IN THE COURT OF APPEALS OF THE
STATE OF OREGON

NATIONAL MAINTENANCE CONTRACTORS, LLC,
Petitioner,

v.

EMPLOYMENT DEPARTMENT,
Respondent.

Office of Administrative Hearings
2013UIT00019; A158760

Submitted May 18, 2016.

Dan Webb Howard and Gleaves Swearingen, LLP, filed the briefs for petitioner.

Ellen F. Rosenblum, Attorney General, Paul L. Smith, Solicitor General, and Judy C. Lucas, Assistant Attorney General, filed the brief for respondent.

Before Tookey, Presiding Judge, and DeHoog, Judge, and James, Judge.

JAMES, J.

Affirmed.

JAMES, J.

National Maintenance Contractors, LLC (NMC) is a Washington-based franchisor with approximately 60 Oregon-based franchisees providing janitorial, landscaping, carpet and duct cleaning, and maintenance services to NMC's customers. NMC seeks judicial review of a final order issued by the Office of Administrative Hearings wherein the administrative law judge (ALJ) upheld the Employment Department's levying of two assessments totaling $138,029.69 for unemployment insurance taxes. We affirm.

On review, NMC raises four assignments of error, arguing that its Oregon franchisees are independent contractors and, thus, exempt from unemployment insurance taxation. In its first assignment of error, NMC argues that the ALJ erred in concluding that its franchisees were not free from direction and control over the means and manner of providing the services. In its second assignment of error, NMC argues that franchisees were independent businesses, and that the ALJ erred in concluding otherwise by incorrectly finding that the franchisees did not retain the ability to hire and fire its own employees. We conclude that the franchisees at issue in this case were not free from direction and control. Because of our decision on that issue, we do not reach NMC's second assignment of error.[1]

In reviewing an ALJ's final order, we review legal conclusions for errors of law and factual determinations for substantial evidence. ORS 183.482(8)(a) and (c); *Broadway Cab LLC v. Employment Dept.*, 358 Or 431, 437-38, 364 P3d 338 (2015). The ALJ made extensive findings of fact, which are largely undisputed by the parties. For purposes of our decision, we state the facts most relevant to our analysis.

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[1] NMC's third assignment of error is a reiteration of its first two assignments, and need not be separately addressed. Its fourth assignment of error challenges two of the ALJ's factual findings. This court reviews disputed factual findings for substantial evidence. ORS 183.482(8)(c) ("Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding."). Our review of the record shows that the challenged factual findings are supported by the record and we, therefore, reject that assignment of error without further discussion.

NMC contracts with businesses to provide janitorial services, landscaping, carpeting, ceiling and duct cleaning, minor construction and restorations, interior plant maintenance, minor renovations, plumbing, electrical work, and related services. It delegates the performance of such services to its franchisees and subcontractors.

NMC solely negotiated the contracts with its customers. The franchisees were not permitted to meet with customers' representatives and were not otherwise involved in the negotiations. During NMC's negotiations with its customers, the customers specified the services they wanted, the frequency of the services, and the windows of time to perform the services.

The franchise agreement, which was materially uniform among the roughly 60 franchisees and was nonnegotiable as to the majority of terms, stated that the franchisee was an independent contractor. The agreement also stated that NMC would not control the franchisee in its method of serving accounts, but the franchisee was required to satisfactorily achieve the desired service, as listed on the particular account service specifications. If the franchisee was a corporation, its officers were required to "devote adequate time to personally perform or supervise the work."

When NMC offered accounts to its franchisees, it informed them of the customer's specifications and walked through the customer's premises with the franchisee, pointing out what needed to be done. NMC provided the franchisee with a list of required equipment, materials, and supplies to serve accounts. All such equipment, materials, and supplies had to be "of brands or types that meet [NMC's] quality standards." NMC's approved brand list included items such as vacuum cleaners, buckets, ringers, brooms, dustpans, dusting cloths, maid caddies, barrels with wheels, trash liners, disinfectants, multipurpose cleaners, glass cleaners, and sponges. NMC specified the minimum required equipment in its manuals and directives. NMC had the option to lease such equipment to the franchisee. The franchisee was not allowed to use other equipment, materials, or supplies without the prior approval of NMC. NMC also provided a list of appropriate dress for servicing accounts.

NMC gave each franchisee and the franchisee's initial employees "a mandatory, but tuition-free initial training program." The franchisee and all its employees were required to complete the initial training program "in a satisfactory manner," as determined by NMC. If the franchisee did not complete the training program in a satisfactory manner within six months after signing the agreement, NMC could terminate the agreement.

