2024's Top Thirty Legal Trends for Automobile Dealers

By Eric L. Chase©

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NOTE: 2023 Rankings are in parentheses; NR (Not Rated in 2023).

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Introduction

America's dealers say it's an understatement that they face continuing uncertainty across a wide spectrum of legal issues in 2024. Those uncertainties span a swath of subjects that cover the products they sell, how they operate, cost of borrowing, and legal/regulatory developments. For example, will they see more regulatory action, with more rules that govern the workforces of small businesses? How will the 2023 elections and candidates approach this plethora of questions? Will federal and state governments continue to push through subsidies and regulations that encourage EV sales over ICE vehicles? Will inflation and higher interest rates continue to level off, or deter or delay demand for new cars, or will they steer buyers to less costly models? Will cyber and AI change how dealerships operate and how customers buy and lease cars? Once again, elections will drive some answers for consumers and dealers, but also generate even more questions. For that reason, the election cycle is #1 on the chart for legal trends affecting dealers.

As for the EV phenomenon, even though many argue that the consuming public is not even close to where EV advocates want American car buyers to be, some state and <u>all</u> federal agencies continue to push with monetary incentives to overcome the lack of EV demand. Automakers themselves are also paying to motivate EV sales. *See* Sean McLain, "EV Makers Turn to Discounts to Combat Waning Demand," <u>Wall Street Journal</u>, Nov. 7, 2023.

2024 presents unprecedented legal and business challenges to automobile dealers, and to practically everyone else as well. Consistent polling shows that Americans are not only seriously divided on almost every major policy issue, but they are also not happy on a purely personal financial level.

Many place some blame on what they perceive as an expanding government colossus, with bureaucracies encroaching on both financial and personal matters. They have less to spend in real dollars than in the recent past. A growing percentage of Americans (perhaps more than 60%, according to multiple sources) live paycheck to paycheck. Unfortunately, that widespread dissatisfaction can and does impact dealers, and it is essential for them to know and understand key legal and financial trends that affect them, their employees, and their customers, so that they can plan to do everything in their power to succeed, and to respond to developments. Hopefully, this publication provides some assistance.

The ranking of the top thirty 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. The 2024 Elections May Shape or Reshape the Auto Industry and Auto Dealer Direction for 2024/2025 and For Years Beyond.

The 2024 election cycle at all levels is in full swing at the time of this ranking. The country is now into the primary season, to be followed by the presidential election on Tuesday, November 5, 2024. The House and a third of the Senate are also up for grabs, with thousands of state and local contests on the same day. This #1 trend for the year is a decisive selection, because federal/state/local government action (and non-action) will shape the businesses and profitability of auto dealers like never before.

<u>*Bottom line*</u>: *This annual publication does not include the details of the political wrangling which dominates national and local news media. Rather, we observe a practical and legal reality: Government funding or tax breaks for selected kinds of car purchases will influence millions of consumer decisions to purchase, or not – and what to purchase and when. The election results are critically important to every American dealer, probably more so than with most other kinds of business.*

2. Multi-Layered Debates Over EV Development, Sales and Legal Requirements Impact Every Franchised Dealer in America.

The EV phenomenon has been a years-long obsession with a federal emphasis to move away from internal combustion energy ("ICE") vehicles to the all-electric mode. But on a state-by-state analysis, the EV push is hardly unanimous. *See*, for example, Hannah Lutz, "State-by-state EV adoption rates show divide: There is a glaring division between EV-friendly and EV-lagging states," *Automotive News*, Sept. 5, 2023. Debates over all aspects of EVs now abound, including whether they are even environmentally sound choices, or cost-saving in the long run. Governments at all levels buy lots of cars. Their buying power in acquiring EVs will influence the entire EV landscape.

Other problems interfere with the best laid plans for eventual EV dominance – like service, cost, and/or recharging unavailability. *See* Nick Cary, Paul Lienert and Giulio Piovaccari, "EV broken? Finding a technician to fix it may take a while," *Reuters*, Sept. 6, 2023. The status of available charges is a consistent problem, and battery disposal makes for environmental debates.

<u>Bottom line</u>: Whether robust EV growth will continue apace depends on several factors that are in play. As ever, dealers are caught in the middle.

3. Cyber Advancement, Digital Retailing, Artificial Intelligence (AI), and Risks that Need Constant Vigilance.

Cyber usage and developments in American business are on a breakneck growth pace, as are new laws and regulations intended to keep up. For purposes of this ranking, the topic includes artificial intelligence ("AI"), although AI is often covered as a fully separate subject. For the foreseeable future, we are in a "Cyber Age." According to Elon Musk and many others, AI will change almost every aspect of how Americans work and live. This phenomenon, though, has just begun. Musk contends that millions of Americans will be able to work less and earn more. Customers, too, will increase in doing their buying from their homes or offices.

