

Congratulations! You're an entrepreneur now

Krissy Clark: Hey there. Just a heads up before we start, that this episode contains some foul language - starting with my next sentence.

But I think there's actually something appropriate about beginning this new season of our show with the story of a job involving — here it comes — shit.

Because a lot of people we've talked to this season have shitty jobs. Like the job that belonged to this guy...

Jerry: My name is Gerardo Vazquez —

Krissy: Everyone calls him Jerry.

Jerry: Ever since I was a little kid. One of my second or third grade teachers just started calling me Jerry. And then everybody started calling me Jerry so it just stuck.

KC: How do you feel about Jerry?

Jerry: I like it. I like my Spanish name too, it's pretty cool. I actually love it, my spanish name. But you can call me either one — it's all good. (laughs)

Krissy: And That's the kind of guy Jerry is. Flexible. Accommodating. He has a passion for feeding hummingbirds. And watching old movies.

But back to his shitty job. Jerry got it in 2007, when he was in his mid-thirties, living with his parents in San Bernardino — a sprawling county east of LA where orange groves have given way to freeways and Amazon warehouses.

The job was with a commercial cleaning company called Jan-Pro. Jerry became a janitor.

One of the places he started cleaning was a big daycare.

When he started, he was eager to prove himself. His first night on the job....

Jerry: Put the Jan-Pro shirt on -

Blue, with white letters...

Jerry: The badge.

Krissy: Loaded up on Rockstar energy drinks.

Jerry: Ready to go. You put your gloves on, your goggles, and start scrubbing.

Krissy: The daycare had about a hundred kids. Many still in diapers, or potty training.

Jerry: You come in, you open the door, you turn off the alarm, you turn on the lights.

Krissy: When he headed to the bathrooms to start cleaning, he had no idea what he was in for.

Jerry: There's like a bomb of poop all over the place. Pee all over the place.

Krissy: And then there were the diapers. Garbage bags full of diapers — so heavy you had to be careful getting them out of the trash bins

Jerry: If you try picking up the plastic bag, with all the diapers — the bottom's gonna rip.

Krissy: And when it rips all the poopy diapers come sliding out, smearing their contents everywhere.

But it wasn't just the shit that was hard to deal with.

Jerry: Crayons, markers all over the place, food all over the place, milk, juice on the floor. The sand.

Krissy: Dragged in from the sandbox. All this stuff, dried up, ground into things. It doesn't come off easily.

Jerry: Mopping for hours just wears down your knuckles.

KC: Just holding that stick...

Jerry: That mop going back and forth, back and forth it just wears you out. After doing that for a good hour, your hands start to hurt — and if I move my fingers like this — they'll pop, by themselves. (pop pop pop pop)

KC: I can hear... and that didn't used to happen?

Jerry: No, got that from the mopping. I think if you ask any janitor — do you get tired if you mop for an hour or two, they're gonna be like YES! It starts to strain your hands, your knuckles.

Krissy: By the time he got done each night, usually around 3 or 4 in the morning....

Jerry: I would just go home, take off my shoes, change and go straight to bed.

Krissy: Of course there are lots of hard jobs in the world. Jobs that are dirty, and gross, and make your body hurt and make you climb into bed as soon as you get home. But there was something about Jerry's job that made it that much harder to bear.

Krissy: Something he discovered when he looked closely at his first check. He was making...

Jerry: Maybe five bucks an hour?

Krissy: Five bucks an hour.

At the time, in 2007, the federal minimum wage was \$5.85 an hour. So, he was making below federal minimum wage. And he was making way below California minimum wage, which was \$7.50 an hour.

But once Jerry realized how little he was making, he says it was hard to get out of the job. He was kind of stuck - for reasons I'll get to later.

And even today - more than a decade later - many janitors like Jerry still earn less than minimum wage.

When you earn that little, Jerry says it makes you want to pull your hair out. It makes you feel sick.

Jerry: You've worked all these hours, very hard work. And at the end of the day you're getting chump change. You're basically just barely making it. You clip coupons, and you um.... It's like hey we get to eat today, so let's thank God.