The franchisee had to pay $150 to NMC for each training program after the initial training program. Alternatively, the franchisee could train and test its employees in a manner satisfactory to NMC and give NMC satisfactory evidence of such training. NMC could charge the franchisee more for the training if the franchisee was assigned a new account having specific onsite requirements, or NMC had reasonable indications from its inspections or from customer reviews that the franchisee's performance for an account did not meet its quality standards.

NMC required all franchisees and their managers to be trained, regardless of their previous experience. The training consisted of written materials and video programs. NMC required trainees to take and pass a test on the information. NMC also issued manuals to the franchisees. The manuals included instructions on cleaning techniques.

The franchise agreement required franchisees to maintain NMC's image when serving accounts by following the customer's requested dress code. Franchisees were required to wear shirts and identification badges bearing the NMC logo. The franchisee was required to use NMC's trademarks as the sole identification for customer accounts that NMC managed. Additionally, the franchisee was prohibited from using any business or marketing practice that might damage NMC's business or the goodwill associated with the trademarks and other franchisees.

While NMC did not supervise the day-to-day performance of its franchisees, its operations coordinators inspected the franchisee's performance at each account at least monthly, whether or not there were issues with performance. NMC's franchise agreement stated that it inspected

the premises of accounts "for the purpose of maintaining its image and reputation for high-quality services in association with its Trademarks."

As noted, the Employment Department concluded that the franchisees were not independent contractors but were, instead, employees for whom NMC was responsible for unemployment insurance taxes. The Employment Department, therefore, levied assessments on NMC in the amount of $138,029.26. NMC appealed to an ALJ, who ultimately upheld the decision of the Employment Department.

Tax assessments by the Employment Department are presumptively correct unless, and until, the person or entity challenging the assessment establishes otherwise. ORS 657.683(4); *Mitchell Bros. v. Emp. Div.*, 284 Or 449, 451, 587 P2d 475 (1978).

The statutory scheme imposing unemployment insurance tax liability relies upon four foundational definitions.

ORS 657.015 defines employee:

> "As used in this chapter, unless the context requires otherwise, 'employee' means any person, including aliens and minors, employed for remuneration or under any contract of hire ***."

ORS 657.025(1) defines employer:

> "As used in this chapter, unless the context requires otherwise, 'employer' means any employing unit which employs one or more individuals in an employment subject to this chapter ***."

ORS 657.030 to 657.094 defines employment. For purposes of this case, the definition at issue is ORS 657.040(1), which states:

> "Services performed by an individual for remuneration are deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Director of the Employment Department that the individual is an independent contractor, as that term is defined in ORS 670.600."

ORS 670.600(2) defines an "independent contractor" as "a person who provides services for remuneration and who, in the provision of the services:"

> "(a) Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;
>
> "(b) *** [I]s customarily engaged in an independently established business;
>
> "(c) Is licensed under ORS chapter 671 or 701 if the person provides services for which a license is required under ORS chapter 671 or 701; and
>
> "(d) Is responsible for obtaining other licenses or certificates necessary to provide the services."

The elements of ORS 670.600(2) are conjunctive, and it is NMC's burden to establish that its franchisees met each of the four criteria. *Broadway Cab LLC*, 358 Or at 443; *see also* *Avanti Press v. Employment Dept. Tax Section*, 248 Or App 450, 456, 274 P3d 190 (2012) ("The statutory criteria are conjunctive; a person is not considered an 'independent contractor' unless each is met.").

In determining whether a worker was free from direction and control over the means and manner of providing services, our decision is guided by administrative rules and the common law in place at the time those rules were adopted.

OAR 471-031-0181(3)(a)(A) states:

> "'Means' are resources used or needed in performing services. To be free from direction and control over the means of providing services an independent contractor must determine which resources to use in order to perform the work, and how to use those resources. Depending upon the nature of the business, examples of the 'means' used in performing services include such things as tools or equipment, labor, devices, plans, materials, licenses, property, work location, and assets, among other things."

OAR 471-031-0181(3)(a)(B) states:

> "'Manner' is the method by which services are performed. To be free from direction and control over the

> manner of providing services an independent contractor must determine how to perform the work. Depending upon the nature of the business, examples of the 'manner' by which services are performed include such things as work schedules, and work processes and procedures, among other things."

Further, as we said in *Avanti*, our common law decisions on direction and control are "illustrative of how the legislature that enacted ORS 670.600 and the agencies that adopted OAR 471-031-0181 would have understood the 'direction and control' test to operate." *Avanti*, 248 Or App at 462. Our cases decided prior to the statutory and rule enactment show "that the 'principal factors showing right of control are: (1) direct evidence of the right to or the exercise of control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire.'" *Id*. at 463 (quoting *Henn v. SAIF*, 60 Or App 587, 591, 654 P2d 1129 (1982), *rev den*, 294 Or 536 (1983)).

