

## **To Suffer or Permit to Work**

Hey, this episode is chapter three in a series. You'll love it even more if you start from the beginning.

**(Phone ringing)**

**Jacques: Hello**

**Krissy: Hi, is this Jacques?**

**Jacques: Yes, it is.**

**Krissy Clark:** The first time I called Jacques Lapointe, it was just to set up an interview with him. Still, when I'm reporting a story, I try to record everything I do. You never know what might happen.

**Krissy: Can I record you as we're talking right now?**

**Jacques: Oh yeah, sure sure sure.**

**Krissy: Ok, hold on one second.**

**Krissy Clark:** Jacques is the founder of Jan-Pro, the commercial cleaning company that Jerry Vazquez bought his janitorial franchise from. The commercial cleaning company where Jerry says he ended up making less than minimum wage, and felt like an exploited employee, even though Jan-Pro said he was an independent contractor.

I wanted to get Jacques's perspective on all this, as the founder of Jan-Pro and the one who developed its whole business model.

But this first call was just about logistics to find a good time to talk. Our phone connection was pretty bad. I wanted to see when we could set something up with better quality.

**Jacques: Hang on I'll look at my calendar right now. Next week, I'm pretty good.**

**Krissy Clark:** But Jacques Lapointe is the kind of guy who when you call him to do just a quick logistical thing, you quickly find he has taken you deep into his world. Before I knew it, he was telling me about some kind of trouble he was having with his SL? Which, I had no idea what he was talking about....

**Jacques:** No one could figure out what was wrong with it, it was bouncing and when it was bouncing the lights would go on you know I was always worried about it. So I go to this place.

**Krissy:** And this is a problem with your what?

**Jacques LaPointe:** With my... my SL. My Mercedes SL, it was bouncing. So I go to this place.

**Krissy Clark:** Jacques is also the kind of guy that when he goes to a mechanic to get his bouncing Mercedes SL fixed, he gives that mechanic his Jan-Pro business card. I get the feeling Jacques gives everyone his Jan-Pro business card.

**Jacques:** So anyway, get the thing fixed. While I'm talking with him, I hand them my Jan-Pro card and he said, oh, he looked at this. He said, Mr. Jacques. He said, you know, my father, he cleans four supermarkets at night.

**Krissy Clark:** Jacques is passionate about Jan-Pro. He seems to think everyone should consider buying a Jan-Pro franchise - including, I'm pretty sure, me.

**Jacques LaPointe:** Because you...you're a female. I'll say this to you. Do you know that more women today are buying franchises than men are percentage wise?

**Krissy:** I did not know that.

**Jacques LaPointe:** Yeah. Well, I wrote it. I did the research, believe me, when I tell you it's a fact.

**Krissy Clark:** I hadn't even started asking him any of the questions I had about his company, but he had basically jump-started the interview for me. His motor was revving and his talking points were on full blast.

Jacques told me how he began Jan-Pro in 1991 in Rhode Island. How he thought having janitors who were independent contractors, in business for themselves meant they'd do a better job - be more invested in the work.

Jacques told me how from small beginnings, Jan-Pro was now an internationally known brand.

**Jacques LaPointe:** Jan-Pro recently sold for \$116 million.

**Krissy Clark:** I couldn't verify this, cus the details of that sale weren't disclosed but I do know that the parent company is big. It now has more than eight thousand unit franchisees, and does more than five hundred million dollars in global sales.

**Jacques: So I don't want to think this is a nothing business.**

**Krissy Clark:** Jacques told me he knew Jan-Pro unit franchisees who have done really well. Like this one guy -

**Jacques: He was foreign. Foreign, I believe, either South American or something like that. But I mean, a legitimate guy and all but, and he built his little Jan-Pro business under the master doing a million dollars a year.**

**Krissy Clark:** And that brought Jacques to his next point. Which was a big one.

**Jacques: What we do is we help the little guy. Build a brand and build a business.**

**Krissy Clark:** This point came up a lot in our fifteen minute conversation that was supposed to be about scheduling. Jan-Pro helped the little guy. Or, little person. By helping him go into business for himself.

