

TECHNICAL ASSISTANCE FOR EMPLOYERS

Oregon Bureau of Labor and Industries
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Independent Contractors

Minimum wage, overtime and other employment laws do not apply to independent contractors. Therefore, many employers seek to avoid the costs and responsibilities associated with employees by calling some workers "independent contractors."

Agencies that enforce employment laws do not rely on the label "independent contractor," but are required to take a close look at the realities of the relationship.

The Bureau of Labor and Industries (BOLI) has different tests than other state agencies so please make sure to look at all that apply. (See below for further detail).

Wage And Hour Division Test To Determine Independent Contractor Status: For Minimum Wage and Other Wage Claims

The issue of whether a worker is an independent contractor arises when the division evaluates whether or not there is an 'employment relationship,' in which case it has jurisdiction to enforce the payment of wages and minimum wages/overtime by an employer to an employee.

The statute regarding enforcement of wage claims is ORS 652.310.¹ The statutes regarding minimum wages, overtime and conditions of employment are in ORS chapter 653. There is no definition of "employee" in ORS chapter 653 and no specific exclusion for independent contractors. For reasons discussed below, the bureau applies the same test for independent contractor in both wage claims and minimum wage cases.

¹ ORS 652.310. which provides, in relevant part:

*** (2) 'Employee' means any individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled. However:

“(a) Where services are rendered by an independent contractor, an individual shall not be an employee under this section unless the individual is a musician or supporting technical person.”

The test currently applied by the bureau when employers allege a worker was an independent contractor, was adopted in *In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148 (1996).² In that case, the Commissioner replaced an old impractical test with the ‘economic reality’ test used by federal courts for determining employee status under the Fair Labor Standards Act (FLSA). In addition, the relevant definitions of "employer" and "employ" in ORS chapter 653 (minimum wage and working conditions) were taken from the federal FLSA law. While federal case law interpreting federal statutes and regulations that are similar to Oregon's laws are not binding on BOLI, they are instructive and may be adopted as precedent in Oregon cases.

In addition, federal courts have adopted an expansive interpretation of the definition of "employer" under the FLSA in order to effectuate the FLSA’s “broad remedial purposes.” The Commissioner adopted the "economic reality" test as articulated in *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993), for use in BOLI wage claim cases to determine whether a claimant is an employee or independent contractor.” The five factors, no single factor determinative, are meant to gauge the degree of the worker’s economic dependence:

- (1) The degree of control exercised by the alleged employer;
- (2) The extent of the relative investments of the worker and alleged employer;
- (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;
- (4) The skill and initiative required in performing the job;
- (5) The permanency of the relationship.

Civil Rights Division Test To Determine Independent Contractor Status

The issue of whether a worker is an independent contractor arises when, after investigation of a complaint of unlawful practices by an employer, BOLI determines that a violation of the law has occurred and the employer defends by alleging the worker was an independent contractor and not an employee.³

² In *Geoffrey* the Commissioner noted that in the past, BOLI had relied on a test from Oregon case law [adopted in *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264 (1982)]. In *Geoffrey* the Commissioner found that the All Season test was impractical in the wage claim setting.

³ Some civil rights statutes protect not only workers, but in some cases applicants and customers. In such situations, whether the complainant is an independent contractor would not be an available defense.

ORS chapter 659A is the primary site of Oregon’s civil rights statutes. ORS 659A.001 does not define employee but contains related definitions for purposes of chapter 659A.⁴

The test currently applied by the Civil Rights Division of the Bureau is set forth in *Cantua v. Creager*, 7 P3d 693, 169 Or App 82 (2000).⁵ The court looked at ORS 659A.001 (4). The court concluded from this language that the right-to-control test incorporated into ORS 659A.001 (4) is the common-law test for employee status.

The court identified four factors to determine whether an alleged employer has the “right to control” the work of an individual. If the factors are present, the individual is likely to be found to be an employee rather than an independent contractor. It is not necessary to find all factors in order to determine that the individual is an employee. If not all factors are present, the evaluator should consider the weight or strength of the factors that are present. If they weigh heavily the individual may still be deemed an employee. Here are the factors:

- (1) Direct evidence of the right to, or the exercise of, control;
- (2) The method of payment;
- (3) The furnishing of equipment;
- (4) The right to fire.

Thus with the *Cantua* opinion the court in essence changed the civil rights test to the All Season test, which was previously but is no longer followed by Wage and Hour.

Other Oregon State Agencies’ Tests For Independent Contractor Status

Oregon's newly revised independent contractor law, effective as of January 1, 2006, at ORS [670.600](#), defines independent contractor for the Oregon Department of Revenue, Employment Department, and the Construction and Landscaping Contractors Boards.

The previous law, in effect through December 31, 2005, included multiple requirements to be met in order for a person providing services for pay to be properly classified as an independent contractor. The 2005 Oregon Legislature, responding to the business community's call for an easier to understand and more broadly applied law, amended the

⁴ ORS 659A.001 states in relevant part *** “(3) ‘Employee’ does not include any individual employed by the individual’s parents, spouse or child or in the domestic service of any person.

“(4) ‘Employer’ means any person who in this state, directly or through an agent, engages or uses the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed.” ***

⁵ Prior to 2000, BOLI applied the FLSA economic reality test, which is the current test applied in wage cases as explained in the Wage and Hour section of this memo. This was consistent with the federal courts’ application of that test in cases involving Title VII of the Civil Rights Act of 1964.

portion of the statute that defines whether a service provider is operating an "independently established business." Some parts of the previous law remain, but several requirements have been either removed or reduced in their impact.

The new law did not affect or change the independent contractor test applied by the [Workers Compensation Division](#) or the Bureau of Labor and Industries. See below.

