

# PUBLICATION

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## Oregon Affirms Commitment to Franchisee as Employee Ruling

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The Oregon Court of Appeals recently affirmed its 2009 interpretation of Oregon's unemployment insurance act to cast franchisees of cleaning services as employees, rather than franchisees and independent contractors, of the franchisor. In *Gross v. Oregon Unemployment Department*,<sup>1</sup> a computer repair service provider called "Rent A Nerd" (RAN) matched customers in need of computer repair or other assistance with independent computer technicians. The technician arranges to visit with the referred customer, uses the technician's own tools, location and effort to resolve the repair issue or refers the customer to another RAN technician, and collects the repair fees and parts charges from the customer. Twice a month, the technician files a report and pays the RAN entity its share of the collected fees. The technicians were given written guidelines to follow in the performance of their services. The issue of whether this arrangement is a franchise under the Federal Trade Commission Franchise Rule,<sup>2</sup> or the Oregon franchise statute<sup>3</sup> was not an element in the case or the decision, but the business model resembles franchises operating in the computer and home services space.

After leaving the RAN world, a technician applied for unemployment benefits. The Oregon Employment Department (OED) investigated and determined that RAN was structured as an employment arrangement. The owner of RAN was assessed for unemployment taxes. He appealed the decision and an administrative law judge affirmed the OED's determination and assessment. The RAN owner then appealed to the Oregon Court of Appeals, which agreed with the OED and its judge that the arrangement was employment and was not an independent contractor arrangement. The court dismissed the RAN owner's arguments that the technicians were *his* employer or *he* was the independent contractor in the relationship. The court endorsed the OED's reasoning, which relied heavily on RAN's claim that the retail customers were customers of RAN and not customers of the individual technicians. Customer "ownership" and good will retention is one of the hallmarks of a franchise system; the concept forms a key part of the system's value – loyalty is to the brand and not to the individual store.

To reach its conclusions, the court drew heavily on its 2009 decision in *Employment Dept. v. National Maintenance Contractors*,<sup>4</sup> in which it construed the definitions of "employment," "services" and "remuneration" under the Oregon unemployment insurance contribution statute<sup>5</sup> to cause it to apply to a commercial cleaning franchise. Like most franchises in that genre, the customers were expressly owned by the franchisor and it collected the cleaning fees, deducted its franchise fee and paid the balance over to the franchisee operator of the business. The court held that the franchise arrangement was in effect subcontracting of cleaning services by the franchisor to the franchisees, and thus within the ambit of the unemployment insurance contribution statute.

But in this computer technician case, the relationship is much more akin to a conventional franchise. The court's recitation of the business model explained:

[RAN]'s business arrangement did not simply involve the payment of a finder's fee by the technicians in exchange for receiving a stream of referrals. Here, the technicians were required to abide by certain written guidelines and oral expectations given to them by [RAN]...at the time they were approved to begin receiving referrals. [RAN] set a common fee structure for the technicians, he provided the technicians with a common

invoice form, he chose the technicians to whom he referred customer inquiries, he required the technicians to keep him apprised of any customer appointments, and he prohibited the technicians from being directly contacted by the customers, even when a customer was dissatisfied with the technician's work. Instead, all calls from customers were required to be made to petitioner. Accordingly, [RAN] remained involved in the relationship between the technician and the customer throughout its duration. Indeed, the very nature of [RAN]'s business arrangement prevented the technicians from independently taking on repeat business from the customers.<sup>6</sup>

This court was not persuaded that the referral service element of the relationship removed it from the employment context, and it referenced franchising as an analogous business model for purposes of the Oregon unemployment statute.

These Oregon cases reveal an additional risk to franchise systems using the high-service, no-office, business model that has become so popular as capital for bricks and mortar franchises has become so difficult to assemble or borrow. Franchisors using the high service model typical of commercial cleaning, mobile facility, employment agency and similar concepts will need to assess whether Oregon is a friendly environment for business expansion. This court pays no heed to the mischief that could arise from its ruling, and whether carefully crafted liability allocations and risk management planning of franchise systems operating in Oregon are thrown in jeopardy by Oregon's insatiable quest for unemployment insurance contributions.

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1. 237 Ore. App. 671; 240 P.3d 1130; 2010 Ore. App. LEXIS 1198; Unemployment Ins. Rep. (CCH) P8922

2. 16 CFR Part 436.1(h).

3. OR. Rev. Stat. § 650.005(4)

4. 226 Ore. App. 473, 204 P.3d 151, rev den, 346 Ore. 363, 213 P.3d 577 (2009).

5. OR. Rev. Stat. § 657.030.

6. 237 Or. App. at 686.