Krissy: So how did this happen? How is it that a worker in America in the 21st century could get stuck in a job making less than minimum wage? In a country where we've had a law on the books for more than 80 years that requires companies to pay a minimum wage to each of their employees.

Well, in Jerry's case, the answer lies in the fact that when Jerry was brought on to be a janitor he was not considered an employee.

He was not an employee of the daycare that he cleaned. And, at least according to Jan-Pro - the janitorial services company whose name was on his uniform - he was not an employee of Jan-Pro either. In Jan-Pro's eyes, he was an independent contractor with his very own personal janitorial business.

Basically, the reason Jerry made less than the minimum wage that employees are guaranteed in this country is because in the eyes of the company whose name was emblazoned on his work uniform, Jerry was a "non-employee."

And more and more American workers are finding themselves in the same position.

Krissy: Welcome to the Uncertain Hour. I'm Krissy Clark. And this season we're talking about this thing we used to call employment. What happened to it, and why it matters.

It's such an ordinary word, right? Employment. Employer. Employee. The kind of bland sounds that fade into the wallpaper of your mind.

But the questions of which workers are really employees, and which companies are really employers, have become all out battles in many industries. And there's a huge amount at stake, like who actually gets the kinds of basic protections that most American workers took as a given not that long ago. Things like being paid at least a bare minimum wage; getting help if you're hurt on the job; having a workplace free of harassment and discrimination; being able to form a union; being eligible for unemployment insurance.

These rights that helped support the American dream, and the American economy, have disappeared for more and more Americans. In fact, a lot of the ways that just "getting by" can feel so hard right now for so many people come back to this question - of who's an employee, and who's not.

Of course, the fights around all this have gotten some attention lately in the context of Uber and Lyft and Amazon delivery drivers, the whole "gig" economy thing.

But, it's a much older, and much deeper story than those apps and websites.

In fact, from the moment our country started making laws to protect employees, more than a hundred years ago, there've always been some companies that try to get around those laws, by arguing their workers are not their employees.

This tactic has, at various times, been aimed at coal miners, migrant cucumber harvesters, strippers, poultry workers, baseball players, computer engineers, and recently, janitors, like Jerry Vazquez.

We're gonna get to the stories of a lot of different kinds of workers this season. But it's Jerry's story that I want to start telling you today. How he and tens of thousands of people like him found jobs where they could make less than minimum wage, at janitorial companies like Jan-Pro. Jobs that involved cleaning the floors and taking out the trash at places you've probably been to, or at least heard of. Like some Walgreens, Outback Steakhouses, Enterprise Rent-A-Cars, H&R Blocks, Supercuts, and plenty of random doctor's clinics, gyms, and office buildings you may have passed through.

And before I get into the question of whether or not these janitors should have been considered employees or non-employees, the first thing I want to tell you is how they got drawn to these jobs in the first place. And what some of these people told me is... well, it started with an ad.

Announcer: If you're working for a paycheck, or worrying about job security, your own business could be just over the horizon. // Now I have the freedom to make my own business decisions. Financially I'm doing better, while I provide security for my family. // I can grow and manage my business at my own pace. It's my choice. // Want your own business? Call Jan-Pro!

Krissy: Jan-Pro isn't the only janitorial services company that sells itself like this. So does Coverall, Jani-King, and Stratus, to name a few. They all have a sales pitch along these same lines to draw you in.

Not, "Hey, come work for us cleaning toilets and scrubbing floors!" Instead, "Hey, come escape the grind of employment! Be your own boss. Set your own hours. Come take a shot at the American entrepreneurial dream. Your own business could be just over the horizon!"

And that really appealed to Jerry.

———*Jerry: They just made it sound very good.*

Krissy: When He first heard about Jan-Pro in the mid 2000s, he was living with his aging parents.

He'd recently left a job doing repairs at oil refineries because his dad was sick with emphysema. Jerry was helping take care of him. So he desperately needed the kind of flexibility to, say, run back home for an hour in the middle of the workday to troubleshoot his dad's oxygen tank.

Jerry: Having a regular job, you can't just leave.

Krissy: Jerry had learned this the hard way, a few years before, when his dad had been in the hospital.

