CLEANING UP OREGON’S JANITORIAL INDUSTRY

New licensing program holds customers jointly liable when janitorial contractors break the law
EXECUTIVE SUMMARY

On July 1, 2018, a new Oregon law will hold janitorial contractors and their customers responsible for fixing longstanding problems in the industry, including sexual harassment and assault, discrimination, and wage theft.

Janitorial companies are now required to obtain a Property Services Contractor license from the Bureau of Labor and Industries (BOLI) and train all employees in preventing workplace sexual harassment and assault. Employers not in compliance risk fines and lawsuits.

Customers, such as building owners and managers, must ensure their janitorial companies have a valid Labor Contractor license. Otherwise, customers may also be exposed to the risk of fines, lawsuits, and liability for unpaid wages.

Choosing a Responsible Contractor – licensed, vetted, and listed at RaiseAmericaPDX.org/Responsible – is the best way property managers can maximize service quality and value, and minimize risk.

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INTRODUCTION: PROBLEMS IN THE JANITORIAL INDUSTRY

The industry trend toward outsourcing in recent decades has fostered a race to the bottom. Many companies contract with janitorial service providers, rather than hire janitors directly. This can reduce costs for property owners and managers, but it also allows them to shield themselves from responsibility when employers pay poverty wages and violate janitors’ legal rights. In 2017, Oregon janitors and their allies sounded the alarm about serious problems plaguing the janitorial industry.

Before the #MeToo movement became a nationwide discussion, Oregon janitors broke the silence about their experiences with sexual harassment and assault on the job. Women in Oregon face the second highest frequency of reported rape and sexual assault in the U.S.¹, and nearly six percent of reported rapes in the U.S. occur while the victim is working.² A number of factors make janitors particularly vulnerable. Janitors often work alone, at night, in isolated locations. Many are immigrant women, who may face additional challenges and intimidation when reporting abuses.³

Some janitorial companies engage in wage theft, paying piece rates (such as by the building floor) that do not add up to minimum wage, or not paying for travel time between worksites. Some “ghost employers” hire janitors over the internet and then disappear when payday comes. Other companies require employees to sign dubious franchise agreements that make janitors pay thousands of dollars for the opportunity to work. Other industry problems include high rates of on-the-job injuries, employer noncompliance with health and safety standards, and opaque subcontracting practices that shield law-breaking employers from being held accountable.⁴

The state legislature took action, creating new tools to raise standards and increase protections for low-wage workers. The Property Service Worker Protection Act of 2017 (HB 3279) holds accountable both janitorial contractors and the customers who hire them. People who hire janitorial contractors in Oregon no longer have the luxury of saying “not my problem.”

Starting in 2018, janitorial companies must obtain a labor contractor license. Additionally, they must provide professional training to all employees to prevent sexual harassment and assault, prevent discrimination, and promote cultural competency and workers’ whistleblower rights.

Anyone who hires a janitorial contractor is now required to ensure that contractor is licensed. Failing to do so can mean serious repercussions for the customer, including fines and lawsuits. Additionally, customers can be held jointly and severally liable for unpaid wages and attorneys’ fees if they hire an unlicensed janitorial contractor that fails to pay its employees.

Oregon’s Bureau of Labor and Industries (BOLI) now maintains a list of licensed Property Service Contractors. BOLI does not proactively assess whether these employers comply with wage laws, however. One way to minimize risk is to choose from a vetted list of Responsible Contractors, maintained by the janitors’ union, Service Employees International Union.

The following pages detail SEIU 49’s study of two janitorial contractors licensed in Oregon; the potential harms that janitorial customers face by using irresponsible janitorial contractors; and how to prevent harm by selecting a Responsible Contractor.
SPOTLIGHT: NATIONAL MAINTENANCE CONTRACTORS

In 2017, Zeller Realty Group, a newcomer to the Portland metro area, purchased a Class A office building downtown and soon made a controversial move. Its property manager, Cushman & Wakefield, canceled the building’s contract with a union janitorial company, which previously guaranteed fair wages, full health insurance coverage, and basic protections for workers’ rights on the job. Cushman contracted instead with National Maintenance Contractors, LLC (NMC), a company with a long history of legal troubles related to its workers.