Unfortunately, the cyber world now includes literally millions of "threat actors" who operate all over the world and can target victims virtually anywhere. Dealerships are popular criminal targets.

Cyber breaches happen all the time, and modern-day thieves attack dealership cyber vulnerabilities with gusto. Curing such vulnerabilities, and notifying affected parties, are key to avoiding the worst outcomes.

<u>Bottom line</u>: "Hacking," ransomware, phishing, business email and other cyber invasions are now commonplace risks for businesses (and governments, the military, and individuals as well). In general, they describe various kinds of criminal activities by wrongdoers who aim to steal money and secrets.

Even as they rely on cyber capabilities, digital retailing and other electronic developments to be competitive, dealers must take the necessary precautions to avoid or minimize becoming victims and to take the necessary steps when crime visits. Dealers need to be ever vigilant in this area as they protect not only their own data, but also that of employees and customers. Litigation over cyber invasion is now a booming industry.

Within another year or two, AI and digital retailing, taken alone, could remain at the top of legal trends for dealerships. This reality will multiply the potential rewards, risks, and legal wrangling in the cyber world.

4. Factory Direct Sales

Factories still press for their ability to retail ICE vehicles, but the main focus by auto franchisors is now upon EV sales. They argue that they should fairly and directly compete in retail with other EV manufacturers, like Tesla, Rivian, and several others.

Bottom line: Once again, franchisors will not prevail in their nationwide push for direct selling rights of EVs. Dealers are mostly safe, for now, as they should be. Yet they need to stay vigilant and proactive.

5. Regulations and Court Decisions that Impact Dealer Business.

Dealers uniformly complain about the costs and stresses of unnecessary and duplicative regulations that have no appreciable value to anyone. But, as we've seen, regulations and court decisions are moving targets that tend to grow, not recede.

Bottom line: Dealers and their advocates must continue expressing the wisdom that cutting back on unnecessary regulations is a positive goal that saves money for both businesses and consumers. Dealers should work with their associations to stay as current as possible about any relevant new regulations and court decisions.

6. State Franchise Laws are Safe, For Now.

It is a mainstay of dealer legal protection that every state requires some form of "good cause" for an auto franchisor to terminate involuntarily a dealer agreement. Many states also have detailed protections and requirements across a broad spectrum of potential relationship issues, including facilities, buy-sells, succession, and inventory control.

Bottom line: The good news for dealers is that their state associations and NADA are worthy masters of protecting the values to consumers and dealers of state laws that rein in franchisor overreach and abuses.

7. Diversity, Equity and Inclusion: Where We are Headed.

This topic is controversial, to put it mildly. *See* related Trend #29 on affirmative action. DEI proponents say it is merely fairness that compels "identity" to drive hiring and promotions. Others say, however, that DEI now goes too far, and suppresses excellence, merit, and initiative.

Bottom line: Many now agree: DEI has gone awry. Dealerships and other American businesses should promote non-discrimination. Unfortunately, as conceived today, many more people believe that DEI does more harm than good because it may undermine the values of merit and excellence.

8. Buy-Sells

Sellers continue to hold the advantage in the automotive buy-sell world. If you want to sell your dealership, buyers are plentiful, and values remain high, while dealers looking to sell are relatively scarce.

Bottom line: A robust buy-sell marketplace will continue in 2024 and beyond. Expect to see *record dealership valuations and sales prices, as demand significantly outpaces availability.*

9. Workforce Issues

Hiring and retaining capable employees remains a struggle and will continue to be a primary concern for dealerships. In October 2023, the UAW settled its differences with GM, Stellantis, and Ford. This is good for the industry, but some analysts worry that the high cost of labor will drive up tissue and retail pricing too much across a much broader spectrum. The success of UAW is sure to encourage dealership employees to push for higher pay and more generous benefits.

Bottom line: The ability of talented employees to seek and obtain good jobs at other dealerships is well established. Thus, dealer owners and managers must go to record lengths in increasing pay and benefits to satisfy and keep their workforces.

Some dealers risk serious liability issues when they try to classify some personnel with ambiguous duties as independent contractors. Seek legal advice before doing this. The more you control what a person does on the job, the more likely that person is an employee.

10. Retail Pricing and MSRP

During the pandemic, the percentage of dealers retailing cars above MSRP went from 2% to over 80%. For 2024, that trend has generally receded.

Bottom line: As the Covid impact has abated, so has the trend of over-MSRP retailing. Yet, a line has been crossed. Dealers are now open to the idea of exceeding MSRP when the market allows.

11. Succession, Legacy and Estate Planning

Available anecdotal evidence suggests that way too many dealers inadequately plan for succession, or they have no plan at all.

Bottom line: Dealers without estate plans and/or succession plans should remedy that void now.