Jerry: And i was telling my boss, hey my dad's having surgery and I have to go. He goes well, just give me a few more minutes. Then like every few minutes I'm like can I go now, cuz my dad's in the hospital, I have to go. Finally, he was like ok, you can go. And then when i got there he was already in the operating room. So I felt a little bit bad about that...

KC: I can see it brings up emotions for you.

Jerry: He says, 'When you go in there you don't know if you're gonna come back out.'

Krissy: Jerry's dad made it through surgery, but Jerry didn't want to be in that position again, unable to be there when his dad needed him. So the idea of making a living while managing his own time, setting his own schedule, it meant a lot.

And then one day, he was looking through the PennySaver, that weekly coupon circular that comes in the mail.

Jerry: There were a bunch of ads of things people were selling. Things you could buy.

Krissy: He's flipping through the pages, and he notices this ad. He kept a copy of it that he showed me. In black and blue letters....

Jerry: It says Jan-Pro Cleaning Systems. Own your own franchise for as low as \$950 down.

Krissy: exclamation point.

Jerry: Guaranteed customers, guaranteed financing. Training and support.

Krissy: \$5,000 to \$200,000 dollars in business.

Jerry: And then it says their phone number.

KC: And why do you think this caught your eye?

Jerry: You're thinking cleaning business, you know that shouldn't be that hard. It's a small down payment, \$950... and then you know I always wanted to do something on my own. Start my own business.

Karen: That was that was the draw. That was the big draw.

Krissy: Karen Miller used to work with Jan-Pro, selling janitorial franchises to people like Jerry. She was based in a different part of the country, Michigan. But she says the selling points were pretty much the same all over.

Karen Miller: You know, to start your own business and freedom for \$950. That was always a very prominent part of marketing.

Krissy: And the marketing worked on Jerry. He called the number listed on the ad he read, set up a meeting and soon found himself at a Jan-Pro office in Ontario, California, a couple blocks off the freeway, in a suburban office park.

Jerry: Pretty clean, decent looking place. Just a small typical office.

Krissy: Kinda empty.

Jerry: No other cleaners anywhere. It was just a secretary. Other managers. Like two other managers.

Krissy: One of the people at the office sat down with him, gave him a promotional packet with a picture of a pink sky and the sun glimmering just over a mountain range and, in big white letters, that phrase:

Promotional video: Your own business could be just over the horizon!

We tried to reach the person who Jerry spoke to that day. She didn't respond. But Karen Miller, the woman at that Jan-Pro office in Michigan, spent a lot of time fielding potential franchise buyers like Jerry. And she says, there was a basic script handed down from Jan-Pro headquarters that they were trained to follow when someone walked in the door. She called it "the spiel."

Karen Miller: We were building relationships with people you know, what are your goals? What are you...what do you see for your future? How, you know, you can have freedom and, you know, stability and security. And we were helping people start their own businesses and they were gonna be business owners and, you know, grow and thrive.

That is definitely not what, you know, it turned out to be. But that is what I believed it was going to be, you know, in the beginning.

Krissy: Karen and people like her, who sold Jan-Pro franchises to people like Jerry, had a big incentive to close those deals because of the way Jan-Pro is structured. Karen's income was directly based on getting people like Jerry to buy franchises.

The whole business model is a little intricate. It took me a while to understand it, and it took Jerry a while, too. But here's basically how it works.

Jan-Pro's franchise structure is shaped like a pyramid, with three levels. At the top is Jan-Pro Franchising International, based in Georgia. They parcel off regions of the country, and sell those territories to people on the middle rung, known as "master franchisees." Or sometimes, just "Masters," which is a little weird.

Those master franchisees try to make back their investment - and a profit - by selling thousands of smaller unit franchises to people at the bottom of the pyramid, people who will actually do the cleaning work, like Jerry, either by themselves, or with people they hire on.

Karen out in Michigan was a master franchisee, trying to sell unit franchises. So were the people who owned that office in Southern California where Jerry got his sales pitch.

According to the brochure that Jerry got with the sun twinkling on the horizon, if he bought one of these "unit franchises", Jan-Pro would train him in how to clean buildings, and Jan-Pro would

guarantee to provide Jerry with an initial set of customers - that is, the offices and businesses that needed cleaning.

