumers. They point to Tesla which, of course, has no dealers and operates extremely successfully as an electric vehicle manufacturer and retailer. Among others, Apple has indicated its quest to make and market autonomous vehicles.

Bottom line: For the foreseeable future, the model of the franchised auto dealer will endure. Give credit to NADA and state dealer associations for making the case that franchised dealers best

serve America's auto consumers. No doubt Tesla, with no dealers, will continue to thrive.

At the same time, dealer associations will continue as bulwarks against pressures from those who aim to displace the kind of sales and service that only franchised dealers can provide consumers.

5. Race, Gender and Identity in the Workplace, and How They Impact the Auto Retail Business (5, 25)

After the death of George Floyd while in police custody on May 25, 2020, there was a dramatic and instantaneous change in policies throughout America – not just to affect police conduct, but also in workplaces, businesses, schools, universities and practically everywhere else. Regardless of differing views on race – *e.g.*, whether there is systemic racism or not – new policies proliferated everywhere that will alter how dealers operate with their employees and customers. Further, we will see accelerated efforts by auto franchisors to recruit and place more minority owners and managers of dealerships.

The #MeToo movement seeks to end mistreatment of women in the workplace and elsewhere. No rational or decent person disagrees with this worthy goal.

Bottom line: The ascendancy of minorities and women in the workplace can be seen in almost every profession. That reality also embraces a rigorously enforced respect for women on the job where risqué jokes as well as serious misconduct have become unacceptable at all times, everywhere.

In addition, corporate policies that emphasize diversity and inclusion have proliferated in every industry and in all states.

The coming year will see more attention to placing and hiring more minority and female owners/executives/employees than ever before in the auto industry. To a certainty, the Congress will consider "equity based" legislation, and dealers may have to cope with a bevy of new laws and regulations in this area. The Biden administration will push the equity policy theme as a priority.

6. Consumerism (NR)

This old chestnut is back with a vengeance. Look for a resurgence of the Consumer Franchise Protection Bureau ("CFPB") and a more active Federal Trade Commission ("FTC") in 2021 and during the years of a Biden administration. Expect more laws to buttress this approach, and a heavy enforcement hand by the Biden administration.

By their nature and proclivity, dealers are already pro-consumer in their outlook, yet they need to be wary of an overly aggressive FTC and state regulators who, all too often, target dealers who have done nothing wrong. A good example of overreach is the use of "disparate impact" to falsely assert that dealers discriminate against minorities in allegedly benefiting from discriminatory credit practices.

Bottom line: In 2021, there will be more government legislation, regulations and enforcement activity to proactively protect consumers from allegedly unfair or discriminatory sales practices. Often, dealers are unfairly targeted, and they must stay vigilant of even a perception of taking advantage of consumers.

7. Factory Sales Performance Standards Besiege Dealers Again (3)

Dealers mostly acknowledge the wisdom of factories that push them to retail more cars – and incentivize them to do so. At the same time, the Covid era might have caused some factories to consider whether facilities requirements should be overhauled. They recognize the growing emphasis on off-site and virtual retailing, but some factories do act as though their image and size requirements should not be challenged.

Bottom line: 2021 will see no abatement of "programs" to incentivize dealers. Dealers should be vigilant to make sure not to enter into "Faustian" commitments that cost more than a program is worth. Most of the time, however, factory programs do turn out to be worth it. Don't sign coerced agreements that confess breaches, or commit to unreasonable future performance or renovations.

8. Are Trade Wars Ending? If So, America's Dealers Could See Significant Benefits – As Well As Some Problems (6)

President Biden likes to differentiate himself from his predecessor on many issues, and the subject of trade relations is a high priority for him. This emphasis could lead to smoother movement of imported vehicles, but also higher costs to dealers and consumers.

Bottom line: It is foreseeable that President Biden will take steps to differentiate himself from his predecessor on trade issues. Look for a rapprochement that will make early headlines in 2021, essentially erasing hard lines and financial penalties/tariffs/sanctions.

9. The Stubborn Persistence and Resilience of Regulatory Overreach in the New Biden Era (7)

Whereas President Trump made good on a pledge to reduce federal regulations, the Biden administration embraces a robust regulatory scheme. The years of reduced red tape for dealers are at an end. The bureaucratic rules of years past will return, and dealers should expect some increased expenses for compliance purposes.

