2022 WL 869486
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Supreme Judicial Court of Massachusetts,
Suffolk.

Dhananjay PATEL [1] & others [2]
v.
7-ELEVEN, INC., & others; [3] DP Milk Street Inc. & others, third-Party defendants. [4]

SJC-13166
|
Argued December 8, 2021.
|
Decided March 24, 2022.

Independent Contractor Act. Massachusetts Wage Act. Statute, Construction, Federal preemption. Federal Preemption. Regulation.

CERTIFICATION of a question of law to the Supreme Judicial Court by the United States Court of Appeals for the First Circuit.

Attorneys and Law Firms

Shannon Liss-Riordan for the plaintiffs.

Norman M. Leon, of Illinois (Matthew J. Iverson, Boston, also present) for 7-Eleven, Inc.

The following submitted briefs for amici curiae: Kevin P. Martin, William E. Evans, & Christopher J.C. Herbert for Chamber of Commerce of the United States of America & another.

Ian D. Roffman & Sara A. Lonks for Financial Services Institute, Inc. Christopher A. Parlo, of New York, Sean P. Lynch, of New Jersey, & Mary Grace Parsons for Life Insurance Association of Massachusetts & others.

John R. Skelton & Katherine R. Moskop, Boston, for Retailers Association of Massachusetts.

Benjamin B. Reed, of Virginia, & Nora H. Murphy, of Maryland, for International Franchise Association & another.

Maura Healey, Attorney General, Kate Watkins & Cynthia Mark, Assistant Attorneys General, & David C. Kravitz, Boston, Deputy State Solicitor, for Attorney General.

Ana Muñoz, Joseph Michalakes, & Audrey Richardson, Roslindale, for Massachusetts Employment Lawyers Association & another.

James Reilly Dolan, of Maryland, Joel Marcus & Matthew M. Hoffman, of the District of Columbia, & Bradley Grossman for Federal Trade Commission.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Opinion

WENDLANDT, J.

***1** In this case, we answer the following certified question regarding G. L. c. 149, § 148B (independent contractor statute): [5]

> "Whether the three-prong test for independent contractor status set forth in [the independent contractor statute] applies to the relationship between a franchisor and its franchisee, where the franchisor must also comply with the FTC Franchise Rule." [6]

We conclude that, where a franchisee is an "individual performing any service" for a franchisor, G. L. c. 149, § 148B, the three-prong test set forth in the independent contractor statute applies to the relationship between a franchisor and the individual and is not in conflict with the franchisor's disclosure obligations prescribed by the FTC Franchise Rule. [7]

1. Background. We recite the facts as stated by the certifying court. The plaintiffs have entered into franchise agreements with the defendant, 7-Eleven, Inc. (7-Eleven), and operate 7-Eleven branded convenience stores in the Commonwealth. Pursuant to these agreements, the plaintiffs "are obligated to operate their convenience stores around the clock, stock inventory sold by 7-Eleven's preferred vendors, utilize the 7-Eleven payroll system to pay store staff, and adhere to a host of other guidelines." Patel v. 7-Eleven, Inc., 8 F.4th 26, 28 (1st Cir. 2021). The agreements classify the plaintiffs as independent contractors. Id. The plaintiffs do not receive a "regular salary"; "[i]nstead, each plaintiff may draw pay from [his or her] store's gross profits, after paying various fees required by the franchise agreement to 7-Eleven for the privilege of doing business with it." Id.

***2** The plaintiffs filed a complaint in the Superior Court, alleging that they are, in fact, 7-Eleven employees and have been misclassified as independent contractors in violation of the independent contractor statute, as well as G. L. c. 149, § 148 (wage act), and G. L. c. 151, §§ 1, 7 (minimum wage law). The case was removed to the United States District Court for the District of Massachusetts. On cross motions for summary judgment, a Federal judge allowed summary judgment in favor of 7-Eleven; relying on Monell v. Boston Pads, LLC, 471 Mass. 566, 31 N.E.3d 60 (2015), he concluded that the independent contractor statute does not apply to franchisee-franchisor relationships because there is an "inherent conflict" between the independent contractor statute and the FTC Franchise Rule. Patel v. 7-Eleven, Inc., 485 F. Supp. 3d 299, 309 (D. Mass. 2020).

