Landscape Contractors Board of Oregon
Owner/Managing Employee Manual
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Introduction

This manual was prepared specifically for you as you contemplate either owning or managing a landscape contracting business in Oregon. The information in this manual will help prepare you for the examination that you are required to take in order to own or be the managing employee of a landscape contracting business. The information is gathered from many different sources and the Board cautions you that the sources may change their content and the manual may not reflect these changes in a timely manner, but the exam will be based upon what is shown in the manual at the time you take the exam. Once you have successfully moved into owning or managing a landscape contracting business you must verify the current information you need in order to conduct business in Oregon and not rely upon the contents of this manual.

Owning or managing a landscape contracting business is not for everyone. The laws that surround landscaping work are different than other businesses and though there are some similarities, there are some distinct differences that can create problems for you; with your clients and with the State Landscape Contractors Board if you are not cognizant of these differences. By owning and licensing a landscape contracting business in Oregon, you need to know that you are then under the scrutiny of the State Landscape Contractors Board (LCB) and must comply with all the laws that relate to landscaping work as well as the other laws that relate to conducting business in Oregon.

It is the intent of the Board to help guide you through the process of beginning and maintaining a landscape contracting business in order to keep you and your business in compliance with the applicable laws that govern landscape contracting in Oregon.

The Board wants you to succeed and wishes you the best in prosperity as you work in this wonderful and creative field of landscape construction.

OUR MISSION:

The Landscape Contractors Board regulates the landscape construction industry in Oregon for the protection of the public interest and to promote a fair and competitive business environment through education, licensing, dispute resolution and enforcement.

CAUTION!

The material in this manual is **for informational purposes only**. It should not be considered to be legal or tax advice. The LCB **strongly** advises you to consult an attorney and/or a CPA when making decisions about the type of business you should use. A small amount of money spent on professional advice while setting up your business may save you tens of thousands of dollars in taxes, legal fees, and professional liability later on.

Chapter 1:
The Landscape Contractors Board

What this chapter covers:

- The history of the Landscape Contractors Board.
- The laws and regulations governing the Landscape Contractors Board.

Landscape Contractors Board History

The State Landscape Contractors Board (LCB) has its origin in Oregon Law back in 1971. The beginnings of the present Board were implemented through the creation of an advisory board that advised the Governor about how the landscape construction industry was to be regulated. The landscape industry was behind the creation of this regulation and has been supportive of the law ever since. Through many years of changes in the statutes and rules, the present Board consists of seven volunteers, five of whom are industry members; the other two are public members who have an interest in the landscape industry. These members apply to the Governor's office to be appointed to the Board and then are approved by the Governor. Each member serves a three-year term and may serve two consecutive terms before they are replaced.

The State Landscape Contractors Board is currently a semi-independent agency; a change that occurred on July 1, 2002. This means the Board is not required to go through the legislative process to have the budget approved and, consequently, does not have access to public tax dollars to implement the functions of the Board. There are other differences in terms of business practices from other state agencies, but the Landscape Contractors Board is still a state agency with all the powers of a regular state agency as the statutes allow. **No tax dollars are used to operate this agency, and all monies received are from the fees collected from licensing activities and from fines imposed in civil actions.**

Laws

The laws that govern and regulate the landscape construction industry in Oregon are found in the Oregon Revised Statutes (ORS) and in the Oregon Administrative Rules (OAR). The statutes that were written specifically for the landscape construction industry are found in ORS 671.510 to 671.997 and the Oregon Administrative Rules that were written specifically for the industry are found in OAR 808.

Oregon Revised Statutes (ORS)

The legislative process is governed by rules, laws and procedures, making it somewhat mechanical in nature. Although the legislative process is long and complex, all laws begin as ideas. An idea for a law can come from anyone: an individual or group of citizens, a legislator or legislative committee, the executive or judicial branch, a state agency, or a lobbyist. These ideas are called "legislative concepts" and, by statute, state agencies such as The State Landscape Contractors Board must file concepts for new laws before the legislative session begins in order for the Governor to approve or reject the concept. Legislators or legislative committees may file an unlimited number of measures within established timelines set by rule. There are many detours that a bill can take and many times that a bill can be stalled or 'killed' during the legislative process.

Once the concept receives the Governor's approval or introduced by others the concept is drafted by legislative counsel into a "bill" and assigned a bill number according to whether it is going to first be introduced on the House side or Senate side of the legislature. The leaders of House and Senate then assign the bill to the appropriate committee who will hold public hearings on the bill to determine what the public and other interested parties feel about the bill. Once a committee finishes hearing the bill, they will make a recommendation on the bill and decide to move or not move the bill to the floor for a vote. If the bill passes out of one side of the legislature (Senate or House) then the bill must go through the same procedure on the other side of the legislature. Once it passes through both sides of the legislature the bill can be signed or vetoed by the Governor. Signing the bill enacts the bill into a law known as a statute.

Oregon Administrative Rules (OARs)

Once a bill becomes a statute, the affected regulating agency is responsible for the implementation of the law. If the agency has the statutory authority it then can administratively create rules to further define the intended meaning of the statute. This must be done transparently through a specified process of holding public hearings designed to engage those who are affected by the rule into the process of rule writing. This process can also involve notifying the legislators who were engaged in the discussions of the bill in committee during the legislative process. After sufficient notice and public testimony is heard the Board can adopt the rule which becomes an Administrative Rule and has the full effect of a law in Oregon. The licensees of the State Landscape Contractors Board are major stakeholders in the creation of these rules. However, it is the responsibility of the members of the Board to implement rules that create good public policy and promote the mission of the Board. Often this may mean the Board will take a different

position than the stakeholders which may lead to some discomfort among the stakeholders.

Rules periodically change and it is important to you as an owner/managing employee to be abreast of these changes when they occur. All changes to rules and the current set of rules are on the LCB website: www.lcb.state.or.us.

Chapter 2:
Starting Your Business

What this chapter covers:

- Why it's important to choose the right type of business.
- The types of business recognized by the LCB.
- A comparison of the advantages and disadvantages of each type of business.

CAUTION!

The material in this chapter is for informational purposes only. It should not be considered to be legal or tax advice. The LCB **strongly** advises you to consult an attorney and/or a CPA when making decisions about the type of business you should use. A small amount of money spent on professional advice while setting up your business may save you tens of thousands of dollars in taxes, legal fees, and professional liability later on.

Common Business Structures

The business entity (form of business) you choose affects the type of business decisions, tax forms, and accounting reporting methods you use. Consult your accounting practitioner first, and then work with an attorney to register the entity with the Oregon Business Name Registration—Secretary of State Corporation Division.

The first decision is to choose a business entity. The LCB recognizes the following types of business as business entities for the landscape construction industry:

- sole proprietorship
- general partnership
- limited liability partnership (LLP)
- corporation
- limited liability company (LLC)
- joint venture (JV)
- limited partnership (LP)

- business trust

Each type of business has advantages and disadvantages. The type that suits your needs best will be based on a number of factors, including your willingness to accept personal liability, your management experience, tax considerations, and the financial condition of the business. It's particularly important to note that each type of business is taxed differently. You are strongly advised to discuss your business needs with an accounting practitioner and an attorney before making a final decision on which type of business to use.

Remember: Your choice of business entity affects both your tax and liability issues.

Sole Proprietorships

A **sole proprietorship** is the simplest form of business, in which one individual conducts the business. The business owner has a personal and unlimited liability for the obligations of the business.

A sole proprietorship does not have to be registered with the Business Registry (the Oregon Business Name Registration—Secretary of State Corporation Division) unless the business is using an assumed business name. If the name of the business does not include the full legal name of the business owner, the business name must be registered as an assumed business name with the Business Registry. For example, if John Smith is running John Smith Landscaping, that name doesn't need to be registered, but Smith's Landscaping does.

The registration allows the public to identify who is transacting business under that business name. This business cannot be transferred to another owner without starting a new business with the new owner. For a landscape contracting business, a new owner means a new business license.

In a sole proprietorship, the owner must pay income taxes on the net profit generated from the business at the owner’s individual tax rate, usually on the Federal Schedule C. The owner is also liable for self-employment taxes. There are no withholding taxes or unemployment taxes that must be paid. However, a sole proprietor may need to make an estimated tax payment to the IRS on a quarterly basis. These quarterly payments must include self-employment taxes in addition to income tax.

General Partnerships

A **general partnership** is an association of two or more persons doing business. All partners have a personal and unlimited liability for the obligations of the business.

A general partnership does not have to be registered with Business Registry unless it uses an assumed business name. If the name of each general partner is not conspicuously disclosed to the public in the business name, it must be registered with the Business Registry. The registration allows the public to identify who is transacting business under that business name.

As with sole proprietorships, a general partnership business cannot be transferred to another owner without starting a new business with the new owner. For a landscape contracting business, a new owner means a new business license. General partners are taxed individually on their share of the profits.

Limited Liability Partnerships

A **limited liability partnership** (LLP) is very similar to a general partnership. An LLP is an association of two or more persons doing business, but the partners have a limited liability.

Limited liability partnerships are restricted to partnerships that render a professional service as defined by ORS Chapter 67. Limited liability partnerships include services such as:

- accountants
- architects
- attorneys
- chiropractors
- dentists
- landscape architects
- naturopaths
- nurse practitioners
- psychologists
- physicians
- podiatrists
- radiologic technologists
- real estate appraisers

Limited liability partnerships also include other persons providing types of personal services to the public substantially similar to these that may be lawfully rendered only pursuant to a license. The protections of limited liability partnerships also apply to partnerships affiliated with a limited liability partnership that render a complementary service or provide services

or facilities to the limited liability partnership. The State Landscape Contractors Board recognizes this form of business organization.

Limited liability partners are taxed individually for their share of profits. Profits or losses are reported on personal income tax returns. All partnerships must file Form 1065 to report partnership activity. Partners generally pay self-employment taxes on earnings.

Corporation

When a small business incorporates, it is automatically considered a **C corporation**, also known as a **regular corporation**. The most basic characteristic of the corporation is that it is legally viewed as an individual entity, separate from its owners, who are now shareholders. This means that when the corporation is sued, shareholders are usually only liable to the extent of their investments in the corporation. Their personal assets are not usually on the line, as they would be if the business was a partnership or sole proprietorship (unless the owners sign a guarantee for the debts of the corporation, which is commonly required). Any debts that the corporation may acquire are also viewed as the corporation's responsibility. In other words, once the business is incorporated, shareholders are protected by the corporate veil, or limited liability. *A corporation may have a single owner.*

> **Note:** Although the corporation generally provides legal protection for the personal assets of the officers of the corporation, the corporate liability veil can be pierced if it can be shown that the corporation has not acted scrupulously as a corporation. For example, in a suit against the corporation, if the corporation's owner does not maintain completely separate accounts and pays corporate bills from a personal checking account, or if they refer to themselves as the "owner" instead of as "President" or "Vice-President," it can be argued that they were acting on their own behalf rather than on the corporation's behalf. This can in turn mean that the owner becomes personally liable even if s/he was acting in good faith on behalf of the corporation. Piercing the corporate veil is usually done by showing that the business was not being operated as a corporation. For your own protection, if you choose to incorporate, you should budget for regular checkups on your financial and business practices with your CPA to make sure your processes and procedures are completely in line with good corporate practice.

Because the corporation is a separate entity, it is also viewed as an individual **taxpayer** by the IRS. As a result, corporations are subject to double taxation, which means that the profits are taxed once on the corporate level and a second time when they are distributed as dividends to the shareholders. (If a business is eligible, it may elect **S corporation** status to avoid this negative characteristic of C corporations.) There is

generally no tax at the corporate level for an S corporation. Shareholders are taxed personally on their share of profits in addition to any salary paid by the S corporation. *An S Corporation may have a single owner.*

Advantages of Corporations

Incorporating your landscape contracting business offers a number of advantages:

- **Limited Liability** Most small businesses that consider incorporating do so for the limited liability that corporate status affords. The greatest fear of the sole proprietor or partner that their life's savings could be jeopardized by a law suit against their business or by sudden overwhelming debts disappears once the business becomes a corporation. Although the shareholders are liable up to the amount they have invested in the corporation, their personal assets cannot be touched. Rather than purchase expensive liability insurance, many small business owners choose to incorporate to protect themselves.
- **Raising Capital** It can be much easier for a corporation to raise capital than it is for a partnership or sole proprietorship, because the corporation has stocks to sell. Investors can be lured with the prospect of dividends if the corporation makes a profit, avoiding the necessity of taking out loans and paying high interest rates in order to secure capital.
- **Attracting top-notch employees** Corporations may find it easier to attract the best employees, who may be lured by stock options and fringe benefits.
- **Fringe benefits** One advantage C corporations have over unincorporated businesses and S corporations is that they may deduct certain fringe benefits from their taxes as a business expense. In addition, shareholder-employees are also exempt from paying taxes on the fringe benefits they receive. To be eligible for this tax break, though, the corporation must not design a plan that benefits only the shareholders/owners. A good portion of the employees (usually 70 percent) must also be able to take advantage of the benefits. For many small businesses, the expense of providing fringe benefits for all employees is too expensive, so the tax break may not be considered an advantage.
- **Continuance of existence** The transfer of stock or the death of an owner does not alter the corporation, which exists perpetually, regardless of owners, until it is dissolved.

Disadvantages of Corporations

Incorporating your landscape contracting business has a number of significant disadvantages as well:

- **Double taxation** After deducting all business expenses, such as salaries, fringe benefits, and interest payments, C corporations pay a tax on their profits at the corporate level. If any of those profits are then distributed as dividends to the shareholders, those individuals must also pay a tax on the money when they file their personal tax returns. For companies that expect to reinvest much of the profits back into the business, double taxation may not affect them enough to be a serious drawback. In the case of the small business, most if not all, of the company's profits are often used to pay salaries and fringe benefits, which are deductible, and double taxation may be avoided because no money is left over for distributing dividends.
- **Bureaucracy and expense** Corporations are governed by state and federal statutes, which mean that they have to abide by sometimes intricate corporate laws. Therefore, lawyers and tax preparers will need to be hired, and regular stockholder and board of directors meetings will have to be held, and detailed minutes of those meetings must be taken. All of the corporation's actions must be approved by the directors, who can limit the ability of the corporation to take quick action on pressing matters. Corporations have to pay fees, which vary by state, when they file their articles of incorporation. In order to bring up a case in small claims court, the corporation is required to be represented by a lawyer, whereas sole proprietors or partners can represent themselves. In addition, if the corporation does interstate business, it is subject to taxes in other states.
- **Rules governing dividend distribution** A corporation's profits are divided on the basis of stockholdings, whereas a partnership may divide its profits on the basis of capital investment or employment in the firm. In other words, if a stockholder owns 10 percent of the corporation's stock, she may only receive 10 percent of the profits. However, if that same person was a partner in an unincorporated firm to which she had contributed 10 percent of the company's capital, she might be eligible to receive more than 10 percent of the business's profits if such an agreement had been made with the other partners. Strict rules, though, govern the way corporations divide their profits, even to the point, in some states, of determining how much can be distributed in dividends. Usually, all past operations must be paid for before a dividend can be declared by the corporation's directors. If this is not done, and the corporation's financial stability is put in jeopardy

by the payment of dividends, the directors can, in most states, be held personally liable to creditors.

The Corporate Structure

A corporation has officers, directors, shareholders, and employees. For a small business, the owners often hold more than one of these positions and may even hold all of them.

- **Officers:** Officers are responsible for making the day-to-day decisions that govern the corporation's operation. The Corporation must have a president, secretary, and treasurer.
- **Directors:** Directors manage the corporation and are responsible for issuing stock, electing officers, and making the corporation's major decisions.
- **Shareholders:** Shareholders own the company's stock and are responsible for electing the directors, amending the bylaws and articles of incorporation, and approving major actions taken by the corporation like mergers and the sale of corporate assets. It is the exclusive right of the shareholders to dissolve the corporation.
- **Employees:** Employees receive a salary in return for their work for the corporation.

Financing a Corporation

There are several ways to finance corporate operations. The most common are selling stock (**equity financing**), taking out loans (**debt financing**), and reinvesting profits.

Equity financing is cash, property, or services exchanged for stock in the company. Generally, each share of stock has a value based upon the initial capital investment in the business. If the small business owner is planning to exchange property to the corporation for stock, then a tax advisor should be consulted; if the property has appreciated, taxes may be due on the exchange.

Debt financing is money lent by banks or shareholders. In the former case, a personal guarantee by the corporation's principals is usually required, which makes an exception to the limited liability rule. The owner of a corporation who personally guarantees a loan is also personally responsible for paying it back if the corporation goes under. Many corporations have preferred to fund the corporation with shareholder money in exchange for promissory notes because unlike dividends, the repayment of debts is not taxable. The IRS monitors such debt closely, though, to make sure it is not excessive and that adequate interest is paid.

Reinvesting profits is using profits from the sales of goods and services to finance corporate operations.

Paying C Corporation Taxes

After the C Corporation deducts all business expenses, such as salaries, fringe benefits, and interest payments; it pays a tax on its profits at the corporate level. Dividends may then be distributed to the shareholders, who must pay taxes on the money as personal income when they file their personal tax returns. In the case of the small business, though, double taxation may not be a consideration, because most or all of the company's profits are reinvested in the business or go to pay salaries and fringe benefits (which are deductible), so no money is left over for distributing dividends.

To avoid double taxation, corporations sometimes pay their shareholder-employees higher salaries instead of distributing income as dividends. But the IRS looks out for this trick and often audits corporations, claiming that executive salaries are not "reasonable" compensation. To prevent this charge, corporations should consider the duties performed, the experience and/or special abilities of the employee, and how much other corporations pay for similar positions before determining "reasonable" compensation. In *How to Run a Small Business*, the J. K. Lasser Institute also advises that a corporation keep its salaries somewhat consistent: "Fluctuating salaries, high salaries in high earning years and low salaries in lean years, will attract a review of salary payments by the Internal Revenue Service. A charge might be made, for example, that the high salary payments were in fact dividend payments."

Running a Corporation

Once a small business has been incorporated, the day-to-day management of business affairs is not much different than any other business. As mentioned earlier, it is important that the business is treated like a corporation. The courts have been known on occasion to overlook a business's corporate status and find the shareholders/owners liable because the business was run as if it were still a sole proprietorship or partnership. Simply filing the articles of incorporation does not guarantee limited liability. In order to maintain corporate status in the law's eyes, these guidelines should be followed:

- **Act like a corporation** Before doing business, stock certificates should be issued to all stockholders, and a corporate record book should be established to hold the articles of incorporation, records of stock holdings, the corporation's bylaws, and the minutes of board and shareholder meetings. In addition, such meetings should be held regularly (once a year is the minimum requirement). In this way, the

corporation can record all important actions taken and show that such actions were approved by a vote. It is also important to treat the corporation like the separate entity it is by keeping personal and corporate accounts separate. In the case of a sole proprietorship the business owner may have used one account to pay the company's accounts and personal expenses, but as a corporate shareholder, the owner now needs to receive a regular salary from the corporation, deposit it in a separate account, and use that account to pay the personal expenses. In all respects, the corporation and owner must be treated as distinct individuals. Fred Steingold advises: "Document all transactions as if you were strangers. If the corporation leases property to you, sign a lease." In addition, the corporation's full name (which should indicate the company's corporate status through use of "Inc." or an equivalent) must be used on all correspondence, stationery, advertising, phone listings, and signs.

- **Act like a corporate officer** When the corporation's owner who is now considered an officer of the corporation signs his/her name to checks, contracts, or correspondence for the corporation, the corporate officer must always indicate that the corporate officer is not acting on his/her own but as an agent of the corporation. This is usually done by listing the officer's title.
- **Adequate capital investment and insurance coverage** It is important to protect the corporation against failure due to debts and lawsuits. In other words, simply trying to protect the owners' assets by becoming a corporation and neglecting to fortify the business can be viewed as reason to disregard a business's corporate status in a lawsuit. Therefore, enough capital should be invested in the corporation to handle all business activities. Likewise, if business activities pose a risk to employees or customers and reasonably priced insurance is available to protect against such risks purchasing such insurance is strongly advised.

Limited Liability Company (LLC)

A limited liability company (LLC) is a relatively new business entity in the United States. Its basic features are that its owners have limited liability for the entity's debts and obligations—similar to the status of shareholders in a corporation—and its income and losses are normally passed through to the owners as if it were a partnership. It is most like a limited partnership, without the requirement that there be at least one general partner liable for the debts and obligations of the partnership.

An LLC is a statutory creation. Unlike general partnerships, which developed under common law, an LLC, like a corporation, is created by filing a

document (usually called Articles of Organization) with an officer designated by state law.

Because each state has its own statutes concerning LLCs, learning and keeping up with the laws that govern LLCs can be a tricky business. When considering the LLC option, consulting knowledgeable and up-to-date legal, financial, and tax advisors is a must.

Advantages of LLCs

There are many advantages of forming an LLC:

- **Limited Liability** Like corporations, the LLC provides its members (owners) protection from being personally responsible for the debt liabilities of the company. Members are only liable to the extent of their investments in the company. If a customer slips and is injured on company property, a law suit may still bankrupt the business, but it cannot touch the personal assets of the LLC's members. This limited liability, then, is a great advantage over partnerships. In general partnerships, all members are liable for the company's debts, but in a limited liability partnership, there is a requirement that at least one member be liable for the company's debts.
- **Avoiding Double Taxation** Like an S corporation, an LLC enjoys exemption from the double taxation required of a C corporation. In other words, the LLC's profits pass through to the company's members, who report their share of the profits on their personal federal tax returns. The company itself does not pay a federal tax before the money is distributed to the members, as do C corporations. However, state and local taxes may still be levied against the LLC.
- **Flexibility of Income Distribution** One of the biggest benefits that small businesses enjoy when choosing LLC status, according to Fred Steingold, author of *The Legal Guide for Starting and Running a Small Business*, is that it is "easier to allocate profits and losses for tax purposes." Whereas the amount of profits the S corporation's shareholders report on their federal tax returns must be proportional to their share of stock, an LLC's members can determine amongst themselves how to divide their income as long as they follow the Internal Revenue Service's rules on partnership income distribution.
- **Simplicity** Another great advantage of an LLC over a corporation is the ease of set up and operating. Incorporating can be an involved and costly process but all that is required to start an LLC is the filing of an Articles of Organization and the drafting of an Operating Agreement defining the company's policies and procedures (a filing fee is still required). Also a corporation requires a board of directors, officers, and regular shareholder and directors' meetings. An LLC is not

required to observe such formalities in its operation. An LLC can operate day to day essentially as if it were a partnership.

- **No Ownership Restrictions** The biggest drawback of forming an S corporation namely the restrictions on the type and number of shareholders the corporation may have is avoided by forming an LLC. The members of an LLC may be foreign nationals or other companies, both of which are prohibited from owning stock in an S corporation. In addition, there is no limit on the number of members an LLC may have, as there is with an S corporation.
- **Member Involvement in the Company** One problem with limited liability partnerships is that those partners who wish to protect themselves with limited liability (which may be all but one of the members) are prohibited from direct involvement in running the company. These partners may have only a financial investment in the firm. All members of an LLC may be directly involved in the company's management without jeopardizing their limited liability.
- **Attractive to Foreign Investors** Because LLCs have been in existence in Europe and Latin America for over a century, investors from those parts of the world are particularly knowledgeable about this business form. According to *The Essential Limited Liability Handbook*, "LLCs often prove to be the most familiar and least imposing business structure for foreign entrepreneurs who wish to enter the American market."

An LLC also has several advantages over a subchapter "S" corporation:

- An LLC has no restriction on number of persons who may be stockholders. S corporations are limited to 35 stockholders.
- An LLC may have multiple classes of stock, while an S corporation can have only one class of stock.
- An LLC may own subsidiaries, but an S corporation cannot own subsidiaries.

Disadvantages of LLCs

LLCs have some disadvantages as well:

- **Earnings subject to tax** Earnings of most members of an LLC are generally subject to self-employment tax. By contrast, earnings of an S corporation, after paying a reasonable salary to the shareholders working in the business, can be passed through as distributions of profits and are not subject to self-employment taxes.
- **Potential termination** Since an LLC is considered a partnership for Federal income tax purposes, if 50% or more of the capital and profit

interests are sold or exchanged within a 12-month period, the LLC will terminate for federal tax purposes.

- **Restrictions on accounting methods** If more than 35% of losses can be allocated to non-managers, the limited liability company may lose its ability to use the cash method of accounting.
- **Stock options not available** A limited liability company which is treated as a partnership cannot take advantage of incentive stock options, engage in tax-free reorganizations, or issue Section 1244 stock.
- **Interstate business more complicated** There is a lack of uniformity among limited liability company statutes. Businesses that operate in more than one state may not receive consistent treatment.
- **Conditional treatment** In order to be treated as a partnership, an LLC must have at least two members. An S corporation can have one shareholder. Although all states allow single member LLCs, the business is not permitted to elect partnership classification for federal tax purposes. The business files Schedule C as a sole proprietor unless it elects to file as a corporation.
- **Taxation** Some states do not tax partnerships but do tax limited liability companies.
- **Potential estate planning issues** Minority discounts for estate planning purposes may be lower in a limited liability company than a corporation. Since LLCs are easier to dissolve, there is greater access to the business assets. Some experts believe that limited liability company discounts may only be 15% compared to 25% to 40% for a closely-held corporation.
- **Converting to LLC may have tax ramifications** Conversion of an existing business to limited liability company status could result in tax recognition on appreciated assets.
- **No perpetual existence** Most states require that a LLC's Operating Agreement set a limit to the company's existence (usually 30 years). Oregon does not but it must be stated as perpetual in the Articles of Incorporation. In the absence of a clause providing for the continuance of the LLC in the event of the death or withdrawal of a member in the Operating Agreement, the LLC will cease to exist when such an event occurs. The transfer of ownership is also more restricted for an LLC (like a partnership) than for a corporation.

Creating an LLC

It is important that the organizer(s) of a prospective LLC follow the "enabling statutes" or formation laws of the state in which the company will be formed

in order to be designated as an LLC. Without this designation, the company will lack the protection of limited liability and will be treated as a general partnership. Therefore, the first step in creating an LLC is to find out Oregon's specific enabling statutes.

The organizer does not have to be one of the company's members. The organizer's function is to file the articles of organization, a task which can be accomplished by a lawyer, a hired agent from a service company specializing in such business, or a manager of the prospective company.

- **Naming an LLC** Before forming an LLC, the company name must be reserved with the secretary of state. The name must contain, as the last words of the name, "Limited Liability Company" or "LLC" or "L.L.C." In all states, though, the name of the LLC must not resemble the name of any other corporation, LLC, partnership, or sole proprietorship that is registered with the state.
- **The Articles of Organization** This form, called the articles of organization or certificate of formation, must be obtained from the secretary of state's office or its equivalent, filled out by the organizer(s), and filed with the same office. A filing fee, which varies from state to state, will also be charged. This simple document requires, at minimum a $50 filing fee in the state of Oregon. Oregon law requires that the following information be included in your articles of organization:
    - ♦ The LLC name
    - ♦ The street address and mailing address, if different, of the LLC's initial registered office
    - ♦ The name of its initial registered agent at that office
    - ♦ A mailing address to which notices may be mailed until an address has been designated by the LLC in its annual report
    - ♦ A statement as to whether the LLC is to be manager-managed
    - ♦ The name and address of each organizer
    - ♦ The period of the LLC's duration (this period may be perpetual or for a set amount of time)
    - ♦ Any other provisions for internal regulations which the members elect to set out

It is important that the articles describe the business in a way that will allow the IRS to designate the company a partnership for tax purposes, and not a corporation. In order for the IRS to do so, the articles must show that the company possesses no more than two of the following four characteristics (which describe a corporation):

- Perpetual existence
- Centralized management
- Free transferability of ownership interest
- Limited liability

One of the easiest ways to show that the LLC is not a corporation is to limit its existence. In fact, most states require that a dissolution date be determined in the Articles of Organization. On this date the LLC's assets are liquidated and its business ceases (occurrences such as the mutual written agreement of the members or the death or retirement of a member may also terminate the LLC's existence before the dissolution date). If no date is specified, a default period of usually 30 years will be enacted. However, the members may decide to continue the LLC's existence at a later date.

- **Fees** Filing fees vary from state to state, from $50 to $500, currently in Oregon the fee is $50.
- **The Operating Agreement** At the first meeting of the members, called the organizational meeting, an operating agreement should be drafted. Although each state has laws governing how LLCs should be operated, the members should create their own operating agreement to document that all members agree on how the company should be run. It should be carefully constructed with an eye to preventing future disagreements and deadlocks. Most basically, the agreement should address the division of profits, members’ voting rights, and company management. A good operating agreement will address the following issues:
    - ♦ Who the members are and how they will be elected in the future.
    - ♦ Grounds on which members may be terminated, and procedures to execute such terminations.
    - ♦ Stipulations regarding allocation of business shares after the death of a member.
    - ♦ Will the company provide for a member if a member becomes disabled by using disability insurance or using its own funds.
    - ♦ How managers will be selected and what their duties, salaries, and grounds for dismissal will be.
    - ♦ How major decisions will be made. (Which decisions will require unanimous approval of the members and which a simple majority vote? Which decisions can be delegated to the manager in charge of daily affairs?)
    - ♦ How often meetings will be held and how much notice members must receive.