The Jan-Pro master franchisee would negotiate the price of the cleaning services with those customers, and collect the payments from those customers.

Once a month, they'd pay Jerry what the cleaning customers had paid them, minus some fees and other deductions that they'd keep for themselves.

Meanwhile, Jerry's main job would be simply to get the buildings clean.

Since most of the cleaning happened at night, after everyone had gone home, Jerry figured he could do the work when he pleased, as long as it was done before anyone came in the next morning. So it was flexible, which, with Jerry's responsibilities caring for his dad made it—

Jerry: Kind of a life saver, you know. So I really wanted it to work.

Krissy: And, Jerry says, it seemed like Jan-Pro was going to help him make it work.

Jerry: You know, they would help me grow my business...

Karen Miller: We'll be there for you. We'll mentor you.

Krissy: That's Karen, the former master franchisee from Michigan, again.

Karen: We'll help you, you know, start your business and grow your business.

Jerry: Acquire customers...

Karen: And, you know, we have all of these tools and, you know, we'll get your clients for you, we'll handle the billing.

Jerry: Get the equipment from better prices. They were a known name brand.

Karen: You know, all of those things.

Krissy: It sounded kinda like Jan-Pro was selling Jerry a janitorial business in a box. Just add water and watch it grow. The chia pet of janitorial services.

There were different levels of plans you could buy into. The more money you spent, the more money you could earn.

The cheapest plan - the one advertised in the PennySaver that first caught Jerry's eye - cost \$950 dollars up front, and \$2800 in total. That was supposed to get you \$5000 in annual

income. But once he met with the Jan-Pro people, he started considering a more expensive plan that generated more income. It cost five thousand dollars up front, plus another \$4000 that he'd pay back in monthly installments. So a total investment from Jerry of \$9,000.

In exchange, Jan-Pro said he could get \$20,000 worth of income per year.

Jerry figured \$20,000 a year wasn't gonna make him rich, but it'd be a solid stream of income for his fledgling business, and then he'd grow it from there.

On the sheet in the Jan-Pro brochure that laid all this out, there was a little asterisk next to that \$20,000 dollars and all the numbers listed in the column of "total income" that Jan-Pro was offering, depending on what level of plan you buy. In small print, the asterisk explained those totals were based on "gross income." Meaning, they weren't spelling out all the franchise fees and royalty fees and financing payments - at 10 percent interest - that Jan-Pro would deduct from Jerry's monthly check, not to mention the self-employment tax he'd have to pay on top of that.

But people rarely gave that asterisk much thought, according to Karen, the former master franchisee from Michigan:

Karen Miller: You know, you go over all of this stuff with people about the royalties and just all of these fees. And nobody's... no one's paying attention to that kind of stuff. They're excited that they're going to, you know, own their own business and be able to have autonomy and be independent. You're excited about the concept and what's happening and what the future looks like and where can I sign on the dotted line?

Krissy: Jerry did have a few questions about how it all worked. Like, how much would that \$20,000 a year break down to, in terms of an hourly rate? Jerry says the Jan-Pro person he talked to told him —

Jerry: You can average about \$25 an hour. So I said, Hey, that sounds good. I was you know pretty much sold.

Krissy: It turns out, Jan-Pro actually has rules forbidding their sales people from estimating how much money a potential unit franchisee might make per hour.

In fact, that rule is spelled out in this big document that they gave Jerry called a "franchise disclosure document," that explains the terms and conditions of buying a Jan-Pro franchise. Jerry holds up his thumb and finger, spread an inch apart.

Jerry: Maybe like that thick.

Krissy: Oh wow.

Jerry: Yeah. (Laughter)

Krissy: The document was filled with long legal disclaimers.

And deep in to the document, there's a warning in capital letters saying "WE HAVE SPECIFICALLY INSTRUCTED OUR SALESPERSONS AND ALL OTHER PERSONNEL THAT THEY ARE NOT PERMITTED TO MAKE ANY CLAIMS, WRITTEN OR ORAL, REGARDING POTENTIAL EARNINGS, INCOME OR OTHER FINANCIAL MATTERS."

