

**House Committee on
Consumer Protection**

Report of
Independent Contractor Steering Committee
"Working Together for Compliance"

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Background:

The passage of Senate Bill 232 (2003 Legislative Assembly) established the Independent Contractors Task Force (Task Force) to study the issues related to the definition of an independent contractor. The Task Force was instructed to make a recommendation to the Legislature by November 1, 2004. Task Force members included representatives from the Governor's office, industry, organized labor, the State Bar Association, and Oregon administrative agencies. The first meeting was held on December 4, 2003.

The Task Force's recommendations were presented and incorporated in Senate Bill 323 (attached) approved by the 2005 legislature. SB 323 modified the single, statutory definition of independent contractor for several state agencies, including Department of Revenue, Employment Department, Construction Contractors Board, and Landscape Contractors Board. Additionally, SB 323 charged these State agencies with the responsibility of cooperating in the administration and enforcement with the goal of achieving consistent implementation and application of the statute.

Independent Contractors Steering Committee:

As a result of the 2005 legislation, state agencies formed the Independent Contractors Steering Committee (Steering Committee)¹ to ensure consistent application of the SB 323 through collaboration. The Steering Committee developed a strategic plan which included joint rulemaking, joint administration (compliance and enforcement), and joint outreach and education. The goals of the Steering Committee were:

- Enhancing services to customer;
- Consistent application of law and rules;
- Improved customer knowledge of laws, rules, and procedures;
- Efficiencies in the use of agency resources;
- Ongoing and institutionalized systems for communications and collaboration on issues related to independent contractors; and
- Increased voluntary compliance.

—Joint Rulemaking—

Steering Committee's first initiative was joint rulemaking to implement the statutory definition of independent contractor in ORS 670.600 (SB 323). The resulting rule OAR 471-031-0181 (Appendix A) became effective on February 1, 2007. The Steering Committee convened an Advisory Committee with individuals who represented small businesses in Oregon, labor unions, landscape contractors, trucking companies, accountants, and employees.

¹ Steering Committee members include: Elizabeth Harchenko, Jack Ogami, Larry Warren, and Tom Sanderson, Dept. of Revenue; Rob Edwards and Pat DeLaval, Employment Dept.; Jerry Managhan and John Shilts, Department of Consumer and Business Services; Doug McKean, BOLI; Danny Santos, Governor's Office; Craig Smith and Robert Rambo, Construction Contractors' Board; Michael Snyder and Kim Gladwill-Rowley, Landscape Contractors' Board.

—Joint Administration—

Joint Audits—

In 2007, the Compliance Network was established as a way to carry out the Steering Committee's Compliance and Enforcement Plan. The Compliance Network is in its early stages of development and consists of representatives from seven agencies². The group is developing "best practices" for gathering and sharing information, discussing investigation techniques, comparing audit procedures, and performing joint audits.

The Compliance Network has developed a foundation to help regulatory agencies collaborate effectively in identifying and reducing noncompliance. The Network created a referral form for each agency representative to communicate with other Network members efficiently and securely. The referral form is also used to determine the need to perform a joint audit and to track progress on the audit. Currently, the Network is developing audit selection criteria and a process for conducting joint audits. The Compliance Network also shares suspicious activities, practices, and trends observed in the field.

Throughout this process, the Network is identifying opportunities and obstacles to improving joint compliance efforts. One of the issues involves the statutory restrictions that affect the ability to share confidential information between agencies. Additionally, the Compliance Network members are learning about the variety of laws, processes, and tools that are used to enforce compliance in their programs. The Compliance Network's goal is to create a streamlined compliance process that is efficient, fair, and effective for both the public and the regulatory agencies.

Sweeps—

There have been multi-agency compliance "sweeps" where enforcement teams join together and canvas targeted geographical areas to ensure contractors and other businesses are in compliance with the law. Since this law became effective, representatives from Revenue, CCB, DCBS, and Employment Department have conducted compliance sweeps in Portland, Medford, Central Oregon, and along the coast. During a weeklong sweep, the team typically visits over 200 construction sites and interviews between 200 to 300 individuals. Examples of issues identified include contractors who have employees yet the contractor is not registered, and contractors with employees yet the contractor is not filing payroll returns, or both.