**Jacques: The Jan-Pro model which is helping the little person...And what it is, is we're helping the little person... That's what we do, we help the little, we put 'em in business...Somebody told me recently you know, how do you feel you know when you're helping thousands of people every day.**

**Krissy Clark:** But here's the thing that Jacques told me that surprised me the most about Jan-Pro, the commercial cleaning company he founded:

**Jacques LaPointe: In my case, believe it or not, even though it's commercial cleaning, I'm not in the cleaning business. We are in the marketing, and sales and marketing, and also building unit franchise owners business.**

**Krissy Clark:** And I'm just gonna stop the tape right here to unpack what Jacques just said because it goes by kind of quickly. But in the middle of all his talk about Mercedes mechanics and "helping the little guy", what he just said here is actually really important. I'm just gonna play the important part for you again

**Jacques LaPointe: I'm not in the cleaning business,**

**Krissy Clark:** Jacques is telling me that he and the company he founded are not in the cleaning business.

Which was weird to me because the company is called Jan-Pro. Jan, as in janitor. Market analysts consistently list Jan-Pro as one of the leaders in the commercial cleaning industry. On a Jan-Pro website, it says in big letters "commercial, office and work space cleaning". There's a picture of a woman with a Jan-Pro shirt, holding a spray bottle full of what looks like cleaning liquid, her finger poised and ready to spray.

And Jan-Pro advertises itself to customers with commercials like this:

**Commercial: When you choose Jan-Pro cleaning and disinfecting, you choose clean. That's because our commercial cleaning services are trusted. Clean. Guaranteed.**

**Krissy Clark:** But Jacques was telling me actually, Jan-Pro's not in the cleaning business. It's in the marketing and sales and building up unit franchises business.

And it turns out that claim, that a company is not in the business it sounds like it's in, has weirdly become one of the main ways that all sorts of companies have justified not paying their workers minimum wage, or other employee benefits. From companies like Jan-Pro, to Uber, to strip clubs.

One of their key arguments is basically, we are not what we might seem.

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Welcome to the Uncertain Hour. I'm Krissy Clark. And this season, we are looking at this thing we used to call employment. What happened to it. And why it matters.

And today I'm gonna tell you the rest of the story of Jerry Vazquez, and his legal battle with Jan-Pro, the cleaning company - or maybe it's a marketing and sales and "building up its franchise business" company.

So remember, last episode, I told you about that nagging feeling Jerry had, that even though he'd been told he was an independent contractor in business for himself,

**Jerry: It felt like I wasn't a franchise owner. It felt like I was an employee.**

**Krissy Clark:** That nagging feeling of Jerry's, wound up being the driving argument in the lawsuit Jerry filed against Jan-Pro.

There's actually a legal name for that feeling he was having. Jerry was feeling misclassified.

That's what it's called when a company improperly labels a worker as an independent contractor when really they should be considered an employee. And in California it's against the law.

When he first heard this word — misclassified — he didn't exactly know what it meant...

**Jerry: I have to go on Wikipedia and look up the definition.**

**Krissy Clark:** and he asked his lawyer about it. She explained to him basically, it sounded like Jan-Pro should have been giving him all the benefits that are legally required to come with employment, like paying him at least a minimum wage, and overtime.

And when you looked at it this way, his lawyer said, the thousands of dollars that Jan-Pro charged Jerry? She didn't think they were legitimate franchise fees. Instead?

**Jerry: Basically I just paid money for a job.**

**Krissy Clark:** Soon after Jerry filed his suit against Jan-Pro, the Jan-Pro lawyers called him in for a deposition. Jerry flew across the country for it, to Boston. He says the questioning was grueling.

**Jerry: They had me in there for six hours,**

**Krissy: Six hours?**

**Jerry: Six hours.**

**Krissy Clark:** Two lawyers representing Jan-Pro, grilling him.

**Jerry: They asked you so many questions, they try to intimidate you. They just want to know your whole life, every single detail. It's kind of ridiculous.**

**Krissy Clark:** I've read a transcript of the deposition. They ask him whether he had a significant other. Where he went to elementary school. What his first job was.

At one point, a lawyer for Jan-Pro asks Jerry about how he decided when to take bathroom breaks when he was cleaning. "It was up to you when you wanted to take a break right?" the lawyer asks. "No one was hanging over your shoulder telling you when to take a break, right?"

There were a lot of questions like this, where Jan-Pro's lawyers focused on moments where no one was telling Jerry what to do. Bigger things, like the fact that Jerry could hire and fire his own workers, like his mom — but also littler things. Like, when the lawyer asks Jerry about how he and his mom would divvy up the labor when they were cleaning a building. "It was up to you right?", he asked Jerry. Jerry told him, "I mean, it's my mom. It's like, 'Where would you like to start, mom?'"

But you can see what the lawyer is driving at here. "So, it was pretty flexible?", he asks Jerry. "You guys had the ability to be flexible with each other in terms of what needed to get done, right?"

The lawyers seemed to be trying to build the case that Jerry was clearly a business owner, not an employee, since he had control and flexibility over these aspects of his work. Jan-Pro wasn't bossing him around, so whatever complaints he had about low-pay weren't about a company paying an employee below minimum wage. They were his own fault.

And it's true that control can be part of what defines the relationship between an employer and an employee.

But the question of whether someone like Jerry is an employee who deserves minimum wage, or an independent businessman who can fend for himself? It goes deeper than that.