But then, in smaller letters it goes on to say that if you believe any claims about earnings, income or other financial matters have been made, you've gotta provide a written statement saying so, and if you rely on that information, you do so at your own risk.

Jerry took all this paperwork home. He says he browsed through it, but he couldn't afford a lawyer to go through the fine print word by word. Plus?

Jerry: I kept thinking you know, it's cleaning, I mean how hard can it be? It shouldn't be that technical or that complicated, legal wise. And of course I also wanted it to work. So I was hopeful.

Krissy: He was excited to take the leap, to buy the franchise, grow the business, and maybe even some day hire his own employees.

But there was a problem. He didn't have enough money to make that \$5,000 down payment.

Jerry: It's a lot of money.... I mean, to me.

Krissy: And, to a lot of people who are drawn to buying unit franchises from Jan-Pro. Karen, the ex-master franchisee from Michigan, says she once sold a franchise to a woman who made the down payment with a pile of money orders.

Karen: You know, that she had been putting aside, and then she just brought a whole stack of them in for her package.

KC: Wow. So she didn't have a savings account, it sounds like.

Karen: Right. Right.

KC: So that gives you a sense of kind of where they were coming from financially.

Karen: Yes, exactly. Exactly.

Krissy: In Jerry's case, he didn't use any money orders. Reluctantly, he asked his parents if they could help. His dad was too sick to work because of his emphysema. They were mostly depending on Jerry to be the breadwinner, plus a little money that his dad got in disability payments, and that his mom earned from a couple jobs taking care of elderly people. All in all, the family budget was pretty tight.

Jerry: Didn't have a lot of money. But I figured as soon as I started working, I'll start paying them.

Krissy: His parents decided to lend him the money. They'd both grown up in Mexico, very poor. They'd moved to the U.S. for a better life. And the idea that their son might be able to start his own business it seemed like the fulfillment of their American dream. His mom, a tiny woman with sparkling eyes, says she wanted to help make it come true.

Jerry's Mom: I want to help.

Krissy: That's what moms do.

Mom: Yeah. I said let's go. I wanna do it.

Krissy: And so, Jerry decided to go for it.

Jerry: I gave them a call and then said yeah, okay I think, I'd like to try this, you know, sign up.

Krissy: He signed the franchise agreement with Jan-Pro Cleaning Systems of Ontario, California. It was a ten-year contract. He put \$5,000 dollars down, with a promise to pay Jan-Pro \$4,000 more through monthly deductions in his check.

And, that's how he started his very own janitorial franchise. The only staff was him and his mom.

Jerry showed me the ID badge Jan-Pro made for him after he did all the paperwork. It's still hanging on its blue lanyard.

Jerry: Here's the badge.

KC: Oh! There you are... you had sort of a mustache. You look the same pretty much!

Jerry: Yeah... my hair's falling out, and it's gray.

KC: So at this point... what's going through your head when you're getting this picture taken?

Jerry: Right there, I was excited. I was ready to get going.

KC: What would you now tell that person?

Jerry: Don't do it. (laughs) Run the other way.

More, after a break.

AD BREAK

Krissy: Midway through the 18-page contract Jerry signed with Jan-Pro back in 2007, on the day after Independence Day, it turns out, there are these two sentences.

The first sentence starts like this: "Franchisee" - that's Jerry - quote "is and shall remain at all times a completely independent contractor...."

The next sentence goes on to say "Franchisee" - that's Jerry again - quote "is not, and shall not hold itself out as, an employee...."

So - there it was, spelled out in legal fine print. Jerry was an independent contractor. Jerry was not an employee. At least according to Jan-Pro.

And when he signed the franchise agreement? That's exactly what he wanted, to be his own boss, to escape the confines of a "regular job."

But that distinction they were making, that Jerry was not an employee and he was an independent contractor, has everything to do with why they didn't pay Jerry the minimum wage.

It's a tactic that more and more companies are using lately. Because if your workers are not your employees, there are lots of things you don't owe them. Like minimum wage, and overtime, and worker's compensation. This is the kind of stuff that's been in the news lately, with Uber and Lyft and DoorDash. But this question, about which kinds of workers are owed which kinds of protections from the people that rely on their labor, it's a question that goes way back, to a time before we even used the words independent contractor or employee.