NMC’s primary business model is selling janitorial “franchises,” often to immigrant workers with limited English proficiency. Under a complicated franchise agreement, NMC charges thousands of dollars up front for the opportunity to work, and then deducts up to 51% in “fees” from the funds property owners and managers pay each month.

NMC claims that their “franchisees” are “business owners” but Oregon courts have established that they are actually employees under state employment law.

NMC’S RECORD OF WAGE VIOLATIONS, “UNTRUE STATEMENTS … FRAUD … DECEIT …”

Public agencies have found NMC to be in violation of wage laws numerous times over decades.

In 1984, just a few years after it began operating in Oregon, the U.S. government debarred NMC from receiving federal contracts for a period of three years for violating wage standards under the Service Contract Act.

In a 1992 consent decree with Washington State’s Attorney General before the Washington Superior Court, NMC was found to be “deceiving workers about pay policies, making false statements, and firing janitors without cause,” as reported by the Seattle Times. The Court also decreed that NMC had “made untrue statements of material facts, failed to disclose material facts to prospective NMC franchisees, or engaged in an act, practice, or course of business which operates or would operate a fraud or deceit.”

The decree stated that NMC “knew or should have known that the prospective investors did not have the necessary English language skills to understand the [disclosure] document.” Some NMC franchisees found themselves without the jobs they had paid for, or below the pay rates they had been promised. NMC terminated work assignments on short notice without giving franchisees “a reasonable opportunity to cure problems” and misled franchisees about what would happen if they were ill or wished to go on vacation.

One might hope that after being barred from federal contracts and having a consent decree issued to stop serious problems, NMC would turn itself around and treat its franchisees and clients fairly. But within a few years, NMC faced lawsuits from its some of its franchisees and more bad press.

According to the New York Times, National Maintenance paid $300,000 to settle a lawsuit in 2003 brought by 12 immigrant janitors who accused it of deceptive practices and of not returning their franchising fees after their accounts were canceled.

The janitors’ attorney, Sam Chung, told the Spokesman-Review, “I don’t even know if they got paid minimum wage in certain circumstances.” The Spokesman-Review reported:

Payments were based on the amount of time NMC said it should take to clean a building, not actual hours worked.

Many of the plaintiffs were immigrants from Asia, and the inability to speak English “was a very significant factor,” Chung said.

He contended franchise agreements, written in English, were “a sham” because the company didn’t have enough work for all the franchises it sold.

… “It was tragic,” Chung said, how some of the franchisees lost their savings to a system that saddled them with loan payments as well as fees that took 20 percent of their income.

Also, Chung said, the company controlled it’s [sic] franchisees as though they were employees, allowing them no direct financial relationship with customers.

In 2004, Willamette Week reported “the bogus ‘franchises’ that janitorial company National Maintenance Contractors has been peddling to poor immigrants are rife with roguery … NMC lures franchisees, usually non-English speakers with no business experience, with the promise of owning their own janitorial company.”

MORE PROBLEMS UNDER MARSDEN HOLDING’S OWNERSHIP: CONTRACT VIOLATIONS, UNPAID WAGES

NMC was acquired in 2006 by Minnesota-based Marsden Holding, but it appears NMC maintained its old ways, and its legal troubles continued.
The Spokane County (WA) Library District canceled its contract with NMC in 2007, after library officials realized that NMC was violating its service contract and prevailing wage law.\textsuperscript{13} The \textit{Spokesman-Review} reported that “library trustees unwittingly stepped into a long-simmering controversy over whether National Maintenance and similar companies improperly circumvent state labor laws and prey on immigrants.” The library district director “said he believed the janitorial work was being done by National Maintenance employees when the contract took effect” but “the company disclosed nothing about franchisees,” the newspaper reported.

**MISCLASSIFICATION: “FRANCHISEES” ARE ACTUALLY EMPLOYEES**

NMC has a history of using “franchise” arrangements to classify workers as independent contractors.

Employee misclassification is the practice of labeling workers as independent contractors, rather than employees. This practice, a widespread problem in some industries, creates unfair market competition and siphons funds from public programs by hiding employees’ income from the tax rolls. Misclassification denies employees fair pay, workers compensation and unemployment insurance, and workplace health and safety protections.\textsuperscript{14}

NMC has been found to have misclassified its employees in both Oregon and Washington. Washington State’s Department of Labor and Industries (L&I) found that NMC misclassified employees as independent contractors in 2014. The State’s L&I audit found that NMC owed unemployment insurance for employees it had misclassified. L&I slapped the company with a $74,250 penalty for failing to keep records for covered workers.\textsuperscript{15} The audit also noted that NMC “was audited twice previously and found to have significant subcontractor issues.”