12. Customer Satisfaction

Customers generally give high marks to dealers for both sales and service experience. This was not always the case, but in today's highly charged competitive environment, most dealerships make sure their sales, service, and administrative employees are well schooled in treating customers well.

Bottom line: Automakers push dealers more than ever to please retail customers, but the push is unnecessary. Dealers already recognize that today's world requires them to do everything possible to keep their customers coming back for sales and service. They emphasize the importance in regular training of how to please and satisfy every customer.

13. Self-Driving (Autonomous) Vehicles

A few years ago, the autonomous vehicle was supposedly the next industry phenomenon. Not so much now.

Bottom line: The day of high numbers of self-driving cars remains elusive. It's still coming, but not so fast. Some observers say, however, that self-driving ICE or hybrid cars will actually grow more than EVs.

14. Recalls

Every franchised new car dealer sees recall notices, and sometimes the scope is so large that they do real injury to the business. Unsellable cars that sit on the lot for weeks or even months can be profit-killers.

Bottom line: Dealers must make sure that their franchisors are treating them fairly when recalled vehicles sit idly on the lot. Plus, they must proactively insist that the carmakers expedite the necessary fixes.

15. Product Shortages and Delays

Unfortunately, under-supply of new inventory and delays remain commonplace across most brands. Insufficient chips, rare metals, transport delays and other factors drive inventory shortages, and skyrocketing unit costs intimidate not only retail buyers but also the factories.

Bottom line: We will not see the end of new car shortages in 2024, but perhaps a reduction in severity. There is hope for 2025, but the shortage situation remains too high for now, though not as steep as the past three years.

16. Allocations

Too many manufacturers are not transparent or fair in the allocation process which seems to change without advance notice regardless of the brand. Accusations by dealers of favoritism and/or outright dishonesty in allocations have proliferated. The topic could not be more critical for dealership profitability. You cannot retail cars that you don't receive from your supplier.

Bottom line: Dealers: Beware of getting shortchanged on allocations, especially if you have reason to believe nearby same-brand dealers are being favored.

17. Continuing Factory Pressure on Facilities and Sales.

At any given time, most auto franchisors are in one phase or another of image changes. For affected dealers, such changes can be enormously expensive and disruptive, often in the millions of dollars and usually without the factory's monetary assistance.

The automakers, in a perverse "Catch-22," frequently demand sales of more new units than they – the factories – can provide.

Bottom line: No surprise here. The automakers are always looking for dealers to *improve "the retail experience," almost all or entirely at the dealers' expense. Thus, "image programs" abound, whereby dealers are pressured to renovate, only occasionally with some franchisor financial assistance.*

In addition, factories demand higher retail sales, even when supply cannot support such demands. This won't change, despite the obvious illegality.

18. Rights of First Refusal (ROFRs)

Although reliable statistics are difficult to come by, auto franchisors are apparently using their ROFR clauses in dealer agreements more strategically. *See*, Jackie Charniga, "Boon or burden? Automakers' use of right of first refusal in dealership buy-sells aids some, hinders others," Automotive News, Sept. 29, 2023. ROFRs, when exercised, can be a big thorn in the side of a prospective buyer whose work and negotiation efforts to acquire a dealership can be stifled by a factory who steps into the buyer's shoes. It can also be a problem for a seller who is marketing a dealer group and one of the franchisors tries to "cherry pick" one dealership out of several in the buy-sell. The threat of a ROFR tends to decrease buyers' interest and brings down offering prices.

Today, ROFR clauses are nearly always in dealer agreements, no matter the brand. The factories applaud this right for a number of reasons: they can replace a buyer with someone who is a minority or female; they can close a point after buying out the exiting dealer; or they can arrange for relocation or modernization of the facilities by a prospective appointee.

A growing number of states bar or limit ROFR exercises. The author advocates a total ROFR ban.

Bottom line: *Buyers and sellers alike should try to ascertain whether a factory may consider a ROFR exercise when a buy-sell is submitted for approval. If an exercise is likely, chances are that the prospective buyer will want a meaningful discount to shoulder the risk. A minority of states currently prohibit outright the exercise of a ROFR, but limitations of some kind continue to grow in state franchise laws. Most states require that the factory's exercise of a ROFR will trigger reimbursement of the seller's and buyer's costs incurred in their reaching the nullified buy-sell.*

19. Coping with Risks of Natural Disaster, Crime, Unrest, Terrorism and Pandemic.

Except for the Covid crisis, the reality is that only a small number of dealers have actually been directly impacted by a major natural or man-made catastrophe.

Bottom line: *Most dealers now share basic emergency information with their workforces: call lists, dealership contacts for specific* *updating information, and the like. These are simple and prudent policies that cost almost nothing. Every dealership should make sure that it circulates such updated information.*

20. Franchisor Audits

Most audits, though disruptive, do not amount to much in either chargebacks or worse.