- Who will keep records and how they will be kept.
- How members will invest in the LLC: will only cash contributions be allowed, or can members contribute services as well. and if so, which services will be accepted and how will they be valued.
- How profits and losses will be allocated to members.
- How compensation (salary) for actively participating members will be determined.
- How new capital should be acquired should the company need it.
- What procedures must be followed to transfer interests in the company.
- What banking procedures should be followed.
- Penalties, if any, if members or managers fail to act in accordance with the operating agreement.

Depending on how an LLC is organized, it can have the tax attributes of a sole proprietorship, partnership, or a corporation. The LLC will make this election with the filing of the first income tax return.

Which Business Model Should You Choose?

The business model you choose should accurately reflect your needs. The following table shows the types of business entities that you can choose for a landscape contracting business.

	Single Owner	Multiple Owner
Sole Proprietorship	✓	not applicable
Partnership or Limited Liability Partnership (LLP)	not applicable	✓
Corporation	✓	✓
S corporation	✓	✓
Limited Liability Company	The entity may elect to be taxed as a sole proprietor or as a corporation	The entity may elect to be taxed as a partnership or as a corporation

In addition to the information already presented in this chapter, the following table summarizes the features of each type of business.

ENTITY TYPE	DESCRIPTION	WORKERS' COMPENSATION REQUIREMENT	BUSINESS NAME AND REGISTRATION REQUIREMENT WITH THE OREGON CORPORATION DIVISION
SOLE PROPRIETOR-SHIP	Exists when a single individual owns and operates his or her own business. In effect, the owner is the business. The funds for the business come from the owner's personal funds, or loans or gifts to the owner. The owner's personal assets can be used to satisfy debts and taxes owed by the sole proprietor. Personal assets may also be attached to pay any legal damages resulting from lawsuits filed against the business. A sole proprietor reports income (or losses) in the owner's tax return. If a sole proprietor dies, the business ceases to exist.	Not required unless the sole proprietor has employees. The only person who is not an employee is the sole proprietor. Relatives are employees if they receive compensation.	Does not have to be registered with the Business Registry *unless* it uses an Assumed Business Name. If the name of the business does not include the full legal name of the business owner, the business name must be registered as an Assumed Business Name with Business Registry.
GENERAL PARTNERSHIP **or JOINT VENTURE**	A voluntary association of two or more persons for the purpose of owning and operating a business. In a general partnership, the partners contribute assets to the partnership and share the management, profits and losses. All partners are personally liable for the obligations of the partnership. Property acquired by a partnership is property of the partnership and not of the partners individually. Upon death or withdrawal of one of the partners, the partnership may be subject to dissolution. Must file an informational tax report. Individual partners must report, and pay, taxes on their share of the partnership income, even if the partnership income is reinvested in the business. A *joint venture* is a partnership that is formed solely for the purpose of a single business undertaking.	Not required unless the general partnership has employees or if there are more than two partners that are not all members of the same family.	Does not have to be registered with the Business Registry unless it uses an assumed business name. If the name of each general partner is not conspicuously disclosed in the business name, then the business name must be registered as an assumed business name with Business Registry.

LIMITED LIABILITY PARTNERSHIP (LLP)	An association of two or more licensed, professional individuals (including licensed contractors) doing business as a partnership. The concepts of a general partnership are generally applicable, except that partners in a registered LLP are directly liable for their own negligent or wrongful acts (or those committed by persons under their direct supervision and control), but not vicariously liable for other partnership obligations. A qualifying general partnership may convert to an LLP without making a conversion from one form (partnership) to another (corporation) and thus avoid a potentially taxable conversion.	Not required unless the LLP has employees or if there are more than two partners that are not all members of the same family.	The name of the limited liability partnership must contain the words "Limited Liability Partnership" or the abbreviation "L.L.P." or "LLP" as the last words or letters of its name. The name must be registered with the Business Registry. If the limited liability partnership will be using a name other than its registered name to conduct business, it must also register that name as an assumed business name.
LIMITED PARTNERSHIP	A partnership formed by two or more persons having one or more general partners and one or more limited partners. (The associating "persons" may include individuals, partnerships, limited partnerships, trusts or corporations, but *not* limited liability companies). The general partners control the business and are liable for the debts and obligations of the partnership. *See* "General Partnership." The limited partners take no active role in the management of the business. Limited partners are similar to shareholders in a corporation because their liability for debts and obligations of the limited partnership is limited to the amount of their contribution to the business. Profits or losses are typically allocated to limited partners on the basis of their percentage of ownership. Death or withdrawal of a general partner ordinarily dissolves the limited partnership (unless the	Not required unless the LP has employees or if there are more than two partners that are not all members of the same family.	The name of the limited partnership must contain the words "limited partnership." The name must be registered with the Business Registry. If the limited partnership uses a name other than its registered name to conduct business, it must also register that name as an assumed business name.

	partnership agreement provides otherwise). Death or withdrawal of a limited partner has no effect on the partnership.		
LIMITED LIABILITY COMPANY (LLC)	An unincorporated association having one or more members. The LLC can be managed either by its members or by one or more managers. Managers can, but are not required to, be members. LLC managers are similar to directors of corporations. Members are like corporate shareholders. To become a member of an LLC, a person ordinarily contributes cash, assets or services. LLCs provide the limited liability protection and operational flexibility of a corporation, together with pass-through taxation ordinarily found in S Corporations (without the restrictions of an S Corporation).	Not required unless the LLC has employees or if there are more than two members that are not all members of the same family.	The name of the limited liability company must contain the words "limited liability company" or one of the abbreviations, "L.L.C." or "LLC". If the LLC will be using a name other than its registered name to conduct business, it must also register that name as an assumed business name.
CORPORATION	A legal entity separate from its owners who are called shareholders. Corporations are created by filing articles of incorporation with the state in which the corporation is formed. Acts as a single entity. It exists separately from its owners (shareholders) and continues to exist even though the shareholders may change. A corporation may own property, sue and be sued. Has board of directors and officers and observes certain legal formalities such as annual shareholder meetings and the creation of meeting minutes. Corporations have limited liability – meaning that while the corporation is fully liable for all of its business obligations, individual shareholders are liable only to the extent of their investment. For income tax purposes, for-profit corporations file either as a C Corporation or as an S Corporation. A C Corporation pays taxes on its income and the corporation's shareholders pay taxes only on income	Not required unless the corporation has employees or if there are more than two corporate officers that are not all members of the same family.	The name of the corporation must contain either "corporation," "incorporated," or an abbreviation of one of those words. A corporation's name must be registered with the Business Registry. If the corporation will be using a name other than its registered name to conduct business, it must also register that name as an assumed business name.

	passed onto them, as by dividends. A corporation with 75 or fewer employees may elect to be an S Corporation. An S Corporation's income is allocated to the shareholders and is taxed at their personal rate, similar to a partnership.		
BUSINESS TRUST	Any association engaged in or operating a business under a written trust agreement or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares. Generally, business trusts are subject to the laws governing corporations. The trustees, shareholders or beneficiaries of a business trust are not personally liable for obligations of the business trust.	Not required unless the trust has employees or If there are more than two trustees that are not all members of the same family.	A trust's name must be registered with the Business Registry. If the corporation will be using a name other than its registered name to conduct business, it must also register that name as an assumed business name.

*Business entities formed under Oregon statute are "domestic" businesses. Business entities formed under the laws of other states that transact business in Oregon are "foreign" business entities.

Owner compensation for different business types is handled in the following ways:

- Sole proprietors are not paid a salary but take money from the business as a draw.
- Partners are not paid a salary but make withdrawals from the business (a distributive share).
- Corporation shareholders are paid a salary.
- S corporation shareholders are paid a salary but may also take a distribution.

How you, as an owner want to be paid is a factor in determining the business entity you choose. Consult with an accounting practitioner for suggestions and advice.

Chapter 3: Business Registration & Licensing

<u>What this chapter covers:</u>

- What a Landscape Construction Professional's license is.
- What a Landscape Contracting Business license is.

Landscape Construction Professional's License

Oregon is a highly regulated state. There are many professions that are licensed with various requirements to obtain the license. In order to bid on, advertise for, or perform landscaping work in Oregon (ORS 671.520), two licenses are required: the individual landscape construction professional license and the landscape contracting business license.

> The landscape contracting business license is issued to a business "entity" and not to an individual, even when the business is a sole proprietorship and is a separate license.

A further requirement for the landscape contracting business is that every business, if not owned by a licensed landscape construction professional, must have an owner or a designated full time employed person who has taken a course on business practices and laws and passed an examination demonstrating the person is at least minimally competent to manage a landscape contracting business. This person does not obtain a license, but every business must meet this requirement before obtaining the landscape contracting business license. A licensed landscape construction professional will also meet the requirement for the managing owner or designated managing employee for the landscape contracting business.

The two license requirement is very similar to what is required by other competency-tested professions in Oregon such as plumbing and electrical. There is a licensed individual (LCP) who has demonstrated a minimum level of competency through experience and testing to perform the work and secondly there is a business entity (Landscape Contracting Business) that the individual either owns or is employed by that is also licensed. This business entity carries the bonding, insurance and worker compensation (if required) providing consumer protection when working for and on the property of a consumer. Contracts are to be written between the landscape

contracting business and the consumer, not between an individual and a consumer even if the individual works as a sole proprietor. The sole proprietorship (business) must also be licensed and thus provide the consumer protection afforded through the insurance and bonding requirements of a licensed landscape contracting business.

> The landscape construction professional is an individual, not a business.

To become a licensed landscape construction professional in Oregon, an individual must apply for and pass an examination to demonstrate a minimum level of competency in supervising and performing the functions that are outlined in statute for landscaping work. There are no standards or codes for most landscape contracting work done in Oregon so the examination is imposed to provide a certain level of assurance to the public that the work is being done or supervised by someone who has demonstrated some competency in the field.

ORS 671.520(1) defines landscaping contracting work as the art, ability, experience, knowledge, science and skill to:

a. Plan or install lawns, shrubs, vines, trees, or nursery stock;
b. Prepare property on which lawns, shrubs, vines, trees, or nursery stock is to be installed;
c. Construct or repair ornamental water features, drainage systems, or irrigation systems;
d. Maintenance of irrigation systems using compressed air, or
e. Plan or install fences, decks, arbors, patios, landscape edging, driveways, walkways, or retaining walls.

The amount of knowledge, skill, experience, and creativity needed to supervise and perform landscape contracting work in a correct manner is extensive and cannot be encompassed in one book or manual. As a result, the Board recommends that an individual who wants to obtain this individual license spend at least two years or the equivalent in the landscape field working for a licensed landscape contracting business, where the licensed individual supervising the applicant spends quality time mentoring the applicant in landscaping work. As an alternative, the individual can gain the education and experience needed through numerous educational facilities and association programs that provide a work experience component as a part of the education process.

> The equivalent is 48 months of experience performing work in a field related to landscaping such as landscape maintenance, golf course, or nursery work.

Individual License Phases

There are currently three phases of license that can be obtained by an individual. These allow the licensee to supervise and perform different types of landscape work. To receive one of these licenses, the individual must first make an application to the Board, pay the required application fee, and pass the exam sections for that license. The three licenses are:

- **Standard Phase:** The individual must pass five sections of the exam covering all aspects of landscape construction EXCLUDING irrigation and backflow.
- **Irrigation only plus backflow:** The individual must pass three sections of the exam covering irrigation and backflow installation for irrigation and water features only.
- **All phases plus backflow:** The individual must pass seven sections of the exam, covering all aspects of landscape construction.

A passing score is 75% on each section of the exam. Once a section is passed, the score is good for one year, after which the individual must retake the section if a license has not been obtained. The minimum wait period between sittings of the exam is 2 weeks after a sitting or review of the exam.

Individual Probationary License

As of January 1, 2008, the Board offers a probationary license. This license is an "All phase plus backflow" license that can be obtained by an individual who passes all seven sections of the exam within one year of taking the first section of the exam but who has not met the mandated experience and education requirements for this license.

For the license to become a full license, the individual must be:

- employed by a licensed landscape contracting business for 24 months under the direct supervision of a non-probationary landscape construction professional; *or*
- employed by a licensed landscape contracting business and is supervising the landscape operations of the business but the business only contracts for landscape work in the amount of $15,000 or less and carries a $15,000 bond for a 24 month period; *or*
- the owner of a landscape contracting business but the business only contracts for landscape work in the amount of $15,000 or less and carries a $15,000 bond for a 24 month period, *or*
- actively licensed as a construction contractor under ORS 701 for a period of at least 24 months.

Responsibilities of the Individual Licensee

Once someone obtains the landscape construction professional license, they play a very significant role in the landscape contracting business they own or by which they are employed. The statutory responsibility, which is described in ORS 671.565(1) (b), states the individual is to supervise the landscape operations of the business. An important part of this for the licensed individual to directly supervise all unlicensed employees employed by the landscape contracting business, as outlined in OAR 808-003-0018.

> When there is a licensed individual supervising employees of a licensed landscape contracting business, the state of Oregon allows unlicensed individuals to perform landscape work in Oregon.

This supervision provides the consumer some assurance that the work is being properly performed, as well as maintains the integrity of the competency exam process. Failure to directly supervise unlicensed employees properly puts the unlicensed employee in violation of Oregon law for the performance of landscape work, specifically ORS 671.540(15) and (16).

Continuing Education Requirements

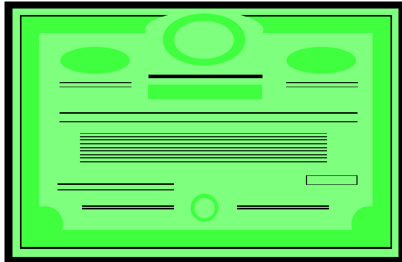
In the 2007 legislative session, the Oregon legislature required individual landscape construction professionals wishing to renew their licenses must participate in continuing education to keep their skills current.

The new statute mandates that up to 10 hours per year can be required for a licensed landscape construction professional to renew his/her individual license. The Board adopted rules to implement this requirement. A summary of the current process is:

1. 20 Continuing Education Hours (CEH) are required every two years to renew the individual landscape construction professional license.
2. Audits will be performed on a randomly selected number of even numbered licensees in even numbered years and on odd numbered licensees in odd numbered years.
3. A minimum of 4 CEH must be in business related subjects and a minimum 8 hours in technical related subject(s). The remaining 8 may be in business or technical subjects, or in community service, teaching, volunteering, or other areas the Board deems acceptable.
4. The licensed individual landscape construction professional must keep certificates of attendance provided by the course providers to submit in the event he/she is audited.
5. The audit will only consider education for the 2 years prior to the audit date.

6. If an individual does not meet the continuing education requirement before the expiration date of the license the individual's license will be subject to suspension, refusal to renew, or termination. The Board may also assess civil penalties for failure to comply with the requirements.

Landscape Contracting Business License



The landscape contracting business is a separate entity from the individual landscape construction professional, even if the business is set up as a sole proprietorship (one owner). All businesses have at least one owner. As such, licensing for the business has different requirements than the individual landscape construction professional and is treated differently by the Board. The type and structure of the business determines how assets, liabilities, profits, and taxes are apportioned to the owner(s). Any owner who decides to start a landscape contracting business must carefully assess the business structure that best fits his or her needs. A brief description of the various types of business appears in Chapter 2, "Starting Your Business."

Choosing your business type has many long-term consequences for how your business operates. The LCB strongly advises you to consult an attorney when setting up your business. A small amount spent to make an informed decision can save you thousands or tens of thousands as the business grows.

Applying for a Landscape Contracting Business License

Every person applying for a landscape contracting business license must submit a completed application that includes:

- The application fee.
- The license fee.
- The business name registration, if required. (See Registering a Business Name on page 32.)
- An original copy of the surety bond or assignment of savings, certificate of deposit or letter of credit in the amount of:
    - ♦ $3,000 if the business performs landscape work on any one project up to $10,000.
    - ♦ $10,000 if the business performs landscape work on any one project up to $25,000.

- ♦ $15,000 if the business performs landscape work on any one project above $25,000.

  (See Bonding and Insurance on page 33.)

- A verification that the business will be operating as an independent contractor and that it meets the requirements of this status. (Requirements are found in ORS 670.600.)
- A certificate of insurance in the minimum amount of $100,000 naming the Landscape Contractors Board as a certificate holder.
- A verification of Workers Compensation coverage (if there are employees).
- A designation of the managing owner or managing employee who has completed the course and examination requirements for this role in the business. (See Managing Owner or Managing Employee on page 34.)
- A list of all licensed individual landscape construction professionals who are owners or employed by the business and the phase of license each individual supervises.
- A notarized verification of employment for each supervising landscape construction professional. (This is a one-time requirement, unless the supervising employee or owner changes in the future, in which case a new verification of employment is required).
- A list of all unpaid arbitration awards or judgments anywhere in the US as a result of the performance of landscape work.
- The signature of the owner/officer/member.

The landscape contracting business's phase of license is based upon the phase of license or combination of the owner(s) or employee(s) of the business. If any part of the business license is based upon a probationary individual landscape construction professional, whether the owner or an employee holds a probationary license, then the business is also considered probationary and is required to obtain a minimum $15,000 surety and is restricted to performing projects that do not exceed $15,000 for a period of 24 months.

Registering a Business Name

The main reason to register the business name is to tell the public and other businesses who is doing business under that name.

You must register a business name with the Business Registry as an assumed business name if the "real and true" name of each person who is carrying on the business is not conspicuously disclosed to the public in the

business name. Each person's "real and true" name must include first name, middle initial and last name. Nicknames are not 'real and true' names and must be registered as assumed business names. If there are words that suggest additional owners, such as "company" or "associates," you must register the business name.

Some examples of assumed business names are:

- Syzygy Lawn and Garden Design
- Longacres Low-Cost Landscaping
- Pretty-in-Pink Floral Design
- The Morsmere Company
- Phillips & Associates

A business name that includes the real and true names of all owners may also be registered, but the registration is optional. A corporation, limited liability company, limited liability partnership or limited partnership does not need to register its name as an assumed business name, unless the entity wants to use the name without the entity type designation.

Some examples are:

	Doing Business As	
Real and True Name	**Don't Need to Register ABN**	**Need to Register ABN**
John Public Construction, Inc.	John Public Construction, Inc.	John Public Construction John Public Homes JPC Homes
Jane J. Jones	Jane J. Jones Enterprises	Jane Jones Enterprises Jane's Enterprises Jones Enterprises Jane J. Jones & Company Jane Jones & Associates
Michael L. Jones & John Smith	Michael L. Jones & John Smith Michael L. Jones & John Smith Enterprises	Michael Jones & John Smith Mike Jones & John Smith M. Jones & J. Smith Jones & Smith M & J Enterprises

If a person transacts business with an unregistered assumed business name, he or she may not have standing in court to pursue or defend legal actions, and may find it difficult to do business, for example, getting licenses, opening bank accounts, and entering into contracts.

Bonding and Insurance

Landscape contracting businesses must maintain both surety bonds and insurance as protections for the consumer.

Surety Bonds

A surety bond is a promise by a bonding agency to provide limited restitution to a consumer if a landscape contracting business fails to pay a LCB order or arbitration award. A property owner can file a complaint against a landscape contracting business for breach of contract (including failure to complete work) or for negligent or improper work. If the LCB orders a landscape contracting business to pay money to a person who filed a complaint against the landscape contracting business, the landscape contracting business must pay as ordered. If the landscape contracting business does not do so, the bonding company will pay the money owed up to the amount of the bond. The bonding company will then seek reimbursement from the landscape contracting business.

A licensed landscape contracting business must provide and maintain a surety bond in the full amount that is required and have this bond on file with the LCB prior to bidding on or contracting for landscaping work that is subject to the bond amount. Some projects require labor and material or performance bonds in addition to the surety bond required for an active license with the LCB. Your bonding surety and accounting practitioner can help verify that your business can provide the required bonds for a project.

Bid Bonds

A bid bond, or a proposal bond, is a guarantee backed by an insurance company that the successful bidder will enter into the project contract for the agreed-upon price. Instead of a bond, owners may require a certified check as bid security. Many landscape contracting business use bonds to avoid tying up capital in bid securities. Bid bonds are returned to unsuccessful bidders shortly after bid opening. Though not required on all projects, bid bonds are usually required on public works projects.

Insurance Requirements

To protect third parties, such as customers, a licensed landscape contracting business must maintain insurance that provides coverage for public liability, personal injury, property damage, and liability for products and completed operations. Examples of losses might be a landscape contracting business's tractor running into the side of a house or a landscape contracting business's employee causing a grass fire with a discarded cigarette.

Some projects may require insurance coverage and limits that are greater than a landscape contracting business or subcontractor carries. Verify that your insurance agent can provide the required insurance before preparing any estimates.

Managing Owner or Managing Employee

In the 2007 legislative session, the LCB introduced legislation that was approved and signed by the Governor to require every landscape contracting business formed after January 1, 2008, to designate on the business application to have an owner or a managing employee who has completed a required course and passed an examination to manage the business. The course is available through approved providers, and the examination is administered by the Board on a regular basis. This manual is part of the study material for this course. The designated person can be a licensed landscape construction professional.

An "owner" is defined in Administrative Rule, OAR 808-002-0734. It means that the individual:

- has an ownership interest in the landscape contracting business;
- is a general partner in a limited partnership;
- is a majority stockholder in a limited partnership;
- is a manager in a manager-managed limited liability company;
- is a member in a member-managed limited liability company; or
- is a person who has a financial interest in a business and manages or shares in the management of the business.

In the final definition of an owner, "manages or shares in the management" means that the owner has a position in the business that's accountable for exercising delegated authority over the human and financial resources to accomplish the objectives of the business. These objectives may include, but are not limited to, planning, directing, implementing, organizing, evaluating, supervising, and/or administering the operations of the business.

A "managing employee" is defined in Administrative rule, OAR 808-002-0630, as any individual, including a general manager, business manager, or administrator, employed fulltime by a landscape contracting business, who manages or shares in the management of the landscape contracting business.

> **Note:** An individual can only be a managing employee of one landscape contracting business at a time.

What does it mean to manage a landscape contracting business? Management is the thing that makes or breaks a business. Failure to properly manage the human resources, the equipment, work processes and financial aspects of your business can and usually does sink your business.

Part of the course from the LCB provides basic information on good business practices to give you some knowledge and skills in this area. Whether you practice them or not is up to you, but the Board is providing some instruction in this area as part of the exam so there is minimal knowledge in these business practices that may help you as a manager of a business to avoid some of the pitfalls that commonly affect landscape contracting businesses in Oregon.

The statement "what you don't track you can't control" is a very important aspect of business management.

Having a business specific chart of accounts and a record keeping system that allows the business to track and monitor those areas of the business that normally get overlooked is a vital business practice.

Local Licensing Requirements

The business license with the Oregon State Landscape Contractors Board (LCB) allows the business to perform business anywhere within the state of Oregon. However, you should also check with the local city and county government wherever you want to do landscape work to see if they require a local business license to perform landscape construction in the city, or county or both. For example, if the business is in Portland, both the City of Portland and Multnomah County have operating requirements.

> **Note:** Any local licensing fees or requirements are in addition to the licensing requirements for the State of Oregon.

Chapter 4: Business Financials

What this chapter covers:

- Principles of accounting
- Budgeting and pricing for profit
- Financial health

General Requirements for Accounting Software

Every landscape contracting business must set up an accounting system as the first step in determining price. There are many programs available for businesses to use, but determining which is best for you will take research and practice on your part. Which ever you choose, make sure it is flexible enough so you are able to track what you want to track. Remember, "If you can't track it, you can't control it." The accounting system should include the ability to:

All popular accounting software aimed at small to midsized businesses can do the following:

- general ledger, accounts receivable, accounts payable, payroll, budgeting and forecasting
- print checks, quotes, sales orders, purchase orders
- print standard accounting reports that are customizable and professional-looking
- support multiple accounting users with basic security features
- customer address lists and to-do lists
- import and export accounting data

Most accounting packages also will do inventory, job costing, and time and billing, or provide add-ons or upgrades that do. In addition, you may want to be able to do direct deposits, handle credit card transactions, or set up a Web store that tie directly into your accounting system.

Setting Up a Chart of Accounts

A chart of accounts is the beginning point of the pricing method and the entire chart of accounts include accounts for the **Balance Sheet** and the **Income Statement**, also known as a Profit and Loss Statement (P&L).

Since the pricing process deals primarily with the Income Statement the main accounts for this are:

- revenue accounts
- direct cost accounts
- indirect cost accounts
- administrative and general overhead cost accounts
- net profit

Revenue Accounts

If the business has several different profit centers, make sure there are multiple revenue accounts; such as:

- design revenue
- planting revenue
- irrigation revenue
- hard-scape revenue
- maintenance revenue

Direct Cost Accounts

These are expenses directly related to the production of revenue, such as:

- production labor
- labor burden (payroll taxes)
- materials (plants, fertilizer, concrete, etc)
- equipment
- subcontractors

Indirect Cost Accounts

These are expenses that are related to the production of revenue and though cannot be assigned to each individual job, they have a close relationship to the production of the revenue and don't occur unless work is being performed. Some managers consider these costs overhead, but this is an area where "tracking" will create "control" and are areas that can make or break a business, such as (not inclusive):

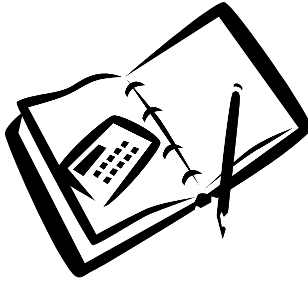
- travel time
- warranty expense
- small tools & supplies
- fuel
- equipment rent
- break time
- shop time (preparing to leave in the morning, unloading at night, etc.)
- equipment repair
- cell phone for production employees (could be overhead)

Administrative and General Overhead cost accounts

These are expenses that continue whether there is work being performed or not, such as:

- rent
- utilities (water, gas, electric)
- salary-owner
- salary-administrative
- salary-sales/design
- insurance-liability
- insurance-medical
- insurance-worker's comp
- office supply
- telephone
- office equipment repair
- licenses
- subscriptions
- vacation time (could be an indirect cost for production employees)
- sick time (could be an indirect cost for production employees)
- facility maintenance
- advertising
- depreciation
- other

Designing the Chart of Accounts



The chart of accounts must be detailed enough to show every aspect of what the business brings in (revenue) and what it spends (expense and overhead) is vital to determining the correct pricing for the business. All accounting software ships with sample charts of accounts to use when setting up your business's accounting system. Many of them have predefined charts of accounts specifically designed for gardening, landscaping, and construction businesses.

Whatever your template, the chart of accounts must have accounts set up that let you show the net profit and print a balance sheet and a profit and loss statement.

- The **net profit** is whatever's left after you subtract direct costs, indirect costs, and overhead costs from the total revenue.
- The **balance sheet** includes accounts for current assets, fixed assets, current liabilities, long term liabilities, and other liabilities and equity accounts.
- The **profit and loss** includes accounts for income/revenue, direct and indirect expenses, administrative (overhead) expenses, and profit/loss.

The following shows a fairly typical chart of accounts for an income statement for a landscape contracting business.

SAMPLE CHART OF ACCOUNTS

FOR LANDSCAPE CONTRACTING BUSINESS

BALANCE SHEET ACCOUNTS

ASSETS (Account #'s 1000 – 1999) Current Assets:

Cash in Bank

Petty Cash

Cash in Savings

Accounts Receivable

Less Allowance for Bad Debts Prepaid Expenses

Inventory

TOTAL CURRENT ASSETS

Fixed Assets

Land

Buildings Equipment Office Fixtures

Vehicles

Allowance for Depreciation

TOTAL FIXED ASSETS

TOTAL ASSETS

LIABILITIES (Account #'s 2000 – 2999)

Current Liabilities

Accounts Payable

Notes Payable (due within 12 months)

Payroll Taxes, Current

Accrued Payroll

Unpaid Vacation/Sick Time

Current Portion of L/T Liabilities

TOTAL CURRENT LIABILITIES

Long-Term Liabilities

Notes Payable (due after 12 months)

TOTAL LIABILITIES

EQUITY (Account #'s 3000 – 3999)

OPEN BALANCE EQUITY

PAID IN CAPITAL

RETAINED EARNING

TOTAL ASSETS = TOTAL LIABILITIES (+) EQUITY => Balance

(CREDIT ACCOUNTS) = (DEBIT ACCOUNTS)

PROFIT & LOSS ACCOUNTS

INCOME (Account #'s 4000 – 4999)

Sales

Landscape Construction Labor

Landscape Construction Materials

Landscape Construction Equipment

Irrigation Labor

Irrigation Material

Total Income (Revenue)

DIRECT EXPENSES (Account #'s 5000 – 5999)

Direct Expenses (expenses tied directly to production – on the job expenses)

- Direct Labor
- Labor Burden (taxes, etc)
- Direct Materials
  - Plants
  - Pavers
  - Wood
  - Mulch
  - Irrigation supply
  - Other materials (the more defined the better the tracking)
  - Equipment (owned) Rental Equipment
- Fuel (if used on project)

Total Direct Expenses

INDIRECT EXPENSES (Account #'s 6000 – 6999)

Indirect expenses (expenses that are related to job but cannot be attached to a specific job)

Indirect Labor (such as picking up materials, travel time, warranty, shop loading time, fueling time, etc)

- Labor Burden (taxes, etc)
- Warranty Materials
- Uniform Expense
- Small tools
- Repair parts
- Fuel (vehicle) & Oil
- Mobile phones
- Other (Itemize if possible)

Total Indirect Expenses

GENERAL OVERHEAD EXPENSES (Account #'s 7000 – 8999)

Overhead Expenses (expenses that occur even if the business is not producing)

- Administrative Salaries

Labor Burden (taxes, etc)

Rent

Office Supplies

Telephone

Electric

Gas

Water

Advertising

Licenses

Insurance

Professional Services (lawyer, accountant)

Property Taxes

Taxes

Depreciation

Interest (on equipment purchases)

Interest (lines of credit, etc)

Other (Itemize if possible)

Total Administrative Expenses

Total Expenses (direct + indirect + administrative)

Net Profit = Total Revenue – Total expenses

Budgeting

A **budget** is based upon the Profit and Loss statement and is an estimation of what the dollar amount in each account of the profit and loss statement will have as an ending figure for the fiscal year. In the beginning of a business, there is really not accurate history for the business and unless the manager has managed another landscape contracting business the manager needs to project what the business will produce in revenues and expenses during the year. This is called budgeting.