In Oregon, a series of state judges have found that while NMC calls its janitors “franchisee” independent contractors, under state employment law, they are actually employees for purposes of unemployment tax contributions.\textsuperscript{16}

The 2013 ruling by an administrative law judge, upheld in 2015 and 2017 appeals, found:

- Franchisees had to pay thousands of dollars to start working for NMC.\textsuperscript{17}
- Each month, NMC kept up to 51% of what building owners and property managers paid for janitors’ work. This included up to 26% for fees, supplies, royalties, etc.\textsuperscript{18} Janitors paid an additional 25% service fee if they wanted assurance they could keep working after one year.\textsuperscript{19}
- Franchisees were not paid for extra hours worked, such as when cleaning extra messes after office parties.\textsuperscript{20}
- If NMC failed to collect payment from its customers, franchisees would not get paid for work performed.\textsuperscript{21}

**NATIONAL MAINTENANCE CONTRACTORS TIMELINE**

- **1978** National Maintenance Contractors begins operations in Oregon.\textsuperscript{35}
- **1984** NMC barred from receiving federal contracts, after violating wage standards under Service Contract Act.
- **1992** NMC admits to “fraud” and “deceit” in consent decree with Wash. Attorney General.
- **2000** NMC sued by a group of immigrant franchisees accusing it of deceptive practices, terminating assignments without returning franchising fee.
- **2003** NMC pays $300,000 to settle same lawsuit.
- **2004** Willamette Week calls NMC franchises “bogus.”
- **2005** Oregon Employment Dept. audit of NMC records 2002-2004 finds unpaid unemployment insurance taxes.\textsuperscript{36}
- **2006** Marsden Holding LLC acquires NMC.
- **2007** Spokane Library cancels NMC contract after learning of NMC’s use of subcontractors. NMC accused of violating prevailing wage law and contract terms.
- **2008** Wash. Labor & Industries pursues NMC for unpaid worker compensation insurance.
- **2013** Oregon Employment Dept. assesses NMC for unpaid unemployment taxes 2009-2011. Oregon administrative judge concludes NMC franchisees are employees, not independent contractors, under state employment law.
- **2014** Washington Labor & Industries fines NMC Franchising LLC for failing to keep records on employees NMC had misclassified.
- **2017** Oregon Appeals Court upholds ruling that NMC franchisees are employees.
- **2018** New Oregon janitorial accountability law holds customers liable for unlicensed contractors’ failure to lawfully compensate employees.
SPOTLIGHT: MILLENNIUM BUILDING SERVICES

On the surface, Millennium Building Services appears to be a traditional janitorial contractor. Millennium competes with other large Portland-area janitorial firms to clean high-profile commercial real estate in downtown Portland and major corporate campuses. Despite its image of a professional and highly regarded janitorial contractor, Millennium employees began speaking up in 2017 about problems on the job, including poverty wages even after years of loyalty, high employee turnover, and employer violations of basic workplace rights. The following are snapshots of workers’ experiences at Millennium.

WORKERS REPORT THE FLOUTING OF PROTECTED SICK LEAVE

In October 2017, a Millennium employee reported to BOLI that she had been denied pay after requesting sick leave for a workplace injury. BOLI investigated and found that indeed Millennium was in violation of state and local protected sick leave law. Other Millennium employees reported to BOLI they believed their supervisor retaliated against them for using protected sick leave. Their complaints are still pending.

INJURED WORKERS, VIOLATIONS OF WORKPLACE SAFETY AND HEALTH RULES

Millennium’s worker injury/illness rate was 2-3 times higher than industry averages between 2014-2016, and it increased each year. Additionally, Oregon OSHA inspectors have found Millennium to be in violation of several workplace safety and health rules.

