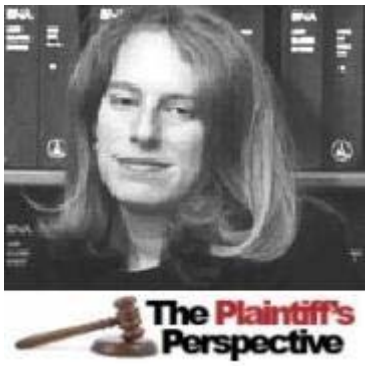
LEVICK STRATEGIC COMMUNICATIONS
BulletproofBlog.com
THE BLOG ON CRISIS COMMUNICATIONS

What's Next: The Plaintiff's Perspective – Employment Reclassification Case Targets Labor Abuses by 'Franchisers'

By: Larry Smith June 9, 2010

In this regular feature, Bulletproof interviews top plaintiffs' counsel for their perspective on the crises likely to affect businesses in the near future. Today, we speak to Shannon Liss-Riordan of Lichten & Liss-Riordan, P.C. in Boston. Ms. Liss-Riordan represents plaintiffs in Pius Awuah et al. v Coverall North America Inc., a lawsuit that has taken employment reclassification cases to a new level.

In March, Massachusetts District Judge William Young ruled that the plaintiffs, classified by Coverall Health Based Cleaning System (a cleaning business) as franchisees, are in fact employees and not independent business entities. As such, they are entitled to overtime pay, minimum wage, and compensation protection benefits. Coverall has 250-plus franchisees in Massachusetts.



Franchisers and their trade association have declared that this ruling threatens the viability of franchise businesses in the state. Damages in the case have not yet been determined nor has the situation of workers who assist the franchisees yet been adjudicated.

Does this case represent a new trend in worker misclassification actions? How so?

Shannon Liss-Riordan: There has been an increased awareness in recent years of employers misusing the independent contractor label in order to save on labor costs. This case is a continuation of that trend but highlights an even more extreme example of this type of worker abuse. Here, a company charged janitorial workers for low-paying cleaning jobs and tried to justify it on the ground that the workers were in business for themselves. What the workers were actually buying was a poorly paid job and the right to hand over more of their money to the company.

Do you agree with David French, vice president of government relations for the International Franchise Association, that the judge's determination – that "franchisers are in the same business as their franchisees" – could affect any franchise company?"

Shannon Liss-Riordan: This case is different from most franchise relationships because here the franchisees really were just performing the services sold by the company, and thus they were in the same business as the company. In this case, Coverall entered into commercial cleaning

contracts with building owners and managers and delegated the cleaning work to its "franchisees," no differently from how an employer would enter into such contracts and delegate the work to its employees.

The company also retained overriding control over the relationship with customers. By contrast, McDonalds, for example, does not itself sell burgers to customers; it sets up a system allowing its franchisees to sell the burgers. And if a customer doesn't like a burger, McDonalds doesn't take that customer away from the franchisee.

Do the Obama Administration's efforts to have the Internal Revenue Service target companies that misclassify workers give plaintiffs extra leverage in these kinds of cases?

Shannon Liss-Riordan: There has been a lot of talk in the federal government, as well as among various state agencies, about cracking down on independent contractor misclassification. Our experience has been that government agencies have very limited resources, and they are only able to pursue a small percentage of companies violating the law.

But, while I wouldn't say that these government initiatives have much direct effect on most of our cases, the government has at least raised awareness of the issue.

What for you would represent a clear enough differentiation between employees and franchisees? Would companies achieve such differentiation by clearly stating that they don't directly sell any of the products or services they license franchisees to sell? Would they achieve such differentiation by no longer prohibiting former franchisees from competing?

Shannon Liss-Riordan: We have seen companies try to escape their legal liability by stating that they do something different from what they actually do. But the courts look at actions, not words, and so just stating that the company does not sell the products or services that the franchisees provide is not enough to get them off the hook.

For instance, we had a strip club claim that it sold alcoholic beverages, not exotic dancing, but the court saw it for what it was – a strip club. We've had package delivery companies argue that they provide "marketing logistical support" to customers who want their packages transported, but the courts have recognized that they are in fact package delivery companies. Likewise, Coverall denied that it was in the business of selling commercial cleaning services, but that is exactly what it does.

In order to differentiate itself from its franchisees, a company needs to be structured such that it really is only providing a franchise opportunity to its franchisees. Eliminating non-compete provisions is also an important step to establishing that the franchisee is not wholly dependent on the franchiser for its business.

You're well known for tips cases. Are there any recent or upcoming developments on

that front that merit attention?

Shannon Liss-Riordan: There are a handful of states that have strong, explicit tips laws protecting gratuity income for service workers. We are seeing cases being brought in more of these states where businesses (particularly restaurants, hotels, and other hospitality establishments) have flouted these laws (largely due no doubt to under-enforcement). We are also pursuing common law claims against establishments that skim or divert tips from service employees in states that do not have explicit tips statutes.

In the wake of the federal court's decision earlier this year in Overka v. American Airlines (which certified a national class of skycaps claiming tip diversion under state common law theories), we expect courts in more states to allow tips cases to go forward under claims such as tortious interference and unjust enrichment. We also expect to see more cases brought on behalf of tipped employees outside the food and beverage industry.

Larry Smith is Senior Vice President of Levick Strategic Communications, the nation's top crisis communications firm, and a contributing author to Bulletproof Blog.