Bottom line: *Franchisors have basic contractual rights when it comes to auditing such routine matters as warranty claims, or anything else that involves factory monetary or other obligations. As long as an audit takes place within a time period allowed by law or agreement, dealers should cooperate.*

21. Dealership Leadership: Why It's so Important.

The intangible qualities of leadership are vital for the success of any dealership. There are countless examples of new dealer leadership resulting in dramatic rises in profitability and workforce productivity – or the opposite. Some leadership qualities come naturally, but people can learn and develop into leaders.

Bottom line: *Every dealer needs to be a proactive leader to run a dealership at or near its peak potential. Some people are born with leadership qualities. Most, however, need to work continuously on what it takes to be an effective leader in the dealership. The effort is worth it.*

22. Used Cars and Lower Profits

During the Covid pandemic, several factors caused used cars to be nearly as desirable as new ones. Retail prices soared, as did trade-in values. Not so much now. Inventory shortages were everywhere. Profits on used vehicles are now back at or near pre-pandemic levels, but used cars are still a salient profit center.

Bottom line: *Although record used car prices have trended down, this profit center will remain healthy through 2024.*

23. Alternative Dispute Resolution (ADR)

In just a single generation, ADR has become commonplace as a way to resolve potential or actual adversity. A majority of dealers impose some form of ADR on their customers, whether it be trying to resolve potential disputes face-to-face, in mediation, arbitration, or all of these.

Since 2002, federal law has barred automakers from forcing arbitration upon dealers, but dealer agreements usually have some form of pre-litigation ADR, such as mediation or negotiation.

Bottom line: *ADR is often a good thing for dealers. In many or most instances, dealer disputes with franchisors may be resolved quickly and cost-effectively in mediation or negotiation.*

The same is true with customer disputes. Litigation should be a last resort.

24. Warranty Reimbursement

Warranty reimbursement issues are no longer as common or controversial as they once were, but the topic is still in play, at least with a few brands across several states.

<u>*Bottom line*</u>*: Most dealers today are content with standard warranty reimbursement rates for both labor and parts. Any dealer who believes the factory is being unreasonable in labor and/or parts reimbursement should seek counsel.*

25. Encroachment

Protests against establishments of new points or relocations happen less often than a few years ago. This lessening of cases is, in part, because dealers and their counsel try to avoid situations that legally permit such challenges. Many buy-sells accomplish this by avoiding relocations further than two miles from existing points, which many states exempt from protest. Or, dealers insist on the factory "clearing the market" with sign-offs from existing dealers who could otherwise protest.

<u>*Bottom line*</u>*: Eligible protesters under state laws should always consider a challenge or negotiate reasonable compensation in return for signing off. Usually the filing time is soon after receipt of a factory notice, so be sure to file before the statutory cut-off date.*

26. Franchise Modification

Unilateral "modifications" now abound with automakers changing dealer agreement terms.

<u>*Bottom line*</u>*: A growing number of state franchise laws allow dealers to protest/challenge unilateral modifications that are deemed "material."*

27. Insurance Coverage

Basic insurance coverage is not optional, and all dealers known to the author have it. <u>All</u> should have a wide breadth of coverage, and the analysis of what to have should be a recurrent exercise. The amounts of coverage can be tricky, especially in an era (like now) where premiums have risen dramatically.

<u>*Bottom line*</u>*: Every dealer must prudently review dealership insurance coverage no less than once a year, preferably with a knowledgeable agent.*

28. Over-the-Air ("OTA") Repairs and Updates

Tesla was the leader in OTA development. OTA is now commonplace among virtually all brands, and virtually call models of all brands carry an ever-growing OTA capability, especially with EVs.

<u>*Bottom line*</u>*: Dealers need to be watchful for OTA activities that may trigger a dealer's right to some compensation under newly enacted state laws. Sometimes, however, a growing reality is*

that OTA either decreases dealer service work and revenue, or in many instances eliminates it.

29. Affirmative Action and SCOTUS Trends

Watch out for this one. It is related to DEI which is a big deal in America, across all businesses, professions, and schools. *See* Trend #7. This outgrowth of identity politics can involve legal entanglements, and dealers are prudent to understand what they must do to assure legal compliance.

Bottom line: *Stay informed about the use of race or other identity factors in hiring, firing, and advancement. For 2024, in the aftermath of the Supreme Court's decision barring affirmative action in college admissions, there will be a sea of affirmative action litigation in other arenas, such as hiring, firing, and promoting.*

30. Inflation

As of this writing, inflation remains a major factor in consumer and business spending power, and it, along with the rise in interest rates, will impact what consumers can afford in buying and leasing automobiles.

Bottom line: *The good news is that the easing of inflation in late 2023 may be a harbinger for 2024.*

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