Do janitorial firms cash in by misclassifying workers as independent contractors?

BY WENDY N. DAVIS | POSTED SEP 01, 2014 09:20 AM CDT

Shannon Liss-Riordan: Janitorial firms cash in by misclassifying workers as independent contractors. Photo by Carl Tremblay.

When Pius Awuah, an immigrant from Ghana, agreed to purchase a cleaning franchise from the janitorial giant Coverall for more than $14,000, he believed the business would earn $3,000 per month.

The Lowell, Massachusetts, resident used his savings and credit cards to put up more than $8,000, while Coverall arranged to deduct the rest from his future earnings. The company gave him clients, at least at first, but the expected revenue didn't materialize, partly because some of them were spread so far apart that he couldn't realistically travel to every site. After a few months, Coverall took away some of the business it had previously given to Awuah, claiming the clients weren't satisfied.

In the end, Awuah typically took in less than $1,300 per month, according to court papers. Now Awuah is among the lead plaintiffs in a class action that could reshape the janitorial industry.

For decades, a handful of large cleaning companies have run their businesses on the franchise model, rather than hiring employees. Coverall, Jani-King, Jan-Pro, CleanNet and a few others routinely market themselves to immigrants like Awuah, often by advertising in foreign-language newspapers.

The immigrants are promised the chance to run their own, potentially lucrative businesses—provided they pay hefty franchise fees, which can run as high as $30,000. But for many, the reality is that they don't receive enough work to be able to support themselves, much less recoup their initial investments. In some cases, the immigrants say they pay additional fees to have a client assigned to them, only to lose that client on the grounds that the client supposedly wasn't satisfied with their work.

OWNER OR EMPLOYEE?

“The janitorial industry seems to be on the cutting edge of figuring out how to cheat people out of their wages,” says Chicago attorney Christopher Williams, who represents plaintiffs in a lawsuit against CleanNet.

“This is their business practice, and they’ve been very devoted to it,” says Catherine Ruckelshaus, general counsel and program director at the National Employment Law Project, a New York City-based nonprofit that has filed friend-of-the-court briefs in several lawsuits against cleaning companies. “It’s a very lucrative way to run their business.”

In the past, numerous individuals have sued cleaning services companies for breach of contract, often alleging that they were duped into shelling out money for the franchises. Many of those lawsuits resulted in confidential settlements.

Recently, however, some of the immigrants have banded together in class actions claiming they were never truly franchise owners at all but, rather, employees—meaning that they’re entitled to receive at least the minimum wage for the time they worked as janitors. In many cases, that amounts to only a few months because they couldn’t afford to continue working for such small revenue.

Awuah’s lawsuit, filed in 2007, centers on allegations that Coverall treated the franchise “owners” like employees, in that the company controlled every aspect of the jobs, from the uniforms and badges they wore to the clients they received.

The plaintiffs also argue that they are employees under the state of Massachusetts’ expansive definition of the term, which provides that people are employees if they’re in the same line of business as the employer.

U.S. District Judge William Young sided in a 2010 decision with Awuah and other purported “franchisees,” writing that they were in the same line of work—that is, the commercial cleaning services trade—as Coverall.

Coverall, a Boca Raton, Florida-based corporation with about 5,000 franchisees, argued that it was in the franchising business, not the commercial cleaning business.

Young specifically rejected that contention. “Describing franchising as a business in itself, as Coverall seeks to do, sounds vaguely like a description for a modified Ponzi scheme—a company that does not earn money from the sale of goods and services, but from taking in more money from unwitting franchisees to make payments to previous franchisees,” wrote Young, granting the plaintiffs partial summary judgment.

Coverall is appealing to the 1st U.S. Circuit Court of Appeals at Boston. The corporation says its regular activities consist of “selling franchises, promoting the Coverall brand, centrally soliciting customer contracts, and providing billing and collections services to franchise owners.”

Coverall adds that Young's interpretation of the law would lead to what it calls absurd results about who was or wasn't an employee. "Franchisors of health clubs would be in the 'business' of providing fitness services, and franchisors of car dealerships would be in the 'business' of selling cars."

'TRYING TO CRY WOLF'

The lobbying group International Franchise Association, based in D.C., is backing Coverall in the appeal, arguing that Young's decision could sweep in such companies as McDonald's and Dunkin' Donuts.

Gregg Rubenstein of Boston, the Nixon Peabody lawyer who represents the franchise trade group, adds that Young didn't need to issue such a broad ruling. "There were lots of ways to reach the result without implicating franchising writ large," he says. For instance, Young could have found fault with the contracts between Coverall and the plaintiffs, without going so far as to say they were employees.

But Shannon Liss-Riordan, the Boston attorney for Awuah and others, says the argument is ridiculous.

"They're trying to cry wolf in order to get out of this judgment we won," she says of Coverall. She adds that companies like McDonald's don't control which customers go to which stores or suddenly take business away from a franchise owner.

"McDonald's has set up a structure by which independent business owners can run fast-food stores," says Liss-Riordan, who has spent the last decade representing people who claim they were duped into purchasing franchises.

Meanwhile, Young's decision in the Coverall case, if upheld on appeal, could leave franchisors vulnerable to a range of new lawsuits, including those for civil rights violations, says Dallas attorney Deborah Coldwell, chair of the ABA Forum on Franchising.

Coldwell suggests, for instance, that in a case of sexual harassment, employees of franchisees could sue the deep-pocketed corporations if the business was considered an employer.

"Plaintiffs' counsel are glomming on to the Coverall decision to expand the liability of franchisors," she says. "This Coverall case has opened stricter scrutiny of employer-employee situations."

The 1st Circuit is expected to decide soon whether those who purchased Coverall franchises are actually employees, but that upcoming ruling won't be the only word on the matter.

Other cases are pending throughout the country. Several lawsuits have resulted in settlements. CleanNet, for instance, agreed in 2013 to pay $7.5 million to settle a class action in Massachusetts, while Coverall agreed to settle a lawsuit in California.

Others, however, including one against Jani-King, are still contested.

In that case, U.S. District Judge Samuel Conti in the Northern District of California ruled in 2012 that Jani-King was not an employer under California law. “Jani-King did not exercise sufficient control over plaintiffs to render them employees,” Conti wrote. “Plaintiffs had the discretion to hire, fire and supervise their employees, as well as determine the amount and manner of their pay.”

The ruling didn’t dispose of the case. Conti said that the franchise owners were entitled to go to trial on a variety of other allegations, including that Jani-King violated its contract and didn’t act in good faith.

For now, however, the trial proceedings in that case are on hold while plaintiffs appeal to the 9th Circuit. The franchisees argue that Conti’s ruling enables Jani-King “to evade its obligations under the Labor Code through subterfuge.”

Whether that argument will carry the day isn’t clear, given that California’s laws differ from those in Massachusetts. “In Massachusetts we happen to be fortunate enough to have very protective laws,” Liss-Riordan says.

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