The best kind of budgeting is **zero-based budgeting**. Zero-based budgeting is determining a budget without relying on past numbers. Instead, you analyze each process that affects the specific account to determine what each account will have as a final number at the end of the year. You start with at zero and build each account.

To make a zero-based budget, you work the income statement portion of the chart of accounts from the bottom up: you determine what the business needs to make for profit in order to guarantee continuation into the future, return on investment and capital expenditures for growth. If the business is a sole proprietorship, then the profit can also be interpreted as "what does the owner earn" during the year. This is an important determination since the owner's standard of living is based significantly upon what the profit is for the business. So, start with the "profit" line and work yourself back up the chart of accounts. Don't start with "revenue"; start with profit and when you are done, the sum of all the accounts below the revenue line will tell you what the revenue has to be in order to make the profit the business desires.

A small example of an abbreviated budget looks like this (bottom up):

Profit	$ 100,000.00
Total General & Administration (G & A) Overhead	$ 334,450.00
Other	**$ 10,000**
Utilities	**$ 3,000**
Telephone	**$ 4,500**
Salaries – sales	**$ 35,000**
Salaries – Admin	**$ 36,000**
Salaries – Owner	**$ 72,000**
Rent – facility	**$ 24,000**
Payroll Taxes (burden)	**$ 21,450**
Office Supply	**$ 3,500**
Insurance – W/C	**$ 18,000**
Insurance – Liability/vehicle	**$ 20,000**
Insurance – Medical	**$ 50,000**
Depreciation	**$ 21,000**
Facility Maintenance	**$ 6,000**
Advertising	**$ 10,000**
Total Indirect Expenses	$ 101,500.00
Fuel/Oil	**$ 25,000**

What the business needs to have to grow the business, pay off debt, have a reserve, and have a return on investment? Take ample time to determine this and build from this number.

Equipment Rental	**$ 15,000**
Small Tools/supplies	**$ 6,000**
Equipment Repair	**$ 12,000**
Shop Time (unbilled)	**$ 14,000**
Travel Time (unbilled)	**$ 15,000**
Warranty Expense	**$ 10,000**
Cell Phones	**$ 4,500**
Gross Margin	***$535,950.00***
Total Direct Expenses	$258,000.00
Subcontractors	**$ 35,000**
Material Costs	**$ 95,000**
Direct Labor Burden	**$ 28,000**
Direct Labor (production)	**$ 100,000**
Total Revenue (Construction)	$ 793,950.00

Anytime a business can convert an indirect expense into a direct expense (that is, bill for the time and materials) it makes the business more

Direct expenses are the expenses you can markup to bill the client since they are expenses used directly on the project.

Doing a budget in this manner shows you that if all the expenses that have been projected are as estimated then the business will need to do almost $794,000 in sales to make a $100,000 profit. Again, remember these numbers are an estimate for a new business but as the weeks and months go on and jobs get completed (if each job is accounted for in a similar manner), the information can become more accurate and be predicted with greater certainty. Constantly comparing a business's actual expenses to what is budgeted will provide the manager with a factual sense of how the initial budget numbers are relating to what is actually happening in the field and adjustments can be made.

Questions that need to be asked are:

- How many man hours will it take to generate this amount of revenue (dependent on price of labor)?
- Does $100,000 of direct labor generate this much revenue? What does the business pay per hour for labor?
- Is this a realistic budget?
- Can the business be competitive?

Pricing and Profit

From the budget, you can determine the price for labor and materials being supplied on the job. As you may realize, the labor and materials referenced here are the **direct labor** and **direct material** costs listed in the chart of accounts. Direct labor and material is what is "marked up" to cover all the other expenses and generate the profit in the business.

In a landscape contracting business, some jobs may have more materials than labor, or visa versa. Doing independent job accounting will give more detailed information about this, but as a company on the whole, the material and labor costs are an accumulation of all these individual job material and labor costs.

The **break even point** is the price that is set on material and labor that reflects where the business will not lose money and not have a profit. The markup on labor and materials to create the break even point is found by dividing the total overhead plus indirect costs by the direct costs. In the example above the mark up would be $435,950/$258,000 = 169%. So if the direct costs of a job were $10,000 then the price that would be appropriate to "break even" would be $16,900.00.

In the budget example above, the business desires $100,000 profit with $793,950 in sales (revenue). This represents a desired percentage profit of 13%. How does this affect the price? You can't just mark up the break even point by 13%. For example, $16,900 x 13% doesn't give a 13% profit. $16,900 x .13 = $2197.00, which means the business would need to sell the service for $19,097.00. To calculate the real percentage profit on this job, divide the profit ($2197) by the selling price ($19,097), which equals 11.5% (percent profit). This is not the 13 percent profit that the business desired.

> Remember: profit is a percentage of selling price, not a percentage of costs.

To determine the selling price to get the desired amount of profit, determine the selling price (which is unknown at this point). The following example shows how to calculate the appropriate selling price ("sp") that generates a 13% profit (the desired profit in the budget). (This should look familiar; it is a basic algebra problem.)

The desired selling price is the break even point plus 13% of the desired selling price, therefore:

sp = $16,900 + .13sp

Subtract the 13% from both sides of the equation to get the equation:

.87sp = $16,900

Divide $16,900 by .87 to determine the desired selling price:

$16,900/.87 = $19,425.00

The profit on this job is: $19,425 -$16,900 (break even) = $2525.00 (profit). To check the profit percentage on the job:

$2525/$19,425 = .13 = 13% (the desired profit percentage).

As these calculations show, the cost of the job should be $19,425 rather than $19,097 (the earlier, erroneous calculation). The amount of money is not significant for this size of job, but if the same mistake is made over the course of $794,000 in sales, it will make a significant difference to the company's bottom line. If a manager decides to sell the job for less, at least the manager knows how much lower the price can go before the job is done at a loss, considering all goes well on the project. As can be expected, there are unforeseen variables that affect a job and as experience in the business grows they will show up in the costs of the project and this information can help determine more accurate selling prices for a particular business.

Frank Ross of Ross & Payne Associates has studied the landscape construction industry in depth and pointed out the fact that the landscape construction industry is heavily dependent upon both labor and materials and that the markup on each of these areas may need to be different depending on the ratio of materials to labor on a project. A "Dual overhead" method was created by Mr. Ross. If this is of interest to you as a manager, contact the Professional Landcare Network (PLANET) for information at http://www.landcarenetwork.org/cms/home.html. The method can also be found, with other details on accounting and specific landscape construction business practices, in the book: *Business Principles of Landscape Contracting* by Steven Cohan.

Financial Ratios

There are indicators that help determine the financial health of a landscape construction business such as financial ratios that are derived from the balance sheet and profit and loss sheets of the business. These indicators can give a business owner and manager a quick analysis of how the business is doing in comparison to other similar businesses in the landscape construction industry.

You must constantly monitor the financial health of your business. The sooner you can identify problems, the easier it will be to fix them. Some of the most common financial ratios to consider are the current ratio, the quick ratio, the cash to current liabilities ratio, and the debt to equity ratio. These ratios can be derived easily from information available on the balance sheet.

Current Ratio

The current ratio (CR) is obtained by dividing the current assets by the current liabilities. This ratio measures the ability to pay the current liabilities (short term debt) from assets that can be converted to cash. For example, if the current assets on the balance sheet are $300,000 and the current liabilities are $100,000 then the current ratio is 3:1. This means that the business has $3.00 in solvent assets for every $1.00 of liability that is payable in the next 12 months. (According to the Professional Landcare Network, aka PLANET, the national average CR for landscape installation businesses is 1.9:1.)

Quick Ratio

The quick ratio is obtained by dividing the total of the cash plus the accounts receivable by the current liabilities. This ratio measures a company's ability to pay current liabilities from liquid assets (assuming the A/R is current). For example, if the cash plus A/R is $150,000 and the current liabilities are $100,000 then the Quick Ratio (QR) is 1.5:1, which means that there is $1.50 of cash and A/R to pay $1.00 of current debt. (According to PLANET, the national average quick ratio for landscape installation businesses is 1.4:1.)

Cash to Current Liabilities Ratio

The cash to current liabilities ratio is the result of dividing the cash by the current liabilities. This ratio measures the amount of fully liquid asset (cash) that is available to pay current debt. For example, if the cash is $15,000 and the current liabilities are $100,000 then cash to current liability ratio is 0.15:1 which means there is only $0.15 available in cash to pay $1.00 of the current debt (payable in a 12 month period). This means that though the company may have enough current assets to pay the debt, most of these assets would have to be liquidated to pay the $100,000 of current debt. Reserves should be built up to avoid having to borrow to meet a greater percentage of the current debt obligation. (According to PLANET, the national average cash to current liabilities ratio for a landscape contracting business is 0.27:1, or $0.27 for every $1 of current liability.)

Debt to Equity Ratio

The debt to equity ratio is obtained by dividing the total liabilities by the owner's equity. (The owner's equity is the net worth of the owner in the business, which is simply the total assets less the total liabilities.) This ratio measures the amount of debt that can be financed by the owner’s equity.

For example, if the total long and short term liabilities for the business are $300,000 and the owner’s equity is $450,000, then the debt to equity ratio is $300,000 ÷ $450,000 = .60. This means that the business has $0.60 of

debt for every $1.00 of owner's equity, a ratio of .6:1. The business has less debt than equity and is therefore able to provide funding for the business without outside resources. Borrowing money increases debt, which is an increase in liability from principle and interest.

A debt to equity ratio of 1:1 means that the total assets are needed to cover the total liabilities. A ratio of greater than 1:1 means that the business is technically insolvent. Never exceed a ratio of 1:1 unless there are significant business situations that require a short term need to do so.

Production Ratios

Work produces sales and production ratios help show the owner or managing employee what is happening in the business in terms of production. Some of the common productivity ratios are sales per employee and sales to fixed assets.

Sales Per Employee

The sale per employee ratio is obtained by dividing the net sales by the number of fulltime employees. (If you have half-time employees, figure two half-time employees equals one fulltime employee.) These numbers come from the profit and loss statement and the number of employees.

Labor is usually the largest cost to a landscape contracting business. It's in the business's interests to maximize the amount of sales each employee produces. For example if the company has $800,000 in sales and the business has 20 employees, the ratio is $800,000 ÷ 20 = $40,000. This means that each employee is effectively generating $40,000 of income for the business. This information helps a business see what "should be" and "what is" and make changes to increase this productivity number. (According to PLANET, the national average for a landscape contracting business is $77,926 per employee.)

Sales to Fixed Assets

The sale to fixed assets ratio is obtained by dividing the net sales by the total fixed assets. These numbers come from the profit and loss statement and the balance sheet.

The fixed assets of a landscape contracting business are usually equipment. Typical fixed assets are buildings (if owned rather than leased), office equipment, and large equipment that gets depreciated over a period of years, such as trucks, tractors, and skid steer loaders, make up the majority of the fixed asset column on the balance sheet. The return on this investment is measured by the amount of sales this equipment produces for the business. This number can help determine if the business owns too much

equipment and should sell and then rent, or if it does not own enough equipment to be profitable.

For example if the fixed assets for the business is $400,000 and the sales are $800,000 then the ratio of sales to fixed assets is 2:1 ($800,000 ÷ $400,000). This means that $2.00 of sales is produced for every $1.00 of fixed asset. This is generally considered a low ratio and indicates that the business is probably either invested in a building or has equipment that is not being used. If sales can increase without increasing the fixed assets, this ratio will improve. (According to PLANET, the national average for a landscape contracting business is a ratio of 9.5:1.)

Profitability Ratios

Without profit, there is no point to being in business. Profitability ratios tell the owner or managing employee what the business is returning to the owner for his/her investment into the business. Some of the most common profitability ratios are gross margin, profit margin, return on assets, and return on net worth. The values to calculate the profitability ratios are obtained from the profit and loss statement and the balance sheet.

Gross Margin

The gross margin is a percentage obtained by dividing the gross profit by the net sales. Gross profit is calculated by subtracting direct costs from sales. (Remember, direct costs are those costs associated with producing the sales; they must relate directly to the production of a sale.) The gross margin percentage is an indication of how direct costs are managed.

For example if the gross profit of the business is $300,000 and the sales were $800,000 then the gross margin is 300,000 ÷ 800,000 = .375, or 37.5%. This means that for every $1.00 of sales, it costs the business $0.375 in direct cost (labor and material) to produce that sale. The lower the gross margin percentage, the less cost is associated with the sale. (According to PLANET, the national average for gross margin in a landscape contracting business is 39%.)

Profit Margin

The profit margin is a percentage obtained by dividing the profit before taxes by the net sales. Profit is the bottom line on the profit and loss statement. It indicates what is left over after all expenses are paid (excluding taxes, since taxes can vary from business to business depending on the formation of the business). This percentage indicates the production efficiency for the business.

For example if the business has a net profit of $100,000 and net sales of $800,000 the profit margin is: $100,000 ÷ $800,000 = .125 or 12.5%. The

larger the profit margin, the healthier the business is and the more likely it will be able to grow and produce more in the future. (According to PLANET, the national average for profit margin in a landscape contracting business is between 3.8% and 9.7%.)

Return on Assets

The return on assets (ROA) is a percentage obtained by dividing the profit before taxes by the total assets. It measures the return on the assets of the company, which is one indicator of return on dollars invested in the business.

For example, if the net profit is $100,000 and the total assets are $700,000 then the ROA is $100,000 ÷ $700,000 = .143 or 14.3%. This means that the business is generating $0.14 for every $1.00 of business assets. An owner or managing employee should think in terms of what a person could receive if they invested these assets in a bank or some other stable security.(According to PLANET, the national average for ROA in a landscape contracting business is 12.4%.)

Return on Net Worth

The return on net worth (also known as the return on owner's equity) is a percentage obtained by dividing the profit before taxes by the owner's equity. This measures what the owner receives from their equity holding in the business. This is a very important number to an owner, since if the owner has an investment in the business their money either needs to grow or why bother.

For example if the net profit is $100,000 and the owner's equity is $450,000 then the return on net worth is: $100,000 ÷ $450,000 = .22 or 22%, which is a fairly good return considering other forms of investment the owner could have chosen. (According to PLANET, the national average for return on net worth in a landscape contracting business is 32.3%.)

Other Ratios

There are other ratios that can be used to determine the performance of the business in other areas. If you are interested in exploring further, these can be found on the web at http://www.netmba.com/finance/financial/ratios/. In addition, Steven Cohan's book *Business Principles of Landscape Contracting* covers many of these ratios in detail.

Chapter 5: Employment Law

What this chapter covers:

- The differences between employees and independent contractors.
- The Oregon regulatory agencies for employment issues.
- Why employment law and regulation are important.

Employees and Independent Contractors

If your landscape contracting business was just you and nobody else, you wouldn't have to worry too much about employment law. But even if you start out as just you and a truck, chances are that you're eventually going to need to hire someone to help you out... at which point, you need to understand about employees

> If you are running a landscape contracting business and you intend to have employees, you must have a clear understanding of the legal definitions and responsibilities for employees and employers.

Although an employee is generally understood to mean someone who receives wages from an employer and for whom the employer pays the employer share of FICA taxes, state and federal unemployment taxes, worker's comp, and other employer tax obligations, it's important for you, the employer, to understand the legal definition of "employee." The laws are very specific. A misinterpretation of the law can result in significant and costly consequences to the landscape contracting business and to any person who is supposed to be an employee.

What Is an Employee?

An employee is legally defined in Oregon as any individual working for remuneration who does not meet the requirements of an independent contractor in ORS 670.600. The specific legal definitions for what constitutes an employee and an employer-employee relationship in Oregon are spelled out in ORS Chapters 654 (Oregon Safety Laws), 656 (Workers Compensation Laws), 657 (Unemployment Laws), and state and federal wage and hour laws. For additional information, see OAR 808-002-0340 & 0360.

> **Note:** An independent contractor or trainee enrolled in a bona fide training program is not considered an employee under the wage and hour law.

What Is an Independent Contractor?

An independent contractor is defined by law in ORS 670.600. The requirements for independent contractor status are regulated for purposes of personal income tax, workers' compensation, unemployment compensation, and licensing with the LCB.

When applying for a license with the LCB, the landscape contracting business certifies it will follow the requirements of being an independent contractor. In addition, the business assumes financial responsibility for defective workmanship through performance bonds, warranties, or liability insurance.

For the employer, an independent contractor certificate offers no protection from an individual identifying themselves as an independent contractor status at the time of contracting and who later claims to be an employee when injured. When hiring independent contractors, be sure that the relationship between the independent contractor and your business meets the statutory criteria.

An independent contractor must:

- Be free from direction and control in providing the work.
- Be engaged in an independently established business that obtains the required business licenses, furnishes necessary tools and equipment, has the authority to hire and fire employees, files appropriate business tax returns.
- Be licensed under ORS 671 or 701 (State Landscape Architect Board, State Landscape Contractors Board, State Board of Architect Examiners, or Construction Contractors Board) if required for the service.
- Be paid on completion of portions of work or on a retainer basis.
- Publicly represent that an independent contractor provided the work.

In a contract of service for pay, "direction and control" means regulating or directing another's activities, or having the right or power to direct another's activities. "Control" happens when the client sets conditions about how the worker conducts himself or does the work (known as "narrowly set" conditions). Some examples of "narrowly set" conditions are:

- Telling the worker how to dress or act on the job.
- Saying the worker can only work on the job when the client is there.
- Approving workers hired by an independent contractor.
- Saying the worker must be trained by the client.

Sometimes work needs to be done when a business is closed or during off-hours. The employer has control when they can tell the worker when, where,

and how to do the job, even when there might be other ways to do the work.

> When an employer has the right to tell the worker when, where, and how to do the job, the worker is an employee, not an independent contractor.

According to ORS 670.600, a business is an independently established business if it meets at least three of five standards:

1. Maintains a business location that is:
   a. Separate from the business or work location of the person getting the service; or
   b. In a part of your home that is used mainly for business.
2. Bears the risk of loss. For example, the business:
   a. Enters into fixed price contracts;
   b. Corrects poor work;
   c. Warrants the service;
   d. Negotiates indemnification agreements or buy liability insurance, performance bonds, or errors-and-omissions insurance.
3. Provides services on contract for two or more people within 12 months, or advertises or promotes the business to get new contracts so it can do the same work for others.
4. Invests in the business by:
   a. Buying tools or equipment you need to provide the services;
   b. Paying for the premises or facilities where the services are provided; or
   c. Paying for licenses, certificates, or special training.
5. Has the right to hire and fire workers.

Independent Contractor or Employee?

Even if a contract between a party and a public entity states that the party is an independent contractor who will indemnify and hold harmless the entity from any suit brought by a third party, courts will look to the relationship between the party and the public entity to determine whether the party is subject to coverage under the OTCA (Oregon Tort Claims Act).

Courts will consider (1) whether the party is performing a function that the public entity itself is authorized to perform and (2) whether the public entity retains the "right to control" the party's work. (Issues of fact determine whether a contractor is an "agent" within the meaning of ORS 30.285 and ORS 30.287.)

The problem for the employer is that, if an individual files a claim with the Oregon Department of Revenue, the Employment Department, the LCB, or the Workers' Compensation Division, or if any of these agencies conducts an audit or investigation of an employer's records, the employment status is determined by the economic realities test (described in Determining Independent Contractor Status on page 58) and these requirements.

These requirements are narrowly construed: compliance must be very tight for the individual to qualify as an independent contractor. As a result, it is not uncommon for employers to mistakenly treat an employee as an independent contractor.

Care must be taken that someone hired as an independent contractor meets the criteria for acting as an independent contractor. If the court determines that someone hired as an independent contractor does not meet the requirements, the court may deem them an "employee." This mistake has serious legal ramifications, including penalties or fines against the employer for failure to pay payroll taxes and failure to make the appropriate tax reporting disclosures. The employer's workers' compensation insurance coverage could also be negatively affected and the hiring agency may even be exposed to civil liability in the case of an accident on the part of the independent contractor.

You should take great care to assess a worker's true employment status.

Unlicensed Contractors Risky for Consumers, Too

Hiring an unlicensed contractor can be risky for consumers, too. If a consumer hires an unlicensed contractor, the contractor can be considered an employee of the consumer, which can lead to significant personal liability for the consumer should there be an accident or a problem with the work.

For a consumer to be in compliance with Oregon statutes and to receive the fullest protection from employer liability, when they hire an unlicensed contractor to perform landscaping work for them in return for any form of compensation (money, good, or services), this person must:

- be employed by a licensed landscape contracting business *or* be employed by a licensed temporary labor provider that supplies labor for the licensed landscape contracting business;
- be under the direct supervision of a licensed landscape construction professional;
- have federal and state taxes withheld;

- be paid at least minimum wage (or meet the salary test for salaried employees);[1]
- be covered by workers compensation; and
- be paid by the landscape contracting business (and not directly by the consumer).

Oregon Regulatory Agencies for Employment

There are three state agencies that regulate workplace issues for all businesses in Oregon. By regulating workplace issues, these agencies promote safe and healthy workplaces that serve the needs of employees while promoting a positive business climate for employers. These agencies are the Bureau of Labor and Industries (BOLI), Workers' Compensation Division (WCD), and the Oregon Occupational Safety and Health Division (OR-OSHA).

Bureau of Labor and Industries (BOLI)

The mission of the Bureau of Labor and Industries (BOLI) is to:

- promote the development of a highly skilled, competitive workforce;
- protect the rights of employees and citizens to equal, nondiscriminatory treatment;
- encourage and enforce compliance with state laws relating to wages, hours, and terms and conditions of employment; and
- advocate policies that balance the demands of the workplace and employers with the protection of employees and their families.

The U.S. Department of Labor, Wage and Hour Division, administers federal wage and hour laws and regulations. The BOLI Wage and Hour Division govern and administer Oregon state wage and hour laws. BOLI also helps promote a skilled workforce through its apprenticeship programs and provides assistance to Oregon employers through its educational services.

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[1] *The salary test generally requires that an employee receives a predetermined amount each pay check, and that the amount is not subject to reduction due to variations in the quality or quantity of work performed. The salary test also requires that the employee be paid a full week's salary for any week in which he or she does any work. Because of this regulatory framework, reductions in pay for increments of an entire week do not affect an employee's salary status, provided no work is done that week. Additionally, the regulations contain exceptions that allow deductions from the weekly salary under certain limited circumstances. For example, employees can be docked pay for major safety violations without losing their exempt status, even if the result is a partial pay week.*

Determining Independent Contractor Status

BOLI looks at criteria commonly known as the economic realities test to determine if an individual worker is an employee of a company or is an independent contractor who contracts for work with a company. The test looks at the relationship between the individual worker and the employer for minimum wage, overtime, or discrimination claims. No single factor determines the worker's economic dependency on the employer.

Generally, the criteria includes the:

- Degree of control exercised by the employer
- Extent of the relative investments of the worker and the employer
- Degree to which the employer determines the worker's opportunity for profit and loss
- Skill and initiative required in performing the job
- Permanency of the relationship

Each relationship between employer and employee, or independent contractor, is considered in light of the realities of the relationship. It does not make a difference if the individual signs a contract stating that he or she is an independent contractor. Agencies and courts will look behind the contract and determine if an employment relationship exists.

Elements of the Employer-Employee Relationship

There are several key signs of an employer-employee relationship.

Regular Paydays

First, and most importantly, Oregon law states that all employers must establish and maintain regular paydays. Paydays may not exceed 35 days after the first day an employee begins work or between paydays. When an employer has notice that an employee has not been paid the full amount the employee is owed on a regular payday and there is no dispute between the employer and the employee regarding the amount of the unpaid wages, if the unpaid amount is five percent or more of the employee's gross wages due on the regular payday, the employer must pay the employee the unpaid amount within three days after the employer has notice of the unpaid amount, excluding Saturdays, Sundays and holidays. If an employer fails to make timely payments to employees, the commissioner of BOLI may require an employer to post a bond to ensure timely payment of wages.

Payroll Deductions

As part of the payment process, employers must make deductions to withhold state withholding tax, federal income withholding tax, Social Security, Medicare, and Workers' Benefit Fund (WBF) assessment from

employees' wages in accordance with federal and Oregon tax laws. Deductions from wages may only be made for one or more of the following reasons:

- When they are required by law such as for federal and state taxes, Social Security, Medicare, workers' compensation assessment, or a garnishment order.
- When they are for the employee's benefit, are authorized by the employee in writing, and are recorded in the employer's books.
- When they are for other items (such as charitable contributions), and are authorized by the employee in writing, provided the employer is not the ultimate recipient of the money, and the deduction is recorded in the employer's books.
- When they are authorized by a collective bargaining agreement.

In addition, all employers who are required to have workers' compensation insurance must also pay a workers' compensation assessment to the state. This payroll assessment does not have any effect on workers' compensation insurance coverage. The assessment may be split between employees (payroll deduction) and employers, or paid in full by the employer. The workers' compensation assessment pays for specific programs that benefit injured employees and the employers who hire them.

Other deductions may also be withheld under certain special circumstances such as those listed below.

- Employers may make deductions for the fair market value of meals or lodging provided for the private benefit of the employee. If the employee does not want the meals, however, no deductions may be made.
- Employers may not make deductions for the purchase or cleaning of uniforms or tools.

An itemized statement of deductions made from wages must be furnished to employees on their regular paydays at the time payment is made. The statement must show the amount and purpose of each deduction and may be a part of the paycheck, attached to it, or it may be a separate document. If the employee agrees, and has the ability to print or store the statement, the statement may be provided in an electronic format.

When an employer deducts an amount from an employee's wages as required or authorized by law or agreement, the employer must pay the amount deducted to the appropriate recipient within the time required by the law or agreement. If the time for payment is not specified by the law or agreement, the employer must pay the amount deducted to the appropriate recipient within seven days. Failure to pay the amount as required

constitutes an unlawful deduction. An employee may pursue collection of amounts which he or she feels have been unlawfully deducted through a private attorney, in small claims court, or by filing a wage claim with Wage and Hour Division of BOLI.

Personnel Records

Personnel records include those records that are or have been used to determine the employee's qualification for employment, promotion, additional compensation, employment termination, or other disciplinary action. If the employee requests such records, the employer is required to furnish a certified copy of these records or allow the employee to review them within 45 days after receipt of the employee's request. If the employee's personnel records are not readily available, the employer and the employee may agree to extend the time within which the employer must provide the employee reasonable opportunity to inspect the records or furnish the employee a certified copy of the records. After the employee terminates, the employer must keep these records for at least 60 days.

Employee Termination

If an employee quits employment and has given advance notice of at least 48 hours (excluding Saturdays, Sundays, and holidays), final pay is due on the last day worked. If the employee quits without 48 hours notice, final pay is due within five days (excluding Saturdays, Sundays, or holidays) or on the next regular payday after the employee quits, whichever is sooner. If an employee who is regularly required to submit time records to the employer quits employment without giving at least 48 hours notice, the employer is required to pay the employee the wages the employer estimates are due. These wages are payable within five days after the employee has quit.

> If an employee leaves the business and gives 48 hours notice, the final paycheck to the employee is due on the last day worked.

If an employer discharges an employee, or if employment is ended by mutual agreement, all wages earned and unpaid must be paid by the end of the next business day after discharge or termination.

Prevailing Wages

The Prevailing Wage Rate (PWR) law, also known as the "Little Davis Bacon Act," regulates the payment of wages for work on public work projects. The PWR law applies to projects carried on or contracted for by a public agency for construction, reconstruction, major renovation or painting of a public work. The law also applies to projects for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure, or improvement of any type that uses funds of a private entity and $750,000 or more of funds of a public agency or in which 25 percent or

more of the square footage of the completed project will be occupied or used by a public agency.