The plaintiffs appealed. Explaining that "there appears to be a conflict between the [independent contractor statute] and the 'exert[ing] ... control' prong of the FTC Franchise Rule," the certifying court certified the aforementioned question. Patel, 8 F.4th at 28.

2. Discussion. We begin with an overview of the two relevant laws -- the independent contractor statute and the FTC Franchise Rule -- to guide our analysis.

a. Independent contractor statute. The independent contractor statute "establishes a standard to determine whether an individual performing services for another shall be deemed an employee or an independent contractor for purposes of our wage statutes," G. L. c. 149 and G. L. c. 151. Somers v. Converged Access, Inc., 454 Mass. 582, 589, 911 N.E.2d 739 (2009). Proper classification is important to the determination of the protections afforded to an individual under the wage statutes. Classification as an "employee" generally entitles an individual to, inter alia, timely payment of wages earned, and holiday and vacation payments due, G. L. c. 149, § 148; a minimum wage, G. L. c. 151, § 1; overtime pay, G. L. c. 151, § 1B; and a private cause of action to enforce these rights, along with the ability to recover the costs of litigation, attorney's fees, and liquidated damages (in the form of treble damages for lost wages and other benefits) for violations of the wage statutes, G. L. c. 149, § 150, and G. L. c. 151, § 1B. Individuals who are not classified as "employees" do not enjoy these statutory protections. Thus, we have recognized that "[a] legislative purpose behind the independent contractor statute is to protect employees from being deprived of the benefits enjoyed by employees through their misclassification as independent contractors." Somers, supra at 592, 911 N.E.2d 739.

Employers who misclassify employees as independent contractors enjoy what might be viewed as a windfall. Misclassification permits an employer to avoid its statutory obligations to its workforce. Misclassification further allows employers to shift certain financial burdens to the Commonwealth and the Federal government.[8] In addition, misclassification "gives an employer ... an unfair competitive advantage over employers who correctly classify their employees and bear the concomitant financial burden."[9] Somers, 454 Mass. at 593, 911 N.E.2d 739. See S. Leberstein & C. Ruckelshaus, National Employment Law Project, Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It, at 1 (May 2016) ("Whether companies treat their workers as employees or independent contractors has profound implications for workers' pay and benefits, for employers, and for public revenues").

***3** The independent contractor statute aims to curb this unwarranted windfall. It evinces the Legislature's broad, remedial intent "to protect workers by classifying them as employees, and thereby grant them the benefits and rights of employment, where the circumstances indicate that they are, in fact, employees." Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 620, 990 N.E.2d 1054 (2013), quoting Taylor v. Eastern Connection Operating, Inc., 465 Mass. 191, 198, 988 N.E.2d 408 (2013). See Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321, 327, 28 N.E.3d 1139 (2015). To that end, the statute does not cabin "employees" to those individuals under the control and direction of a putative employer, as provided under the common law. See Chambers v. RDI Logistics, Inc., 476 Mass. 95, 104, 65 N.E.3d 1 (2016) ("In enacting the [independent contractor] statute, the Legislature intended to provide greater protection than did the common-law 'right to control' test that previously governed misclassification claims"); Advisory 2008/1, Attorney General's fair labor and business division, at 2 (Advisory 2008/1) (tracking evolution of employee classification tests from common-law control and direction test to independent contractor statute).

Instead, the statute evidences the Legislature's intent to cast a wider net. It sets forth a presumption that "an individual performing any service" for a putative employer "shall be" considered an "employee" for purposes of the wage statutes. G. L. c. 149, § 148B. See Sebago, 471 Mass. at 327, 28 N.E.3d

1139. Once the individual has shown the performance of services for the putative employer, the alleged employer may rebut the presumption by establishing each of the following three prongs (known as the "ABC test") by a preponderance of the evidence:

> "(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
>
> "(2) the service is performed outside the usual course of the business of the employer; and,
>
> "(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed."

G. L. c. 149, § 148B (a). See Somers, 454 Mass. at 589, 911 N.E.2d 739. If any one of these criteria is not shown, the statute directs that the individual is an employee for purposes of our wage statutes and entitled to the protections set forth therein. See Sebago, supra at 327, 28 N.E.3d 1139.

