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Are Your Independent Contractors Actually Employees? Susan E. Wells

A recent case in the Massachusetts Federal District Court, *Awuah, et al. v. Coverall North America, Inc.*, recently held that certain franchisees of the Coverall commercial cleaning franchise system were employees, not independent contractors.

The Massachusetts Wage Act requires an employer to satisfy all of the following requirements in order to be classified as an independent contractor, not as an employee:

1. The worker must be free from control and direction in connection with the performance of services, both under his contract and in fact.
2. The services must be performed outside the usual course of business of the employer.
3. The worker must customarily be engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

In the *Awuah* case, the Court held that the workers were employees because both Coverall and its franchisees sold cleaning services and because the workers did not provide cleaning services for others; therefore, the workers did not perform services outside the usual course of business of the employer. Although Coverall argued that it was not in the business of providing commercial cleaning services, but was in the franchising business, the Court was not persuaded. In fact, the Court likened franchising to Ponzi schemes. The Court further held that because Coverall's franchisees were employees, they were eligible for minimum wage, overtime pay and workers' compensation protection.

Riding on the coattails of the *Awuah* case, franchisees in the Jani-King and Jan-Pro commercial cleaning franchise systems have filed lawsuits similar to *Awuah*. Independent contractors in other fields, such as delivery vans and strip clubs, have also raised similar claims.

Other consequences of the *Awuah* case include concern by other franchisors and other business owners that their franchisees and other independent contractors will likewise be classified as employees and they will be subject to minimum wage, overtime pay, workers' compensation protection and possibly requirements of other employment laws and regulations. As a result, certain franchisors and other business owners are electing to take Massachusetts out of their expansion plans.

Although federal law differs from Massachusetts law on how the term "independent contractor" is defined, the Internal Revenue Service was already targeting companies that conduct business similar to Coverall's structure. In the Coverall franchise model, the franchisor advertised for, contracted with and billed most, if not all, of the franchisees' customers. In addition, Coverall provided its franchisees initial equipment, although franchisees were required to provide any necessary replacements.

In addition, most state laws differ from Massachusetts law as well. Therefore, although it is possible that other state courts might follow Massachusetts' lead, it is doubtful.

Susan E. Wells is a partner with the law firm of Jaburg & Wilk. She has been assisting start-up and seasoned clients with their business transactions, including franchising, for 30 years.