A public agency includes the state of Oregon or any of its political subdivisions, or any county, city, district, authority, public corporation or entity, or any of their legal agencies.

Workers on public works projects subject to the PWR law must be paid no less than the prevailing rate of wage published by BOLI for the trade or occupation in the locality where such labor is performed. Effective January 1, 2006, landscape contracting businesses must pay workers employed on projects subject to both the state PWR law and federal Davis-Bacon Act the higher of the applicable state or federal wage rate. BOLI publishes rates applicable to projects subject only to the state PWR law and projects subject to both state and federal law, showing which prevailing wage rate is higher.

Landscape contracting businesses or subcontractors engaged on a public works project that requires prevailing wage rates must post the applicable wage rates in a conspicuous and accessible place on the project. BOLI provides these wage rates at no cost. They are also available on the bureau's website at www.oregon.gov/boli.

Landscape contracting businesses who have refused to pay the prevailing wage rates or who have intentionally failed or refused to post the prevailing wage rates are ineligible to receive any contract for public works (except for federal contracts) in Oregon for up to three years. BOLI may also debar the officers of debarred landscape contracting businesses, and place them on a "list of ineligibles."

> Failure to pay the prevailing wage rate can bar you from public works contracts in Oregon for three years.

Public works projects that are exempt from prevailing wage rates requirements include:

- projects for which the total project amount does not exceed $50,000
- projects that are privately owned, use funds of a private entity, and in which less than 25 percent of the square footage of the completed project will be occupied or used by a public agency and for which less than $750,000 of funds of a public agency are used
- projects for which no funds of a public agency are directly or indirectly used
- projects for residential construction that are privately owned and that predominantly provide affordable housing as defined by law
- contracts of a People's Utility District
- projects of the Oregon State Lottery Commission
- projects of the Travel Information Council

- Oregon Department of Corrections' inmate labor work release program assignments
- Oregon Youth Conservation Corps members

Landscape contracting businesses who were awarded a prevailing wage rate-covered public works contract first advertised or solicited prior to January 1, 2008 are required to pay a fee of one-tenth of 1 percent (.001) of the contract price to BOLI. The minimum fee that must be paid is $100, and the maximum fee that must be paid is $5,000. The fee is due within 10 days of receiving the first progress payment or within 60 days of the beginning of work on the contract, whichever date occurs first. Public agencies are responsible for paying the fee to BOLI on public works contracts first advertised or solicited after January 1, 2008.

Public works contracts require some additional reporting.

Landscape contracting businesses and subcontractors are required to submit weekly payroll information and certified statements to the contracting agency by the fifth business day of each month for each week following a month in which workers were employed upon a public work. The landscape contracting business may submit a weekly payroll on either a form provided by BOLI or may use a similar form, provided this form has all the same information. Public agencies and general contractors are required to withhold 25 percent of amounts owed to contractors if certified payrolls are not submitted as required.

If a contract that is initially less than $50,000 later increases to an amount greater than $50,000, the landscape contracting business must pay prevailing wage rate wages for the entire project.

The commissioner determines the prevailing wage rates based on annual independent wage surveys. Landscape contracting businesses must reply to wage surveys sent by the commissioner, which will help determine appropriate prevailing wages for landscaping work on public projects in Oregon.

Landscape contracting businesses engaged on projects that require payment of prevailing wages must post a notice, in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work, and the applicable prevailing wage rates for that project. The notice must also contain information regarding any health and welfare or pension plan provided for employees, how and where to make claims, and where to obtain further information. Every landscape contracting business on the site is responsible for the posting of all prevailing wage rates that apply to the project. A civil penalty may be assessed and/or the landscape contracting business may be debarred from public contracting for failing to post the prevailing wage rates as required

Every public contract must also contain a condition that no person shall be employed for more than 10 hours in any one day, or 40 hours in any one week, except in cases of emergency or where the public policy absolutely requires it. In such cases, the employee shall be paid at least time-and-a-half pay for:

- All overtime in excess of eight hours a day or 40 hours in any one week when the workweek is five consecutive days, Monday through Friday.
- All overtime in excess of 10 hours a day or 40 hours in any one week when the workweek is four consecutive days, Monday through Friday.
- All work performed on Saturdays, Sundays, and legal holidays.

In general, the PWR law:

- Covers the **cleanup of hazardous material spills** if the project includes some construction or reconstruction. The PWR law does not cover contracts that only include picking up and hauling away hazardous material not in connection with a covered construction project.
- Covers **demolition work** only if it is to prepare for planned construction or renovation. If no construction is planned to replace the demolished property, the demolition is exempt.
- Does not cover **general maintenance work**, such as sweeping, cleaning, and landscaping is not covered unless it is done as part of a construction, reconstruction, or major renovation project. For example, PWR laws do not apply if maintenance landscaping work such as mowing or pruning is performed on the grounds of an existing building where no other work is being performed. If the same landscaping is part of new construction or a major building renovation, then it is covered work.
- Does not apply to **"owner-operators" of trucks**. Drivers who own and operate their own trucks and who are independent contractors are not required to be paid prevailing wage rate wages. Operators of other equipment or motor vehicles are not exempt from PWR laws.
- Does not apply to persons employed on a public work for the manufacture or furnishing of materials, articles, supplies, or equipment are not workers required to be paid prevailing wages unless the employment of such persons is performed in connection with and at the site of the public work. Persons employed on a public work who are employed by a commercial supplier of goods and materials must be paid no less than the prevailing wage for work performed in fabrication plants, batch plants, barrow pits, job headquarters, tool

yards, or other such places that are dedicated exclusively, or nearly so, to the public works project.

- Applies to persons employed on a public works project who spend more than 20 percent of their time during any workweek performing duties that are manual or physical in nature as opposed to mental or managerial in nature are workers and must be paid the prevailing wage rate. Mental or managerial duties include administrative, executive, professional, supervisory, or clerical duties

Employees are not required to be paid prevailing wage rate wages for travel time unless they are traveling between the job site and a dedicated site. Other wage and hour regulations may require that travel be compensated, however. (Contact BOLI for more information.)

If a business fails to pay the prevailing wage, they are liable for the underpayment as well as possible civil penalties.

Any landscape contracting business failing to pay prevailing wages as required is liable for the amount of underpayment. Employers may also be liable for liquidated damages equal to the amount of unpaid wages and additional civil penalties for the underpayment of wages. For example, if a landscape contracting business underpaid an employee by $1,500, the landscape contracting business is responsible for the unpaid wages plus an equal amount in liquidated damages for a total of $3,000.

In addition to any other penalty provided by law, BOLI may assess a civil penalty not to exceed $5,000 for each violation of any provision of PWR law or any rule the commissioner has adopted pursuant thereto. BOLI may, as a condition of settling a case, require the landscape contracting business to take a training course on PWR law and ask for a commitment of future compliance.

Employee Claims for Wages

Ensuring that workers are paid minimum wage and that overtime is calculated correctly are functions of BOLI.

If the employer does not pay an employee wages to which he or she is entitled, the employee may file a claim with BOLI. The following procedure outlines the steps to be followed by employees who file claims in connection with wage disputes:

1. An employee's first step is to file a claim with BOLI. The wage claim will be reviewed for completeness and to make sure the division has jurisdiction. The employee may be asked to provide additional information and/or evidence to support the claim.

   BOLI will not accept a wage claim if:

a. A private legal action has already begun to recover the wage claims;

b. No work was performed in Oregon;

c. The claim is against a business in which the employee was a partner, an owner, or had a direct financial interest;

d. The claim is against a relative; or

e. The employee is unwilling to take the employer to court.

In case of a dispute over wages, the employer must pay, without condition and within the time set by law, all wages the employer agrees are due. The employee retains the right to claim any balance the employee alleges is due by filing an action with the court or a claim with BOLI.

If an employer willfully fails to pay an employee final wages when due, the employer is subject to a penalty of the employee's hourly rate for eight hours per day for each day the employee remains unpaid up to a maximum of 30 days. The penalty may not exceed 100 percent of the unpaid wages if the employer pays the wages due within 12 days after written notice of nonpayment is sent to the employer, and the employer has not willfully violated the final pay provisions of the law in the preceding year.

Employers are liable for unpaid wages for a period of six years from the date the wages were earned and two years for claims of unpaid overtime. Employees may lose their right to their wages if they fail to pursue claims in a timely manner.

Discharging or otherwise retaliating against an employee because the employee has discussed, inquired about, or filed a wage claim is prohibited.

2. Upon receipt of a wage claim, BOLI will notify the employer of the claim by mail.

   a. If the employer agrees the amount claimed is due, the employer may issue a check to the claimant and send it to BOLI.

   b. If the employer agrees that a portion of the amount claimed is due, that amount should be paid promptly.

   c. If the employer disagrees with the wage claim, the claim will be assigned for investigation to a wage and hour compliance specialist, who will review the employer's records and other relevant information to determine whether wages are owed and if so, the amount of unpaid wages.

3. If the employer disputes the compliance specialist's determination, an administrative hearing or court trial may be held in the matter.

Minimum Wage and the Fair Labor Standards Act

A business must have two or more employees and have an annual sales volume of $500,000 or more to be subject to the federal Fair Labor Standards Act (FLSA), which is administered by the U.S. Department of Labor. Individual coverage applies to employees whose work regularly involves them in commerce between states (interstate commerce). An employee who works on or handles goods that move through interstate commerce is subject to the protection of the FLSA, regardless of the sales volume of the employer. The Fair Labor Standards Act requires the payment of the federal minimum wage.

> If state and federal regulations differ, you use the regulation that benefits the employee most.

Most Oregon employers are subject to both federal and state minimum wage and overtime laws. The effect of this dual coverage is that the employer must comply with the standards most beneficial to the employee when there are conflicting requirements in the laws. For example, since Oregon law currently requires a higher minimum wage rate than federal law, all Oregon employers must pay the Oregon state rate, unless their employees are exempt under Oregon law. Oregon law requires the minimum wage rate to be adjusted annually for inflation by September 30 of each year for the following calendar year. You should check the Oregon state and federal minimum wage requirements before employing anyone to make sure you're in compliance.

Minimum wage applies to all employees in Oregon, unless they are classified as exempt. Employees must receive at least minimum wage for all hours worked, including preparation time, opening and closing times, and required meetings. State and federal minimum wage laws define the term "employ" as "to suffer or permit to work." "Work time" includes both time worked and time of authorized attendance. For each hour of work time that the employee is gainfully employed, no employer may employ any employee at a lower wage; however, BOLI may approve hourly wage rates lower than the minimum wage for persons who are mentally or physically disabled or who are student-learners.

Every employer employing any employees subject to the minimum wage provisions shall post and keep posted an Oregon Minimum Wage Poster in conspicuous places in every establishment where employees are employed so as to permit them to readily observe a copy. Posters are mailed by BOLI annually to every Oregon employer and are also available upon request and on the bureau's website at www.oregon.gov/boli.

By this definition, any time spent by an employee in the performance of any duties must be recorded and paid as time worked. Under Oregon law, it is permissible to pay wages by the hour, as a salary, in commissions, or at a piece-rate. Whichever method is used, employers must keep accurate time records and the employee's total earnings must equal or exceed minimum wage for all hours worked. Employers are responsible for maintaining accurate time records of all hours worked. The records must be kept for up to three years in order to defend against wage claims and comply with audits.

In order to avoid liability related to payment of wages, it is the employer's duty to have and to enforce rules prohibiting unauthorized work. For example, assume an employee arrives at work early or stays late because of transportation problems. The employee prefers to work rather than remaining idle, and states that he or she will volunteer the time. Wage and hour laws require that an employer must compensate an employee for all hours worked, whether those hours are authorized or not, even if those hours would be overtime hours. If an employee violates the business policy and works regular time or overtime without required authorization, the employer may discipline the employee but the employee must still be paid for the hours worked.

Unless exempt, private sector employees must be paid overtime at one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. This rate is the same for the state of Oregon and the federal government. Employers may not discriminate between the sexes in payment of wages for work of comparable character requiring comparable skills. Whenever overtime is being calculated on a daily basis, it also must be calculated on a weekly basis. The greater of the two amounts is the one to be paid. The payment of overtime is required by state and federal law and cannot be waived by agreements with employees.

> Employers may be assessed both civil and criminal penalties for violating wage and hour standards.

A workweek is any seven consecutive 24-hour periods as determined by the employer. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the state or federal overtime requirements. For purposes of overtime computation, each workweek stands alone.

Meal and Rest Periods

Oregon law specifically mandates meal and rest periods. These periods may not be waived or used to adjust working hours.

The general rules for meal periods are:

- Adults must be given a 30-minute meal period if the workday is six hours or longer.
- Minor workers less than 18 years of age must be given a 30-minute meal period no later than five hours and one minute after the minor reports to work. Minors ages 14 and 15 must be fully relieved of work duties at this time. Minors who are 16 and 17 years of age and adults may work during the meal period under exceptional circumstances, if they cannot be relieved, but must be paid for that time.
- In exceptional circumstances, if the employee can't be relieved due to the nature or conditions of the work, then the meal period must be paid. The scheduling of meal periods depends on the length of the workday. If the work period is seven hours or less (but at least six), the meal break must be between the second and fifth hour worked. If the work period is more than seven hours, the meal break must be taken between the third and sixth hour worked.

The general rules for rest periods are:

- Paid rest periods of at least 10 minutes must be provided during each four-hour work period or major part thereof. The rest period is to be taken approximately in the middle of each work segment. There are narrow exemptions to the rest period requirements for part-time adult employees working alone in retail/service businesses.
- Minor workers must be provided a 15-minute break during each four hours of work.
- Rest periods may not be added to the meal period or deducted from the beginning or end of the work period in order to reduce the length of the work period.

Employing Minors

There are special rules in Oregon for employing minors (people under the age of 18). Although some of these are described in this section, there are many other rules relating to the employment of minors. If you employ minors, you should consult with an attorney who specializes in employment law or contact BOLI's Technical Assistance for Employers division.

There are a number of restrictions on the type of work minors may do:

- Minor employees who are ages 16 and 17 may work in construction with restricted use of some machinery and explosives.
- Minors are not allowed to perform hazardous work activity. Hazardous work includes using motor vehicles and transporting goods (except under limited circumstances for minors 17 years old); use of woodworking machines, battery-powered handheld drills and sanders;

operating power-driven hoisting apparatus or power-driven metalworking machines; or being involved in activities such as wrecking, demolition, excavation, and roofing.

- Minors under 16 years of age may not be employed in construction activities.

There are some additional requirements for record keeping when hiring minors:

- Minors must obtain a Social Security card the same as adult employees.
- Employers who hire minors must obtain an annual employment certificate. The certificate covers all minors the employer hires. The employer estimates the number of minors that will be employed during the year, lists the job duties they will be performing, and identifies any machinery or equipment they will be using. This certificate must be posted in a conspicuous place in the work area where employees may review it.

  Employment certificate applications may be obtained from the BOLI Child Labor Unit, Wage and Hour Division (503-731-4105), or may be downloaded from BOLI's website at www.boli.state.or.us/wage/wh-216-1.pdf.

Minors must be paid the applicable minimum wage rate. Employees ages 16 and 17 may work at any time with no daily hour restrictions up to 44 hours per week. However, they must be paid time and one-half the regular rate of pay for any time worked over 40 hours in a week.

Some child labor law exceptions apply for employment by a minor's parent(s). Contact BOLI for specific information.

Exempt vs. Non-exempt from Minimum Wage and Overtime Employees

There are limits to the types and amounts of deductions an employer may make against an employee's salary without jeopardizing their exempt status. This section provides an overview of the complex regulations concerning exempt and non-exempt status.

Exempt Classification

When an employer classifies an employee as exempt from minimum wage and overtime, it is up to the employer to establish that the employee meets the criteria for exempt status. There are three categories of "white collar" employees that may qualify for exempt status:

- executives (supervisors),

- administrative managers, and
- professional employees.

Both federal and state regulations require that employees must satisfy all of the duties tests and also be paid a genuine salary to be classified as exempt employees.

Exempt executives (supervisors) must satisfy the following duties tests:

- Primarily manage a distinct unit or subdivision within the organization,
- Spend most of the workweek performing management duties. This generally means more that 50 percent of the work time; however, other factors might support exempt status if less than 50 percent of work time is spent in management. Other factors could include:
  - ♦ the employee is paid a significantly higher salary than is paid to nonexempt staff;
  - ♦ the employee makes frequent management decisions;
  - ♦ the employee is free from direct supervision;
  - ♦ supervises two or more full-time employees (or the equivalent of two or more);
  - ♦ has hiring or firing authority or, if not full authority, their recommendations are given particular weight;
  - ♦ customarily and regularly exercises authority to make decisions of significance.

Exempt administrative employees must satisfy the following duties tests:

- Primarily perform office or non-manual work directly related to management policies or general business operations. The work must be distinguished from production or sales work and is limited to duties directly related to the running of a business and not merely the day-to-day carrying out of its affairs.
- Perform work as an administrative assistant, such as an executive's assistant who has management duties; a staff employee, such as an advisory specialist or department head; or as a special assignment employee such as a field manager.
- Spend most of the workweek performing management duties. As with exempt executives, this generally means more than 50 percent of work time; however, other factors might support exempt status.
- Customarily and regularly exercise authority to make decisions of significance.

Professional employees must satisfy the following duties tests:

- Primarily perform work as professionals in either learned or artistic professions, or as teachers in an educational institution or as highly skilled computer professionals. Learned professionals, teachers and highly skilled computer professionals are those who have attained knowledge of an advanced type customarily acquired by a prolonged course of specialized intellectual instruction and study. A four-year degree may satisfy this requirement, however associate degrees do not.
- Spend most of the workweek performing professional duties. This generally means more than 50 percent of work time; however, other factors may be considered if less than 50 percent of the week is spent in professional work.
- Perform work that is predominantly intellectual and varied rather than routine, manual, mechanical, or physical.
- Consistently exercise discretion and independent judgment.

In addition to the duties tests, exempt employees must be paid on a genuine salary basis as opposed to hourly or other methods of payment. Almost all Oregon employers are subject to the Fair Labor Standards Act (FLSA). Employers subject to the FLSA are required to pay a minimum weekly salary of $455 a week or $23,660 annually. This new salary level was enacted on August 23, 2004.

The salary must be a predetermined amount that is not varied based on quantity or quality of work. Exempt employees need not be paid for weeks in which no work is performed, however the general rule requires that the employee receive the full salary for any week in which work is performed without regard to the number of hours or days worked. The general rule is subject to exceptions as follows:

- Salary may be prorated (reduced) if an exempt employee takes a day or more off for personal reasons other than sickness or accident.
- Salary may be reduced for absences of a day or more for sickness or disability if the reduction is made according to the employer's plan, policy, or practice of providing paid sick or disability leave. For example, if an employer has a paid sick leave plan and the employee has exhausted all available paid leave under that plan, then his or her salary may be reduced by those absences of a day or more for sickness or disability.
- If the employee performs any work during the workweek when serving on jury duty, military leave or when attending a proceeding as a witness, the exempt employee's weekly salary must be paid. However, the employer may offset any amounts received by the employee as jury or witness fees or military pay for that week.

- Reductions in an exempt employee's salary may not be made as a disciplinary measure unless the penalty is imposed for violations of safety rules of major significance such as smoking in an explosive plant or oil refinery. However, if the employee is suspended for a full workweek, and no work is performed during that week, no salary is required.
- Reductions for unpaid disciplinary suspensions of one or more full days for workplace infractions or workplace conduct. Suspensions must be imposed pursuant to written policy applicable to all employees.
- An employer is not required to pay the full salary in the initial and terminal week of employment.
- In private sector employment, the exempt employee's salary may not be reduced when an employee is absent for part of a day, unless the absence qualifies as leave taken under the federal Family and Medical Leave Act. (Special rules apply to government agencies).

Commonly Asked Questions about Exempt Status

This section contains commonly asked questions about exempt from minimum wage and overtime payment status.

Q. Are employers required to track hours worked by exempt employees?

A. No, if an employee is truly exempt as a "white collar" employee, there is no need to track hours worked. However, it is permissible for employers to track hours worked for legitimate business purposes such as job costing, or benefit accruals. It is also permissible for employers to require exempt employees to be present during specified hours.

Q. Is it permissible to require exempt employees to use accrued vacation or sick leave when they are absent?

A. Yes, the Ninth Circuit Court of Appeals has decided that deductions from leave banks for absences are permitted since the words "amount" and "compensation" in the regulations refers to "cash" or "salary." Therefore, as long as the employee receives the appropriate payment in cash or salary, deductions from leave banks do not affect the exempt employee's status. However, it is essential that the exempt employee's salary is not "subject to deductions" for partial day absences. Therefore, employers should adopt policies clearly stating that the salary will not be reduced for absences of less than a full day, if the employee has no available accrued leave to access.

Q. If the employee is absent for a full day or more due to sickness or disability, and has no accrued paid leave to use, may the employer reduce the employee's salary?

A. Yes, as long as the employer has a paid leave plan that provides compensation in cases of illness or disability.

Q. Is it OK to pay extra amounts, in addition to the salary, to exempt employees?

A. Yes. Oregon regulations specify that extra amounts may be paid to exempt employees even if they are based on hourly rates. Federal regulations do not specify that extra compensation may be paid on an hourly basis, but state that bonuses, commissions, or shift amounts may be paid in addition to the guaranteed salary. Some court cases have questioned the practice of paying extra amounts on an hourly basis. Therefore, it is recommended that extra amounts be in the form of bonuses or other "lump" sums rather than "hour for hour."

Q. Is it permissible to reduce the exempt employee's salary if the employer shuts down for part of a week due to slowdowns in orders, or for equipment failures, or for other operating requirements of the business?

A. No, the general rule requires that exempt employees be paid for the full week if any part of the week has been worked.

Q. Can an employer require an exempt employee to use accrued paid leave during a part-week shutdown?

A. An opinion letter dated November 20, 1995, issued by the U.S. Department of Labor (DOL), states that the employer may not require exempt employees to use accrued leave for absences occasioned by the employer. However, the U.S. Department of Labor has revised its enforcement policy and now relies on opinion letters issued on February 15, 1994 and April 6, 1995. The DOL's current interpretation is that an employer may require the use of paid leave, so long as the employee receives his or her full weekly salary. This means that an employee who has exhausted all paid leave must nonetheless receive his or her full weekly salary when a part-week shutdown occurs.

Q. I understand that a basis for determining whether employees are exempt is that they are paid on "a salary basis." What does that mean?

A. In general, an employee is considered to be paid on a salary basis if he/she receives a predetermined amount (salary) for the pay period, and that amount is not subject to reduction in any week in which he/she performs any work, regardless of the number of days or hours worked.

Q. Does this mean that deductions are never allowed from the salary?

A. No. Deductions may be made in the following situations:

- Employees need not be paid for any work week in which they perform no work.
- Deductions may be made when the employees are absent from work for a day or more for personal reasons.
- Deductions may be made when the employees are absent from work for a day or more for sickness or a disability if the employer has a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability.

Q. Does this mean that if an employer does not have a paid sick leave plan that covers both sickness and disabilities, the employer could not deduct for such sickness and/or disability?

A. Yes. If there is no plan, policy or practice of providing compensation for such sickness or disability the deduction would be disallowed if the employee were to remain exempt.

Q. May I deduct for a day or more of sick leave if the employee has not been with my company long enough to qualify for compensation under my sick leave plan?

A. Yes.

Q. If an employee has used all accrued sick leave, may I deduct for periods of less than a day?

A. No. Deductions may only be made for a day or more.

Q. What kinds of deductions would not be allowable if the employer wants to regard the employee as being paid on a salary basis?

A. Deductions may not be made for:

- Time when work was not available.
- Absences occasioned by the employer or by the operating requirements of the business.
- Absences caused by jury duty, attendance as a witness or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.
- Absences of less than one day.

Note that although the employer is prohibited from docking an exempt employee for such absences, the employer may require that the exempt employee use accrued paid leave.

Unemployment Insurance

Unemployment insurance is defined as a tax used for the payment of benefits to unemployed employees.

A person is considered disqualified from receiving unemployment benefits if:

- the person was terminated from a job because of misconduct, or
- the person voluntarily left work without good cause, or
- the person is discharged or suspended because of the unlawful use of any controlled substance unless that person is participating in a recognized drug rehabilitation program. The person may also be disqualified for being discharged two or more times within a 12-month period for substance abuse. The person will be disqualified if it is found that the person committed a felony or theft in connection with work, admits the act, and is convicted in a court.

Unemployed persons will continue to be regarded as disqualified if they fail to apply for available suitable work when they are referred by the employment office or fail to accept suitable work when it is offered

A person will not be disqualified for benefits if:

- The person quits work or fails to accept work when a collective bargaining agreement is in effect and the employer modifies the amount of wages in breach of the agreement.
- The person is laid off.
- The person is discharged for other than misconduct or use of controlled substances.
- The person voluntarily left work before the date of a good-cause voluntary leaving date.
- The actual voluntary leaving occurs no more than 15 days before the planned date of voluntary leaving.

An employer may be liable for "wrongful discharge" in violation of public policy if the employer terminates the employee for complying with a public duty, or for pursuing a right granted by law. Examples of such violations include an employee who is terminated because he or she:

- Brought a job-site safety concern to the employer’s attention
- Had to miss work to serve jury duty.
- Reported in good faith what he or she believed to be illegal conduct or activities being committed by fellow employees or supervisors.

Employment Agreements

An express contract is an actual agreement of the parties, which consists of the terms that are declared at the time it is formed and stated in clear and explicit language, either verbally or in writing. Under certain circumstances, an employee handbook or manual can constitute a contract.

An implied contract is one that is not formed by an explicit agreement of the parties. Instead, it is inferred from the acts or conduct of the parties that show the existence of an agreement between them.

Collective bargaining agreements are contracts that have been negotiated between union representatives and company representatives on behalf of the union member.

An employer may be in breach of an agreement when the employer does not live up to the express, implied, or bargained agreement. A breach includes such actions as not paying an agreed-upon salary, not paying wages in a timely manner, not providing agreed-upon benefits, and not providing workers' compensation coverage. Monetary and other relief may be awarded in a legal action for breach of an employment contract. An agreement between employer and employee as to terms and conditions of employment, how the employer will handle discipline or termination, and so on, may be binding on the employer. Note that not all such agreements are written.

Family and Medical Leave Laws

This section describes family medical leave under both federal and state laws. When the two laws overlap, the two laws will be applied congruently; however, if there are greater rights under Oregon law, those laws will apply. In practical terms, this generally means that in Oregon Family Medical Leave (OFLA) laws will apply for Oregon employees since coverage is generally broader under the state law than under federal law. The law applies to businesses that have 50 or more employees.

Federal Family and Medical Leave Act

The federal Family and Medical Leave Act (FMLA) allows eligible employees of an employer to take up to 12 work weeks of unpaid leave (480 hours) in any 12-month period for a serious health condition of the employee or family member. This is commonly referred to as "protected" leave because taking family medical leave cannot be counted against a job applicant or an employee in assessing his or her work record. Family medical leave also "protects" an employee's job by allowing him or her to return to his or her job once the leave is over (except in some limited situations). The FMLA also allows that an employee's medical benefits remain at the same level while the employee is on leave and that the employee must generally be allowed to return to the same or an equivalent position upon return from leave.

Under the FMLA, both male and female employees are eligible for family leave for the birth, adoption, or foster care placement of a child.

FMLA leave is also available to care for a spouse, child, or parent with a serious health condition. The FMLA defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider.

An employer may require medical certification from a health care provider to verify that an employee or the employee's family member has a serious health condition. In the case of an unanticipated emergency, an employer must allow at least 15 days for the employee to obtain the medical certification form from his or her physician. In general, no direct contact by the employer with the employee's health care provider is permitted. Employers who have reason to doubt the validity of the initial medical certification may require a second opinion at the employers' expense; however, the ability to obtain a second or third medical opinion is limited by law. It is a good idea to attach the employee's job description to the medical certification form so the health care provider may refer to it when filling out the medical certification form and any subsequent Fitness for Duty Reports.

Oregon Family and Medical Leave Act

The Oregon Family and Medical Leave Act (OFLA) provides an unpaid leave of absence for up to 12 weeks to eligible employees of Oregon employers for certain family and medical reasons. This law applies to employers who have 25 or more employees. Eligible employees may request OFLA leave for any of the following qualifying purposes:

- parental leave for the addition of a child to the family through birth, adoption, or placement by foster care.
- serious health condition leave to care for a family member with a serious health condition or the employee's own serious condition.
- pregnancy disability leave for pregnancy disability or prenatal care.
- sick child leave to care for a sick child who does not have a serious health condition but requires home care.

Employees are required to give written notice to the employer 30 days in advance of the leave unless the leave is taken for an emergency. Employees who fail to give written notice may be subject to discipline by the employer.