In March 2017, Oregon OSHA cited Millennium for failing to ensure proper instruction and supervision,23 after an employee suffered severe injuries on the job. OSHA deemed this violation “Serious,” meaning “the workplace hazard could cause an accident or illness that would most likely result in death or serious physical harm.”24

In 2017, a Millennium employee submitted a safety and health complaint related to their assignment at the childcare center of major corporate campus in Beaverton. Oregon OSHA investigated and learned that Millennium had two incidents of workers being splashed in the eyes with cleaning chemicals. OSHA cited Millennium for improper labeling of hazardous cleaning chemicals, and not maintaining a required safety committee, and the agency issued a warning about improper use of bleach and out-of-date Safety Data Sheets.25

This was not the first time Millennium experienced such problems. A few years prior, in 2009, Oregon OSHA issued Millennium citations for not providing personal protective equipment to employees using certain cleaning chemicals, and for not maintaining proper workplace illness/injury logs.26

HIGH TURNOVER AT DAIMLER TRUCKS HQ

Millennium janitors who clean Daimler Trucks North America’s headquarters come and go so fast, the employee turnover rate on site is nearly 100 percent per year, according to SEIU’s analysis of reports by workers.

Millennium employees have reported approximately 17 cleaning positions at Daimler’s Swan Island headquarters — six day porters and eleven night janitors. In the last 12 months, Millennium employees say that 16 of their coworkers have left the building, which would mean a 94.1 percent turnover rate on site.

WORKERS REPORT RETALIATORY, OFFENSIVE, AND INAPPROPRIATE CONDUCT BY MANAGEMENT

Millennium employees filed a charge with the National Labor Relations Board (NLRB) in January 2018, alleging Millennium violated their rights under federal labor law to speak up about the need for improvements on the job. Based on the results of its investigation, the regional NLRB office reached a settlement with Millennium, which obligated Millennium to post worksite notices affirming workers’ rights to form a union and discuss this topic at work.

MILLENNIUM’S USE OF SUBCONTRACTORS

Property owners and managers should also be aware of Millennium Building Services’ use of subcontractors. SEIU has spoken with workers at multiple buildings in downtown Portland and around the metro area where Millennium holds a cleaning contract and subcontracts the work to other companies.

Recently, SEIU discovered that MBS hired Rudmar Inc. (doing business as Pro-Clean NW) as a subcontractor. In 2013, a jury found that Rudmar/Pro-Clean illegally discriminated against a Mexican employee, paying them “less than similarly situated white or American employees.” The plaintiff alleged that Rudmar/Pro-Clean’s operations manager had referred to the plaintiff as “his little potato—brown on the outside and white on the inside,” and that Rudmar/Pro-Clean managers told him he was not worth paying more because he was “illegal.” The plaintiff was awarded a judgment of more than $111,000 including attorney’s fees.
RISKY BUSINESS: CLIENTS USING UNLICENSED CONTRACTORS CAN FACE FINES, LAWSUITS, LIABILITY

Building owners and property managers have long faced increased risk when hiring a janitorial contractor on the cheap. When contractors pay poverty wages and maintain poor working conditions, the result is often high employee turnover, which can compromise service quality. In some cases, irresponsible contractors’ practices can pull their customers into public controversy.

Now property owners and managers face greater penalties under the Property Service Worker Protection Act if they choose an irresponsible janitorial contractor. Specifically:

- BOLI may assess a civil penalty of up to $2,000 per violation to anyone who uses an unlicensed janitorial contractor.
- Anyone who uses an unlicensed janitorial contractor may be subject to legal action, injunction, and legal costs.
- Additionally, a customer may be personally, jointly, and severally liable for any unpaid wages due to an employee who worked for the customer.

With joint liability now part of Oregon law, building owners and managers are required to do their due diligence in hiring a legitimate and licensed janitorial contractor. Anyone wishing to hire a janitorial company is now required to examine its Property Service Contractor license or permit, and to retain a copy.

But even a customer who complies with this basic requirement can face other hidden risks.

SUBCONTRACTING: A HIDDEN RISK

Many janitorial companies, including the two highlighted in this report, use subcontractors at some locations. Some customers have no idea that their building is being cleaned by a different company than the one they hired.

If you own or manage a building and use a janitorial contractor, that company may engage in the common practice of subcontracting the cleaning to one or more other entities.

Even if you confirm that your janitorial contractor has a valid Property Services Contractor license, you could face significant risk if they subcontract to another company.