What Jerry's case actually turns on is this strange little phrase. It's actually the same phrase that's at the heart of a lot of lawsuits happening right now, filed by workers at more prominent companies like Uber, and Lyft, and Doordash. This phrase is just six words long...

"To suffer or permit to work."

And to explain what those six words mean, and why they're so important to Jerry's case against Jan-Pro, and lots of other cases, I wanna take you to the moment that these words got written into federal law....

Don't worry, we'll get back to Jerry. But first, I wanna take you back to the 1930s.

The country's already plunged deep into the Great Depression. Jobs were really hard to find. A lot of the jobs that did exist had wages that were really low.

**FDR: Here is the challenge to our democracy,**

**Krissy Clark:** Here's President Franklin Roosevelt in his second inaugural address, in 1937, talking about just how bad things were for so many people - tens of millions of people in poverty,

**FDR: Who at this very moment are denied the greater part of what the very lowest standards of today call the necessities of life. I see millions of families trying to live on incomes so meager that the pall of family disaster hangs over them day by day.**

**Kate Griffith: People were willing to say yes to anything even if there were pitiful wages, even if they didn't give them enough to buy enough bread for their family.**

**Krissy Clark:** This is Kate Griffith. She's chair of the labor relations, law and history department at Cornell. And she says there was a sense among many people, that part of why wages were so low was because workers were so desperate and businesses were taking advantage of that.

**Kate: This idea of inequality, of bargaining power... and what they meant is this power imbalance between the company on the one hand and the low wage worker on the other. And the word they use a lot is chiseling, that the companies were chisellers, they were chiseling wages. In other words, even companies that could have paid a bit more and did have some profit margins were taking advantage of the fact that you had very desperate and hungry people who were willing to work for basically nothing, and that that was something that is unfair and unnecessary. And so, you know, we're not going to let them do this.**

**Krissy Clark:** So Congress decides to pass this law, the Fair Labor Standards Act. It created the federal minimum wage.

And when lawmakers are writing this law, Kate says, they are very careful about how they word it because they know plenty of companies are not gonna like this law...

**Kate: You know, it's not convenient to be regulated and to have to pay these things.**

**Krissy Clark:** In fact, before the federal minimum wage was passed, there'd been a handful of states that had passed minimum wage laws. But each time one was passed, some company would challenge it in court saying the law violated their freedom of contract - that is, their ability to freely negotiate with their workers.

And for decades, the Supreme Court actually agreed with that argument. It struck down state minimum wage laws as unconstitutional.

But then in the middle of the Great Depression, around the time that FDR threatened to pack the Supreme Court, there was a change of heart.

It was a case, coincidentally, brought by someone who also cleaned up after people. Not a janitor, like Jerry, but a hotel chambermaid in Washington state. She was getting paid below her state's minimum wage for women - yep, there was a special minimum wage for women.

After the Supreme Court heard the hotel maid's case, the majority ruled in her favor. There was this shift in perspective that came to see minimum wage laws not as violating a company's freedom of contract, but as vital to a worker's freedom of contract. It created a base line and gave workers some bargaining power, so they didn't have to say yes to just anything.

Plus, if workers were making more money then society might not have as much of a burden of supporting people living in poverty.

**Kate: There's just a decency wage that our democracy requires.**

**Krissy Clark:** Once the Supreme Court gave the official green light to state minimum wage laws, FDR's administration worked with lawmakers to pass a federal minimum wage.

And they made one thing very clear.

**Kate: We're not going to let the companies find loopholes because they will.**

**Krissy Clark:** Kate knows this is what lawmakers were thinking because she went back and read all the congressional hearings, all the debates, all the committee reports that lead up to passage of the minimum wage law.

And what she found was lawmakers actually making lists of all the ways companies might try to avoid paying minimum wage to their workers. She talks about this in a paper she wrote.

**Krissy: On a footnote on page five sixty eight,**

**Kate: OK, wow, you read the footnotes,**

**Krissy: That's where the good stuff is!**

**Kate: OK, footnote 44. Yeah.**

Lawmakers are talking about how to, quote

**Kate: Prevent the circumvention of the act,**

**Krissy Clark:** and then, they actually give this list of the “devices” they anticipate companies will use to try to circumvent the act. Devices like the use of subcontractors. Or employees who work in their homes. Or by classifying workers as

**Kate: Independent contractors.**

**Krissy Clark:** Independent contractors, like how Jan-Pro classified Jerry the janitor.

**Kate: Or by any other means or device. And this list just shows awareness of the creativity of businesses in terms of shifting how they're structured or how they're paying people. These were the common ways that they thought that companies were circumventing regulation at that point. And so they were suspicious!**

**Krissy Clark:** But, Kate says, rather than lawmakers just making a list like this in the law, of all the different ways companies would probably try to avoid paying their workers minimum wage; Rather than writing into the law “Don't do those things”, lawmakers try something else. Something that was either genius, or a recipe for disaster.