Employers who misclassify their employees do so at their peril. See G. L. c. 149, § 148B (d) (providing criminal and civil remedies for violations of wage statutes); G. L. c. 149, § 27C (authorizing various penalties, including fines, imprisonment, and civil penalties). An individual who successfully shows that he or she has been misclassified "shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees." G. L. c. 149, § 150. See Somers, 454 Mass. at 589-590, 911 N.E.2d 739. These sanctions apply to both business entities and certain individual officers. G. L. c. 149, § 148B (d) ("Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section"). See Advisory 2008/1, supra at 4-5 (explaining that G. L. c. 149, § 148B [d], "creates liability for both business entities and individuals, including corporate officers, and those with management authority over affected workers").

b. FTC Franchise Rule. The FTC Franchise Rule does not concern employee misclassification; instead, it was adopted in the late 1970s in response to widespread deception in the sale of franchises, including misrepresentations related to the costs to purchase a franchise and the terms and conditions under which a franchise would operate. These misrepresentations lured unsuspecting and often unsophisticated prospective franchisees with false promises regarding potential earnings. 43 Fed. Reg. 59,614, 59,625 (1978). To address these problems, the FTC Franchise Rule considers a franchisor's failure to provide presale disclosures specified in the rule to a prospective franchisee to be an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). See 16 C.F.R. §§ 436.2, 436.9. It also prohibits a franchisor from making unilateral, material alterations to the terms and conditions of the franchise agreement without providing timely notice to the franchisee. 16 C.F.R. § 436.2(b).

***4** These disclosure requirements apply to, among others, "franchisors," which includes "any person who grants a franchise and participates in the franchise relationship." 16 C.F.R. § 436.1(k). A "franchise," in turn, is defined as a continuing commercial relationship where, inter alia, the franchisor "will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation." 16 C.F.R. § 436.1(h)(2). [10] Thus, under the FTC Franchise Rule, the required disclosures are triggered when a prospective franchisor makes one of two elections -- either to exert a significant degree of control over the franchisee's method of operation or to provide significant assistance in the franchisee's method of operation.

c. Statutory construction. With this background in mind, we turn to the certified question, which is one of statutory construction. Accordingly, our analysis begins with "the 'principal source of insight into legislative intent' " -- the plain language of the statute. Tze-Kit Mui v. Massachusetts Port Auth., 478 Mass. 710, 712, 89 N.E.3d 460 (2018), quoting Water Dep't of Fairhaven v. Department of Envtl. Protection, 455 Mass. 740, 744, 920 N.E.2d 33 (2010). If the statutory language is clear and unambiguous, it is "conclusive as to legislative intent." Monell, 471 Mass. at 575, 31 N.E.3d 60. "Where[, however,] the meaning of a statute is not plain from its language, familiar principles of statutory construction guide our interpretation." DiFiore v. American Airlines, Inc., 454 Mass. 486, 490, 910 N.E.2d 889 (2009).

> "[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated."

Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749, 840 N.E.2d 518 (2006), quoting Hanlon v. Rollins, 286 Mass. 444, 447, 190 N.E. 606 (1934).

The plain language of the independent contractor statute neither expressly includes nor expressly excludes franchisees from its reach. Thus, it does not itself answer the certified question. Nonetheless, the Legislature's silence is instructive because it contrasts sharply with other wage and employment-related statutes in which the Legislature has demonstrated its intent to exclude certain categories of workers by express language. See, e.g., G. L. c. 149, § 148 (specifying wage act does not apply to certain hospital employees, employees of cooperative association, or "casual employees"); G. L. c. 152, § 1 (4) (excluding certain workers from definition of "employee" in connection with workers' compensation statute). Therefore, it is apt that, "[f]rom this silence, we infer that the Legislature intended the criteria for identifying independent contractors to be applied in the context" of the franchise relationship. Sebago, 471 Mass. at 328, 28 N.E.3d 1139.

***5** This conclusion is bolstered by the statute's broad remedial purpose. See Monell, 471 Mass. at 575, 31 N.E.3d 60 ("a remedial statute ... should be given a broad interpretation ... in light of its purpose ... to promote the accomplishment of its beneficent design" [quotation and citation omitted]). In fact, we have previously observed that, in light of the independent contractor statute's remedial design, "it would be an error to imply ... a limitation where the statutory language does not require it." Depianti, 465 Mass. at 621, 990 N.E.2d 1054, quoting Psy-Ed Corp. v. Klein, 459 Mass. 697, 708, 947 N.E.2d 520 (2011). By contrast, categorically excluding franchise relationships from the statute's ambit would permit employers to evade obligations under the wage statutes merely by labeling what is actually an employment relationship as a "franchise" relationship, allowing employers to foil the legislative intent to protect workers as employees when they are, in fact, employees. See Depianti, supra at 619-620, 990 N.E.2d 1054 (rejecting claim that statute does not apply absent written employment contract in view of statute's remedial nature).