Because, of course, people have worked for other people for as long as there's been recorded history. And at the roots of our current employment laws, there are much older laws dealing with people working for other people.

And it's worth looking at how we got here. Why does the law give certain kinds of workers protections and not others? Because eventually, all that history will come crashing down on to

Jerry Vazquez, as he mops floors with aching hands, wondering how the hell he wound up making five bucks an hour.

And so before I get back to Jerry the janitor, I want to take you way back to a time centuries ago

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Richard Carlson: Back before the industrial revolution.....

Krissy: Back in the 1700s, the 1600s, and even further back, when the law divided workers into two groups, which were kind of the great great grandparents of employees and independent contractors.... namely?

Richard: There were servants and then there were artisans, independent laborers.

Krissy: That's Richard Carlson. He's a professor and legal scholar at South Texas College of Law, Houston. He's spent years writing about the origins of employment.

And Richard says, to understand the way we think about these questions - of who is an employee and who's an independent contractor. Or what a company owes its employees? What rights they have? It helps to know a little about what came before employees or independent contractors even existed. What those two concepts descended from in America, and Britain before that.

And, like he was saying, what they descended from, is this.

Richard: There were servants and then there were artisans.

Krissy: Artisans were in business for themselves. They had a skill, like making shoes, or cabinets, or cloth, that they could sell to different clients. They had their own tools, made their own choices about how to manage their business and profit from their labor. They were independent.

And then, on the other side of the line there were the workers who were dependent on someone else to earn a living. These workers were called servants.

Krissy: Are we talking like butlers? I keep thinking of Downton Abbey.

"Carson the Butler speaking!"

Krissy: Is that appropriate?

Richard: Yeah

Krissy: But not just butlers. There were servants doing all kinds of work for all kinds of masters.

Richard: The people who work out in the fields or manage the livestock. You might have a carpenter who is your servant.

Krissy: Servants were controlled by their masters. At their beck and call. Which could lead to horrible brutality and exploitation. Still, masters also had certain expected social, and even legal obligations to take care of their servants in certain basic ways. Like, if a servant got injured because of a master's negligence or poor supervision, the master was legally responsible for that. In fact, if a master was wondering what legal responsibilities he had to his servants -

Richard: You would look in the book on family law, and you would look for the chapter on your servants, because the servants were regarded as part of your family.

Krissy: Masters knew their servants personally. They were part of their household.

And it was these two kinds of identities, either dependent servant, with a master or independent artisan, that defined paid work, for literally centuries.

Up until:

Richard: Up until the industrial revolution.

Krissy: Which started, roughly, in the late-1700s and had gained full steam by the mid-1800s. Now, I'd always thought of the industrial revolution as mostly about machines getting invented: the steam engine, electricity, the railroad.

Richard: But that's just one half.

Krissy: The other half of the industrial revolution, Richard says, was reorganizing how people actually did work. That was just as revolutionary.

Early on the people who worked in factories were basically independent artisans, hired on personally by the factory owner to make stuff, each using the machines in their own individual ways.

But some factory owners started to realize, you know, we could get more done and make more money, if we took control of the work, developed standard ways of doing the work. Imposed rules, and people to oversee those rules. There are new layers of management. Factories get bigger, and less personal.

Richard: Suddenly I don't know any of the people who work for me, except the people who are closest to me in my office.

Krissy: And as this happens, a new kind of worker is born. They're not independent artisans. The work is controlled by the factory owner and their livelihoods depend on the factory owner's business decisions.

They're more like servants. With one big exception, because remember, servants were legally part of a master's family. But a factory owner did not have that same sense of connection to his factory workers.

Richard: They're not my servants because they're not part of my household. I don't think of them as members of my family.

Krissy: So these workers were dependent like servants. But this new impersonal factory system had eroded the sense that a factory owner had any duty toward his workers when something went wrong at the factory. And that turned out to matter a lot. Because during the industrial revolution, things could go really wrong.

Richard has this old family story he likes to tell to put this in perspective.