Instead, they write the law in this incredibly expansive - and weird - way. They declare that “Every employer shall pay each of his employees” a minimum wage, and then they define employee like this:



**Kate: An employee is an individual employed by an employer.**

**Krissy Clark:** Every time I hear that definition, it cracks me up.

I'll just read it again, to let you savor the absurdity.

An employee is, "Any individual who is employed by an employer."

Meanwhile, an employer is, "anyone acting directly or indirectly in the interest of an employer in relation to an employee."

**Kate: Yes. It's kind of ludicrous how circular those two definitions are. And so then you say, OK, well what does it mean to employ, maybe that'll tell me something and that's really put broadly.**

The definition of employ, according to the Fair Labor Standards Act and lots of state minimum wage laws too, is

**Kate: To suffer or permit to work.**

There are those six words. To suffer or permit to work. When you employ someone, you permit them to work, or at least, you suffer them to work. Suffer - as in tolerate - like in the phrase, I don't suffer fools.

**Kate: Which is just an awkward way of talking now. But what they meant is if a company knows work is happening, is in a position to know it's happening and it's benefiting them, they're responsible as an employer. I can't even think of a way for Congress to put it more broadly than a company that permits someone to work for it on its behalf.**

**Krissy Clark:** One of the lawmakers who wrote the act referred to these definitions of employ and employee as the "broadest ever included in any one act."

Other employment laws use slightly different definitions for the words employ and employee. But the law establishing a minimum wage defined them in this super broad and circular way.

**Kate: I used to critique that circularity a lot when I was teaching this,**

**Krissy Clark:** But Kate says once she went back and actually read what lawmakers were thinking, how worried they were about companies looking for ways to get around the definition, she thinks it's kind of genius, because it is so broad.

It acts like a blanket. It assumes a worker is an employee who deserves minimum wage unless the people who hired the worker can prove that worker is truly in business for themselves - like, say, a plumber, who works for a company now and then fixing a toilet.

And here's another thing this broad sweeping language does. It makes the word employment fit lots of different kinds of work arrangements, not just the kinds from the 1930s. Because....

**Richard: The people who wrote these laws were already witnessing the bizarre ways in which people would constantly reinvent work. They'd lived through this.**

**Krissy Clark:** That's Richard Carlson, the employment law professor from South Texas College of Law, Houston. We heard from him in an earlier episode. And Richard says, just like we're living through the "reinvention of work" through apps like Uber and Lyft and Doordash, the lawmakers who were writing the Fair Labor Standards Act? They'd lived through the tail end of the Industrial Revolution, the growth of mass production and assembly lines. That is some serious reinvention of work.

**Richard: Every generation lives through it and thinks that it's new. There's, there's nothing new at all.**

**Krissy Clark:** Sometimes in Silicon Valley these days, the minimum wage law and the whole idea of who is an employee as it was defined in the law gets critiqued as being old-fashioned.

The argument these companies often make is, how could something written in the 1930s fit all the tech innovations and new work arrangements that have cropped up in the 21st century?

I heard Uber's CEO, Dara Khosrowshahi talking about this not too long ago, on PBS.

**Dara: The traditional view of work, which is you have a full time job, you only work for one company in your life, that idea is outdated.**

**Krissy Clark:** Uber and other companies have formed a lobbying group, called the Coalition for Workforce Innovation, that aims to quote "modernize" workforce policy, because in their words, "labor laws in the US are woefully outdated."

And this argument's been persuasive. Uber and other app based gig companies recently spent \$200 million dollars on a campaign to specifically exempt their workers from wage laws in California that use this old definition of "to suffer or permit to work." And they won.

The Uber CEO says companies like his -- just don't FIT in to the old definitions of work. That they've come up with something different.

**Dara: And that's the new way of work, which is independent work, or so called gig work.**

But according to Richard Carlson, the law professor from Houston, it was just those kinds of claims - that the work at our company is different and new - that the framers of the Fair Labor Standards Act were anticipating with their weird and sweeping definition of what employment IS.

**Richard: They were being purposely, purposely vague because they knew they could never really nail down this thing that was going to continue to evolve. And every workplace would be different. They knew that when they wrote those words.**

**Krissy: Ah, so it's sort of acknowledging, like this is amorphous guys.**

**Richard: Yes, exactly.**

It's like these words, employ and employee, and the circular definitions that came with them, they were a way of the lawmakers saying these worker protections should apply to well,

**Richard: All those people that you think might need protection.**

People who were controlled by the companies they worked for. People who were dependent on those companies, economically. People who were braided into the heart of those companies' business. People in work arrangements they knew about, like coal miners and factory workers, and people in work arrangements that hadn't even been invented yet, like giving someone a ride when they ping you through a cell phone.