Additionally, the Construction Contractors Board has hired 11 field representatives. As part of our joint compliance efforts, they are sending referrals to the other agencies based on their field incident reports. These reports are particularly fruitful for the other agencies' enforcement efforts as well.

² Compliance Network membership includes Department of Revenue, Employment Department, Workers' Compensation Division, Construction Contractors' Board, Bureau of Labor and Industries, Oregon Occupational Safety and Health Division (Oregon OSHA), and Landscape Contractors' Board.

—Joint Outreach and Education—

A sub-committee of the Steering Committee called the Oregon Independent Contractor Education and Outreach Workgroup was created in May 2006. Their charge was to recommend and implement methods to improve education and outreach concerning the definition of independent contractors for both businesses and workers. The results of the workgroup's efforts include:

- The independent contractor website, which is separate from the individual agencies' websites and is focused on just independent contractor issues. The website is located at: www.oregonindependentcontractors.com and has links from each of the agencies websites.
- The independent contractor website also includes an E-mail address and phone number for questions about the classification of workers.
- The workgroup created a new brochure about the definition of independent contractor that has been published in four languages and is available through the independent contractor website.
- The workgroup is developing a 12-minute flash video that will be available on-line through the independent contractor website that further explains the difference between independent contractors and employees.
- As an on-going effort, the workgroup reviews and updates state publications, such as the Oregon Business Guide, related to independent contractors.
- The workgroup staffs statewide presentations on independent contractor issues through organizations such as the National Association of Tax Consultants and community colleges.
- The group has utilized the technology available through the State Library by creating a Payroll Tax ListServe email service. Department of Revenue sends periodic "newsletter" type emails to interested parties. Currently, there are several hundred businesses subscribing to the ListServe and the number is steadily increasing.
- In addition to the link provided on the independent contractor website for questions, the Department of Revenue also established an email address for employers to submit questions to the department as well as to report informant information at payroll.help.DOR@state.or.us.

2007 Oregon Revised Statutes & Administrative Rules

INDEPENDENT CONTRACTORS

670.600 Independent contractor defined. (1) As used in this section:

- (a) "Individual" means a natural person.
- (b) "Person" has the meaning given that term in ORS 174.100.
- (c) "Services" means labor or services.

(2) As used in ORS chapters 316, 656, 657, 671 and 701, "independent contractor" means 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) Except as provided in subsection (4) of this section, is 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.

(3) For purposes of subsection (2)(b) of this section, a person is considered to be customarily engaged in an independently established business if any three of the following requirements are met:

(a) The person maintains a business location:

(A) That is separate from the business or work location of the person for whom the services are provided; or

(B) That is in a portion of the person's residence and that portion is used primarily for the business.

(b) The person bears the risk of loss related to the business or the provision of services as shown by factors such as:

(A) The person enters into fixed-price contracts;

(B) The person is required to correct defective work;

(C) The person warrants the services provided; or

(D) The person negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance.

(c) The person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.

(d) The person makes a significant investment in the business, through means such as:

(A) Purchasing tools or equipment necessary to provide the services;

(B) Paying for the premises or facilities where the services are provided; or

(C) Paying for licenses, certificates or specialized training required to provide the services.

(e) The person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.

(4) Subsection (2)(b) of this section does not apply if the person files a Schedule F as part of an income tax return and the person provides farm labor or farm services that are reportable on Schedule C of an income tax return.

(5) For purposes of determining whether an individual provides services as an independent contractor:

(a) The creation or use of a business entity, such as a corporation or a limited liability company, by an individual for the purpose of providing services does not, by itself, establish that the individual provides services as an independent contractor.

(b) When the individual provides services through a business entity, such as a corporation or a limited liability company, the provisions in subsection (2), (3) or (4) of this section may be satisfied by the individual or the business entity. [Formerly 701.025; 1997 c.398 §2; 1999 c.402 §9; 2003 c.704 §5; 2005 c.533 §§1,2]

670.605 Rules for application of definition of independent contractor. (1) In accordance with ORS chapter 183, those agencies responsible for the administration of ORS 671.510 to 671.760 and ORS chapters 316, 656, 657 and 701 jointly shall adopt rules to carry out the provisions of ORS 670.600.