Richard: I tell you a little story about my grandfather. He came over as a Swedish immigrant and he was looking for work and he found a job in a factory.

Krissy: A metal factory operating a machine. Before he took the job, Richard's grandfather asked the boss, why is this job open anyway? What happened to the last guy who did it?

Richard: The boss answered, Well, the machine cut his finger off. It's kind of a dangerous machine, but you want the job? And my grandfather said, sure, I'll take the job, I haven't got anything else I could do. So he was on the job about three months before the machine cut his finger off.

KC: Wow.

Richard: And the boss was kind of surprised, like you lasted that long. But my grandfather then had to quit that job because you needed that finger to be able to do this job.

Krissy: A replacement was hired. And a few weeks later?

Richard: The replacement loses his finger. The thing is, why didn't the employer make this a safer machine and the answer is why would I spend all that extra money? I can always just hire employees and cycle them through this process and one person loses their finger. I'll hire another one.

Krissy: Especially since back then it didn't cost the factory owner anything if a worker lost a finger.

Richard: Nothing. Doesn't have to pay for the medical expenses, doesn't have to pay for the disability caused by the lost finger.

Krissy: Even in the bad old days when work was often organized in master-servant relationships, society would have expected a reputable “master” to be responsible for their servant when they lost a finger. But now, with the impersonal way that industrial work happened

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Richard: You're just kind of a faceless mass that came off the ship. You're just like cattle passing through the stockyards.

Krissy: This is a time, the late-1800s, early-1900s, when you start seeing mass industrial accidents happening across America.

Richard: Once you start organizing thousands of workers under a single roof, the potential cruelty of work becomes a lot more obvious and visible to people.

Krissy: And so workers start striking. Journalists start documenting. Politicians start passing some of the first laws to protect workers from these sorts of dangers. One of the very first protections: Worker’s compensation laws that require companies to bear the cost of insurance for all work-related injuries, like that finger that Richard's grandpa lost. But as these laws are being written, there’s this simple but really big question that comes up for the people writing the laws about the workers they’re worried about.

Richard: What do we call these people?

Krissy: They’re not independent artisans, but they’re not servants. So what are these people? What word will properly capture all the people they think deserve these protections?

Richard: Lawmakers are struggling with the right word for this: Workmen, workers, contractors, hirelings, laborers? You go through a period where no single term predominant predominates for all of this.

KC: Hireling was my favorite one on your list.

Richard: Yeah, that that's that sounds so offensive.

KC: I know that I was imagining if you actually specialized in hireling law and not employment law.

Krissy: Spoiler alert. Hireling was not the word that was collectively settled on.

The word that was settled on was, you guessed it.

Richard: Employees.

Krissy: Employees! That will be the big word.

Richard: Which is derived from the term employ.

Krissy: Which means, to make use of something, from the latin *implicare*. Literally, to fold or braid something in.

In this case companies are braiding in - they're employing - the labor of a human being.

A human being who is kind of like a servant, but instead of having a master, they have an employer. And laws are gonna require those employers to provide their employees certain protections.

Still, there were discussions about whether companies should provide protections to everyone that works for a company.

Richard: If we create these statutes that will regulate work and protect people who are engaged in work, how do we define the people who are protected and those who are not?

Krissy: Should it matter how much independence you have in your job? Or how much skill? Where should they draw the line?

And pretty quickly, lawmakers decide there is one kind of worker that does not need the same kinds of protections from the companies they work for. Specifically:

Richard: People who were legitimately their own business and perhaps were their own employers, for that matter.

Krissy: That is, independent contractors, descendants of the independent artisans of old. Like, say, a plumber with his own business, who comes in occasionally to fix a factory toilet.

They were excluded from these worker protection laws. The idea being that if you're truly in business for yourself, if you're able to manage how things are run, choose your clients and negotiate how much you charge for your services, then you're not so economically dependent on any single company; you aren't braided into their business. And they haven't braided their business around you.

And, since the factory can't tell you what to do, they don't rely on you for their whole business model in the same way, they don't owe you the same amount of protections. Protections that can be really expensive to provide.

But almost as soon as that legal line is drawn, between employee and independent contractor, between getting worker protections and not, something starts to happen. One of the first times it happens is in the 19-teens in a coal mine in Pennsylvania, owned by a company called Lehigh Valley Coal.