With that framework in mind, we turn to the parties' arguments in this case. NMC begins by urging this court to apply a different standard of direction and control to franchises from that which is applied to other business entities. Specifically, NMC argues that facts that show direction and control should not be considered if those facts are common in the franchise industry. According to NMC, to establish direction and control in the context of franchising requires a showing of facts beyond those prevalent, and allegedly essential, to a franchise relationship. We disagree.

The statutory definitions of "employee" and "employer" contain the caveat "unless the context requires otherwise." The phrase "unless the context requires otherwise" means that, "in some cases, the circumstances of a case may require the application of a modified definition of the pertinent statutory terms to carry out the legislature's intent regarding the statutory scheme." *Necanicum Investment Co. v. Employment Dept.*, 345 Or 138, 142-43, 190 P3d 368 (2008).

However, this court has previously examined those terms in the context of franchise relationships and determined that, while "franchises are unique business

arrangements that can differ in many important ways from a traditional employment relationship," there is nothing in the nature of a franchise that requires a modification of those terms beyond their traditional definition. *Employment Dept. v. National Maintenance Contractors*, 226 Or App 473, 488, 204 P3d 151, *rev den*, 346 Or 363 (2009).

Certainly, the franchise relationship, and the franchise agreement, provide context for the evaluation of direction and control. *Avanti*, 248 Or App at 473 (noting that "[facts are] considered in the context of the agreement ***"). As we have repeatedly said, the "right to control is a matter of degree." *Pam's Carpet Service v. Employment Div.*, 46 Or App 675, 681, 613 P2d 52, *rev den*, 289 Or 677 (1980). An independent contractor is not free from any and all direction or control. Rather, the evaluation turns on whether the business or person contracting for services controls the means and manner of providing those services, or merely maintains controls necessary to effectuate the desired result. *Ponderosa Inn, Inc. v. Emp. Div.*, 63 Or App 183, 190, 663 P2d 1291, *rev den*, 296 Or 120 (1983) (stating that the "fact that a petitioner could have told a hired painter how to do the work he undertook, including what and where to paint, was 'not the kind of ability to control that the statute refers to. *** Obviously a contract will specify what is to be painted and, [even] if impliedly, will ordinarily require that the work be done in an acceptable manner. That does not necessarily mean that there is an employment relationship.'" (*See also Avanti*, 248 Or App at 461.)). But franchises are not categorically subject to a different standard.

Here, the evidence in the record supports the ALJ's conclusion that NMC retained control over the means by which their franchisees delivered on their contractual obligations to customers. A key consideration in determining whether someone is free from direction and control over the means of providing the service is their ability to choose the tools of their trade. Certainly, one can tell the carpenter the length of the beam, but it is another thing to dictate the brand of saw with which she makes the cut. That is the level of control that NMC exerted here.

In this case, the franchisees had no independent control over the tools of their trade. Rather than simply requiring that whatever tools used delivered the desired result—a clean building—NMC controlled the type *and brand* of equipment that was used down to even the buckets and sponges. NMC's manuals and directives specified the approved brands, and franchisees could not deviate from that brand list without prior approval. NMC then offered to provide those approved brands, via lease arrangement, to its franchisees.

Evidence further supports the ALJ's conclusion that NMC retained direction and control over the manner in which its franchisees performed the services. First, NMC dictated who performed the service, requiring its corporate franchisees to personally perform or supervise the work.

Second, NMC required mandatory training for all franchisees regardless of their experience level. Training materials and manuals provided by NMC to the franchisees instructed them on approved cleaning techniques. Of note, these techniques were not simply recommendations, or a list of techniques NMC had determined were efficient in helping the franchisee achieve the desired result. Rather, the materials taught approved techniques for cleaning and the franchisees were tested on that material. Their success on that test, and impliedly their adoption of the approved techniques, was a prerequisite to performing the work.

All of this is not to say that control over the brand of tool used, or the technique employed, will *per se* always result in direction and control over the means and manner of providing services. There may well be situations where such controls are necessary to achieving the desired result. Perhaps a certain brand of mower, and only that brand, leaves a distinctive pattern in the grass that is associated with the franchise. Similarly, perhaps a franchise's signature pizza dough can be achieved only by employing a particular technique for rolling. In such instances, those controls over means and manner might be "more generalized instructions concomitant to the 'right of the person for whom the services are provided to specify the desired results.'" *Avanti*, 248 Or App at 461 (referring to ORS 670.600(2)(a)). In this case,

however, it cannot be said that the franchisees were free from direction and control over the means and manner of performing the service. Accordingly, the ALJ did not err.

Affirmed.