Bottom line: Heavy regulation is back, perhaps with a vengeance. Dealers will need to budget for the added costs.

10. Dealer Advertising (11)

Dealer advertising in 2021 faces a minefield of potential hazards. Both the FTC and state/local agencies scour the media to find deviations from advertising requirements. It is incumbent on dealers, therefore, to meticulously assure compliance with all advertising laws and regulations. Sometimes penalties for breaches can be harsh.

Bottom line: In 2021, dealers must make every effort to avoid even slight deviations from what is required in advertising regulations. Federal, state and local agencies will be unforgiving of advertising mistakes large and small. There will be an uptick in federal enforcement activities by the Biden administration.

11. Elusive CSI: What Does CSI Mean and Is It A Valid Indicator of Real World Customer Satisfaction? (10)

As nearly all dealers know, factory measurements of customer satisfaction in ever-changing forms of customer satisfaction indices

(CSI) are not reliable gauges of “true” satisfaction. But they are not going away.

Bottom line: Despite the fallacies of CSI as a true barometer of actual customer satisfaction or loyalty to the brand or dealer, the importance of such scores to dealers remains a fixture in franchisors' supervision and measuring of dealer performance. Of course, positive scores also often translate into dealer revenue.

12. Recalls (12)

The annual multi-million vehicle recall trend is now commonplace in the U.S. car/truck world. For decades, millions of cars are recalled to cure defects both large and small, significant or not. This phenomenon can be harmful to dealers by stripping salability of inventory while the defects are being fixed.

Bottom line: Recalls happen because of factory defects. Thus, the factories should make dealers whole for their costs attributable to extra floor plan expense and other incidental losses. Dealers and state associations should press franchisors to expedite the deliveries of necessary parts and to explain for their benefit of customers that dealers are doing all they can.

13. The Autonomous Vehicle Phenomenon Rolls Along: Where We Are, Where We Are Going and How Soon Might AVs Be Commonplace (4)

Although the public fanfare at the prospect of widespread self-driving vehicles has faded, the reality of their development is still moving forward. This phenomenon dovetails with a new reality for the way people travel by vehicle all across America. See *Shift*, December 2020, a publication of [Automotive News](#): “Mobility at a crossroads.”

***Bottom line:** It is only a question of time when autonomous vehicles will be routinely available to consumers for hire or purchase. But that event will not happen in a big way in 2021.*

14. Legacy and Succession: Don't Let Your Dealership Legacy Become a Legal Nightmare (14)

It is surprising that many dealers still have either no succession plan, or one that lacks detail or even certainty.

***Bottom line:** This is simple. Every dealer should have a legacy plan in place so that succession is as seamless as possible when transition happens. It should be an essential part of an overall estate plan.*

15. Involuntary Termination: Threats, Realities and Dealer Responses (15)

Involuntary franchise termination is rare in the auto industry, but the threat of it is not so rare. Of course termination is a business death penalty, and no threatened dealer should take any written suggestion of it by the factory lightly. For several years, a number of auto franchisors have sent "routine" agreement letters for dealers to sign, containing admitted "breaches" that they pledge to cure, with the further admission that the breaches would be adequate cause for termination.

***Bottom line:** DON'T SIGN SUCH LETTERS. They are poisonous for dealers. A termination threat is one of those rare occasions when a dealer should immediately consult with experienced counsel.*

16. Buy-Sell Activity (16)

Colleagues in the brokerage arena have reported the rollercoaster ride of 2020 – a steady upswing in the latter half of the year, after a quiet hiatus in the spring. Because of pandemic fallout, dealership sales transactions not only went from low velocity to high activity, but also the variations in geographical differences and brand differences were noteworthy.

***Bottom line:** Buy-Sell activity in 2021 will be brisk, with valuations at record highs for nearly all brands.*

17. Rights of First Refusal ("ROFRs") (17)

Factory ROFRs in dealer agreements are now commonplace. They are unlawful in only five states, so the prospect is very real when dealers negotiate their buy-sells.