If you have maintained an ongoing business relationship with an independent contractor beginning before January 1, 2006, the provisions of the previous law apply to your relationship through December 31, 2005, and the provisions of the new law apply to your business relationship as of January 1, 2006.

For detailed information about the previous law, and the new law from the agencies covered by it, go to <http://www.oregonindependentcontractors.com/IC/12-definition.shtml>.

Generally, the new law considers service providers to be independent contractors if they:

(1) Are free from direction and control, the right of the service recipient to specify the desired result.

(2) Are licensed under ORS 671 or 701 (Construction Contractors Board, State Landscape Architect Board or Landscape Contractors Board and State Board of Architect Examiners) if required for the service.

(3) Are responsible for other licenses or certificates necessary to provide the service.

(4) Are customarily engaged in an independently established business (that is, they meet 3 out of the 5 below):

(a) Maintain a business location that is separate from the business or work location of the service recipient; or that is in a portion of their own residence that is used primarily for business.

(b) Bear the risk of loss, shown by factors such as:

Entering into fixed price contracts;
Being required to correct defective work;
Warranting the services provided; or
Negotiating indemnification agreements or purchasing liability insurance, performance bonds, or errors and omissions insurance.

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

(d) Make a significant investment in the business through means such as:

Purchasing tools or equipment necessary to provide the services;
Paying for the premises or facilities where the services are provided; or
Paying for licenses, certificates or specialized training required to provide the services.

(e) Have the authority to hire and fire other persons to provide assistance in performing the services.

Additional provisions in the new law:

A person who files tax returns with a Schedule F and also performs agricultural services reportable on a Schedule C is not required to meet the independently established business requirements.

Establishing a business entity such as a corporation or limited liability company, does not, by itself, establish that the individual providing services will be considered an independent contractor.

Requirements in ORS 670.600 that were removed by the amendments that took effect January 1, 2006:

(1) The service provider must have filed federal and state tax returns in the name of the business or farm in the previous year if operated as an independent contractor in the previous year.

(2) Payment for labor or services is based upon completion of a specific portion of the project or on an annual or periodic retainer.

(3) The service provider uses a telephone listing and service for the business that is separate from the personal residence listing and service.

Independent Contractor Test for Oregon Worker's Compensation Division

For detailed information about the independent contractor test used by the Worker's Compensation Division, go to

<http://www.cbs.state.or.us/external/wcd/compliance/indcon.html>. Generally, for workers' compensation purposes, an independent contractor is an individual or entity that provides a service under a contract without direction and control, or without others having the right to direct and control the provision of those services. Checking progress and establishing timelines for completion of the project is appropriate when spelled out in the contract. The independent contractor controls how the service is provided, who provides it, and the means of accomplishing it. The key requirement is that the independent contractor be free from actual direction and control and free from another's right to direct and control.

The creation or use of a business entity, such as a corporation or partnership, for the purposes of providing services does not, by itself, establish that the entity provides services as an independent contractor. An independent contractor is responsible to the customer only for the contracted result of the work, not the manner or method used to accomplish the work.

Generally, an independent contractor is a person or entity engaged in an independently established business, selling goods and services to a public of his or her own choosing, under his or her own direction and control, and setting his or her own prices. When a person is customarily engaged as an independent contractor, the termination of one contract does not terminate the business or create an unemployment situation for the independent contractor. Normally an independent contractor has customers and prospective customers as a result of advertising and being known by the public as a going business.

Apply the following tests to determine if a person or entity is an independent contractor:

Right to Control:

- (1) Direct evidence of the right to, or the exercise of control
- (2) The method of payment (a contractor's pay will relate more to completion of a job)
- (3) The furnishing of equipment
- (4) The right to dismiss (whether either party can terminate the contract, or the person be dismissed at will, or does the person have the authority to hire someone to work alongside?)
- (5) Can the "contractor" accept or refuse a job?
- (6) Was a bid made for the job? Were multiple bids taken by the person seeking to retain a service?
- (7) Can the independent contractor set their own hours within the time frame of the general contractor?
- (8) Can they use their own methods to accomplish the intended result?
- (9) Was the contractor subject to monitoring beyond checking progress?

The Nature of the Work:

- (1) Consider the character of the work or business.
- (2) How much is the work a regular part of the hiring entity's business?
- (3) How skilled is it?
- (4) Is the work continuous or intermittent?
- (5) Is the duration sufficient to amount to the hiring of continuous services as distinguished from contracting for completion of a particular job?
- (6) To what extent may it be expected to carry its own accident burden?

The information in this document regarding independent contractor tests for state agencies other than BOLI should be confirmed with those agencies.

Federal Agencies

The U.S. Department of Labor <http://www.dol.gov/> and the federal Equal Employment Opportunity Commission (EEOC) <http://www.eeoc.gov/> use the “economic realities” test, which is discussed above in the Wage and Hour Division section.

The Technical Assistance for Employers unit of the Bureau of Labor and Industries offers employer seminars, handbooks, and other materials covering a number of topics. For additional information, visit our website at www.oregon.gov/boli/ta or call our Employer Assistance line.

Technical Assistance for Employers

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These materials were prepared as a general summary and teaching guide. The mission of the Technical Assistance for Employers Program is to promote compliance with civil rights and wage and hour laws through education. Technical Assistance does not provide legal advice. In order to determine the legality of any matter or to protect your legal rights, you should contact an attorney. Check the yellow pages of your telephone directory or contact the Oregon State Bar Lawyer Referral Service at 1-503-620-0222 or 1-800-452-7636.

THIS INFORMATION IS AVAILABLE IN ALTERNATE FORMAT.