But - there's always a but when it comes to even America's most idealistic laws, right? And the Fair Labor Standards Act was no different.

As sweeping as the minimum wage law was, as many kinds of workers its drafters seemed to want to include, there were some exemptions and some of them were made for ugly reasons, and I want to spend a minute on that.

Southern Democrats wouldn't pass the law unless it specifically excluded farm workers and domestic workers, like housekeepers. Jobs that were at the time disproportionately held by Black Americans. It was not an accident.

As a white lawmaker from Florida put it at the time, having a minimum wage that applied equally to white and black people quote, "just will not work in the South." He went on, "You cannot put the Negro and the white man on the same basis and get away with it."

And so for the first few decades after a federal minimum wage was passed, farm workers and domestic workers were not covered by it.

***AUDIO: We demand that there be an increase in the national minimum wage so that men may live in dignity (cheers).***

**Krissy Clark:** After decades of civil rights activism, most farm workers and domestic workers did get brought in to the fold--

***AUDIO: We have included more than 9 million new workers under a higher minimum wage.***

**Krissy Clark:** Though even now, some of them - along with a few other kinds of workers - still aren't covered.

But even once some of those biggest holes in our minimum wage laws were addressed, there was still another crack in the system. A crack that many Americans in all types of industries are still falling through, especially low-income black and Latinx Americans. People like Jerry Vazquez, the janitor, and his colleagues.

Because remember how I said the way employment was defined in the fair labor standards act was either genius, or a recipe for disaster?

It turns out there was just enough vagueness and amorphousness in the definition of those words - employ, and employer and employee - to leave the door open to infinite debate. Richard Carlson, the law professor calls it a "zone of ambiguity".

**Richard: That line between what we now think of as independent contractors versus employees has never, never been clear.**

**Krissy Clark:** These vague definitions may have been meant to cast a really wide net over who is eligible for minimum wage, but what ended up happening is that it just kind of confused everybody. Created this gray area that's been ripe for exploitation.

One key study commissioned by the US Department of Labor found that up to thirty percent of firms misclassify their workers as independent contractors. Other research has found that many of the industries where it happens the most are ones with workers who are disproportionately people of color, and immigrants. Construction, home care, trucking, driving and delivery services, and janitorial services.

Often these workers have no idea they've been misclassified, or what misclassification even is. But when a worker does suspect they've been misclassified and pushes back, the battles in courts, and government agencies, are full of endless and mind-bending arguments about where the line between independent contractor and employee really should be.

Arguments that Jerry Vazquez, the Jan-Pro janitor, has gotten to watch from a front row seat.

That's after a break.

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**Krissy Clark:** Jerry filed his lawsuit against Jan-Pro more than twelve years ago. And over the years it's gotten some attention in a few corners. Which surprised Jerry. He'd figured,

**Jerry: You're just a janitor... like, who cares.**

**Krissy Clark:** But sometimes he'll google the case, to see what's going on with it and articles will come up. There was one that came out not long after Jerry filed his lawsuit.

It quoted Fulton Connor, who owned the Jan-Pro master franchise in San Bernardino, where Jerry bought his unit franchise. He said, if Jerry was having trouble making money from cleaning buildings, that was Jerry's own fault. Quote, "some people, like Mr. Vazquez, took too long and were not following the cleaning schedule. In general, our franchisees are happy. I've had owners thank me because they were able to buy homes for the first time in their lives."

That article was in the Franchise Times, a franchise industry trade magazine. The franchise industry has been watching the Jan-Pro case closely.

Robert Cresanti is the president and CEO of the International Franchise Association, and he says yes, it's sad that a franchise owner like Jerry wasn't making much money at his cleaning franchise. But business owners fail all the time.

**Robert Cresanti:** Where they can say, gosh, I put a, you know, one hundred thousand dollars into my micro brewing beer company and it turned out no one liked my beer and I didn't get a minimum wage for the two years of work that I put up. And I didn't get the money back that I put into the building. And what business that, you know, are people guaranteed a certain profit, you know, from their work?

**Krissy:** What would you say to one of these janitors who doesn't feel like they have enough control over their franchise to actually be an independent business owner. You know, starting a business means you're taking some risk. But it also means that you get to call the shots. And I think that these janitorial franchisees feel like they don't get either of those. They don't they don't get to call the shots, but they also don't get the protections that come with being an employee.

**Robert Cresanti:** I think the answer is I'm terribly sorry that that has happened to you and that there are many opportunities for you to find ways to grow the business so that you could become profitable and successful.