Coal mining, as you probably know, can be really really dangerous.

Richard: You know, mine's collapse. The walls cave in, you're breathing in poisonous fumes. When you're swinging a pick ax, that's always dangerous.

Krissy: When inevitably, a coal miner got hurt, he asked Lehigh Coal, the company he worked for, to help him, pointing to this new law on the books.

Richard: But Lehigh doesn't want to have to pay for those injuries. It certainly doesn't want to have to pay for people's disabilities.

Krissy: And so Lehigh Coal says, oh, actually that law doesn't apply to the coal miners that get hurt in our coal mines because -

Richard: These are not our employees. These people are just independent contractors. We simply grant them access to our coal and they are their own supervisors. So their injuries are their problem, not ours. We owe them nothing.

Krissy: The coal miner was not happy about this. He sued the coal company, and the guy who writes the opinion in the case is this influential judge named Learned Hand.

Richard: who I think has perhaps the best name that any judge ever had, Judge Learned Hand.

Krissy: I CONCUR.

Richard: And he looks through this. And he says, you know, these are the very people that we intended to protect with these laws. Whether you call them workers or laborers or employees, it's clear to us that this is exactly the problem that these laws were designed to deal with. You have an enterprise here that is making the workers bear the costs of these injuries and it is a ordinary business cost of having a coal mine. So we think that ought to be built into the enterprise. You, the employer, ought to bear these costs. And we think you have sufficient control over the enterprise that these injuries happen on your watch and therefore you should be liable for them.

Krissy: Besides, argues Judge Learned Hand, doesn't it sound kind of absurd for a large coal mining company to say its coal miners - the people who do the main job that allows it to exist - are not their employees?

Richard: Coal mining companies extract and sell coal. These workers were doing exactly that. They were doing that regularly day to day. They were part of the same enterprise.

Krissy: And they should be treated as employees of that enterprise, according to Learned Hand, with all the benefits that come with the word employee, regardless of whether that's what the coal company called them. Cuz if a worker protection law doesn't cover a coal mining company's coal miners, who was it gonna protect?

Richard: Courts were very concerned about making sure that these new employment laws applied to people who were economically dependent. They needed protection. The workers down in the coal mines. The factory workers who are being hurt by these these incredibly sharp and dangerous tools.

Krissy: The coal mining company appealed the case all the way up to the Supreme Court, but ultimately, they lost. Judge Learned Hand's opinion about who should be protected as an employee became foundational.

And yet, the argument that Lehigh Coal was trying to make, was the beginning of a cycle that still goes on today. Law after law gets written using that word - employee - to delineate the kind of worker that companies need to protect. Laws that require companies must provide employees with worker's compensation insurance, with unemployment insurance, with the right to organize and eventually with a minimum wage.

And each time one of those employment laws is passed, there are companies like LeHigh Valley Coal that say to themselves, well, if employers have to give this kind of protection to employees

Richard: Perhaps we can avoid being an employer.

Krissy: By telling their workers

Richard: Congratulations, you've just become entrepreneurs. You are now here by our independent contractors.

Krissy: At various times, coal companies have done this. So have slaughterhouses, bakeries, cucumber farms, newspapers, and package delivery companies. Some took workers that had been their employees and one day started calling them independent contractors. Others built businesses that avoided employees from the jump, like Uber and Lyft, and decades before them, a lot of janitorial franchise companies.

Which brings us back to Jerry Vazquez, the janitor, and his contract with Jan-Pro, which explicitly pronounced that he was an independent contractor. Not an employee. So they didn't have to pay him minimum wage.

Except, Jerry decided they were wrong. And he started to look for a way to fight back.

Jerry: Just feels like you want to hit the wall. Like you just want to hit the wall or something. It's just very frustrating. You kinda do feel like you're going up against this big company and you don't have the power to do much.

Krissy: That's Next time, on the Uncertain hour.

That's it for this episode of The Uncertain Hour. Thanks so much for listening.

And if you like what you've heard, please tell a friend, leave a review, send us a note. It really keeps us going.

CREDITS

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