Moreover, we have rejected the argument that the independent contractor statute should not apply where an industry is separately or even highly regulated. See Sebago, 471 Mass. at 328, 28 N.E.3d 1139 (absent any legislative intent to exclude highly regulated taxicab industry, we "infer that the Legislature intended the criteria for identifying independent contractors to be applied in the context of [even a highly regulated] industry"). Notably, we have applied a nearly identical ABC test (from the unemployment compensation statute, G. L. c. 151A, § 2 [a]-[c]) in the context of a franchise relationship. See Coverall N. Am., Inc. v. Commissioner of the Div. of Unemployment Assistance, 447 Mass. 852, 857-859, 857 N.E.2d 1083 (2006) (affirming division decision in view of franchisor's failure to make required showing under third prong of ABC test).

d. Purported conflict between ABC test and FTC Franchise Rule. The certifying court suggests a conflict between the first prong of the independent contractor statute and the FTC Franchise Rule that could "impact[ ] untold sectors of workers and business owners across the Commonwealth." Patel, 8 F.4th at 29.[11] 7-Eleven contends that classifying franchisees as employees under the statute places the entire market for franchise relationships in the Commonwealth at risk.[12] We examine the asserted conflict and 7-Eleven's dire predictions in view of "[o]ur respect for the Legislature's considered judgment[, which] dictates that we interpret the statute to be sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation." Hovagimian v. Concert Blue Hill, LLC, 488 Mass. 237, 241, 172 N.E.3d 728 (2021), quoting Meshna v. Scrivanos, 471 Mass. 169, 173, 27 N.E.3d 1253 (2015). See Commonwealth v. Dodge, 428 Mass. 860, 865, 705 N.E.2d 612 (1999), quoting Beeler v. Downey, 387 Mass. 609, 616, 442 N.E.2d 19 (1982) ("[w]e must read the statute in a way to give it a sensible meaning"). As the United States Supreme Court has observed regarding Congress, the Legislature "does not, one might say, hide elephants in mouseholes." Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001).

***6** Here, however, we are not faced with a conflict between a construction of the independent contractor statute such that it applies in the franchise context, on the one hand, and a franchisor's required compliance with the FTC Franchise Rule, on the other. The FTC Franchise Rule "is a pre-

sale disclosure rule. While the Rule requires franchisors to provide a Financial Disclosure Document to prospective purchasers, it does not regulate the substantive terms of the franchisor-franchisee relationship." Letter from Federal Trade Commission Chair Joseph Simons to Representative Jan Schakowsky, at 1 (Oct. 15, 2020). Compliance with these disclosure requirements does not mandate that a franchisor exercise any particular degree of control over a franchisee. Rather, the regulation establishes rules for when the franchisor chooses to exercise a certain degree of control. Indeed, even where a franchisor does not exercise any control over the franchisee's method of operation, the FTC Franchise Rule's disclosure obligations are triggered so long as the franchisor "provide[s] significant assistance in the franchisee's method of operation" (emphasis added). 16 C.F.R. § 436.1(h)(2).

To be sure, the FTC Franchise Rule's disclosure obligations are also triggered where the franchisor elects to exercise a "significant degree of control over the franchisee's method of operation." 16 C.F.R. § 436.1(h)(2). It is this election that appears to be at the nub of the certifying court's concern. Specifically, the court was troubled that a franchisor that elects to exercise a "significant degree of control over the franchisee's method of operation" might not be able to show that the individual is "free from control and direction in connection with the performance of the service," under the first prong of the ABC test. G. L. c. 149, § 148B.

Even where the franchisor makes that election, however, the FTC Franchise Rule's disclosure obligations do not run counter to proper classification of employees under the independent contractor statute. Thus, the identified "conflict" between the FTC Franchise Rule and the independent contractor statute rests on a misapprehension of what the former requires -- that is, timely disclosures to the prospective franchisee.