Under new liability provisions, a customer could be held liable for any unpaid wages owed by an unlicensed subcontractor, plus attorney fees.

For this reason, minimizing risk means using a janitorial contractor that is both licensed and responsible.
THE SMART CHOICE: RESPONSIBLE CONTRACTORS

The best way to ensure that building owners and managers can avoid being entangled in others’ poor decisions is to choose a responsible union contractor, with bona fide dispute resolution systems to allow workers to speak up about concerns on the job.

The Responsible Contractors list maintained by Service Employees International Union (SEIU) includes janitorial contractors that meet the following criteria. Responsible contractors:

- Have a Property Services Contractor permit or license, as required in Oregon.
- Compensate their workforce at or above prevailing wages and benefits.
- Seek to maximize continuity at workplaces, prioritize worker safety and promote continuous improvement in the quality of their workforce.
- Respect and encourage the rights of their employees to bargain collectively.
- Provide employees with a bona fide complaint/grievance procedure.
- Support the environmental and energy efficiency policies of building owners.
- To find a Responsible Contractor, see RaiseAmericaPDX.org/Responsible.
CONCLUSION: IT’S TIME TO CLEAN UP THE JANITORIAL INDUSTRY

Serious problems such as wage theft, discrimination, and sexual harassment and assault have plagued the janitorial industry for too long.

Correcting such serious problems requires a multifaceted approach. As described above, janitorial contractors are now required to be licensed, and property owners and managers must use exclusively licensed janitorial contractors. Doing otherwise could mean risking fines, legal action, and joint liability.

In addition, janitorial contractors are required to train all their employees, supervisors and managers in preventing sexual harassment and assault, preventing discrimination, promoting cultural competency and understanding employees’ whistleblower rights.

Whether you’re a building owner, property manager, individual customer, janitorial employer or employee, or someone who cares about these issues, you have a role to play.
NOTES


8. “… with regard to arrangements for replacements for franchisees who were ill or who wished to go on vacation.” Consent Decree, State of Washington v. National Maintenance Contractors.


   See also Lee, Thomas. “Janitors Say Contracts Cheat Them.”


13. The suit was dismissed in Oct. 2008 when the library district released $35,142 it had withheld from NMC. L&I continued to pursue a $17,000 fine against NMC for alleged failure to provide certified payroll records, and an attorney for NMC said the company would try to negotiate an agreement with the state.


16. Han, James W., Final Order, February 2, 2015, National Maintenance Contractors vs. Employment Department, Oregon Court of Appeals case no. 2013-UIT-00019.

17. Han, James W., Final Order, February 2, 2015, p. 12, item 57.

18. This covered: 6% royalty, 13% “office management fee,” 1% liability insurance premium, 4-6% for cleaning supplies the franchisee bought from NMC. Id., p. 6.

19. NMC only was required to provide replacement work for one year, if a client terminated or reduced the scope of work at an account the franchisee had bought from NMC. Franchisees had the option of paying an additional 25% fee that NMC called an “extended replacement guarantee,” requiring NMC to maintain its end of the deal after the first year. Id., p. 6.

20. Id., p. 11

21. Id.


23. Oregon OSHA, Inspection No. 317719183, Citation and Notification of Penalty, issued March 26, 2018, p. 4.


25. Oregon OSHA, Citation and Notification of Penalty, Insp. No. 317717660.

“Notice,” no date. Notice of Alleged Safety or Health Hazards, Complaint No. 209426442, 7/17/17 2:22 p.m.

26. Oregon OSHA inspection 313477820(91), Citation and Notification of Penalty.

27. Sergio Garcia v. Rudmar Inc., Case No. 1205-06755, Multnomah County Circuit Court, Verdict Form, June 28, 2013.


29. Id., General Judgment and Money Award, July 27, 2013; Principal judgment of $27,511.73; William Waudby, Principal judgment of $26,273.00; Rudyard Bocala, Principal judgment of $26,273.00; Attorney fees of $31,537.40 awarded Dec. 20, 2013; Supplemental Judgment and Money Award, dated Dec. 6, 2013, filed Dec. 11, 2013, entered Dec. 20, 2013.


31. ORS 658.453(1)(f)

32. ORS 658.475

33. ORS 658.415(8)(a), 658.465

34. ORS 658.437(2)

35. Id., p. 4, note 1.