**Krissy Clark:** I should say, we have talked to people who say they made their Jan-Pro franchises work; they made enough money.

But whether it's possible to make a go of a Jan-Pro franchise isn't the question the court has to decide in Jerry's case.

What the court has to decide is whether Jerry was in fact an independent contractor, running his own franchise, or whether Jan-Pro called him an independent contractor when it should have called him an employee.

Robert's organization, the International Franchise Association, has filed a friend of the court brief in Jerry's case on the side of Jan-Pro. The association is worried that a case like Jerry's could destroy the whole concept of the franchise - a concept that Robert says is deeply American.

But Jerry and his lawyer aren't arguing that there's no such thing as a legitimate franchise owner or a legitimate independent contractor running their own business.

Jerry's lawsuit is just saying that Jerry, and Jan-Pro franchisees like him, shouldn't have been considered true franchise owners or independent contractors. That their relationship to Jan-Pro really was as employees. So, they argue, Jan-Pro should pay those workers like employees.

In fact, pretty much everyone involved in this fight acknowledges there is such a thing as an independent contractor. And there is such a thing as a company that misclassifies its employees as independent contractors.

So how do you decide which is which? Like I said, it's maddeningly complex.

Because of that "zone of ambiguity" between independent contractors and employees. That fuzzy line.

Just where to draw the line is a question that has confounded judges, juries, and government agencies for decades.

They've applied all sorts of different logic to this question. And a few years ago, the California Supreme Court issued a major decision about it. The state legislature then wrote it into law. That decision says anyone who works for a company should be presumed to be an employee, not an independent contractor, unless the company can prove that the work arrangement passes this basic test.

So I wanna tell you about that test, and about how things look for Jerry if you apply that test.

The test breaks down the question of where to draw the line between independent contractor and employee into 3 basic things. Lawyers call them prongs, like a fork.

There's Prong A, prong B and Prong C.

**Kids: A-B-C-D-E-F-G-H-I**

**Krissy Clark:** And so it's come to be known as...

**Rosin: The ABC test.**

**Kids: The ABC test!**

**Krissy Clark:** My kids love the ABCs, so they wanted to chime in here too.

According to the ABC test, which more and more states have come to adopt, a worker can only be considered an independent contractor if the following three things are true.

**Kids: A! A! (singing)**

**Krissy Clark:** The A prong is pretty intuitive, and it focuses on the issue of who's in control. To be an independent contractor, a worker's gotta be quote "free from the control and direction" of the company, in terms of how their work is performed. And then there's prong...

**Kids: B!**

**Krissy Clark:** The worker's also gotta be doing work that is "outside the usual course" of the company's business." As in, plumber who gets hired to fix a coal mining company's toilet? You could be an independent contractor. But a coal miner who mines that company's coal? Probably not.

And then there's Prong C.

**Kids: C!**

**Krissy Clark:** If you wanna call your worker an independent contractor, the worker must be "customarily engaged in an independently established trade, occupation, or business", as in, they don't just work for your business.

And, like I said, the way the test works

**Shannon: Is that the alleged employer has the burden to prove all three prongs. So if the alleged employer cannot prove even one prong, then the workers are employees.**

**Krissy Clark:** That's Jerry's lawyer, Shannon Liss-Riordan, arguing Jerry's case in front of the 9th Circuit Court in 2018. Shannon's nickname is "The Sledge Hammer "

**Jerry: And I'm telling you man, Shannon Liss is a fighter. I mean they don't call her The Sledge Hammer for no reason.**

**Krissy Clark:** And she has used her sledgehammer to hammer out the points of the ABC test in courtroom after courtroom.

Shannon and Jerry think that Jan-Pro fails the A, B and C prongs. Jan-Pro disagrees. But

the prong that Jerry and his lawyer argue Jan-Pro really, really fails, and the prong that has really really freaked out a lot of businesses - especially franchises, lately - is prong B. And so I'm gonna focus on that one.

The B prong, remember, is the one about how if a company hires a worker to do work that is in the company's "usual course of business" then that worker is an employee. Full stop. Shannon, Jerry's lawyer, says in the case of Jan-Pro, and other janitorial franchise companies, proving that they fail that prong, is pretty much a slam dunk. She points to those ads Jan-Pro uses to sell its cleaning services.

**Clip of ad: Our commercial cleaning services are trusted, clean, guaranteed.**

**Krissy Clark:** Jan-Pro is a cleaning company, Shannon says.

**Shannon: The actual service that they're providing to customers is cleaning services.-So the people who are doing that work cleaning are their employees.**

**Krissy Clark:** We of course reached out to Jan-Pro multiple times to hear their take on this directly. No one would agree to an interview. But in court documents, and in court hearings, you can find their arguments. And it's in the B prong where, at least to a non-lawyer person like me, those arguments take a turn toward the especially weird.