(2) The agencies responsible for the administration of ORS 671.510 to 671.760 and ORS chapters 316, 656, 657 and 701 shall cooperate as necessary in their compliance and enforcement activities to ensure among the agencies the consistent interpretation and application of ORS 670.600. [Formerly 701.030; 2001 c.409 §4; 2005 c.94 §115; 2005 c.533 §3a]

471-031-0181

Independent Contractor

(1) Purpose of Rule. The Landscape Contractors Board, Department of Revenue, Department of Consumer and Business Services, Employment Department, and Construction Contractors Board must adopt rules together to carry out ORS 670.600. 670.600 defines "independent contractor" for purposes of the programs administered by these agencies. This rule is intended to ensure that all five agencies apply and interpret ORS 670.600 in a consistent manner; to clarify the meaning of terms used in ORS 670.600; and, to the extent possible, to enable interested persons to understand how all five agencies will apply ORS 670.600.

(2) Statutory Context.

(a) ORS 670.600 generally establishes three requirements for "independent contractors." One requirement is that an "independent contractor" must be engaged in an "independently established business." Another requirement is related to licenses and certificates that are required for an "independent contractor" to provide services. A third requirement is that an "independent contractor" must be "free from direction and control over the means and manner" of providing services to others.

(b) The specific focus of this rule is the "direction and control" requirement. See ORS 670.600 for the requirements of the "independently established business" test and for licensing and certification requirements.

(3) Direction and Control Test.

(a) ORS 670.600 states that an "independent contractor" must be "free from direction and control over the means and manner" of providing services to others. The agencies that have adopted this rule will use the following definitions in their interpretation and application of the "direction and control" test:

(A) "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.

(B) "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.

(C) "Free from direction and control" means that the independent contractor is free from the right of another person to control the means or manner by which the independent contractor provides services. If the person for whom services are provided has the right to control the means or manner of providing the services, it does not matter whether that person actually exercises the right of control.

(b) Right to specify results to be achieved. Specifying the final desired results of the contractor's services does not constitute direction and control over the means or manner of providing those services.

(4) Application of "direction and control" test in construction and landscape industries:

(a) The provisions of this section apply to:

(A) Architects licensed under ORS 671.010 to 671.220;

(B) Landscape architects licensed under ORS 671.310 to 671.479;

(C) Landscaping businesses licensed under ORS 671.510 to 671.710;

(D) Engineers licensed under ORS 672.002 to 672.325; and

(E) Construction contractors licensed under ORS chapter 701.

(b) A licensee described in (6)(a), that is paying for the services of a subcontractor in connection with a construction or landscape project, will not be considered to be exercising direction or

control over the means or manner by which the subcontractor is performing work when the following circumstances apply:

(A) The licensee specifies the desired results of the subcontractor's services by providing plans, drawings, or specifications that are necessary for the project to be completed.

(B) The licensee specifies the desired results of the subcontractor's services by specifying the materials, appliances or plants by type, size, color, quality, manufacturer, grower, or price, which materials, appliances or plants are necessary for the project to be completed.

(C) When specified by the licensee's customer or in a general contract, plans, or drawings and in order to specify the desired results of the subcontractor's services, the licensee provides materials, appliances, or plants, including, but not limited to, roofing materials, framing materials, finishing materials, stoves, ovens, refrigerators, dishwashers, air conditioning units, heating units, sod and seed for lawns, shrubs, vines, trees, or nursery stock, which are to be installed by subcontractors in the performance of their work, and which are necessary for the project to be completed.

(D) The licensee provides, but does not require the use of, equipment (such as scaffolding or fork lifts) at the job site, which equipment is available for use on that job site only, by all or a significant number of subcontractors requiring such equipment.

(E) The licensee has the right to determine, or does determine, in what sequence subcontractors will perform work on a project, the total amount of time available for performing the work, or the start or end dates for subcontractors working on a project.

(F) The licensee reserves the right to change, or does change, in what sequence subcontractors will perform work on a project, the total amount of time available for performing the work, or the start or end dates for subcontractors working on a project.

Stat. Auth: ORS 657.610

Stats. Implemented: ORS 657.040, 670.600, 670.605, 671.010 - 657.710, 672.002 - 672.325, 701

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