There is no requirement that family medical leave be paid. However, employees must be allowed to use any existing accrued vacation leave, and the employer must apply its existing sick leave policy. OFLA requires the employer to also allow employees to use any accrued sick leave. This means that if an employee wants to be paid and uses accrued paid vacation and

sick leave when on FMLA and OFLA those hours reduce the number of FMLA and OFLA hours available for protection of their job. Employees do not have to exhaust all their paid leave before being allowed to take leave without pay and have their job protected by FMLA and OFLA. Currently an employee is allowed to retain up to 40 hours of accrued paid leave and then use the remaining FMLA and OFLA hours as unpaid. When employees return to work from leave, they are entitled to their former job or to an available equivalent job if the former job has been eliminated. Employers covered under both OFLA and FMLA must allow the employee on leave to return to the former job, if that job still exists.

Overlapping of FMLA and OFLA with Workers' Compensation Laws

The overlapping of the FMLA and OFLA laws can become complicated. You are encouraged to seek legal advice for specific information about how to apply these laws. Larger companies are covered by both OFLA and FMLA. The OFLA applies to employers with 25 or more employees whereas FMLA applies to employers with 50 or more employees.

> If the FMLA and OFLA differ, use the regulation that benefits the employee most.

In an employee absence due to a workers' compensation claim, the absence can be counted as family leave if it meets the definition of a serious health condition under OFLA or FMLA. Employers must then look at the reinstatement rights under the leave laws and under the workers' compensation discrimination laws and do whatever is beneficial for the employee.

When an employer grants a family leave for a condition that is also a disability under the ADA, the employer must reasonably accommodate an employee's disability if it does not create undue hardship. If an employee's family leave entitlement has been exhausted for a serious health condition that is also a disability, the reasonable accommodation obligation still remains.

An example would be an employee who suffered permanent injuries to his or her back, and although able to return to work, needs special office furniture or equipment to allow him or her to perform the job after the 12-week family leave period.

Protection for Whistleblowers

Whistleblowers are protected by Federal and Oregon laws.

An employee who opposes employment practices that he or she believes, in good faith, are unlawful and who is subsequently terminated or suffers an adverse employment action, such as a reduction in pay or a transfer to a less desirable job, may successfully sue his or her employer for retaliation or discrimination under state or federal law. Employers should know what the

laws are and should seek legal advice in avoiding liability and preventing retaliatory action or discrimination.

Federal Law

Several federal laws prohibit retaliation against a person who has, in good faith, made a Title VII complaint or assists another's complaint.

The Age Discrimination in Employment Act prohibits retaliation against an applicant or employee who makes an ADEA complaint or who assists another's complaint.

The Americans with Disabilities Act also prohibits retaliation for asserting one's rights, opposing unlawful conduct, or assisting another complaint.

Oregon Law

It is against Oregon law to discriminate against an individual who has:

- opposed any discriminatory practice, assisted another's complaint, or attempted to do so
- opposed a practice prohibited by the Oregon Safe Employment Act or assisted another's complaint
- exercised his or her individual rights or inquired about his or her rights under the workers' compensation system, the disability laws, OR-OSHA, family leave laws, and/or other laws prohibiting discrimination
- used, invoked, or assisted a complaint under the workers' compensation system
- testified before the Legislative Assembly
- testified at an unemployment hearing
- made a wage claim or discussed a wage claim with anyone
- reported, in good faith, what that person believes to be criminal activity, caused a criminal complaint to be filed, cooperated with law enforcement, brought a civil proceeding against an employer, or testified at a civil proceeding or criminal trial

Miscellaneous Discrimination Laws

Miscellaneous discrimination laws cover the following areas:

- It is unlawful to discriminate because of an expunged juvenile record.
- It is unlawful to discriminate against an individual because another member of that individual's family works for the employer.
- It is unlawful to require as a condition of employment that an individual refrain from lawful tobacco use during nonworking hours.

- It is unlawful to discharge or commit certain acts against an employee due to his or her jury service.
- It is unlawful to deny accrued paid leave to an employee donating bone marrow.
- It is unlawful to discharge a person because his or her wages are garnished.
- It is unlawful to discriminate against an employee for reporting a violation of health or residential facilities laws.
- It is unlawful to refuse to grant leave to a member of the National Guard called into service.

It is also unlawful in Portland, Eugene, Corvallis, and Ashland to discriminate on the basis of sexual orientation, pursuant to those cities' codes. It is unlawful in Portland, Eugene, Corvallis, and Ashland to discriminate on the basis of an individual's source of income.

Additional Statutory Rights of Employees

Under certain circumstances employees are entitled to rights related to family obligations, medical leave for themselves or certain family members, job-site injuries, or disabilities. Employers must comply by allowing employees to exercise their rights under those laws and by not retaliating against the employees for doing so or for inquiring about their rights.

Hiring Practices

This section lists some of the most common dos and don'ts when hiring employees:

An employer may not ask if an applicant is disabled or inquire about the nature or severity of a disability. Employers may be liable if they ask questions that would elicit information about a disability; for example, "How many times have you been sick in the last year?" Employers should focus inquiries on an applicant's ability to perform job-related functions.

An employer cannot require a medical examination until after a job offer has been made. However, an employer may condition a job offer on the results of a post-offer medical examination if the employer requires all entering employees in the same job category to take the examination.

Upon receiving a request for reasonable accommodation, an employer may request additional information, including medical verification of the condition requiring accommodation

Federal and state law prohibits employers from advertising or making any inquiry expressing a preference based on protected class status. Therefore, all pre-employment questions should be designed to obtain information

relating only to qualifications for successful job performance. Avoid questions that ask for:

- Direct information about an individual's race, sex, age, marital status, or other protected class status.
- Information typically evaluated differently for men and women, such as questions regarding childcare arrangements.
- Information that could be used to screen out members of protected classes, such as questions about religious practices or medical conditions.

Employers can ask questions relating to an individual's ability to perform essential tasks, but the ADA prohibits questions relating to physical impairments or disabilities An employer can inquire about these issues if driving is an essential function of the job (but not for purposes of determining whether the person can get to work).

Questions regarding an applicant's general medical condition should also be avoided. Below are some examples of illegal questions that could violate an applicant's protected class status:

- **Don't ask: Do you have a physical or mental condition that would interfere with your ability to perform the job?**
  Instead ask: Can you perform the essential functions of the job with or without a reasonable accommodation?
- **Don't ask: Marital status: Are you married? Divorced? Separated? Who do you live with? How many children do you plan to have? What does your spouse do for a living?**
  Since it is illegal to discriminate on the basis of marital status, any such inquiries are inappropriate.
- **Don't ask: Age: Birth date? How old are you?**
  Instead, if it is necessary to know if an applicant is over a certain age for legal reasons, this question could better be stated as "Are you 21 or over?" or "Are you 18 or older?"
- **Don't ask: Race, Gender: What is your race? Gender? Furnish a photograph. Hair and eye color.**
  If it is necessary to ask for this information for affirmative action purposes, a statement indicating that the information is needed for affirmative action reporting purposes only and will not be used to discriminate should accompany such inquiries. A photograph should not be required unless physical appearance is a bona fide occupational requirement for the job.

- **Don't ask: Sex: Are you pregnant? Do you plan to start a family?**
  Oregon Law clearly states that discrimination on the basis of pregnancy is sex discrimination. According to the law, pregnant employees must receive the same benefits as other employees in similar job classifications.
- **Don't ask: Injured Worker: Have you ever applied for workers' compensation?**
  This question is unlawful under the ADA. In addition, Oregon employers with six or more employees cannot refuse to hire an applicant because of that person's prior workers' compensation claims.
- **Don't ask: Religion: What is your religious affiliation? Are you able to work Saturdays and Sundays?**
  Since it is unlawful to refuse to hire an applicant because of a religious affiliation, such questions could be perceived as discriminatory.
- **Don't ask: National Origin: Were you born in the U.S.? Are you a citizen of the U.S.?**
  It is better to state that if hired, it will be necessary to present identification in accordance with Immigration Reform Control Act (IRCA) requirements.
- **Don't ask: Family Relationship: Do you have any relatives currently employed in this company?**
  An employer cannot refuse to hire because the applicant has a relative working for the same business, unless one family member would work in a supervisory capacity over the other, or unless the employer could prove the existence of some other bona fide occupational disqualification
- **Don't ask: Criminal History: Have you been convicted of a crime?**
  An employer may ask about relevant convictions but not about arrests. An employer should not have a blanket rule of rejecting all ex-convict applicants. Employers should instead consider the relationship between the crime and the job. Employers should state on the job application that a conviction will not necessarily bar employment. In assessing a conviction, the employer should take into account how old or recent the conviction is, the age of the applicant when the crime occurred, the seriousness and nature of the crime, and any rehabilitation the applicant has undergone. Applicants should only be excluded from employment based on job-related convictions.

Giving and Getting References

The main risk in giving references is that the employer may end up defending a claim that adversely reflects on an employee's abilities or character. Under Oregon law, employers are protected if the statements:

- Relate to job performance
- Are made with a good-faith belief that they are true
- Serve a business interest or purpose
- Are limited to that specific business interest or purpose
- Are made on a proper occasion
- Are communicated to proper parties.

Employers are not required to give references. However, a consistent policy should be adopted that one person or department will handle all requests for references. If the policy is to decline requests for references, prospective employers should be informed of the policy so no negative or positive reflection on the employee is imparted.

It is a good idea to require that all requests be in writing on company letterhead and to require a written release signed by the employee or former employee. Also, it is recommended that you keep a written record of what was said.

When answering questions, avoid opinions and limit comments to documented observations. Do not discuss an employee's disability (if any), physical or mental limitations, medical, or claims history.

There is no law that requires an employer perform reference checks. However, employers must exercise reasonable care to ensure that employees, customers, clients, and visitors are free from harm inflicted by unfit employees if the employer either knew or should have known of the employee's dangerous actions. Employers who fail to exercise reasonable care to screen out unfit employees may be sued for negligent hiring or negligent retention of unfit employees.

Some suggestions for getting references include the following:

- Write a letter requesting references from each employer listed.
- Obtain a written release from the applicant and send this with the letter requesting references from each employer.
- Verify educational degrees.
- Look for gaps in employment history, obtain explanations for the gaps, and verify the explanation.

Age Discrimination

Oregon law prohibits employment discrimination because a person is 18 years of age or older. This contrasts with the federal Age Discrimination in Employment Act, which protects employees 40 years of age or older. The Oregon statute applies to all Oregon employers.

Blacklisting is the intentional prevention of the future employment of an employee by the former employer and is an unlawful employment practice in Oregon. Blacklisting usually occurs when the former employer makes representations to prospective employer(s) that the individual should not be hired. It should be distinguished from a reference, which is essentially a request for information about job performance.

The law also prohibits discrimination in hiring and firing on the basis of citizenship status or national origin. The Bureau of Citizenship and Naturalization Service is responsible for implementing the Immigration Reform and Control Act of 1986 that requires employers to hire only American citizens and aliens who are authorized to work in the U.S. As a landscape contracting business with employees, you need to verify the employment eligibility of anyone hired after November 6, 1986. The employee completes Section 1 and the employer completes Section 2 of Form I-9.

Form I-9 Requirements

To comply with the Form I-9 requirements as an employer, you must:

- Complete Form I-9 and keep it on file for at least three years from the date of employment or for one year after the employee leaves the job, whichever is later.
- Verify on Form I-9 that you have seen documents establishing identity and work authorization. This must be done for both U.S. citizens and noncitizens.
- Accept any valid documents provided by your employees. You may not ask for more documents than those required, and you may not demand to see specific documents, such as a "green card," because that is considered an act of discrimination.
- Be aware that work authorization documents must be renewed on or before their expiration date. Form I-9 must be updated at the same time.

To comply with the Immigration and Naturalization Act (INA) antidiscrimination provisions, an employer should:

- Let employees choose which documents to present as long as they prove identity and work authorization.

- Accept documents that appear to be genuine and related to the individual.
- Treat all people equally when you announce the job, take applications, interview, offer the job, and verify employment eligibility, hire, and fire.
- Avoid "citizens only" hiring policies.
- Give out the same job information over the phone and use the same form for all job applicants.
- Base all decisions about hiring and firing on job performance and on-the-job behavior rather than on appearance, accent, name, or citizenship status of employees.

Employers are encouraged to develop training on Form I-9 procedures, implement a compliance program, and develop a tickler file as a reminder of when all Form I-9s need to be re-verified or when they can be destroyed.

Employers who do not comply with the Form I-9 requirements may face fines and penalties. Employers who discriminate may be required to pay fines and penalties, to hire or rehire the employee, and to pay back wages.

Workers' Compensation Division

The Workers' Compensation Division (WCD) administers and enforces Oregon's workers' compensation laws. WCD works to ensure that:

- Employers provide coverage for their workers.
- Employees with occupational injuries or diseases receive their entitled benefits.

The Workers' Compensation Division (WCD) oversees the administration of workers' compensation insurance. It also regulates workers' compensation insurance carriers and employers to ensure that workers injured on the job receive the benefits due them and the employment assistance necessary to regain their economic self-sufficiency. The Workers' Compensation Board reviews appealed cases for workers' compensation claims and ensures that resources and procedures are provided for fair resolution of disputes. This regulatory responsibility is balanced with fair and consistent policies that encourage a healthy business climate for companies regulated by WCD.

> All workers are subject workers with a few exceptions as noted in workers' compensation law ORS chapter 656.

Every business that employs one or more subject workers must provide workers' compensation insurance coverage. Workers' compensation covers an employee's medical expenses for on-the-job injuries and disease. It also provides payments to employees while they are temporarily or permanently disabled by that injury. Workers' compensation also provides death benefits

to dependents if an employee dies as a result of occupational injury or disease. This is a no-fault type of coverage.

The goals of Oregon's workers' compensation law are to:

- provide, regardless of fault, sure, prompt, and complete medical treatment for the employee's job-related injury or disease as well as fair, adequate, and reasonable income benefits to injured employees and their dependents
- provide a fair and just administrative system for delivery of benefits to injured employees
- restore injured employees quickly to physical and economic self-sufficiency
- encourage employers to implement accident studies, and to institute prevention programs that reduce economic loss and human suffering caused by industrial accidents
- provide the exclusive source and means for employees to seek and qualify for workers' compensation

Workers' compensation insurance is good for employees and good for business. If an employee gets hurt, workers' compensation insurance provides him or her with medical treatment, payment for lost time and disability, and even re-employment assistance if it is needed. Workers' compensation insurance also protects employers by providing a fair and equitable system for medical care and income for employees who are accidentally injured on the job. There was a time when employees who were hurt on the job sued their employers for help with their expenses. An employer could risk financial ruin if the worker received a large award in court.

Workers' compensation replaces legal liability with no-fault insurance. Employees with injuries or diseases caused by work can get treatment quickly, without proving the employer at fault and the employers are protected from lawsuits. Benefits are for actual loss and do not add up to large sums intended to punish the employer or pay for pain and suffering. As long as the injury or illness resulted from work, the employer or employee can avoid going to court by using this process.

Types of Employee Benefits

Employees covered by workers' compensation insurance in Oregon have benefits for work-related injuries that generally include:

- coverage when required by their employer to temporarily work in another state
- medical treatment necessary for the job-related injury or disease

- compensation for lost time
- compensation for partial or full disability
- retraining

The duties of an employer are to:

- ensure that employees injured on the job or their beneficiaries will receive compensation for compensable injuries as defined by the Workers' Compensation Law
- qualify as a carrier-insured employer or self-insured employer
- provide workers' compensation insurance coverage using an approved method

Workers' compensation benefits are paid depending on how an employee is injured or dies on the job.

- If an employee is injured or dies because of the employee's intention to harm or kill himself or herself, no benefits will be paid.
- If an employee is injured or dies because of the employer's deliberate intention to harm or kill the employee, the employee or the employee's dependents may not only collect workers' compensation benefits but may also have cause for action in court.
- If an employee is injured or dies because of the acts of a third person not employed by the same company, the employee or his or her dependents may seek a remedy through the courts.

Workers' compensation insurance coverage is available through the following venues:

- **Self-Insurance** An employer may be able to qualify as a self-insured employer. This option is usually available to large employers because the employer must have resources to pay for major claims. An employer is required to have a substantial security deposit and be certified by the WCD to be self-insured.
- **Private Insurance Carrier** An employer can obtain workers' compensation insurance from any insurer authorized to provide such coverage in Oregon. There are more than 300 insurers authorized to write workers' compensation insurance in Oregon. Many of these insurers sell policies through agents. Often the agency that handles a business' insurance can also write workers' compensation insurance. Some insurers will deal directly with the employer; others have special arrangements to provide workers' compensation through business organizations or associations. The Employer Compliance Unit can provide information about obtaining insurance.

- **Oregon Workers' Compensation Insurance Plan** The Oregon Workers' Compensation Insurance Plan, commonly known as the assigned risk pool, is a safety net for employers who are trying to obtain workers' compensation coverage, and have been refused at least once by a private insurance carrier. Liberty Northwest and State Accident Insurance Fund (SAIF) are the two carriers who process policies and claims for the plan.

  The Oregon Workers' Compensation Insurance Plan provides workers' compensation insurance coverage to employers who are classified in an assigned risk pool. In an assigned risk pool, the workers' compensation insurance rates are not negotiable and may require a higher premium level than those rates in the voluntary market of private carriers. Although you can seek an assignment for coverage under the Oregon Insurance Plan when you are refused once by a private carrier, it may be worthwhile to continue seeking less-expensive coverage in the voluntary market.

  Employers in the Oregon Workers' Compensation Insurance Plan may enter the voluntary market after maintaining an injury-free work environment, developing a good payment history, and establishing good job safety records with OR-OSHA. For more information, you may contact the Workers' Compensation Ombudsman for Small Business Employers.

Worker Leasing Companies

For Workers' Compensation for Leased Employees, the leasing company will handle payroll, workers' compensation, and most other paperwork for workers hired through a worker leasing company. Worker leasing companies must be licensed with WCD to do business in Oregon. Call the WCD to check the licensing status of a worker leasing company.

Consequences for Not Complying with Workers' Compensation Requirements

The penalty for a first offense assessed by the WCD is two times the amount of premium that should have been paid for insurance, but with a minimum of $1,000. In addition, the non-complying employer is responsible for all claim costs including the administrative fees of the assigned claims agent.

If an employer continues to employ without coverage, the penalty goes to $250 per day with no limit on the total fine. WCD will also request a permanent court injunction to force the employer into compliance. An employer who disobeys an injunction is in contempt of court and is subject to other types of sanctions, including jail time.

By law, bankruptcy does not defeat (remove) obligations for noncompliance. Corporate directors, officers, and limited liability company members and managers are personally liable for penalties and claim expenses. An employee can also file civil suit against a non-complying employer in addition to obtaining benefits from a workers' compensation claim.

Rights for Employees Injured on the Job

Most Oregon employers are prohibited from discriminating against employees because of such injuries. Usually, injured employees must be allowed to return to their former positions when they are able to perform them. In addition, employers are obligated to return employees to suitable positions when the employees are unable to perform their former jobs but can perform in other position(s).

If the former position has been eliminated for legitimate business reasons, the employer does not have to create a job or resurrect the old job but must offer the employee a suitable vacant job (re-employment). A suitable position is one that is substantially similar to the former position in compensation, duties, skills, location, duration (full or part time, temporary, or permanent) and shift.

An employee loses the right to reinstatement/re-employment if any of the following occurs:

- The employee is determined to be medically stationary and not physically able to return to the former position (for loss of reinstatement rights) or to any position (for loss of re-employment rights).
- The employee is eligible for and participates in vocational assistance.
- The employee accepts suitable employment with another employer after becoming medically stationary.
- The employee refuses the employer's offer, made in good faith, for doing suitable light duty or modified work employment from the employer before becoming medically stationary.
- Demand for reinstatement is not made by the employee within seven days from the date the employee is notified by the insurer or self-insured employer by certified mail that the employee's attending physician has released the employee to the former position (for loss of reinstatement rights) or for reemployment (for loss of re-employment rights).
- Three years have elapsed since the date of the employee's original injury.

- The employer discharges the employee for reasons not connected with the injury and for which others are or would be discharged.
- The employee clearly abandons future employment with the employer.
- The employee does not report to work as specified in the employer's suitable job offer.

As long as the workers' compensation claim is compensable, the employer may not discipline the employee for any absences that are related to that claim. The employer must pay the benefits if that is what the employer does for other employees. In no instance may an employer provide fewer benefits for an injured employee than for other employees.

Workers' Compensation Claims Procedure

If an employee files a claim for workers' compensation; the employer has five days to report to the insurer. The report must include:

- The date, time, cause, and nature of the accident and injuries
- Whether the accident arose out of, and in the course of, employment
- Whether the employer recommends or opposes acceptance of the claim and the reasons why
- The name and address of any health insurance provider for the injured employee
- Any other details the insurer may require

Written notice of acceptance or denial of the claim must be furnished to the employee by the insurer within 60 days after the employer receives notice of the claim. The insurer may revoke acceptance and issue a denial at any time for fraud, misrepresentation, or certain other illegal activities by the employee.

When an employee requests a hearing on a denied claim that alleges fraud, misrepresentation, or other illegal activity, the insurer has the burden of proving the deception. If the employer produces such proof, the employee then has the burden of proving the compensability of the claim. If the insurer accepts a claim in good faith, and later obtains evidence that the claim is not compensable, the insurer has two years to deny the claim. Once an employee requests a hearing about revocation of acceptance and denial, the insurer must prove that the claim is not compensable, or that the insurer is not responsible for the claim. If an administrative law judge sets aside denial of a previously accepted claim, the Workers' Compensation Board, or the court, benefits must be paid to the employee starting from the date the benefits were terminated.

If an appeals process goes as far as litigation, the insurer will have an attorney. Injured workers will probably retain attorneys. Fees will be paid out of, or in addition to, the compensation award.

Exemptions

Some workers do not need to be covered by workers' compensation insurance, even if they are employees. Here are some common exceptions:

- **Sole Proprietors.** If you are a sole proprietor, you are not required to have workers' compensation on yourself. You must have coverage for your subject workers. This coverage must include your family members.
- **Partners.** In the construction industry in Oregon, two partners may be exempt (more if all are members of the immediate family). The partners must each have substantial ownership.
- **Corporate Officers or Limited Liability Company Members.** Two (more if all are members of the immediate family) corporate officers or limited liability members/managers who are also substantial owners and directors may be exempt from having workers' compensation on themselves.
- **Private Residence Employees.** A worker may be exempt who is hired to do gardening, maintenance, repair, or remodeling in or about the private home of the person employing the worker. This exception does not include a worker doing new home construction.
- **Out-of-State Employees.** If an employer from out of state brings employees into Oregon, the workers' compensation coverage from the home state will usually satisfy Oregon's requirement for those workers temporarily in Oregon. Coverage from states that do not also recognize Oregon's coverage in their states is not acceptable coverage for doing work in Oregon, and Oregon coverage would have to be obtained. If the landscape contracting business hires a worker specifically to work in Oregon, then Oregon-specific coverage is required.

Oregon Occupational Safety and Health Division (OR-OSHA)

Oregon Occupational Safety and Health Division (OR-OSHA) administers the Oregon Safe Employment Act (OSE Act) and enforces Oregon's occupational safety and health rules. The OSE Act was enacted to ensure the occupational safety and health of Oregon's workforce. OR-OSHA rules establish minimum safety and health standards for all industries. By promoting safety and reducing occupational

> All landscape contracting businesses must comply with the OSE Act when hiring employees.

hazards, OR-OSHA programs have helped reduce Oregon's workers' compensation premiums.

When hiring new employees, make sure to use a written employment application and make sure the application contains legal questions about any safety training a prospective employee may have received in the past. This provides a point of reference so you know what minimum training the employee has already received and what training you must provide.

OSHA and Safety Regulations are discussed in further detail in Chapter 13.

Why Is All This Important?

These requirements are in place to protect the consumer, the employee, and the employer. If an employee is working on the consumer's property and is injured on the job, the responsibility for the injury or accident does not fall back onto the consumer but is assumed by the landscape contracting business. There is also added protection for the working individual in that they are assured medical care through Worker's Comp and Social Security. Proper employment status also guarantees that the employees will maintain a certain level of income when working (minimum wage requirements) even if they're injured or are unemployed for specific reasons.

> Employment regulations provide a measure of protection for everyone.

For example, if a determination is made during an investigation that the individual working is not a true employee and is being treated as an independent contractor but does not meet the independent contractor requirements, the landscape contracting business in question can be subject to harsh penalties plus back payments for taxes and employment costs. Also, the employee that is being treated as an independent contractor may be subject to penalties for working without being properly licensed, since the person will not meet the exemption provided in ORS 671.540.

Chapter 6: Contracts

What this chapter covers:

- What a contract is.
- What needs to be in a landscape construction contract.
- How to handle customer relations and expectations.

What Is a Contract?

Contracts are the way a business communicates with a client: the consumer. A contract specifies the obligations or duties for the contracting parties to do or not to do a particular action. Specifying "what, when, how, and for how much" protects both the consumer and the landscape contracting business. In the event there is a claim or complaint filed against a landscape contracting business, the terms of the contract are the basis for determining whether there is a breach of contract or negligent work. Having a well-written and easily understandable contract is imperative for the protection of both the consumer and landscape contracting business.

Contract law describes and controls the relationships between parties when they agree to an exchange of items with value. The "contractor" in this chapter is the landscape contracting business. Although the information in this chapter pertains to contracts written for landscaping work, it is written primarily using language for construction contracts issued by general contractors licensed under ORS 701. Though landscaping work has a separate and more restrictive contract law for written contracts, the information is applicable in most cases.

> When the contract is in writing, it serves as proof of the parties' obligations.

Mandated Contract Requirements

ORS 671.625 states that all landscape construction work (landscaping work) performed in Oregon, ***no matter how much it costs,*** is to be done with a written contract (ORS 671.625), and is to contain certain elements that the State Landscape Contractors Board (LCB) has stipulated by rule. The contract is also to be reviewed and initialed by the licensed individual landscape construction

> All landscape contracting work needs to be done pursuant to a written contract; otherwise it is not enforceable in a court of law in Oregon by the landscape contracting business (however the consumer can enforce the contract)

professional who is either the owner or an employee of the business.

There are currently 19 elements (described in detail in OAR 808-002-0020) that need to be included in the contract for landscaping work:

landscape contracting business name	address or location of work to be performed if different from the consumer's address	description of guarantee; if no guarantee such a statement shall be included
license number	a list of plant materials, if any, together with the size and quantity	business licensee's signature
business address	general description of the work to be performed	consumer's signature
telephone number	estimated time for completion or estimated completion date	statement that the business is licensed by the State Landscape Contractors Board
consumer's name	price	current address of the Board
consumer's address	payment schedule	phone number of the Board
name and license number of any subcontractors and a description of the landscaping work to be subcontracted (after April 1, 2011)		

Note: These elements do not constitute a complete contract.

These elements must be included for the contract to be enforceable by a landscape contracting business. Failure to include any one of these elements may lead to the inability for the landscape contracting business to collect payment on the work performed due to the contract being unenforceable in a court of law in Oregon (ORS 671.625). Additionally, incomplete contracts or failure to have a written contract will result in a civil penalty issued by the State Landscape Contractors Board.

General Contract Requirements

To understand contract law, you must become familiar with some legal jargon that has special meanings used in written law and by the courts. The four basic elements of contract law are formation, performance, breach, and remedy. Before a contract exists, it must meet specific requirements to be

formed. Then, the contract can run its course through the remaining elements of contract law.

After the contract is formed, the parties perform obligations. If a party fails to perform, or performs unsatisfactorily, the contract is breached. If the other party has been damaged by the breach, the law provides remedies that the damaged party can use to obtain the benefits bargained for in the contract.

Elements of a Contract

A legally enforceable contract has a number of necessary elements:

Legal Capacity

The parties need to have the legal capacity to enter into a contract. In addition to age and other elements of legal capacity, a landscape contracting business must be licensed and display their LCB license number on estimates, bid forms, and contracts.

Legal Purpose

The contract must have a valid (legal) purpose to be enforceable. A legal purpose means that:

- the performance of the contract is not in and of itself unlawful; and
- performance of the contract will not result in a violation of law.

Consideration

The contract must have consideration, something of value exchanged on both sides. Consideration can be something actual, like money or property, or can be a promise to do or not to do some action. The terms of the offer determine what kind of consideration is needed to form a contract.

A landscape contracting business usually provides consideration by promising to perform specified work either directly or through a subcontractor. Once the contract is formed, the landscape contracting business then has the duty to do what was promised. The standard landscape contracting business contract specifies the business's responsibilities and rights.

The owner, in return, provides consideration by promising to pay, and then performs by actually paying the agreed amount in the specified manner. In addition, the owner has the following obligations that are usually specifically stated or implied in the contract:

- Providing plans and specifications that are complete, accurate, drafted according to code, and suitable for the intended purpose of the contract.

- Making timely payments to the landscape contracting business and provide access to the job site. Even if the contract is silent on the matter, the owner has an implied duty to provide the landscape contracting business with access to the job site.
- Providing permits, fees, and licenses required before proceeding with the project. Under building codes, the property owner is responsible for obtaining construction permits. However, the landscape contracting business can offer to obtain the needed permits as a service. Under Oregon law, before the landscape contracting business performs any work requiring a permit, the business must have the required construction permits.