Remember that conversation I had with Jacques Lapointe, the founder of Jan-Pro? To set up that interview with him. He later backed out of doing an interview about Jan-Pro, said Jan-Pro's lawyers were hesitant for him to talk to me because they're still in the middle of this lawsuit. But that thing Jacques said in passing when I was talking to him on our first, logistical call, it actually cuts to the heart of one of Jan-Pro's main arguments.

That Jerry, who cleaned buildings with Jan-Pro is not an employee, because Jan-Pro is not a cleaning company.

**Jacques Lapointe: In my case, believe it or not, even though it's commercial cleaning, I'm not in the cleaning business. We are in the marketing, and sales and marketing, and also building franchise owners business.**

**Krissy Clark:** The International Franchise Association actually sent a memo out to its members after California adopted the ABC test a couple years ago, advising franchisors to think about doing a quote "scrub" of their marketing materials to emphasize that they are in the business of franchising, rather than in the line of business their franchisees are in. The memo gave a special warning about janitorial franchises in particular.

And in court, you could hear that point coming from Jeffrey Rosin, one of the lawyers representing Jan-Pro, which sometimes goes by the acronym JPI.



**Rosin: JPI's usual course of business is not commercial cleaning. None of its employees do commercial cleaning. None of them perform commercial cleaning.**

**Judge: But they make all their money on commercial cleaning.**

**Krissy Clark:** That's one of the 9th Circuit Court judges at a hearing in 2018. The judges didn't seem to be buying the Jan-Pro lawyer's argument. But he kept pressing it.

And this "we aren't what we seem" argument that Jan-Pro has leaned on? It's become surprisingly common across a whole bunch of industries where workers are claiming they've been misclassified.

Shannon, Jerry's lawyer, has represented a lot of workers in all kinds of industries who were labeled independent contractors, but say they should have been employees, making at least minimum wage. Uber drivers, strippers, FedEx delivery drivers.

**Shannon: For instance, when I litigated against FedEx, FedEx tried to claim that it could satisfy prong B because it wasn't in the delivery industry. FedEx argued that it was a logistics operation rather than a delivery company. And the federal court said no, no that's just a matter of semantics, whatever that means. Everyone knows you're a delivery company. And in the adult entertainment cases, the same thing. The strip clubs tried to deny that they are in the business of adult entertainment. But that argument didn't go over very well with the courts. They said no. You have naked women dancing at your club and that's why customers come to you. You are a strip club.**

**Krissy: It also becomes very, it's so meta. Like, we're a franchising company. We're a logistics company. It's weird.**

**Shannon: Right? And it's and it's like Uber claiming that it's that it's not a transportation company. It's a technology platform. Everyone knows that Uber is a transportation company. That's who you go to if you need a ride across town.**

**Krissy Clark:** And just recently, the 9th Circuit Court of appeals issued an opinion in the Jan-Pro case in line with that argument. The court pointed out that Jan-Pro ads, and its website, "promote Jan-Pro as being in the business of cleaning." And the court found that Jan-Pro's business quote "ultimately depends on someone performing the cleaning. That work is performed solely by the unit franchisees.

They also wrote that they, and other courts, were skeptical of Jan-Pro's argument that it is in the business of "franchising" rather than cleaning." They quoted a ruling from a judge in Massachusetts, who was presiding over a similar case involving another janitorial franchise company, called Coverall. He wrote, quote

“Describing franchising as a business in itself, sounds vaguely like a description of 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.”

Robert Cresanti, with the International Franchise Association, says franchising definitely can be a business in itself:

**Cresanti: Franchise companies are in the business of selling franchises. They most often don't provide goods and services themselves. They have training. They provide continuity. They ensure brand quality by making sure that somebody doesn't make a hamburger and lets it sit in a takeout tray for 30 minutes and then have a customer come in and buy it and walk away feeling like they got a terribly low quality product.**

**Krissy Clark :** Robert and his franchise association have pushed back against the ABC test. They've filed their own lawsuit, trying to get all franchises in California exempted from the test. Robert argues there's always gonna be a little overlap between a franchisor's "usual course of business", and a franchisee's. And franchisors need some control over how franchisees do their work. Robert says if the relationship between a franchise and a franchisee has to satisfy the ABC test, it could turn all franchisees into employees.

But Shannon, Jerry's lawyer, says that's painting with too broad a brush. She says a lot of franchise relationships already don't really fall under the ABC test. That it really only kicks in if you're treating your franchisees like employees. Like, she says, in the Jan-Pro case.