Our decision in Monell is inapposite. [13] There, we addressed an actual conflict between two State statutes. [14] Here, we do not face a conflict between two State laws. Instead, we are asked to consider whether a conflict exists between Federal regulations and the first prong of the State independent contractor statute. Conflicts between Federal and State laws are governed by the principles of preemption. See, e.g., Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 368, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986); Roma, III, Ltd. v. Board of Appeals of Rockport, 478 Mass. 580, 587, 88 N.E.3d 269 (2018). Under those principles, as applicable to the case at hand, the FTC Franchise Rule preempts the independent contractor statute only if the latter "actually conflicts" with the former in the sense that "it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (quotation and citation omitted). English v. General Elec. Co., 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). [15]

***7** We are presented with no such conflict. A franchisor can comply with the FTC Franchise Rule to make the prescribed disclosures, and in situations where a franchisee is deemed an employee under the independent contractor statute, the franchisor can comply with its obligations under the wage statutes. Compliance with these latter obligations does not render it impossible for a franchisor to comply with the FTC Franchise Rule. The FTC Franchise Rule supports this conclusion. It states that "[t]he FTC does not intend to preempt the franchise practices laws of any state or local government, except to the extent of any inconsistency with [the FTC Franchise Rule]," and that "[a] law is not inconsistent with [the FTC Franchise Rule] if it affords prospective franchisees equal or greater protection." 16 C.F.R. § 436.10(b).

Setting aside that compliance with the FTC Franchise Rule only requires certain timely disclosures, the franchisor's election to exercise "a significant degree of control over the franchisee's method of operation" does not render every franchisee an employee under the first prong of the ABC test; the two tests are not the same. This is because "control over the franchisee's method of operation" does not require a franchisor to exercise "control and direction" in connection with the franchisee's "performing any service" for the franchisor -- the relevant inquiry under the first prong of the ABC test. That the election under the FTC Franchise Rule and the first prong of the ABC test employ the same word -- control -- does not create an inherent conflict. Indeed, "significant control" over a franchisee's "method of operation" and "control and direction" of an individual's "performance of services" are not necessarily coextensive. Cf. Goro v. Flowers Foods, Inc., U.S. Dist. Ct., No. 17-CV-2580 TWR (JLB), 2021 WL 4295294 (S.D. Cal. Sept. 21, 2021) ("For example, the phrase 'method of operation' in the FTC Franchise Rule is broader than the phrase 'performance of ... [services]' appearing in the ABC Test. While a franchisor may dictate that a franchisee include certain food items on its menu, that does not mean that a franchisor must

dictate the franchisee's hiring decisions, the layout of its kitchen, or the wages it pays its employees"); Wickham v. Southland Corp., 168 Cal. App. 3d 49, 54, 213 Cal.Rptr. 825 (1985) (franchisor's exercise of significant control over business operations not equivalent to control over franchisee's performance of services where franchisee hired and fired, set wages for and instructed employees, and controlled day-to-day store operations).

Courts in other jurisdictions have found franchisors electing to assert significant control over the franchisee's method of operation to have made the requisite showing under the first prong of the ABC test or its equivalent. See, e.g., Haitayan v. 7-Eleven, Inc., U.S. Dist. Ct., Nos. 17-7454 DSF (ASx), 18-5465 DSF (ASx), 2021 WL 4078727 (C.D. Cal. Sept. 8, 2021) (applying common-law right to control test, akin to first prong of ABC test, and finding franchisees were not employees where franchisees controlled "when they work, how much they work, and when they take vacations," employed multiple individuals, and exercised control over "the hiring, firing, wages, discipline, scheduling and staffing of their employees"); 7-Eleven, Inc. v. Sodhi, U.S. Dist. Ct., No. 13-3715 (MAS) (JS), 2016 WL 3085897 (D.N.J. May 31, 2016) (franchisee was not employee under Fair Labor Standards Act's definition of "employee," which includes analysis of right to control similar to first prong of ABC test, where, inter alia, franchisee did not have regular schedule, wore specified uniform only sporadically, traveled around country on business unrelated to franchisor, was "hands off" in his management of convenient store, had other business ventures, and set store prices); Jan-Pro Franchising Int'l, Inc. v. Depianti, 310 Ga. App. 265, 267-268, 712 S.E.2d 648 (2011) (applying first prong of ABC test and concluding that franchisor, which did not pay subfranchisee and did not hold accounts serviced by subfranchisee or invoice customers to whom subfranchisee provided direct cleaning services, was not employer). [16]