Offer to Act

As part of the contract process, there must be an offer, which is a promise made by one party to do, or not to do, a specific act or acts. The landscape contracting business usually makes the offer in the form of a proposal, bid, or binding estimate. To be valid, an offer requires:

- an intent on both parties to enter into a contract;
- both parties have the legal capacity to enter into the contract (see above); and
- a definite statement of required terms, such as identification of the parties, scope of work and price.

Besides the three requirements of a valid offer, it is recommended that the following terms also be included in the offer:

- time for performance of work;
- schedule or project duration;
- number of days of work;
- special conditions that may affect the work like time, materials, or cost;
- how changes to the work will be requested and agreed upon (change orders);
- provisions for dispute resolution (may include mediation and/or arbitration); and
- any other terms and conditions that may affect performance by the landscape contracting business or payment by the property owner or landscape contracting business.

Acceptance of the Offer

There must be an acceptance of the exact terms of the offer. Acceptance of an offer occurs when a person to whom the offer has been directed makes an appropriate statement of agreement with the terms of the offer. For an acceptance to be valid, it must:

- be voluntary (not the result of threats or made under duress);
- the party accepting must have legal capacity to accept the definite and explicit terms of the offer; and
- be of the exact terms of the offer. Any attempt to change terms is legally a rejection of the offer, and the changed terms become a counteroffer, which can then be accepted or rejected by the other party.

Performance of the Contract Terms

Once the contract has been signed by the parties, the contract must be performed. As part of the fulfillment of the legal obligation in the contract the landscape contracting business does the work and the consumer (or person receiving the benefit of the work) pays.

The landscape contracting business's primary contractual right is to be paid for the work. A well-drafted contract specifies when and how payment will be made, including when progress payments and final payment are due. The contract should also define procedures for allowing and paying for added project costs. The contract should specify exact start and completion dates and discuss when time extensions or accelerations of time will be allowed. The contract establishes schedules for bonuses and for withholding pay because of incomplete or inadequate work, as well as establishing consequences for late work.

An owner's contract with a landscape contracting business ordinarily allows the landscape contracting business to contract with subcontractors (within the ability of the license), order materials, and implement whatever construction methods, processes, and coordination of activities the landscape contracting business thinks are appropriate. The contract may contain an escalation clause or describe how the landscape contracting business will be reimbursed for unexpected increases in the cost of labor, equipment, or materials.

The following basic responsibilities are either implied or specifically stated in contracts for landscape contracting businesses:

- give sufficient attention to the project to fully perform the required work in a timely manner;
- complete the project as specified;

- follow project designs, drawings, and specifications;
- obey all laws and regulations, including those dealing with employment, environmental protection, and safety;
- provide all relevant insurance coverage;
- inform owners of any changes, delays, problems, or errors;
- act in good faith and deal fairly; and
- warrant good workmanship.

Inadequate supervision of subcontractors or employees is the basis for many claims against landscape contracting businesses.

The landscape contracting business is responsible for work performed by the subcontractors and must provide adequate overall supervision.

Owners are not allowed to interfere with the landscape contracting business's work, direction, work methods, or control. A landscape contracting business is considered by law to be an independent contractor and not the owner's employee. Owners who do not allow a landscape contracting business to proceed independently may be in breach of contract. However, among the owner's rights that may be found in a landscape contracting business's contract are the rights to:

- make modifications, additions, or deletions to the project;
- offer other contracts related to the project;
- inspect project work without interfering with progress;
- perform any work on which a landscape contracting business defaults;
- use substantially complete portions of the work, so long as that use does not interfere with the progress of remaining work;
- require a performance or payment bond from the landscape contracting business in addition to the surety bond each licensed landscape contracting business posts;
- accelerate or extend completion times under specified conditions;
- retain a portion of progress payments until the landscape contracting business's work is complete; and
- withhold or deduct from payments due to pay for work that is incomplete or has not passed inspection.

"Substantial performance" occurs when a party has made a good faith effort to perform his or her obligations under a contract and has completely performed all essential obligations. A contract may be substantially performed even if minor, nonessential obligations have not been fully performed

Breach of Contract

A breach is an unexcused failure by a party to a contract to do what the contract requires. A party is in breach of a contract when, without a legally sufficient excuse, there is a failure to fully and properly perform a duty. There can be material and immaterial breaches of contract.

A material breach is one that will cause great harm or substantially lessen the value of the contract for the non-breaching party. When a material breach occurs, the other contract party is entitled to enforce contract remedies. An example of a material breach is failing to provide adequate drainage on a residential landscaping project that results in runoff and lawn erosion in the spring.

An immaterial breach is one that does not significantly lessen the value of the contract for the other party or does not result in significant harm to that party. An immaterial breach may not create enforcement remedies. An example of an immaterial breach may be to have used a different brand of sprinkler head than was specified in the contract.

When a breach of contract occurs, the non-breaching party must decide what type of remedy to seek. The choice depends on whether the non-breaching party wants to void the contract or seek damages for the breach. The choice of what type of remedy to seek is called "election of remedies."

Courts have the power to grant two types of remedies: legal and equitable. Legal remedies for breach of contract include actions for damages, which is the remedy most often applied to construction contract disputes. Equitable remedies include rescission, reformation, and injunctions. These are only granted if there is no adequate legal remedy available. In most landscape construction contract cases, equitable remedies are not available because the legal remedy of damages will be sufficient to cure harm suffered by the non-breaching party.

Rescission is a remedy that is intended to restore the parties to their original positions before the contract existed. Rescission and restitution may or may not be awarded in landscape construction contract cases. A legal rescission occurs when the parties to a contract mutually agree to cancel their respective obligations and return to their pre-contract positions. An equitable rescission is available only through the courts.

Damages

Damages are a way to compensate the non-breaching party for economic losses arising from a breach of contract. Such losses can occur as a result of reliance on the contract, or because the non-breaching party’s expectation of gain (usually called the "benefit of the bargain") has been lost. The usual remedy for breach of contract is monetary damages.

Monetary damages awarded in a breach of contract action are calculated to include:

- Actual losses suffered by the non-breaching party; and
- The benefits that would have been received from performance of the contract by the non-breaching party (called the "benefit of the bargain" by lawyers and judges). For the landscape contracting business, benefit of the bargain will include the profit the landscape contracting business would have made from the job. For the owner, benefit of the bargain is usually the difference between the original contract price and the amount the owner actually had to pay to have the work completed by a different landscape contracting business after a breach by the original landscape contracting business.

Expectation (Benefit of the Bargain) Damages

In a simplified example of a construction contract, if the property owner breaches by not paying, the landscape contracting business's expectation damages equal the net profit that would have been received if payment in full had been made. If it is the landscape contracting business that breaches, the property owner's expectation damages are the difference between what the owner agreed to pay the breaching landscape contracting business, and the amount the owner must pay to complete the work after the breach occurs. The purpose of awarding expectation damages to the non-breaching party is to provide the benefits that would have been received if the contract were fully performed by both sides (the benefit of the bargain).

Liquidated Damages

Liquidated damages consist of an amount of money agreed upon by the parties as being fair compensation to the innocent party if a breach of contract occurs. The amount is included in a special provision of the contract that must be carefully worded to be enforceable by the courts. The amount of liquidated damages must reasonably estimate the actual damages that would be suffered in the event of a breach. If the amount stated in the contract is so large it is out of proportion to the harm that may be suffered, a court may refuse to award the amount stated in the contract.

Reliance Damages

The purpose of reliance damages is to return the non-breaching party to the position he or she would have been in if the contract had not been made. Reliance damages are usually an alternative to expectation damages. They are used when it is not possible to show, with any reasonable certainty, the amount of the expectation damages, and in cases where a breach occurs very early in the course of the contract. Reliance damages will ordinarily be

measured by the costs expended by the non-breaching party in performing (or getting ready to perform) the contract up to the breach date.

Consequential Damages

Consequential damages are indirect losses to the injured party. These damages are recoverable if the injured party can prove that the damages were foreseeable at the time the contract was made.

Special Damages

Special damages arise due to the special nature or circumstances of the non-breaching party or the project, and may be awarded by a court to cover losses not included in benefit of the bargain damages.

Certainty

All damages, whatever their nature, must be proved with reasonable certainty to be recoverable. A claim for damages based on speculation or guesswork is not sufficient. Generally, there must be clear and objective evidence of the amount of damages actually sustained to allow recovery. A property owner's damages for a landscape contracting business's breach may be determined with certainty by the difference in cost necessary to bring in another landscape contracting business to perform the work.

A landscape contracting business's lost profit in a job may be calculated by subtracting the cost of labor and materials (and related overhead expenses) from the total contract price. Other ways to prove damages with certainty are testimony from expert witnesses or the records of other businesses to show that a landscape contracting business's calculation of damages is in line with actual industry standards. The more objective the basis for calculation, the more certain the proof of damages

Mitigation

The non-breaching party has a duty to minimize the damage it suffers as a result of the breach. Both expectation and reliance damages will be reduced by the amount that could have been avoided if the non-breaching party had taken reasonable measures to reduce the harm.

Foreseeability

Damages are limited to those suffered as a predictable result of the breach. Courts and attorneys refer to such predictable damages as being "foreseeable." Whether certain damages claimed are foreseeable is a factual determination made on a case-by-case basis.

Specific Performance as an Equitable Remedy

Specific performance as an equitable remedy is an equitable remedy that is rarely available in construction contract law. However, specific performance can be an administrative remedy for resolving claims filed with the Landscape Contractors Board. (This is covered in Chapter 8, "Claims and Dispute Resolution.") An administrative remedy may give the landscape contracting business an opportunity to perform any proposed remedies. The claimant is required to allow performance of a remedy by the landscape contracting business in order to maintain the validity of the claim and access to the surety bond.

During an on-site investigation, the LCB mediator/investigator will first attempt to mediate a resolution but, if not successful in that endeavor, can determine repairs or additional work that is required to meet contract requirements and request that the landscape contracting business do the repairs or work. Also, the parties may agree to the landscape contracting business voluntarily performing a specific activity that will resolve a claim item. In this claim process specific performance is offered as a remedy instead of awarding monetary damages.

Right to Cancel

Beginning January 1, 2008, Oregon law permits a property owner to cancel any initial contract for construction, improvement (which includes landscaping work), or repair of a residential structure by giving the landscape contracting business a written notice of cancellation prior to midnight of the next business day after signing the contract. Some exceptions apply such as where work has already substantially begun. The buyer is required to provide the landscape contracting business a written notice of cancellation. (The landscape contracting business does not have any notice requirements.)

In addition, Oregon law contains a mandatory, three-day right of a buyer to cancel a home solicitation contract when the contract is solicited at any place that is not the seller's permanent place of business. A construction contract is subject to this law if there is a personal solicitation made by the landscape contracting business or the landscape contracting business's agent and the landscape contracting business's offer is accepted anywhere other than the landscape contracting business's permanent place of business.

> Regardless of who initiates the contact, whenever an offer is accepted, the landscape contracting business must give notice to the property owner of his or her right to rescind the contract.

When the property owner cancels the contract within the specified time, the landscape contracting business must deliver to the owner all payments or other evidence of money owed by the owner (such as promissory notes or

contracts calling for installment payments) within 10 days, and the owner must return any goods or materials delivered to the property by the landscape contracting business within 20 days.

In the case of any contract fitting the definition of a home solicitation sale, the landscape contracting business is taking a great risk in performing any services or delivering any goods before the owner's 3-day right of cancellation expires. If the landscape contracting business provides services of a non-emergency nature and the contract is then cancelled in a timely manner, the landscape contracting business is not entitled to compensation for the work performed. An example of this is a landscape contracting business that distributes flyers advertising his or her services and meets with a homeowner who opens the door and the two parties sign a contract during their meeting.

Is the Contract Enforceable?

If the landscape contracting business is involved in a business agreement, one of the first things to determine is whether the promise or agreement at issue is an enforceable contract under the law. While contracts usually involve promises to do something (or refrain from doing something), not all promises are contracts. How does the law determine which promises are enforceable contracts and which are not?

A promise is not necessarily a contract.

Courts look at a number of factors to determine whether an agreement should be enforced. The court must initially determine whether the agreement constitutes a contract or not. In order for an agreement to be considered a valid contract, it must satisfy certain requirements:

- One party must make an offer and the other party must accept it;
- There must be a bargain for exchange of promises, meaning that something of value must be given in return for a promise; and
- The terms of a contract must be sufficiently definite for a court to enforce them.

If a court determines that a contract exists, it next must decide whether that contract should be enforced. There are a number of reasons why a court might not enforce a contract. These are called defenses to the contract. Contract defenses are designed to protect people from unfairness in the bargaining process, or in the substance of the contract itself. If there is a valid defense to a contract, the contract may be *voidable*, meaning the party to the contract who was the victim of the unfairness may be able to cancel or revoke the contract. In some instances, the unfairness is so extreme that the contract is considered void, in other words, a court will declare that no contract was ever formed.

Some of the reasons a court might refuse to enforce a contract are:

Statutory Defense

A *statutory defense* exists if the contract for landscape construction work was not written or it didn't meet the requirements for a contract as set forth by the LCB. ORS 671.625 and in OAR 808-002-0020 are very specific about whether a contract for landscaping work is enforceable in a court of law in Oregon (discussed in Mandated Contract Requirements on page 93).

Capacity to Contract

In order to be bound by a contract, a person must have the legal ability to form a contract in the first place. This legal ability is called *capacity to contract*. A person who is unable, due to age or mental impairment, to understand what they are doing when they sign a contract may lack the legal capacity to contract. For example, a person under legal guardianship due to a mental defect completely lacks the capacity to contract, and any contract signed by that person is void. In other situations, a person may not completely lack the capacity to contract. The contract would then be rendered void at the option of the party claiming incapacity, if he or she is able to prove the incapacity.

A minor generally cannot form an enforceable contract. A contract entered into by a minor may be canceled by the minor or by his or her guardian. After reaching the age of majority (18 in most states), a person still has a reasonable period of time to cancel a contract entered into as a minor. If a person does not cancel the contract within a reasonable period of time, the contract will be considered ratified, making it binding and enforceable. If a person signs a contract while drunk or under the influence of drugs, can that contract be enforced? Courts are usually not very sympathetic to people who claim they were intoxicated when they signed a contract. Generally a court will only allow the contract to be rendered void if the other party to the contract knew about the intoxication and took advantage of the intoxicated person, or if the person was somehow involuntarily intoxicated (for example, if someone spiked the punch).

Undue Influence, Duress, Misrepresentation

Coercion, threats, false statements, or improper persuasion by one party to a contract can void the contract. The defenses of *duress*, *misrepresentation*, and *undue influence* address these situations:

- *Undue influence* is a type of improper persuasion that causes a person to enter an unfair transaction. Undue influence is often defined as unfair persuasion by a person who, because of his or her relation to the victim, is justifiably assumed by the victim to be one who will not act in a manner that is inconsistent with the victim's welfare.

- The defense of *misrepresentation* focuses on dishonesty in bargaining. A misrepresentation may be: 1) a false statement of fact, 2) the deliberate withholding of information which a party has a duty to disclose, or 3) an action that conceals a fact (for example, painting over water damage when selling a house).
- To claim the defense of *duress*, a party must show that assent or agreement to the contract was induced by a serious threat of unlawful or wrongful action, and that she had no reasonable alternative but to agree to the contract. Blackmail is an example of duress.

Unconscionability

The *unconscionability* defense is concerned with the fairness of both the process of contract formation and the substantive terms of the contract. When the terms of a contract are oppressive or when the bargaining process or resulting terms shock the conscience of the court, the court may strike down the contract as unconscionable. The unconscionability defense applies to a wide variety of types of conduct, so a court will look at a number of factors in determining if a contract is unconscionable. If there is a gross inequality of bargaining power, so the weaker party to the contract has no meaningful choice as to the terms, and the resulting contract is unreasonably favorable to the stronger party, there may be a valid claim of unconscionability. A court will also look at whether one party is uneducated or illiterate, whether that party had the opportunity to ask questions or consult an attorney, and whether the price of the goods or services under the contract is excessive.

Public Policy and Illegality

Rather than protecting the parties to a contract as other contract defenses do, the defenses of illegality and violation of public policy seek to protect the public welfare and the integrity of the courts by refusing to enforce certain types of contracts. Contracts to engage in illegal or immoral conduct would not be enforced by the courts.

Mistake

A contract can be canceled on the grounds of mutual mistake of fact but a mistake made by only one party is not a defense. Only mistakes made by both parties as to the same material fact will serve as a defense.

A *unilateral mistake* is defined as a mistake or misunderstanding as to the terms or effect of a contract by one of the parties but not by the other. A unilateral mistake is usually not a defense to breach of contract claims. However, a *mutual mistake* of a material fact is a defense to an alleged breach of contract. If it can be established that both parties were in error regarding a major fact leading to the contract formation, the contract may

be determined to be null and void, or the contract may be reformed (this means that the court rewrites the contract to agree with the actual intent of the parties at the time of formation). Use of this defense is extremely limited, and a mistake by one party will not usually void the contract unless the other party knew or should have known about the mistake and tried to take advantage of the situation.

Impracticability/Impossibility

It is a defense to a claimed breach that performance is physically impossible because of circumstances beyond the control of the obligated party. Naturally, a party must exercise all reasonable measures to attempt to complete performance, but if it is truly impossible, then the party is relieved of the duty.

Illegality

An act or obligation that is illegal and contrary to legal principles may not be the subject of a contract. A contract is not enforceable when it is formed around an illegal purpose, such as performance that is criminal or against public policy.

Repudiation of the Contract by the Other Party

Letting the other party know, by word or action that the first party no longer intends to be bound by a contract is called *repudiation*. When the second party receives notice of this intent, that second party's duty of performance is terminated. If the party who repudiated the contract later sues for breach, the other party can use the repudiation as a defense. Use of this defense is always tricky, and the party relying on the defense must present evidence that will convince the court that repudiation occurred. If a landscape contracting business intends to use this defense, it is good practice to provide notices to the other party of that party's repudiation and to state in the notice that the landscape contracting business will consider the contract repudiated if the other party does not perform all outstanding obligations within a specified period of time.

Fraud

Fraud is deliberately giving false information, or deliberately withholding information known to be important. If a party enters into a contract as a result of fraud by the other party regarding a material matter, the contract may be void. It is a principle of the law that contracts should be maintained as valid if at all possible. If the fraud is only with regard to an immaterial matter, a court might decide not to invalidate the whole contract. This defense is difficult to use, as it requires proof of the falsity of the

information, as well as proof that the party making the false statement knew it was false and had the intent to deceive.

Special Contract Relationships in Landscape Construction

The landscape contracting business (but not the subcontractors) is a party to a contract with the owner of the property. Since they are parties to the same contract, the landscape contracting business and the owner are in *privity of contract* with each other.

Subcontractors are parties to contracts with the landscape contracting business but not the property owner. The subcontractors and the landscape contracting business are in privity of contract with each other. Subcontractors are not in privity of contract with the property owner.

Landscape Contracting Business, Subcontractor, and Supplier Duties

Landscape contracting businesses and subcontractors are always obligated to perform their contractual duties. Who has the right to enforce performance of those duties varies depending on the parties to the contract. When a landscape contracting business subcontracts out portions of the landscaping work to other licensed landscape contracting businesses the originating business is responsible for the work performed by the subcontractors. The business is obligated to provide adequate overall supervision and accountability for the work being performed. Inadequate monitoring of these subcontractors is the bases for many claims against landscape contracting businesses.

General Contractors

In some instances a general contractor, licensed under ORS 701, is subcontracting to licensed landscape contracting businesses for the landscaping work. The general contractor on a major project is usually the only contractor in a direct contract relationship with the owner and the responsibilities of the general contractor to the owner are to provide for completion of the entire project. The general contractor typically does not (and in the case of landscaping work, cannot) perform the work unless licensed with the LCB or is doing a limited amount of landscaping work when under contract to construct a new residential home for a homeowner pursuant to ORS 671.540 (h) or (i). Instead, the general contractor can, and often does, subcontract landscaping work out to licensed landscape contracting businesses. Many times landscape contracting businesses subcontract to other contractors and act as limited general contractors based upon the scope of the license that the business holds.

Regardless of whether the general contractor has subcontracted for the performance of any part of the work, the general contractor is directly

responsible to the owner for all performance. If a subcontractor or supplier fails to perform, the owner can hold the general contractor fully responsible. The general contractor's responsibilities include the scheduling and coordination of trades, purchasing materials, and all construction work. Slow performance or delivery by a subcontractor or supplier will not usually serve as an excuse in the general contractor's dealings with the owner.

The general contractor also has the duty to provide for overall job-site safety. While both original contracts and subcontracts frequently address this issue, the general contractor has control over the job site and must maintain safe working conditions.

Subcontracts are between the general contractor and other independent contractors, and the owner is generally not a party to those contracts. Therefore, the subcontractor must look only to the general contractor in the event of a breach and file claims with the appropriate licensing board.

Subcontractor Contracts

The general contractor is responsible to the property owner for performance of their contract. It is the general contractor's responsibility to determine who will perform the work. The general contractor may take a role in performing some activities, or may assign responsibilities to employees or subcontractors. When work is subcontracted, the general contractor must verify that the subcontractor is a licensed independent contractor with active surety bond and liability insurance.

Duties and Conditions

A subcontract is an agreement between the landscape contracting business and a subcontractor. The role of the subcontractor is to perform certain aspects of landscape construction work according to the original contract between the owner and the landscape contracting business, and the subcontract with the landscape contracting business. The subcontractor does not have a direct relationship (not in privity of contract) with the owner but only with the landscape contracting business. Typically, subcontracts are awarded for work in specialty trades within the construction industry such as plumbing, heating, ventilation and air conditioning (HVAC), earthwork, foundation and landscaping work. Most subcontracts specify that subcontractors must comply with all the conditions of the general contract and the project documents. While verbal subcontracts may be valid for small jobs *(*although not landscaping work*)*, a detailed written subcontract helps avoid many potential disputes. In some cases, the approval of the owner is required for each subcontract.

Suppliers

Suppliers furnish materials and equipment, in contrast to labor and services. Suppliers may have a contract with a subcontractor, the landscape contracting business, and in some cases, with the owner of the project.

Performance

In the performance of their duties, Landscape contracting businesses, subcontractors, and suppliers are held to a standard of performance equivalent to the generally accepted standards and practices of the industry in the geographic area where the work is being performed. The owner is entitled to insist on compliance with the plans and specifications. The contractor must fully perform the essential elements of the work to achieve substantial completion. This is what the owner bargained for and this is what the owner is entitled to receive for his or her payments.

Substantial Completion

Unless otherwise specified, a landscape contracting business has fulfilled a contract when the project is substantially complete. However, although the performance of the contract may be substantially complete, the owner of a project may be allowed to set aside funds from the final payment sufficient to cover the cost of completing or correcting minor items necessary to achieve final occupancy. In determining substantial completion, the owner and the landscape contracting business frequently have different interpretations of when the project is adequate for the owner's beneficial use. For this reason, many contracts clearly state and define when the project will be deemed substantially complete. It is usually better for the landscape contracting business and owner to reach consensus on this issue before signing the contract then to wait until the project is nearing completion. A well-written contract can prevent delays in payment and the possible need for court action or other dispute-resolution activity.

Other Forms of Contract

In addition to written and oral contracts, there are two other forms of contract you need to know about but remember, any contract for the performance of landscape contracting work in Oregon that is not written cannot be enforced by a landscape contracting business in Oregon.

An *implied contract* is one that is not formed by an explicit agreement of the parties. Instead, it is inferred in law from acts or conduct of the parties that show the existence of an agreement between them. In certain situations, a court will examine the conduct of parties and the circumstances surrounding their transaction, and will determine that a contract can be implied from the conduct and circumstances to prevent one party from unjustly benefiting at the expense of the other party.

Oregon law also adds to every contract (written, oral, or implied), certain "implied covenants," including a covenant that each party will act in good faith and deal fairly. For construction contracts, this means an implied warranty of good workmanship by the contractor. These implied covenants are different from the concept of implied contract, but it is important to remember that they will exist in every construction contract, whether or not they are stated in the terms agreed to by the parties.

A *quasi contract* is neither an oral nor a written contract; in fact, it is not a contract at all, because there was never an actual agreement between the parties as to all essential terms. Instead, a quasi contract is an obligation created by law in circumstances where one party receives a benefit from the actions of another, and it would *unjustly enrich* the party receiving the benefit if no compensation was paid.

Special Categories of Landscape Construction Contracts

Landscape construction contracts are often categorized by the way compensation is measured or paid, or by the type of work to be performed. Common types of construction contracts are:

- **Unit Price.** This form of contract is used in situations where specific tasks, each of which can be separately priced, are to be performed. A price is fixed for each task or unit of the work, and the total cost is the number of units times the price per unit.
- **Guaranteed Maximum Price.** The landscape contracting business will be paid for time and materials up to a maximum amount that is agreed upon by the parties. Progress payments are frequently provided for in this form of contract. Sometimes, such a contract will also specify the minimum price that will be paid to the landscape contracting business.
- **Cost-Plus-Fee.** The landscape contracting business will be paid all costs of material and overhead, plus an agreed-upon fee in a specific dollar amount or percentage of the total expenditures.
- **Lump Sum.** The landscape contracting business will be paid a set price for the work to be performed, usually due at completion of the work.
- **Time and Materials.** The landscape contracting business will be paid the actual costs of all materials used plus an hourly fee for time spent on the project.

Principles of Contract Interpretation

For the most part, parties are free to establish the terms of their own contracts. When a dispute occurs, a court or arbitrator will enforce the

contract according to its meaning and the intent of the parties. For this reason, it is important that landscape contracting businesses carefully read contract language. If there is any doubt as to the meaning of contract terms, landscape contracting businesses should seek legal advice. Legal advice obtained during the process of forming the contract can help to prevent problems or disputes from occurring.

The following are general descriptions of how commonly used terms have been interpreted by courts over the years, but a landscape contracting business who sees these terms in a written contract may want the advice of legal counsel before signing.

"Time is of the Essence"

Landscape construction contracts must contain conditions relating to time, in particular the project starting and completion dates. If a contract is silent on the time for performance of work, the courts may deem the contract unenforceable due to the contract lacking this information. When the contract states that "time is of the essence," the completion date or time is critical and time itself has a high value. When a contract provides that time is of the essence, failure to meet a performance deadline can be a breach of contract. In addition to being a ground for a breach of contract, time is of the essence provisions can affect compensation under a contract. Contracts often stipulate rewards for early completion and impose damages for late completion. When time is of the essence, the dates for performance, bonuses, and penalties are strictly enforced.

Contract Price and Payment Schedule

A written contract will state the contract price and may indicate a payment schedule. A landscape construction contract may also provide for retainage by the owner of part of each invoice amount until the landscape contracting business's performance is complete. It is important for the landscape contracting business to negotiate the payment schedule with an eye toward the cash-flow needs of the business. This includes the financial obligations incurred from performance of the project like paying direct job costs, business overhead, and profit. Different types of landscape construction contracts will involve different calculations of progress payment due amounts.

Cost-Plus-Fee Contract

Payments to the landscape contracting business under a cost-plus-fee contract are generally based on reimbursement of expenses incurred by the landscape contracting business during the preceding performance period, plus an agreed-upon fee for the landscape contracting business's services. Maintenance by the landscape contracting business of complete and accurate

cost records is essential for preparation and support of payment requests. Within each type of construction contract, Oregon law requires provisions that call for timely payments to landscape contracting businesses.

Billing

ORS 671.625 gave the LCB authority to make requirements on billings (invoices) for landscaping work performed in Oregon to help consumers know what they are paying for and the costs associated with the billed work. All billings by a licensed landscape contracting business shall include the following per OAR 808-002-0020:

- name, address and telephone number of the licensed landscape contracting business;
- name and address of the consumer;
- total contract price and amount paid to date; and
- the amount now due and the work performed for the amount due.

Payments

By laws adopted in 2003, construction contracts in which the owner is a private party (rather than a government or public agency), may provide for progress payments if performance of the contract is expected to take less than 60 days, but must contain provisions for progress payments if the work is expected to take longer.

In such cases, an owner is generally required to make payments within 14 days of billings by the landscape contracting business, and the contract must provide for 30-day billing cycles unless the landscape contracting business agrees to a different cycle and that agreement is spelled out on each page of the plans and specifications. Upon completion of work, final payment must be made within seven days. (The law does have provisions for handling disputes and specifications for appropriate billings by the landscape contracting business.)

On the other hand, contracts between a public agency, as the property owner, and a landscape contracting business have special requirements in Oregon law to assure prompt payment. All such contracts must include provisions for progress payments and must provide for payment within the earlier of 30 days after submission of an invoice or 15 days after approval of that invoice by the public agency. (The law also contains provisions for interest on late payments, and handling disputes.)

Unit-Price Contract

Requests for payments are typically based on actual quantities of each bid item completed to date. The contract generally states how the parties will determine the completed quantities.