***Bottom line:** If you are in the buyer mode, investigate the likelihood of a factory ROFR exercise as soon as you can. Even though many states require expense payments by the factory to displaced buying dealers, that remedy does not usually cover all expenses, nor does it pay for your lost time.*

18. Alternate Dispute Resolution ("ADR"): Some Progress in Arbitration (18)

Alternate Dispute Resolution for disputes between dealers and consumers is a common feature of retail contracts. For decades, however, consumer groups have attacked contractual mandatory arbitration as allegedly unfair to consumers. Look for the Biden administration to vigorously attack dealer arbitration provisions in consumer contracts.

***Bottom line:** I still advocate the use of voluntarily signed arbitration clauses in auto retail agreements. In 2021, be vigilant about the legal developments in this arena. It is possible that such clauses in consumer contracts will become prohibited by federal law or regulation.*

19. Dealer Associations Generally, and the Wisdom of Legal Standing. Should They Have It? (19)

My answer to this often-asked question is YES: Associations should have standing to represent common interests of their dealer members. This enables them to represent dealers in the name of their organizations, without the need for dealers to be parties.

***Bottom line:** In 2021, we should see more dealer laws allowing association standing. To association executives: This is a good capability for your tool box. But you only use it sparingly, when the necessity is clear.*

20. Taxes (NR)

This could be a big issue that will foreseeably arise in 2021. President Biden has promised to greatly overhaul tax laws to gain more government revenue from high earners and profitable businesses. That would include most franchised dealers.

***Bottom line:** Watch the developments as they get legislated this year, and work with your CPA to develop strategies to properly protect personal and business income. Regardless of taking all prudent and lawful steps, you will almost certainly pay more in federal taxes. Many states will follow suit.*

21. "Other" Workforce Issues (20)

Aside from the "identity" phenomenon addressed in Trend #5, dealers must cope with a

host of workplace policies, practices and procedures such as hiring, firing, workplace conditions, wages/hours, overtime and more.

***Bottom line:** With expected legal changes, you will need to revise your operations and employee manuals. 2021 could see a higher minimum wage requirement in federal legislation.*

22. Warranty Reimbursement (21)

Battles over retail reimbursement for parts used in warranty repair have continued for decades. Although there is not yet adequate compliance by factories across the board in paying earned warranty reimbursement for both labor and parts, dealers across the country have mostly prevailed in court.

***Bottom line:** For 2021, dealers should continue to demand from their franchisors what they are due in parts and labor warranty reimbursement: Retail. In some states and with some brands, compromises have been reached so that dealers accept a reasonable accommodation.*

23. Natural Disasters, Terrorism, Unrest and Pandemics (22)

While the pandemic year of 2020 is still fresh on the mind, dealers without emergency plans should develop them now. Unfortunately, "civil unrest" was more prevalent in 2020 than any time in recent history, and a number of American car dealerships were trashed and looted. Such events are foreseeable, although likely rare in 2021.

***Bottom line:** Dealers should have on hand the basic information for contacting all employees in the event of any major emergency, and telling them what to do and where to go in the event.*

24. Encroachment and Franchise Modification (23)

While protests under state laws of establishments and relocations of nearby competitive dealerships seem to have tapered off, they still happen.

Bottom line: When a dealer is confronted with a notice under state law, announcing that the factory intends to place another same-line dealer near you – within a protestable proximity, you will nearly always want to contest the move. In some instances, the expected losses with new, nearby competition can be catastrophic. Seek legal help if you get such a notice.

25. Factory Audits (24)

Even though dealers understandably grow anxious when the factory announces an audit, most audit results are uneventful. Sometimes, however, warranty or incentive audits do conclude that chargebacks are owed. Sometimes, chargebacks are excessive and/or they penalize dealers for technical infractions that caused no losses to anyone – the factory or consumers. Often, dealer challenges to chargebacks are successful, in whole or part.

Bottom line: Anecdotal evidence suggests that factory audits are on the rise. Usually, dealers have no meaningful option in whether an audit will take place. In very rare instances the factory might over-step in, for example, scheduling an audit outside a contractual or legal deadline. In 2021, dealers should fully understand what an audit is about, and in most cases, cooperate fully. If you see a clear abuse, either call your rep or your lawyer.

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