***8** Given that the first prong of the ABC test incorporates the common-law "right to control" test that preceded the enactment of the independent contractor statute, this result is not surprising. Chambers, 476 Mass. at 104, 65 N.E.3d 1 ("the 'right to control' test is incorporated in the first prong of the [independent contractor] statute"). See Dynamex Operations W., Inc. v. Superior Court, 4 Cal. 5th 903, 958, 232 Cal.Rptr.3d 1, 416 P.3d 1 (2018) (acknowledging that worker who would be considered employee under common-law test "would, a fortiori, also properly be treated as an employee" for purposes of first prong of ABC test). Thus, application of the first prong of the ABC test to franchise relationships can hardly be considered a barrier to such relationships given that the previous direction and control test has not presented an insurmountable hurdle. See, e.g., D. Swift, C. Niu, L. Despradel, & C. Li, FRANdata, Franchise Business Economic Outlook 2020: Franchise Growth Continues, at 8 (2019) (citing, in report prepared for International Franchise Association, steady growth of number of franchises across country); International Franchise Association, Economic Impact of Franchising in Massachusetts (estimating over 12,400 franchise establishments existed in Commonwealth in 2020).

To the contrary, despite 7-Eleven's dire predictions that application of the ABC test to franchise relationships will end franchising in the Commonwealth, other courts have done so apparently without the predicted apocalyptic end of franchise arrangements in their respective jurisdictions. See, e.g. Mujo v. Jani-King Int'l, Inc., 13 F.4th 204, 210 (2d Cir. 2021) ("individual can be an employee ... if an application of the ABC test would deem that individual an employee, even if that same individual is also a franchisee"); Vazquez v. Jan-Pro Franchising Int'l, Inc., 986 F.3d 1106, 1124 (9th Cir. 2021) (upholding application of ABC test to franchises); Jason Robert's, Inc. v. Administrator, Unemployment Compensation Act, 127 Conn. App. 780, 787-788, 15 A.3d 1145 (2011) (holding ABC test applies to franchises). Cf. Williams v. Jani-King of Philadelphia, Inc., 837 F.3d 314, 324-325 (3d Cir. 2016) (noting, in class certification appeal, that "[a] franchisee may be an employee or an independent contractor depending on the nature of the franchise system controls"). Indeed, as we noted supra, we also have applied a nearly identical ABC test in the franchise context, yet franchising continues in the Commonwealth. [17] Coverall N. Am., Inc., 447 Mass. at 857-859, 857 N.E.2d 1083.

e. Additional guidance. We respond briefly to the certifying court's invitation for "any further guidance ... on any other relevant aspect of Massachusetts law that [we] believe[ ] would aid in the proper resolution of the issues presented here." Patel, 8 F.4th at 29.

***9** First, nothing in the independent contractor statute prohibits legitimate franchise relationships among independent entities that are not created to evade employment obligations under the wage statutes. See Advisory 2008/1, supra at 5 ("The [office of the Attorney General] is cognizant that there are legitimate independent contractors

and business-to-business relationships in the Commonwealth. These business relationships are important to the economic wellbeing of the Commonwealth and, provided that they are legitimate and fulfill their legal requirements, they will not be adversely impacted by enforcement of the [independent contractor statute]. The difficulty arises when businesses are created and maintained in order to avoid the [independent contractor statute]").

Second, distinguishing between legitimate arrangements and misclassification requires examination of the facts of each case, which begins with a threshold determination whether the putative employee "perform[s] any service" for the alleged employer. G. L. c. 149, § 148B. This threshold is not satisfied merely because a relationship between the parties benefits their mutual economic interests. See Jinks v. Credico (USA) LLC, 488 Mass. 691, 696 (2021). Nor is required compliance with Federal or State regulatory obligations enough, in isolation, to satisfy this threshold inquiry. See Sebago, 471 Mass. at 329-331, 28 N.E.3d 1139 (compliance with regulatory leasehold mandated by regulations was not dispositive in determining whether individual "performs any service" for putative employer).