Lump-Sum Contract

Payment requests are typically prepared by estimating the percentage of work completed and in place, including the percentage of work completed by subcontractors based on their submitted invoices.

Scope of Work

To avoid uncertainty and help prevent disputes; the scope of work to be performed should be detailed in the landscape construction contract. If there is insufficient detail, a dispute could lead to an attempt by a court or arbitrator to determine the intent of the parties at the time the contract was formed. In defining the scope of work, the landscape contracting business may reference plans and specifications used in preparing the contract price, or identify such plans and specifications as an exhibit to the contract.

Unenforceable Contracts

Verbal or written contracts may be unenforceable because of a failure to comply with all the elements of contract formation. Sometimes even a contract that is validly formed will be unenforceable because of practical considerations.

Void Contracts

A void contract has no legal force or binding effect generally because the purpose of the contract is illegal or against public policy.

Voidable Contracts

Even if a contract is made for a legal purpose, some contracts may be subject to cancellation. This can occur when the contract terms are too vague and uncertain to interpret or the defaulting party is "judgment proof" (in other words, available assets are insufficient to pay damages awarded in litigation).

Performance Excused – Failure of Condition Precedent

A party can defend against a breach of contract claim by showing that a condition precedent did not occur.

Dispute Prevention and Resolution

"An ounce of prevention is worth a pound of cure." Most of us have heard this old saying, and its truth is established almost every day in landscape

construction contracting. When entering into a contract, look for ways to stop disputes from arising, minimize disputes that do occur, and provide a mechanism for quick and relatively inexpensive resolution.

Dispute Prevention Partnering

Dispute prevention partnering is a technique in which the property owner, landscape contracting business, architects, and principal subcontractors establish ongoing and open lines of communication through all stages of the project. Each party contributes to all significant decisions, and the group attempts to anticipate problem areas of the project and work out plans to deal with unforeseen problems. The cornerstone of the system is prompt and full disclosure of problems that arise. Dealing with problems early reduces the likelihood of serious disputes. An important part of the partnering process is to make certain that changes in the work or other duties and responsibilities are fully documented in writing. Partnering concepts are being increasingly incorporated into substantial project contracts.

Negotiation

In situations where partnering mechanisms are not being used, prompt disclosure and negotiation are the preferred methods of dealing with potential and actual disputes. As soon as a landscape contracting business sees that a problem might arise, or discovers an unforeseen problem, the landscape contracting business should start immediate negotiations with the property owner, architect, and/or subcontractor(s) to resolve the problem with minimal cost and disruption of the project. If an agreement is worked out, it should be in writing and signed by all the parties.

Alternative Dispute Resolution

When a contract is formed, parties can agree to terms and conditions for alternative dispute resolution. The cost and time involved in court litigation of disputes, and the desire to keep disputed projects as much on track as possible, have led to the use of a variety of alternative (to courts) dispute resolution methods. The parties must agree to all alternative dispute mechanisms (except for the landscape contracting business's right to cure defects, and court-ordered and LCB arbitration) either in the original contract or a subsequent written agreement. For more information on dispute resolution, see Chapter 8, "Claims and Dispute Resolution."

Mediation

Mediation is a negotiation presided over and guided by an experienced mediator. An effective mediator has received special training and has a strong working knowledge of landscape contracting law and practices. The mediator will hear the claims and factual presentations of the various sides to the dispute and will call upon his or her experience to help work out an

agreement satisfactory to the parties. Mediation is not binding, but if the parties are open to a negotiated resolution, the process can be extremely effective.

Arbitration

A contract can provide for the parties to arbitrate disputes. However, parties can voluntarily agree to arbitrate even if the contract does not have terms for arbitration or resolving disputes. A court can order arbitration in matters having relatively low economic damage claims. Binding arbitration is much more common in the construction industry. When efforts to negotiate and/or mediate a matter have failed, an appointed arbitrator will conduct what is for all intents and purposes a trial of the matter. The arbitrator will issue a ruling that is binding on the parties and can be enforced through court processes. The arbitration process is usually as costly as litigation in terms of attorneys' and arbitrators' fees. The advantage over litigation is that the matter can usually be arbitrated quicker than by conducting a court trial.

If mediation and arbitration are not successful the next step could be court litigation.

Court Litigation

In the absence of agreed-upon or mandatory alternative dispute mechanisms, court litigation is the last resort for settlement of disputes. Little need be said about this method of dispute resolution, except to emphasize the importance of including in every written contract *a comprehensive attorney fee recovery provision*. In the absence of such a written provision, the winning party cannot recover those costs from the other side.

The LCB Dispute Resolution Process, described in Chapter 8, "Claims and Dispute Resolution," is designed to keep the consumer and landscape contracting business out of the costly court system.

Liquidated Damages

Liquidated damages provisions set a dollar amount that will be forfeited, or paid, if a certain type of breach of contract occurs. Special contract drafting rules apply to the provision of liquidated damages and a lawyer should be consulted before including them in a contract.

Customer Relations and Expectations

Contracts and liens pertain to customer relations. Good customer relations and management practices can prevent problems that can lead to having claims filed against the business or liens filed against the homeowner. The following checklists are provided to help the landscape contracting business manage customer relations.

Pre-contract Phase Checklist

1. Determine customer objectives.
2. Determine customer budget.
3. Prepare plans for the work.
4. Determine your capacity to handle the job (skill and manpower needed).
5. Discuss the following with the customer:
   - Time expectations;
   - Payment;
   - Project management;
   - Customer-landscape contracting business communication;
   - Quality of work;
   - Post installation maintenance;
   - Determine the availability of materials and supplies;
   - Make sure you have accurate take-offs; and
   - Contact subcontractors and get firm quotes if appropriate,

Contract Phase Checklist

1. Use a written contract (not having a written contract means the landscape contracting business may not get paid and a civil penalty by the LCB will be assessed).
2. Review material terms with the customer.
3. Explain the change order process.
4. Explain maintenance obligations.
5. Get a down payment on the contract price.
6. Introduce the licensed supervisor for the work.
7. Review the plans.
8. Confirm time expectations.
9. Firm up subcontracts.
10. Confirm warranty terms.

Performance Phase Checklist

1. Obtain all required permits.
2. Schedule work.
3. Order materials and supplies.
4. Staff up.
5. Coordinate all subcontractors.
6. Review plans with foreman and crew.
7. Lay out job; review with customer.
8. Review plant material with customer on site.
9. Review any other major materials such as brick, wood, rock, if selected by the customer.
10. Monitor daily work, both quality and progress.
11. Address unknowns immediately after discovery and inform the customer.
12. Follow plans strictly.
13. Obtain change orders BEFORE new work starts.
14. Send progress statements or billings.
15. Meet time expectations.
16. Train customer for maintenance.
17. Manage the site.

Follow-through Phase Checklist

1. Do final inspection with customer.
2. Perform necessary tests.
3. Prepare and deliver written maintenance instructions to customer.
4. Have customer sign acceptance and completion statement.
5. Collect unpaid fees.
6. Visit site a week after completion.
7. Follow up with maintenance proposal.
8. Perform all warranty or guaranty obligations.
9. Ask for customer feed-back (prepare a form in advance).

Chapter 7: Supervision & Leadership

What this chapter covers:

- The requirements for supervising employees
- Leadership styles
- Communications styles

Supervision Requirements

The supervision requirement in Oregon law is the element that provides some assurance to the consumer that the person who has demonstrated competence through testing and experience in performing landscaping work is directly involved in the project being performed by the landscape contracting business.

As a managing owner or managing employee of a landscape contracting business there are some requirements for supervision of the technical aspects of the business by a licensed landscape construction professional that you need to understand. This knowledge will help prevent unlicensed employees being in violation of the landscape laws and subject to civil penalties. ***Failure to require proper direct supervision of unlicensed employees has severe consequences for the landscape contracting business and the employees of the business!***

If an individual employee is licensed, then the person can perform work within the phase of license that he or she is licensed, provided that the person is an owner of, or is employed by, a licensed landscape contracting business. *Performing work outside the phase of the individual license requires another individual licensed landscape construction professional holding a license in that phase of license to directly supervise the individual performing the work.* Just because a person is licensed in one phase of landscaping, doesn't allow this person to perform work in another phase without being directly supervised by a properly licensed landscape construction professional.

> Failure to comply with these requirements can result in maximum civil penalties for the individual performing the work and serious consequences for the business that allowed the situation to happen.

If an individual employee is not licensed, then all landscaping work performed by this person must be done while employed by a licensed landscape contracting business and *under the direct supervision* of an

individual landscape construction professional licensed in the phase of work being performed that is an owner of or employed by the landscape contracting business.

What is Direct Supervision?

The word "direct" has implications that are not easily adhered to in the landscape construction industry. The Board's definition, as stated in OAR 808-002-0328, is:

"Direct supervision" as used in ORS 671.540 (1) (q) and (r) means that a licensed landscape construction professional supervises any unlicensed employee who performs landscaping work such that the employee:

- has had instruction on the project from the landscape construction professional, verbally or in writing;
- knows the landscape construction professional by name;
- knows how to contact the landscape construction professional; and
- can communicate with the landscape construction professional within an hour, and, if unavailable, that landscape construction professional will return the call by end of the day to the employee.

This definition means that there are not intermediate people between the licensed individual supervising the work and the unlicensed employee being supervised. Failure of a landscape contracting business to require this type of supervision will result in monetary penalties for the business and can also result in additional penalties for the unsuspecting employee for not meeting the exemption in ORS 671.540 (1) (q) or (r).

Effective Leadership

As a leader, you must know yourself and seek improvement. Four major factors in leadership are:

- **Styles.** Different people require different styles of leadership. For example, a new hire requires more supervision than an experienced employee. A person who lacks motivation requires a different approach than one with a high degree of motivation. You must know your people! The fundamental starting point is having a good understanding of human nature, such as needs, emotions, and motivation.
- **Understanding.** You must have an honest understanding of who you are, what you know, and what you can do. Also, note that it is the followers, not the leader who determines if a leader is successful. If they do not trust or lack confidence in their leader, then they will be uninspired. To be successful you have to convince your followers, not yourself or your superiors, that you are worthy of being followed. If

you are a leader who can be trusted, then those around you will grow to respect you.

- **Communication.** You lead through two-way communication. Much of it is nonverbal. For instance, when you "set the example," that communicates to your people that you would not ask them to perform anything that you would not be willing to do. What and how you communicate either builds or harms the relationship between you and your employees.
- **Situations.** All situations are different. What you do in one situation will not always work in another. You must use your judgment to decide the best course of action and the leadership style needed for each situation. For example, you may need to confront an employee for inappropriate behavior, but if the confrontation is too late or too early, too harsh or too weak, then the results may prove ineffective. Various forces will affect these factors. Examples of these forces are your relationship with your seniors, the skill of your people, the informal leaders within your organization, and how your company is organized.

Leadership Styles

In the past several decades, management experts have undergone a revolution in how they define leadership and what their attitudes are toward it. Through it all it was determined that not everything old was bad and not everything new was good; rather different styles were needed for different situations and each leader needed to know when to exhibit a particular approach.

Autocratic Leadership Style

Autocratic leadership is often considered the classical approach. It is one in which the manager retains as much power and decision-making authority as possible. The manager does not consult employees, nor are they allowed to give any input. Employees are expected to obey orders without receiving any explanations. The motivation environment is produced by creating a structured set of rewards and punishments.

This leadership style has been greatly criticized during the past 50 years. Some studies say that organizations with many autocratic leaders have higher turnover and absenteeism than other organizations. Certainly Gen X employees have proven to be highly resistant to this management style. These studies show that autocratic leaders:

- rely on threats and punishment to influence employees.
- do not trust employees.
- do not allow for employee input.

However, autocratic leadership is not all bad. Sometimes it is the most effective style to use. These situations can include:

- New, untrained employees who do not know which tasks to perform or which procedures to follow.
- Effective supervision can be provided only through detailed orders and instructions.
- Employees do not respond to any other leadership style.
- There are high-volume production needs on a daily basis.
- There is limited time in which to make a decision.
- A manager's power is challenged by an employee.
- The area was poorly managed.
- Work needs to be coordinated with another department or organization.

You should not use the autocratic leadership style when:

- Employees become tense, fearful, or resentful.
- Employees expect to have their opinions heard.
- Employees begin depending on their manager to make all their decisions.
- There is low employee morale, high turnover and absenteeism and work stoppage**.**

Bureaucratic Leadership Style

Bureaucratic leadership is where the manager manages "by the book¨ and everything must be done according to procedure or policy. If it isn't covered by the book, the manager refers to the next level above him or her. This manager is really more of a police officer than a leader. He or she enforces the rules. This style can be effective when:

- Employees are performing routine tasks over and over.
- Employees need to understand certain standards or procedures.
- Employees are working with dangerous or delicate equipment that requires a definite set of procedures to operate.
- Safety or security training is being conducted.
- Employees are performing tasks that require handling cash.

This style is ineffective when:

- Work habits form that are hard to break, especially if they are no longer useful.

- Employees lose their interest in their jobs and in their fellow workers.
- Employees do only what is expected of them and no more.

Democratic Leadership Style

Democratic leadership is also called the participative style as it encourages employees to be a part of the decision making. The democratic manager keeps his or her employees informed about everything that affects their work and shares decision making and problem solving responsibilities. This style requires the leader to be a coach who has the final say, but gathers information from staff members before making a decision.

Democratic leadership can produce high quality and high quantity work for long periods of time. Many employees like the trust they receive and respond with cooperation, team spirit, and high morale. Typically the democratic leader:

- develops plans to help employees evaluate their own performance.
- allows employees to establish goals.
- encourages employees to grow on the job and be promoted.
- recognizes and encourages achievement.

Like the other styles, the democratic style is not always appropriate. It is most successful when used with highly skilled or experienced employees or when implementing operational changes or resolving individual or group problems. The democratic leadership style is most effective when:

- The leader wants to keep employees informed about matters that affect them.
- The leader wants employees to share in decision-making and problem-solving duties.
- The leader wants to provide opportunities for employees to develop a high sense of personal growth and job satisfaction.
- There is a large or complex problem that requires lots of input to solve.
- Changes must be made or problems solved that affect employees or groups of employees.
- You want to encourage team building and participation.

Democratic leadership should not be used when:

- There is not enough time to get everyone’s input.
- It’s easier and more cost-effective for the manager to make the decision.

- The business can't afford mistakes.
- The manager feels threatened by this type of leadership.
- Employee safety is a critical concern.

Laissez-Faire Leadership Style

Laissez-faire leadership is also known as the "hands-off¨ style. It is one in which the manager provides little or no direction and gives employees as much freedom as possible. All authority or power is given to the employees and they must determine goals, make decisions, and resolve problems on their own. This is an effective style to use when:

- Employees are highly skilled, experienced, and educated.
- Employees have pride in their work and the drive to do it successfully on their own.
- Outside experts, such as staff specialists or consultants are being used.
- Employees are trustworthy and experienced.

This style should not be used when:

- It makes employees feel insecure at the unavailability of a manager.
- The manager cannot provide regular feedback to let employees know how well they are doing.
- Managers are unable to thank employees for their good work.
- The manager doesn't understand his or her responsibilities and is hoping the employees can cover for him or her.

Varying Leadership Style

There's no one right way to lead or manage that fits all situations. Good leaders often switch instinctively between styles, based upon the people they lead and the work that needs to be done. Remember to balance the needs of the business against the needs of the team. While the proper leadership style depends on the situation, there are three other factors that also influence which leadership style to use.

> Establishing trust is the basis of all good leadership.

The first factor is the manager's personal background. What personality, knowledge, values, ethics, and experiences does the manager have? What does he or she think will work?

The second factor is the employees being supervised. The employees are individuals with different personalities and backgrounds. The leadership style that managers use varies depending upon the individual employee and what he or she will respond best to.

The third factor is the company. The traditions, values, philosophy, and concerns of the company will influence how a manager acts.

Effective leadership is not simply based on a set of attributes, behaviors, or influences. You must have a wide range of abilities and approaches that you can draw upon.

A great leader:

- has integrity
- sets clear goals
- clearly communicates a vision
- sets a good example
- expects the best from the team
- encourages
- supports
- recognizes good work and people
- provides stimulating work
- helps people see beyond their self-interests and focus more on team interests and needs
- inspires

If you resolve to always tell your employees the truth and be willing to get in and do any job with them, you're more than halfway there as a great leader.

Effective leaders are exceptionally motivating, and they're trusted. When your team trusts you, and is really fired up by the way you lead, you can achieve great things!

Communication Styles

Effective communication with employees can be the result of your personality characteristic matching that of your employee. There are four basic communication styles:

- Director (Doer)
- Socializer (Talker)
- Analyzer (Controller)
- Supporter (Advocate)

Directors are quick decision makers, self assured and leaders. They value results, are confident, in control, and ask direct questions. Their style will demand direct answers, know what they want and want their opinion to count.

Directors want direct answers.

Socializers want approval.

Socializers are influential, intuitive, inspirational, emotional, and love a crowd. Their style is to be an animated story teller, approachable, friendly/outgoing and non-judgmental.

Analyzers want facts and figures.

The characteristics of the Analyzer are conscientious, conservative, logical, unemotional, and they are perfectionists. They want the facts, are rational and not swayed by enthusiasm. Their style is they thrive on facts and systems. They like to re-check details, are reserved, and like to control their surroundings. Facts control their decisions.

Supporters resist change.

A Supporter is loyal, steady, easygoing, detail minded, will support decisions, craves stability and security. Their style is steady, consistent, and conflict is uncomfortable for them. There are fearful of losing security and are soft spoken.

It is important for a supervisor to know their personality characteristics and that of the employee(s) in order to have effective communication. Many times personality styles can conflict or be totally ineffective when information must be understood or acted on.

How the supervisor personality deals with the employee personality needs to change to suit the employee's individual style.

A Director working with:

- A Supporter: be careful to not go to fast and should deal with the employee in a relaxed manner.
- A Director: let the employee feel in control.
- An Analyzer: provide details and slow down in their approach.
- A Socializer: the Director will have trouble communicating with this type of employee.

A Socializer working with:

- A Supporter: stay calm, slow down, and provide reassurance.
- A Director: minimize self-expression and stick with the facts.
- An Analyzer: the Socializer employee will have trouble communicating with this employer. Go slow and provide details.
- A Socializer: stay on track or little work will be accomplished.

A Supporter working with:

- A Supporter: be decisive to save time.
- A Director: give quick and to-the-point answers.
- An Analyzer: give factual information and pay attention to details.

- A Socializer: go slow, as the employee will be uncomfortable with a flamboyant fast pace.

An Analyzer working with:

- A Supporter: don't overcome the employee with too much information.
- A Director: give quick answers even if it is uncomfortable.
- An Analyzer: stay with an agenda and don't linger over minute details.
- A Socializer: go slow, as the employee can be annoyed with a fast pace and enthusiasm.

For a simple self-awareness exercise, try having everyone in your company fill out the following chart. Each person checks the characteristics that describe them.

______ cautious	______ crave stability and security
______ detail minded	______ easygoing and steady
______ easy to approach	______ friendly and outgoing
______ inspirational	______ logical and unemotional
______ loyal	______ nonjudgmental
______ not swayed by enthusiasm	______ quick decision maker
______ reserved	______ self-assured/leader
______ stable	______ value results
______ want direct answers	______ want opinions to count
______ wants facts and rational	______ work with people they like

When everyone has filled out the chart, match up the selected characteristics to the second chart to get a basic idea of their working styles. People are rarely going to be all one thing, but they'll frequently have a style preference.

Director/Doer	**Analyzer/Controller**
______ Quick decision maker	______ Logical and unemotional
______ Self-assured/leader	______ Reserved
______ Value results	______ Cautious
______ Want opinions to count	______ Not swayed by enthusiasm
______ Want direct answers	______ Wants facts and rational
______ **Total**	______ **Total**
Socializer/Talker	**Supporter/Advocate**
______ Friendly and outgoing	______ Easygoing and steady
______ Easy to approach	______ Detail minded
______ Inspirational	______ Loyal
______ Work with people they like	______ Stable
______ Nonjudgmental	______ Crave stability and security
_____ **Total**	______ **Total**

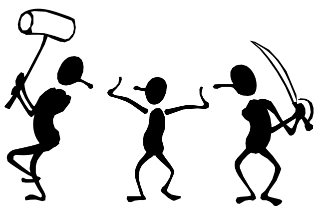
Leadership is learned and comes with practice. How you, as a managing owner or managing owner lead your business is your decision, but researching how others before you have led successfully and incorporating their wisdom and expertise into your business can have significant impact on how profitable and efficient your landscape contracting business will be!

Chapter 8:
Claims and Dispute Resolution

What this chapter covers:

- What is the LCB dispute resolution program.
- Understanding surety bonds.
- The types of claims and the claim process.

LCB Dispute Resolution Program



As part of the services offered by the LCB for consumer protection, the Board provides a unique process for resolving disputes between licensed landscape contracting businesses and consumers. This process is free to the consumer and is paid from the application and licensing fees collected by the Board. There are a set of laws that govern this process, which are found in ORS 671.690 through 671.760 and further clarified in Administrative Rules in OAR 808-division 4 and 8.

A full understanding of this process is vital to the landscape contracting business and to the licensed individual landscape construction professional who supervises the landscape activities of the business. Informing clients that this process is available to them as a method to hold landscape contracting businesses accountable and both parties out of court is a significant advantage for the consumer to contract with licensed businesses instead of unlicensed businesses.

Every licensed landscape contracting business must have on file with the Board a surety bond, irrevocable letter of credit, or assignment of savings. Access to the bond is administered by the Board in case the business breaches a contract, performs negligent work, fails to pay taxes, fails to pay employees or fails to pay a supplier of materials or labor. The consumer (person who entered into the contract with the landscape contracting business) can file a claim with the Board, which then starts a legal dispute resolution process to resolve the problem. The Board can use different forms of dispute resolution from mediation to binding arbitration to help resolve complaints without compelling the parties to go to court, though the court process still remains an option for all parties to the dispute.

Bonds

All licensed landscaping businesses must file a surety bond, assignment of savings, or irrevocable letter of credit with the LCB. The bonding requirements are based upon the charges per landscape job, as follows:

- $3000 if the business performs landscape work on any one project up to $10,000
- $10,000 if the business performs landscape work on any one project up to $25,000
- $15,000 the business performs landscape work on any one project above $25,000

When a landscaping project exceeds the limitations of the current bond, it is the business's responsibility to obtain the increased surety amount before work continues on that project. The business must obtain the correct bond amount before bidding on a project that will exceed their current bonding restrictions.

Types of Claims

There are several types of claim that can be filed against a landscaping business:

- **Breach of Contract Claim:** A claim for amounts due from a landscape contracting business as a result of a breach of contract in performing landscape contracting work.
- **Material or Equipment Claims:** A claim for unpaid materials for or rental of equipment to a landscape contracting business.
- **Employee Claims:** A claim for unpaid wages or benefits filed by an employee of a landscape contracting business for work performed by the employee relating to the business' operation as a landscape contracting business.
- **Negligent or Improper Work Claims:** A claim as a result of negligent or improper landscape contracting work.
- **State Tax and Contribution Claims:** A claim filed by the State of Oregon for amounts due for taxes and contributions due to the State of Oregon from a landscape contracting business.
- **Subcontractor Claims:** A claim arising out of a contract between the subcontractor and the landscape contracting business.

Breach of contract and negligent or improper work claims must be filed within one year following the date the work was completed (the date when all the provisions of the contract were substantially fulfilled, excluding

warranty work; or the date the landscape contracting business ceased work, if the business failed to substantially fulfill the provision of the contract).

Material, equipment rental and employee claims must be filed with the LCB within one year after the delivery date of the material, equipment or labor.

State tax and contributions claims must be filed within one year of the due date of the tax or contribution.

Claim Process

A claim is filed when the LCB receives a Statement of Claim form from a consumer (claimant) that contains all the required information. This includes the claim items, dates of work performed, date of completion of work, contracts submitted and a signature by claimant. This claim stays open until the issue is resolved; the claimant fails to respond, or fails to cooperate. Sometimes claims can be suspended due to bankruptcy or court issues, but once those issues are settled the claim process will continue. A claim can sometimes remain open for years!

> The claim form is on the web or will be sent directly to the claimant upon request.

Where to File a Claim

The first thing a consumer should do is to properly classify their complaint; the second is to know where to take it.

For complaints about landscape construction work performed by unlicensed persons, the consumer may want to contact the Landscape Contractors Board for help in dealing with this issue. The Landscape Contractors Board works in cooperation with the Department of Justice on such cases and pursues cases with diligence when violations of the Uniform Trade Practices Act are evident and verified. (The Uniform Trade Practices Act is discussed on page 141.)

If efforts the consumer makes to resolve a complaint are not successful—either by dealing directly with the business or through one of the agencies just described—the consumer may wish to file an action in small claims court, or consult a lawyer. If the consumer can prove that the consumer has suffered any actual loss as a result of an unlawful trade practice and that the business knew or should have known that its conduct or that of its agents violated the law, then the consumer may be awarded the amount of their loss, or $200, whichever is greater. The consumer may also ask to be compensated for their attorney's fees. And, if the conduct was intentional and malicious, the consumer may ask for punitive damages that may be greater than their actual loss.

If the business wins the case, however, the consumer faces having to pay the defendant's attorneys fees. This is true even if the case was involuntarily dismissed because the consumer ran out of funds to keep the lawsuit going.

Conditions for Acceptance of Claims by the LCB

There are several conditions for a claim to be accepted by the LCB. The statutes and rules state:

- A bond shall not be used to satisfy claims filed more than one year following the date the work was completed.
- The LCB will only process a claim that is filed for negligent or improper work within one year following the date the work was completed.
- "Date work completed" is the date when all the provisions of the contract were substantially fulfilled, excluding warranty work; or the date the landscape contracting business ceased work, if the business failed to substantially fulfill the provisions of the contract.
- The landscape contracting business against which the claim is filed must have been licensed during all or part of the work period.
- A direct contractual relationship based on a contract must exist between the claimant and the licensed landscape contracting business, or, for an employment-related claim, that an employment relationship exists.
- For claims relating specifically to landscape contracting work, the work must have been performed within the boundaries of the State of Oregon, or be for materials or equipment supplied for installation or use on property for landscaping work located within the boundaries of the state of Oregon. Material or equipment claims may not include non-payment for tools or equipment sold to a landscape contracting business that is not incorporated into the job site, for interest or service charges on an account or for materials purchased as stock items.
- The work has to be work subject to ORS 671.510 through ORS 671.760, which only deals with landscape construction, not landscape maintenance.

In general, the LCB will accept:

- State Tax and contribution claims, where the tax and contribution liability arose while the business was licensed.
- Material claims, where one or more invoices involve material delivered in Oregon while the business was licensed. (Damages will be awarded only for material delivered within the period time that the business was actively licensed.)

- Any other landscaping work claims.

What the LCB Does When It Receives a Claim

Once the LCB has accepted a claim, it examines the claim to make sure that the LCB has jurisdiction over the claim based on the information in the previous section and information provided by the claimant. If the LCB determines they do not have jurisdiction, the LCB dismisses the claim by issuing a proposed order to dismiss. If the LCB determines they do have jurisdiction, the LCB furnishes the landscape contracting business with a copy of the claim and requests the landscape contracting business respond to the items stated in the claim so both sides of the story can be heard by the Board, usually within 14 days.

Contractual Elements that Affect the Processing of a Claim

Conditions in the contract can affect how the LCB proceeds with a claim. For example, if the contract contains an agreement to mediate or arbitrate disputes arising out of the contract, the terms of the agreement supersede LCB rules. In such a case, the LCB informs both parties that the LCB will close the claim in 60 days unless a written waiver of mediation or arbitration is signed by both parties or receives evidence that mediation or arbitration have been initiated.

After notifying the parties, if mediation or arbitration is initiated by either party the LCB will suspend processing of the claim until the mediation or arbitration is complete. If the claimant does not respond and mediation or arbitration is not initiated, the LCB will close the claim. If the landscape contracting business does not respond, the LCB will continue to process the claim.

Once the claim is opened and information is received from both parties, the Board keeps the claim open until resolution is achieved either through an on-site meeting or a proposed default order for damages.

> **Note:** Many times when a consumer files a claim with the Board the communication between the landscape contracting business and the consumer has deteriorated to the point where they really don’t want to talk to each other. The trust level has fallen, many times to a point of no return. Something that started out rather minor can turn into something that is way out of proportion due to a lack of communication and reluctance to trust anyone who is a party to the dispute. Constant attention to keeping the communication pathways open along with a willingness to see the "other side" of the issue will most surely result in fewer claims being filed against a landscape contracting business. Yes, it is common sense, but very difficult to do when conflict arises between parties in a dispute. Though not always successful, the claim process is the Board’s attempt to keep both

parties out of court and having to pay for the legal costs associated with that process.

On-Site Meetings

The LCB may schedule an on-site meeting to mediate the dispute at the job site. The claimant or an agent of the claimant must attend this meeting. If an agent attends, they must have the authority to enter into a settlement.

The claimant must allow access to the property that is the subject of the claim and allow the landscape contracting business to be present or the claim will be closed.