**Shannon: The workers get what looks like a paycheck from the company. They do the work, the company collects the money from the customer and then they issue them what looks like a paycheck, while deducting the fees that it considers to be its royalties and other various fees.**

**Krissy Clark:** She compares that to, say, a McDonald's franchisee. Their income doesn't rely on getting a check from the parent company. They get their money straight from the customers who buy their hamburgers, and then they pay McDonald's a cut of their revenue. Shannon says, McDonald's franchisees really seem to have

**Shannon: Actual running businesses, and the company is really running itself as a company. And that's just not happening with these cleaning companies.**

Krissy Clark: And the 9th circuit court seems to agree. They've sent Jerry's case back down to a trial court, telling it to use the ABC test to take a really hard look at Jan-Pro - even though it's a franchise - and decide whether people like Jerry really should be considered employees. So, Jerry won that round of court battles. But the case still isn't over.

**Jerry: I was gonna show you something real quick.**

**Krissy: Oh, yeah. Show me. Can I follow you?**

**Krissy Clark:** It's been more than ten years since Jerry filed his case against Jan-Pro. But after all these years, Jerry still has some of his Jan-Pro cleaning equipment. He keeps it out on the patio, where it was raining when I visited. The giant garbage can on wheels, the mop,

**Jerry: This is still the original broom they gave me.**

**Krissy Clark:** And, the picket signs that he made. For when he and his mom stood outside the Jan-Pro master franchise office in San Bernardino

**Jerry: Twice I went to do a little picketing protest with my Jan-Pro sign.**

**Krissy Clark:** Jerry abandoned his Jan-Pro business back in 2008, right before he filed his lawsuit. Jan-Pro hasn't gone after him for owing the extra money he had on his financing note, but they never refunded him the money he'd already paid, either.

Jerry still lives at home, with his mom. His dad has died, from complications of the emphysema that had first prompted Jerry to get involved in Jan-Pro, so he'd have more flexibility to take care of his dad.

In Jerry's mind, his dreams of getting his Jan-Pro business off the ground were all wrapped up in bigger dreams he had about his life.

**Jerry: My hopes were to grow the business. Eventually, you know buy a house, find me a young lady, get married, have kids, have a family. You know, have a life like everybody else.**

**Krissy: You felt like it kind of stalled you?**

**Jerry: Yeah, like I was stuck.**

**Krissy Clark:** Jerry never meant to be a poster child for anything, but he's glad he pushed back against Jan-Pro, and filed his lawsuit, because he thinks this whole misclassification thing really matters.

**Jerry: I think all these companies are misclassifying people are hurting a whole great deal of other people, not just the person working. When they underbid accounts, now the mom and pop businesses can't compete. Now they go out of business. Social Security gets less money, Medicare gets less money. If you're making less money now that means I'm spending less money in the economy. So even all the other businesses around, get hurt.**

**Krissy: You've thought about this, you're not just thinking about it for yourself. It sounds like you've thought about this deeply, sort of more broadly.**

**Jerry: Yeah, I think it affects everybody. Because now if I was making the amount of money that I should have been making, I would have spent more money. I would have went to the restaurant, Denny's or something. You know, I would have went to McDonald's, you know, I wasn't going to McDonald's. I wasn't going to Denny's. If I would have made the right amount of money, maybe I could have bought a newer car.**

**Krissy Clark:** Jerry's had other non-employee jobs since Jan-Pro. At an Amazon warehouse, where he worked through a temp agency. And at one of those meal-kit companies, assembling ingredients for people's dinners in a refrigerated room. He worked through a temp agency there, too.

Right now he's working for his friend, who's an electrician. He's kind of his helper. It's not a great job market, obviously, but he's keeping his eye out for something more stable.

After his dream of entrepreneurship, what he really wants now is just a regular job.

He's still hoping he'll win his lawsuit against Jan-Pro, and get them to stop treating people like they treated him. He hopes that Jan-Pro will finally refund him the five thousand dollars he spent on buying the franchise, and all the fees and loan payments they took from his checks. And back wages so that he would have at least been making minimum wage and overtime. He may get some more money, in damages too.

It wouldn't make him rich. But at least he could pay his mom back, with interest, for the money she loaned him to start his Jan-Pro franchise. Meanwhile, thousands of janitors like Jerry are still cleaning buildings for Jan Pro and other janitorial franchise companies, and those companies are still selling new franchises.

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That's it for this episode of The Uncertain Hour. Thanks so much for listening. We'll be back next week, to hear from some of the people who helped popularize the non-employee workforce. And they argue, it's a really good thing.

**AUDIO: If anybody speaks about it as if this is sort-of evil thing, it really disturbs me because there it's a strategic decision that companies should consider.**

And if you like the show, please tell a friend, leave a review, send us a note. We love hearing from you. Have you ever been a "non-employee"? Tell us more. Our email is [uncertainhour@marketplace.org](mailto:uncertainhour@marketplace.org).

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