

# Franchise Times®

## Pandora's Law

### When franchisees are ruled employees, all bets are off

By Julie Bennett

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A legal decision involving 10 Massachusetts Coverall franchisees, Pius Awuah and others v. Coverall North America Inc., is causing havoc across the franchise community. On March 23, Massachusetts District Judge William Young ruled that Awuah and his fellow plaintiffs were not independent business owners, but employees of Coverall Health Based Cleaning System, and therefore eligible for minimum wages, overtime pay and workers' compensation protection.

Because the employee/independent contractor issue was carved out of a larger lawsuit, Coverall cannot appeal the decision until that case is litigated, said Coverall Vice President and General Counsel Jacqueline Vlaming. "We have to view this as law in Massachusetts," she said. In early April, Coverall began treating its 250-plus Massachusetts franchisees as employees, a change Vlaming said is extremely complicated to implement. "Now, we pay franchisees monthly for services rendered. In Massachusetts, we'll have to pay them a bi-weekly wage. Either we'll have to get our franchise owners to send us time sheets or we'll have to find a way for them to check in and out with their customers."

The decision has implications that stretch beyond Coverall, which has stopped selling franchises in Massachusetts. "The ruling threatens the viability of franchise businesses in Massachusetts," said David French, vice president of government relations for the International Franchise Association. M. Troy Flanagan, the IFA's director of government relations, said he's heard from several franchise attorneys who have advised their clients to also stop selling franchises in that state. The IFA Legal Symposium, to be held May 16 to 18, in Washington, D. C., will include two seminars on the employee/independent contractor subject and law firm NixonPeabody has scheduled a May 11th Webinar on "The Awuah Case: Bellweather or Outlier?"

Research indicates it might be both.

#### The ABC test

According to Flanagan, many states use an ABC test to determine how employers categorize workers. In his decision, Judge Young said that in Massachusetts an individual is considered an employee unless:

- A. The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of the service, and in fact.
- B. The service is performed outside of the usual course of business of the employer.
- C. The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the business performed.

Twenty-five states with ABC laws require an employer to violate all three "prongs" of the test before it can be required to reclassify its independent contractors as employees. But in 2004, Flanagan said, as part of an unrelated bill, the Massachusetts legislature changed its independent contractor law to require that only one of the three prongs be violated to move workers into employee status. That

lowered threshold has generated lawsuits from franchisees of the other two leading commercial cleaning companies — Jani-King and Jan-Pro — and from workers in a variety of industries, from strippers to Federal Express delivery drivers.

### Patron saint of strippers and drivers

The unifying factor in all these cases is plaintiff attorney Shannon Liss-Riordan of Lichten & Liss-Riordan of Boston. Liss-Riordan said she was expecting Judge Young to rule in her favor. Her firm, she said, has been successful in gaining employee status for drivers who are forced to purchase their own delivery vans and for strippers in a nightclub in Chelsea, Massachusetts, who had to pay \$35 to “rent” a pole for the night and had to remit a portion of their tips to the owners of King Arthur’s Lounge. That case was decided on prong B of the ABC test. Owners of the club argued that selling alcohol is their main business and that the women, according to an article in the Boston Globe, “were independent contractors who provided extra entertainment akin to televisions and pool tables at a sports bar.”

But Suffolk Superior Court Judge Frances McIntyre said, “A court would need to be blind to human instinct to decide that live, nude entertainment was equivalent to the wallpaper of routinely televised sports events.” Liss-Riordan said that the commercial cleaning cases are similar, “except that franchisees have to spend thousands of dollars to get a job instead of \$35 a night.”

Judge Young’s decision in the Coverall case was also based on prong B of the independent contractor law and his language was almost as colorful. Liss-Riordan argued that the franchisees and Coverall were both engaged in the cleaning business. But Coverall, represented by attorneys from the Boston and Chicago offices of DLA Piper, argued that Coverall is not in the commercial cleaning business, but is in the franchising business. Judge Young said, “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.”

The judge quickly added that description was not applicable to Coverall, which trains its franchisees, provides them with uniforms and ID badges, contracts for all cleaning jobs and does all the billing. “These undisputed facts establish that Coverall sells cleaning services, the same services provided by these plaintiffs,” his decision stated.

Despite such disclaimers, the “Ponzi scheme” language showed up in newspaper and even law journal accounts of the trial and several attorneys said they feared the publicity would attract even more franchisee lawsuits. Gregg Rubenstein, a partner with NixonPeabody in Boston, said, “Using Judge Young’s definition of business format franchising would put many franchisors at risk. Is McDonald’s selling hamburgers, or is it selling a business system that allows its franchisees to sell hamburgers? Could every McDonald’s franchisee also be classified as an employee? If franchisors are held to be in the same business as their franchisees, it may certainly raise issues under the Massachusetts independent contractor laws.”

To prevent such legal mayhem, the IFA is lobbying the Massachusetts legislature to change its independent contractor law, by recognizing franchising as a distinct business model. On April 8, the IFA sent a letter to Massachusetts Senator Thomas McGee, chairman of the legislature’s joint committee on Labor and Workforce Development, saying that Judge Young’s decision in favor of the Coverall franchisees was an “unintended consequence of the 2004 revisions to the independent contractor law. Becoming a franchisee is an explicit choice not to be someone’s employee.”

A change to the law may not save Jani-King and Jan-Pro from similar fates. Last September, in a decision in Vincent De Giovanni, Mariette Barros and others v. Jani-King, Judge Young ruled in favor of Liss-Riordan’s request for class action status for Massachusetts Jani-King franchisees over the same issue. Worse, Judge Young said class action status was appropriate under all three prongs of the independent contractor law. Arthur Pressman of NixonPeabody, who, with Rubenstein, is representing

Jani-King, said their case is still in the motion stage, but should come to trial sometime this year. A Jan-Pro case that rests on the same issue is also pending. The larger Coverall case, which includes a ruling on damages to the Massachusetts plaintiffs from the March 23rd decision, plus franchisees from several states alleging unfairness and breach of contract, is scheduled to begin trial before Judge Young in May and could go on for several weeks, Liss-Riordan said.

In the meantime, Vlaming said she is still "figuring out the impact" of Judge Young's decision. "We have 25 master franchisees in Massachusetts," she said, "but we own the Boston market corporately. I believe this is opportunistic litigation that targets commercial cleaning companies but is affecting all franchisors."