Third, we briefly address 7-Eleven's contention that, because compliance with the FTC Franchise Rule necessarily renders every franchisee an employee for purposes of the Massachusetts wage statutes, and because such a finding precludes charging a franchisee fee pursuant to our decision in Awuah v. Coverall N. Am., Inc., 460 Mass. 484, 498, 952 N.E.2d 890 (2011), the entire franchise model in the Commonwealth is in jeopardy. As discussed supra, 7-Eleven's fear rests on the faulty premise that application of the ABC test will result in every franchisee being classified as an employee of the franchisor. In addition, in Awuah, we concluded that "to the extent that such [franchise] fees are paid back to [the franchisor] out of wages earned from [the franchisor], they represent a prohibited assignment of an employee's future wages to his employer." Id. at 498, 952 N.E.2d 890. This does not mean, of course, that, where appropriate, a franchise fee cannot be assessed as a cost of doing business deductible from gross revenue rather than from wages, even if, under the ABC test, the franchisee is deemed to be an employee. See id. at 493 n.20, 952 N.E.2d 890 (acknowledging that Federal court's treatment of gross revenue as equivalent to wages involved "a strained interpretation" that failed to account for other costs of doing business). See also Mujo, 13 F.4th at 212 ("Even assuming that the franchisees are employees who receive wages, the deducted [franchise] fees are not wages under the [Connecticut minimum wage] statute").

We express no opinion as to how the ABC test applies to the facts of the present case. See Depianti, 465 Mass. at 619 n.14, 990 N.E.2d 1054.

3. Conclusion. For the reasons stated, we conclude that the independent contractor statute applies to the franchisor-franchisee relationship and is not in conflict with the franchisor's disclosure obligations set forth in the FTC Franchise Rule.

The Reporter of Decisions is to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of the court, to the clerk of the United States Court of Appeals for the First Circuit, as the answer to the question certified, and will also transmit a copy to each party.

All Citations

--- N.E.3d ----, 2022 WL 869486

Footnotes

1 Individually and on behalf of all others similarly situated.

2 Safdar Hussain, Vatsal Chokshi, Dhaval Patel, and Niral Patel, individually and on behalf of all others similarly situated.

3 Mary Cadigan and Andrew Brothers. All claims against Cadigan and Brothers have been dismissed.

4 DPNEWT01, DP Tremont Street Inc., and DP Jersey Inc.

5 A panel of the United States Court of Appeals for the First Circuit (certifying court) certified the question pursuant to S.J.C. Rule 1:03, as appearing in 382 Mass. 700 (1981), which provides in relevant part:

> "This court may answer questions of law certified to it by ... a Court of Appeals of the United States ... when requested by the certifying court if there are involved in any proceeding before it questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court."

6 The Federal Trade Commission (FTC) has promulgated a series of regulations regarding franchises, 16 C.F.R. §§ 436.1 et seq., to which the certifying court referred collectively as the "FTC Franchise Rule."

7 We acknowledge the amicus briefs submitted by the Chamber of Commerce of the United States of America and the Small Business Legal Center of the National Federation of Independent Business; Financial Services Institute, Inc.; the Life Insurance Association of Massachusetts, Securities Industry and Financial Markets Association, American Council of Life Insurers, and National Association of Insurance and Financial Advisors; the Retailers Association of Massachusetts; the International Franchise Association and Dunkin' Brands, Inc.; the Attorney General; the Massachusetts Employment Lawyers Association and the Immigrant Worker Center Collaborative; and the Federal Trade Commission.

8 Employers who misclassify employees as independent contractors enjoy unwarranted reprieve from financial contributions to, inter alia, Social Security and Medicare, unemployment insurance, and workers' compensation, and from employee income tax withholdings. See Somers, 454 Mass. at 592-593, 911 N.E.2d 739, citing 26 U.S.C. § 3102 (2006) (Federal tax withholding); G. L. c. 62B, § 2 (State tax withholding); G. L. c. 151A, § 14 (employee unemployment insurance); G. L. c. 152, § 25A (workers' compensation insurance); 830 Code Mass. Regs. § 62B.2.1(4)(a)(1) (2005) (employer's payroll tax obligations).

9 See Advisory 2008/1, Attorney General's fair labor and business division, at 1 ("Misclassification undermines fair market competition and negatively impacts the business environment in the Commonwealth"); F. Carré, Economic Policy Institute, (In)dependent Contractor Misclassification, at 5 (June 8, 2015) ("employers who play by the rules ... are disadvantaged by higher labor and administration costs relative to employers that misclassify").

10 The FTC Franchise Rule defines a "franchise" as "any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

"(1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;

"(2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and

> "(3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate."

16 C.F.R. § 436.1(h).

11 In particular, the certifying court stated that "there appears to be a conflict" between the first prong of the independent contractor statute, on the one hand, and the FTC Franchise Rule, on the other. Compliance with the latter, the court believed, would potentially make every franchisee an employee. Patel, 8 F.4th at 28-29.

12 7-Eleven maintains that requiring franchisors to make the requisite showing under the first prong of the ABC test (that the franchisee is "free from control and direction" in connection with the performance of services for the franchisor) necessarily conflicts with the FTC Franchise Rule, which defines a franchisor as, inter

alia, an entity that exercises significant control over a franchisee's method of operation. 7-Eleven contends that the Legislature must have intended to exclude such relationships from application of the independent contractor statute altogether.

13 The Federal District Court judge relied on Monell in connection with his summary judgment decision. Patel, 485 F. Supp. 3d at 310. For the reasons set forth infra, we agree with the certifying court that Monell did not "decide the issue presented in this case." Patel, 8 F.4th at 29.

14 Monell concerned a conflict between the independent contractor statute and the real estate licensing statute, which required a real estate salesperson to conduct real estate business only as a representative of a real estate broker and prohibited a real estate salesperson from operating his or her own real estate business. Monell, 471 Mass. at 572-573, 31 N.E.3d 60. Compliance with these regulatory requirements made it impossible for a real estate broker to satisfy either the second prong or the third prong of the independent contractor statute, id. at 575, 31 N.E.3d 60; yet, the real estate licensing statute expressly authorized a real estate salesperson to affiliate with a broker either as an employee or as an independent contractor, id. at 576, 31 N.E.3d 60. Guided by the canon of statutory construction that a specific statute controls over provisions of a general statute, id. at 577, 31 N.E.3d 60, we concluded that the independent contractor statute did not apply to real estate brokers. In doing so, we emphasized "the limited nature of our holding." Id.

15 Preemption can be either express, as evidenced through congressional statement or enactment, or implied. English, 496 U.S. at 78-79, 110 S.Ct. 2270. Preemption may be implied either through an actual conflict or through "field preemption," such as when a State law "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." Id. at 79, 110 S.Ct. 2270. Neither express nor field preemption is at issue in this case.

16 The controls required under the Lanham Act, 15 U.S.C. § 1064(5)(A), do not themselves preclude the showing required under the first prong of the ABC test. Cf. Depianti, 465 Mass. at 615, 990 N.E.2d 1054, quoting Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1327 (7th Cir. 1979) ("the controls that franchisors are required to maintain under the Lanham Act are not intended 'to create a [F]ederal law of agency ... [or to] saddle the licensor with the responsibilities under [S]tate law of a principal for his agent' ").

17 While the certifying court and the parties have focused on the first prong of the ABC test, we note that courts have also found franchisors to have satisfied the second prong of the test or its equivalent, requiring the putative employer to show that the service is performed outside the usual course of the business of the employer. See, e.g., Haitayan, U.S. Dist. Ct., Nos. 17-7454 DSF (ASx), 18-5465 DSF (ASx) (C.D. Cal. Sept. 8, 2021) (franchisees operating convenience stores conduct business outside franchisor's core business of franchising); Jan-Pro Franchising Int'l, Inc., 310 Ga. App. at 268-269, 712 S.E.2d 648 (finding second prong satisfied because franchisor's business was to establish trademark and cleaning system and then license it to franchisees whereas franchisee marketed to, invoiced, and collected payment from clients).

Franchisors have similarly been held to have satisfied the third prong of the ABC test, requiring the putative employer to show that the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. See, e.g., Jan-Pro Franchising Int'l, Inc., supra at 269-270, 712 S.E.2d 648 (franchisee wears "different hat" from franchisor, satisfying requisite showing under third prong of ABC test, where franchisee can expand operations and work for several clients). Of course, any analysis of whether the ABC test is met must be done on a case-by-case basis. By citing these cases, we do not suggest any particular result under the facts of the present case.