If both parties agree to a settlement, the mediator/investigator prepares the settlement for both signatures on site. This settlement agreement may be considered to be a substituted contract replacing all previous agreements and is binding upon all parties.

If the respondent, an authorized representative from the licensed landscape contracting business, does not attend the on-site meeting or a settlement agreement by both parties is not reached, the mediator/investigator will review the claim items and make a recommendation. This is called an investigation report.

Either party may challenge the LCB's investigation report at a contested case hearing.

A Proposed Default Order for Damages

A claimant may seek monetary damages if the claimant disagrees with the recommendation proposed by the investigator or if the landscape contracting business cannot or will not comply.

The claimant must submit one or more estimates from a licensed landscape contracting business for the cost of correction of each claim item and a Monetary Damages Sought form listing each item.

The LCB may issue a proposed default order proposing dismissal for the claim if:

- the claimant did not suffer damages
- the respondent did not cause damages
- the claim is not the type the LCB has jurisdiction over
- the claim was not filed within the time limit
- the claimant did not permit the landscape contracting business to comply with the agency recommendations or the monetary value of the damages sustained is less than an amount due to the respondent from the claimant under the of the contract

The LCB may issue a proposed default order for payment if the LCB determines the claimant suffered damages caused by respondent and the monetary value of those damages is substantiated on the record.

The LCB may also refer the claim to the Office of Administrative Hearings for a hearing to determine the validity of the claim and whether the amount claimed is proper.

The Office of Administrative Hearings/Hearing Requests

The LCB may refer a file to the Office of Administrative Hearings (OAH) where the claim process is transferred to the OAH and handled by this agency.

Either party to the claim may request a hearing within certain time limits (21 days after the proposed order is issued). All hearings for dismissal are held as contested case hearings.

All other hearings shall be held as arbitration unless a party requests it be held as a contested case or files the dispute in court within specific time limits.

Final Order for Damages

Once a determination is made and the time to request a hearing has passed and the order becomes final, the landscape contracting business has 30 days to pay the claimant the amount due.

If the amount due is not paid by the landscape contracting business, the LCB will request the amount be paid by the bond company.

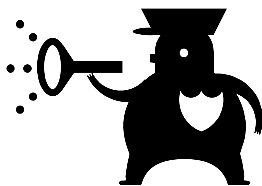
Determining how the bond company pays for multiple claims against the same business within 90 day increments is a process the bonding company deals with when distributing the bond to the claimants.

Chapter 9: Enforcement

What this chapter covers:

- The regulations covering licensed individuals and businesses.
- Disciplinary actions for violating licensing regulations.
- What constitutes unlawful trade practices.

Enforcing Regulations



The licensing regulations with the LCB dictate that each landscape contracting business must be licensed, and that each business either employ or be owned by at least one licensed landscape construction professional who has passed the competency exam to supervise the landscape operations of the business. The laws and rules—Oregon Revised Statues (ORS) and Oregon Administrative Rules (OAR)—pertain only to a person who is involved in "landscaping work" as defined in ORS 671.520. They **do not** apply to a person who is involved in landscaping maintenance, such as routine lawn mowing, planting annual type flowers in existing beds and small shrub or tree pruning (less than 15 ft in height) as part of a regularly scheduled maintenance program. There is also some statutory overlap between the LCB and the Construction Contractors Board (CCB) in regard to the installation of fences, decks, arbors, driveways, walkways, patios, landscape edging or retaining walls. These specific items can be constructed with a license from either of the boards.

The Oregon Revised Statutes that regulate the landscape industry are ORS. 671.510 to 671.760 and ORS 671.990 to 671.997, with ORS 671.530 being the statute that specifically deals with the licensing requirement. This is the most commonly violated statute that the LCB deals with and a violation of this statute is a Class "A" misdemeanor [ORS 671.990 (2)]. The penalty that can be imposed by an Oregon court for violating ORS 671.530 is up to one (1) year of imprisonment and a fine of $5000. The LCB occasionally encounters violations that are much more serious than just the mere licensing violations including, but not limited to, fraud; theft; and theft by deception and deceptive business practices.

Normally, violations are handled on a civil basis and are investigated by the LCB's internal investigators. These civil sanctions include, but are not limited to fines, license suspensions and/or revocation. The maximum fine the LCB can assess for each violation of the LCB laws is $2000 per occurrence. On occasion, the LCB encounters a violator that has little regard for the civil

sanctions that are imposed and continues to violate the law. In these instances, the LCB aggressively pursues criminal sanctions and enhanced civil sanctions. The civil sanctions include the civil penalty fines and/or license suspensions, and may also include an Assurance of Voluntary Compliance (AVC), which is the civil equivalent of a plea agreement and/or a Notice of Unlawful Trade Practices and Proposed Resolution, which states that the Oregon Attorney General's office may file a civil lawsuit against the person and/or a court-ordered injunction prohibiting work in the industry for a specified term. All of these civil sanctions are recorded in the appropriate court of jurisdiction and a violation of these sanctions may result in a contempt of court order.

> Violations are usually handled as civil offenses, but can be processed as criminal offenses with fairly stiff penalties and jail sentences.

The LCB will also pursue having criminal charges filed in the appropriate jurisdiction for the specific violations of the applicable Oregon Revised Statute(s). As stated, normally these investigations are handled by the LCB's internal investigators, however occasionally; law enforcement assistance may be requested.

Commonly Violated Statutes

The statutes that are most commonly violated are:

671.530 Licensing requirements; use of title; scope of landscape construction professional license. (1) A person may not operate as a landscape construction professional in this state without a valid landscape construction professional license issued pursuant to ORS 671.560.

(2) A person may not represent in any manner that the person is a landscape construction professional unless the person has a valid landscape construction professional license issued pursuant to ORS 671.560. The prohibition in this subsection includes, but is not limited to:

(a) Using the title of landscape contractor, landscape construction professional, landscape gardener or landscaper or any other title using a form of the word "landscape" that indicates or tends to indicate that the person is a landscape construction professional; and

(b) Using any sign, card or device that indicates or tends to indicate that the person is a landscape construction professional.

(3) A person may not operate as a landscape contracting business in this state unless the person has a valid landscape contracting business license issued pursuant to ORS 671.560.

(4) A person may not advertise or represent in any manner that the person is a landscape contracting business unless the person has a valid landscape

contracting business license issued pursuant to ORS 671.560. The prohibition in this subsection includes, but is not limited to:

(a) Using the title of landscape business, landscaping business or landscape contracting business; and

(b) Using any title, sign, card or device that indicates or tends to indicate that the person is a landscape contracting business.

(5) A landscape maintenance business may use a form of the word "landscape" in the title of the business only if the title clearly indicates the maintenance nature of the business. For purposes of this subsection, the term "landscape gardening" does not indicate the maintenance nature of a landscape maintenance business.

ORS 164.015 "Theft" described. A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person:

(1) Takes, appropriates, obtains or withholds such property from an owner thereof; or

(2) Commits theft of property lost, mislaid or delivered by mistake as provided in ORS 164.065; or

(3) Commits theft by extortion as provided in ORS 164.075; or

(4) Commits theft by deception as provided in ORS 164.085; or

(5) Commits theft by receiving as provided in ORS 164.095. [1971 c.743 §123]

When the public deals with a properly licensed landscape contracting business, they are dealing with a company that is insured and bonded. The insurances that a company carries protect the consumer from any liability issues that may arise, such as damage to property or a personal injury. The bond that a company is required to have protects the consumer against negligent work or against contractual issues that occasionally arise. Many times, negligent work or contractual problems are resolved through a mediation program of the LCB, after the consumer filing a formal claim with the Board.

When the public deals with an unlicensed person or business, they do not have the protections that the insurance and bonding afford them. As a result, they may be placing themselves in a position of substantial liability risk should another's property get damaged, or the person(s) doing the work become injured in the course of the work. The consumer's only recourse to negligent work or contractual problems is to file their own civil suit against the person or business in a court of law and in many cases the amount of money in question makes the legal fees a deterrent to filing. Many

homeowners feel that their homeowner's insurance will cover property damage or personal injury; however, in most situations where the homeowner hires someone to work on their property, the homeowner's insurance carrier will not accept this responsibility since the person usually represents themselves as an independent contractor. This situation also raises the question as to whether the person performing the work is an independent contractor or employee of the consumer, which in turn raises many issues that consumers may not be prepared to deal with. The mission statement of the LCB addresses this consumer protection as its primary concern.

Probation

There are cases where a landscape contracting business has repeated claims against it that legitimately show the landscape contracting business is not operating with good business practices. The Board has the ability to place a landscape contracting business, a landscape contracting business owner, or a landscape construction professional on probation if the business has three or more claims filed against it during a 12 month period, pursuant to ORS 671.614. In placing a landscaping business, owner, or professional on probation, the Board may, in addition to imposing conditions outlined in ORS 671.614(3) and (4), require that the landscaping business, owner, or professional do the following:

- Submit to the Board copies of all written contracts entered into during the period of probation.
- Submit to the Board copies of all billing invoices (or those that the Board specifies) issued during the period of probation.
- Submit copies to the Board of all permits required for landscaping work during the period of probation.
- Authorize the Board to contact the customers of the landscaping contracting business and supply to the Board the names, addresses and phone numbers of such customers.
- Maintain a log of site visits and customer contacts during the period of probation.

Though this is a form of disciplinary action, there are no fines associated with this probation, but is a way for the Board to aid the business in improving their business practices and hopefully reduce the number of complaints as a result of Board involvement and monitoring.

Unlawful Trade Practices Act

CAUTION!

This information can change and is in no way legal advice, nor should it be taken as such. If you are faced with Unlawful Trade Practice Act issues, it is advised you contact a lawyer versed in this area.

The LCB includes this information in this manual so landscape contracting business owners/managing employees understand the laws that consumers can access if a landscape contracting business operates in a manner that would induce the filing of an Unlawful Trade Practice Act complaint against the business. This is a serious matter and every landscape contracting business needs to operate in a manner that will avoid this situation at all costs.

The following information regarding **consumer law** is brought to you as a public service by the State of Oregon's legal staff. The material presented is general legal information intended to alert you to possible legal problems and solutions.

Oregon has a law called the Unlawful Trade Practices Act. This law applies when a consumer purchases real estate, goods, or services for personal or household use from a seller who regularly engages in that business or occupation. This law also applies to healthcare professionals who commit practices prohibited by this law in the course of providing professional services. In general, most purchases or leases, including those involving used goods, like cars, are covered by this law. However, keep in mind that this law does not apply to the purchase of insurance, a loan of money, extension of credit or Landlord-Tenant disputes. Moreover, this law does not create a cause of action for personal injury.

The Unlawful Trade Practices Act prohibits many practices, most of them involving some form of deception or misrepresentation by the seller. You may want to obtain a copy of the Act from the Oregon Attorney General's Office of Consumer Protection/Financial Fraud, located in the Justice Building, 1162 Court Street, Salem, Oregon 97301, telephone (877) 877-9392 between 8:30 a.m. and 4:30 p.m. You also may register a complaint about an unlawful trade practice with this agency, which was created to enforce this law. In addition to phoning the office, consumer complaints may now be made online at www.doj.state.or.us and clicking the "consumer complaint form" link. While The Attorney General's Office of Consumer Protection/Financial Fraud does not represent individual consumers, it can

sometimes help individual injured consumers resolve their complaints with businesses by mediating and helping them get their money back.

Here's a list of the most common violations of the Unlawful Trade Practices Act:

- misrepresenting the characteristics, benefits and qualities of the product or services offered;
- making false or misleading statements about prices, including price reductions;
- causing confusion about important aspects of a transaction, such as the approval, sponsorship or certification of the product by others;
- representing that used or altered goods are new;
- discrediting another's products or services by false or misleading representations about them;
- false advertising; false representations about the availability of credit;
- false representations that goods are available for sale when in fact the goods are not available, or available in only a very limited quantity;
- false or misleading representations about prizes, contests or promotions used to publicize a product, business or service;
- promises to deliver by a certain time with intent not to deliver as promised;
- unauthorized service or dismantling of goods or real estate; or
- telephone or door-to-door solicitation without proper identification.

The misrepresentations covered by this law can come in many forms, and can be either spoken or written. An unlawful practice may be committed even by the failure to disclose an important fact. In addition, the Act requires that certain disclosures be made when the seller knows that there are material defects in real estate, goods or services.

If you feel you have been victimized, you should keep all your contracts, canceled checks and any other documents pertaining to the transaction. If you wish to file a court action concerning an Unlawful Trade Practice, you must file it within one year from the date the seller committed the violation, or the date you reasonably should have discovered the violation of the act.

Chapter 10: Related Industries

What this chapter covers:

- Construction contracting.
- Landscape architecture.
- Plumbing and electrical.

Other Laws

Landscaping work is considered an "improvement" on real property. It is not subject to Construction Contractor Board (CCB) licensing due to this work being described in ORS 671.510-671.760. It does require a landscape contracting business license to perform in Oregon. Construction Contractors cannot perform landscaping work without a LCB license unless exempt under ORS 671.540 (special conditions). However, it is important to know the limits of landscaping work and where licensing with the CCB may be required if the landscaping work being performed crosses into construction contractor licensing.

Construction Contractors

A construction contractor is an individual or business entity who, for compensation or with the intent to sell, arranges or undertakes or offers to undertake or submits a bid to construct, alter, repair, add to, subtract from, improve, inspect, move, wreck or demolish, for another, any building, highway, road, railroad, excavation or other structure, project, development or improvement attached to real estate, or to clean or service chimneys, or to do any part thereof regardless of the type of property involved—whether residential, commercial, industrial, or publicly owned.

Types of Construction Contracting

A person desiring to perform construction on small commercial structures or development projects may choose to be licensed as either a residential contractor or as a commercial contractor.

To determine which type of endorsement is appropriate, contractors should consider the nature of the structures for which the endorsements are intended. A ***residential structure*** includes a site-built home; a structure that contains one or more dwelling units and is four stories or less; a

condominium or other residential unit; a modular home constructed off-site; a floating home; and a manufactured dwelling.

A ***small commercial structure*** includes a nonresidential structure with a ground area of not more than 10,000 square feet that is not more than 20 feet tall. A small commercial structure also includes a non-residential leasehold, rental or other unit that is part of a larger structure with a ground area of not more than 12,000 square feet that is not more than 20 feet tall. A small commercial structure also includes a nonresidential structure of any size if the contract price for all construction is not more than $250,000.

A ***large commercial structure*** is any structure that is not a residential structure or a small commercial structure.

License Categories

Beginning July 1, 2008, contractors licensed under ORS 701 must satisfy certain experience requirements in order to obtain endorsements as commercial contractors. Specifically, an applicant for a commercial contractor endorsement must demonstrate that the applicant employs persons with sufficient qualifying experience or education.

Construction experience may include time spent as:

- a licensed contractor
- a journeyman
- a supervisor or foreperson
- an employee of a licensed contractor who is also engaged in construction activities

The following may substitute for construction experience:

- Completion of an apprenticeship program may substitute for up to three years of experience.
- A Bachelor's degree in a construction-related field may substitute for up to three years of experience.
- A Bachelor's degree or Master's degree in business, finance, or economics may substitute for up to two years of experience.
- An Associate's degree in construction or building management may substitute for up to one year of experience.

Construction contractors have different endorsements on their licenses based on their experience and education, as shown in the following table.

Endorsement Type	Description	Comments	Bond	Insurance	Experience Education
Commercial General Level 1	A contractor (or subcontractor) whose business requires the use of more than two unrelated business trades and who undertakes or offers to undertake work in connection with small or large commercial structures.	This contractor may also perform work that requires two or fewer unrelated business trades.	$75,000	$2,000,000 aggregate	8 years experience or qualifying substitute education
Commercial General Level 2	A contractor (or subcontractor) whose business requires the use of more than two unrelated business trades and who undertakes or offers to undertake work in connection with small or large commercial structures.	This contractor may also perform work that requires two or fewer unrelated business trades.	$20,000	$1,000,000 aggregate	4 years experience or qualifying substitute education
Commercial Specialty Level 1	A contractor whose business requires the use of two or fewer unrelated business trades and who undertakes or offers to undertake work in connection with small or large commercial structures.		$50,000	$1,000,000 aggregate	8 years experience or qualifying substitute education
Commercial Specialty Level 2	A contractor whose business requires the use of two or fewer unrelated business trades and who undertakes or offers to undertake work in connection with small or large commercial structures.		$20,000	$500,000 per occurrence	4 years experience or qualifying substitute education
Commercial Developer	A developer of property that is zoned for or intended for use compatible with a small commercial or large commercial structure.		$20,000	$500,000 per occurrence	None

Residential General Contractor	A contractor (or subcontractor) whose business requires the use of more than two unrelated business trades and who undertakes or offers to undertake work in connection with residential or small commercial structures.	This contractor may also perform work that requires two or fewer unrelated business trades.	$20,000	$500,000 per occurrence	None
Residential Specialty	A contractor whose business requires the use of two or fewer unrelated business trades and who undertakes or offers to undertake work in connection with residential or small commercial structures.	A manufactured dwelling installer is a specialty contractor.	$15,000	$300,000 per occurrence	None
Residential Limited	A residential limited contractor performs work on residential or small commercial structures but does not perform work exceeding $40,000 in annual volume or enter into any one contract to perform work that exceeds $5,000.		$10,000	$100,000 per occurrence	None
Residential Developer	A developer of property that is zoned for or intended for use compatible with a residential or small commercial structure.		$20,000	$500,000 per occurrence	None

Landscape Architect

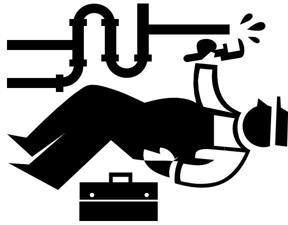
Landscape architecture is an area of landscaping and architecture that deals with the design elements of landscaping work. "Landscape architecture" means the performance of, or offers to perform, professional services that have the dominant purpose of landscape preservation, development and enhancement, including but not limited to reconnaissance, research, planning, landscape and site design, the preparation of related drawings, construction documents and specifications and responsible construction observation. Landscape architecture includes the location, arrangement and design of tangible objects and features that are incidental and necessary for landscape preservation, development and enhancement. There is some overlap in the laws that regulate landscape construction professionals and landscape contracting businesses with the laws that regulate landscape architects in Oregon.

Landscape designing at a conceptual level (the making of plans or drawings for the selection, placement or use of plants or other site features, unless the plans or drawings are for the purpose of providing construction details and specifications) is not regulated in the state of Oregon. It is an area of concern for both the Landscape Contractors Board and Landscape Architects Board when persons provide designs that show construction details or specifications without being properly licensed.

Plumbing

CAUTION!

The installation of a backflow assembly for irrigation and water features must be done by an individual landscape construction professional holding the Irrigation plus backflow or All Phase plus Backflow phase of license, or by a licensed plumber. NO UNLICENSED EMPLOYEE may install a backflow assembly without being in violation of ORS 447 (plumber law). Also, any employee of a licensed landscape contracting business installing low voltage wiring must carry a card provided by the LCB (see www.lcb.state.or.us) that indicates the employee is authorized by the business to install the low voltage wiring on class II or class III electrical installations (ORS 479.940)



Landscape construction professionals that are owners or employees of landscape contracting business that have passed the backflow license section of the examination administered by the LCB have an exemption from plumbing law to install backflow assemblies on potable water lines. The LCB is given authority to license landscape construction professionals for backflow installation through ORS 671.615.If the landscape construction professional holds the backflow assembly installation license and also has a certification for testing backflows from the Oregon Health Authority, this landscape construction professional also has the ability to repair a backflow assembly for irrigation systems and water features. The exemption from plumbing law for this landscape construction professional to perform this work is found in ORS 447.060.

This exemption does not create an exemption from the permit process or other laws related to the installation of backflow assemblies. The permit requirement is enforced by the LCB and any violations of the plumbing exemption are reported to the plumbing Board for compliance action by that Board.

Electrical

Employees of landscape contracting businesses that carry a identification card supplied by the Landscape Contractors Board (found on the LCB website) may install low voltage landscape lighting and low voltage irrigation wire without being licensed with the electrical Board [ORS 479.905 (4) & 479.940(3)] That being said, low voltage wiring for an irrigation system is considered work of a licensed landscape contracting business that is licensed for irrigation, so an All phase plus backflow or Irrigation plus backflow license is required for the installation of low voltage irrigation control wires.

This exemption from licensure with the electrical Board does not exempt the landscape contracting business from the permit process or any other laws regarding the installation of low voltage wiring.

Chapter 11:
Lien Law

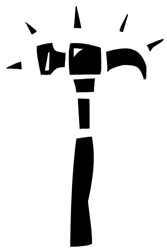
What this chapter covers:

- Liens and what they cover.
- How to file and enforce a lien.
- Who is entitled to file a lien.

CAUTION!

The material in this chapter is **provided as a resource for study for the LCB exam and is** for informational purposes only. It should not be considered to be legal advice. The LCB **strongly** advises you to consult an attorney for specific legal advice on filing or enforcing liens.

Liens



In general terms, a construction lien is nothing more than a security interest in real property which is considered land and improvements. A construction lien secures payment of a debt. Liens can be filed to cover a debt due to a person who provides labor, materials, equipment, or services that were used or consumed in the construction of the improvement, which is located on real property, such as the following:

- materials and supplies, whether upon delivery to the site, consumed or destroyed during construction, or materials that have become a permanent part of the improvement
- equipment (rental)
- plans, drawings and specifications used for landscaping or preparation of land

The construction lien claims a security interest against the real property. Real property is land and improvements. Under this law, contractors have the right to secure the debt that is owed to them for work on real property by recording a construction lien.

Debts arising from construction projects are not automatically secured. Suppliers and contractors must follow required steps to properly exercise their lien rights.

If you wait until your work is done on a project before evaluating your construction lien rights, it may be too late for an attorney to perform some of the steps required to perfect your lien claim in a timely manner. The time to evaluate your construction lien rights is before you submit a bid or begin work on a project.

> A construction lien is a claim upon property for money owed to a contractor, material supplier or anyone who supplied labor or materials for improvements to the property.

One of the ways a business in Oregon can create some assurance for collecting money owed for the performance of work on a consumers property is to perfect (file) a lien on the property. To do this, the business must follow some very specific and exact steps; otherwise the lien is not legal and the business's efforts will be in vain.

The statute that governs liens for construction work is ORS 87 and the procedures and notices for the lien process are monitored and governed by the Construction Contractors Board (CCB) and their forms must be used. The State Landscape Contractors Board is not mentioned in the statute and has no jurisdiction or authority over the filing of a lien; however, if a landscape contracting business wants to have lien rights, there are strict requirements that need to be met.

> The administration of the lien process is shouldered by the Construction Contractors Board and forms for information and notification for consumers are found on their website, www.lcb.state.or.us.

Note: Although the Landscape Contractors Board does not have statutory authority over landscape contracting businesses in how a lien is filed, ORS 87 has definite requirements if any business wants to file a lien for work performed. It is with this understanding the following information is presented.

Lien Considerations

There can be more than one owner or mortgagee on any given property. Your landscape contracting business may have a contract with one owner and not another, so as the owner/managing employee you may have to look at the "when to send" chart on page 157 two or three times, depending on the number of owners! The term "owner" may include lessees. See ORS 87.005(8)(c).

If your landscape contracting business contracts directly with any owner, the business may or may not have to provide the Notice of Right to a Lien to the owners, but the business may be required to provide the "Information Notice to Owner." See ORS 87.093.

The "when to send" chart on page 157 does not discuss "services." Services may include architectural, engineering, and land surveying services.

Consider whether to provide the notice in order to start the time periods for a notice of non-responsibility. The Court of Appeals noted that the improvement must be built with owner's actual or imputed knowledge.

The Notice of Right to a Lien may be given at any time during the progress of the improvement, but the notice only protects the right to perfect a claim of lien for materials, equipment, labor or services provided eight (8) days, not including Saturdays, Sundays and other holidays as defined in ORS 187.010, before the notice is delivered or mailed.

The content of a construction lien claim is very important and is outlined in ORS 87.035. A lien claim must include at least:

- A true statement of demand, after deducting all just credits and offsets.
- The name of the owner(s) or reputed owner(s).
- The name of the person who employed the claimant or to whom the claimant furnished the materials or rented the equipment.
- A description of the property to be charged with the claim of lien sufficient for identification, including the address if known.
- The claim shall be verified by the oath of the person filing or of some other person having knowledge of the facts (that is, the claimant's signature must be notarized).

There are two separate definitions of "residential" in the Oregon construction lien statutes. ORS 87.021 defines "residential building" for purposes of Notices of Right to a Lien and ORS 87.093 defines "residential construction or improvement" for purposes of Information Notices to Owners.

Generally, persons or entities are entitled to perfect a lien only if they perform labor upon, furnish materials to, or rent equipment to be used in the preparation of the land or the construction of the improvement at the request of an owner of the improvement or an owner's construction agent and the labor, materials or equipment were used or consumed in the construction of the improvement. Thus, to determine whether your business is entitled to claim a construction lien, you must first ask if the landscape contracting business contract is with an owner or with an owner's construction agent. "Owner" is defined at ORS 87.005 (5) and "Construction Agent" is defined at ORS 87.005(3). A construction agent can be a contractor or an "other person having charge of construction or preparation." "Contractor" is defined at ORS 87.005(4); the courts have tried to define "other person."

Oregon's construction lien law requires that certain notices be given before a business or any other claimant may perfect a claim of lien. For instance, the Notice of Right to a Lien must be in writing, delivered in person or delivered

by registered or certified mail. The "Information Notice to Owner" may also be proved by a United States Postal Service Certificate of Mailing.

The Oregon Construction Contractors Board (CCB) publishes the form called the "Information Notice to Owner." Because ORS 87.093 refers to the CCB's form for this notice, it is suggested that this form must be used in order to comply with the statute. While the statute does not require that the owner sign this form, the CCB's form includes a signature line for the owner. Thus, it is suggested that a contractor obtain the owner's signature and keep a copy of the form signed by the owner.

A lien can be for the amount of the contract price or for the amount for use of equipment that is equal to the reasonable rental value.

Filing a Lien

A lien must be filed within 75 days after the claimant either completes construction or ceases to provide labor or equipment or to furnish supplies. (The Notice of Completion begins the 75-day period.) A lien cannot be modified or corrected after the 75-day period lapses. Liens are filed following a statutory lien format. Liens are filed with the recording officer of the county where the improvement is located.

The 75-day lien period is not extended by performing insubstantial or substandard work following notice of completion. This includes warranty work.

Who Is Entitled to a Construction Lien?

Beginning January 1, 2008, a construction contractor that does work for an owner of a residential structure where the aggregate price exceeds $2,000.00 must have a written contract or the contractor will not have a right to assert a lien claim

> Remember, LCB law requires a written contract for all landscaping work no matter the amount if the contract is to be enforced by the landscape contracting business in Oregon.

The following persons are entitled to assert a construction lien:

- Licensed contractors who properly and substantially perform their work with the consent of the property owner or the owner's agent.
- Persons who perform work or provide materials or equipment as described by the construction lien law, including:
    - ♦ Performing labor, transportation, or furnishing any materials used in constructing the improvement or rental equipment used in the construction of the improvement.

- ♦ Preparing a lot or parcel of land, or improving an adjoining street or road, or leasing or renting equipment for such land preparation or improvements.
- Trustees of employee benefit plans that have contributions allocated by labor performed on an improvement.
- Certain persons performing work related to construction activity such as: architects, landscape architects, land surveyors, and registered engineers who prepare plans, drawings, or specifications for construction of an improvement, or who supervise the construction.
- Landscape architects, land surveyors, or other persons who prepare plans, drawings, surveys or specifications for landscaping, or preparation of a lot or parcel, or who supervise the landscaping or preparation.

Construction liens secure payment to the contractor.

A valid construction lien secures the contractor's right as a creditor to receive payment. The lien is recorded (filed) in the county recorder's office of the county where the project is located. The recording, also known as "perfecting the lien," is required for the lien to be effective.

On public improvements, you cannot record construction liens against an agency's interest in a public works project or "public improvement" that is constructed on public property and owned by the local, state, or federal government. Instead, you may have rights under the Federal Miller Act or Oregon's Little Miller Act, which are regulated by the respective Miller Act and retainage laws. Generally, a successful bidder must execute and provide a bond on a public improvement project and rights under the Miller Act are against the bond.

Certain pre-claim notices typically need to be given.

There are two types of pre-claim construction notices in Oregon: *Information Notice to Owner about Construction Liens* and *Notice of Right to a Lien*

Giving these pre-claim notices is an important step in protecting the lien rights of the owner and contractor in a construction contract. The notices are needed in preserving the contractor's rights for when the next step is taken in exercising lien rights. For the owner, the notices inform them of legal rights in protecting their real property interests.

Determine the need for pre-claim notices.

If you contract with an owner, you are an "original contractor." If you do not have a contract with the owner, you are a subcontractor. For lien law purposes, the term "general contractor" is not used. For purposes of pre-claim notices, you are an original contractor when you have a contract directly with the owner.

What Notices Are Required?

The notification requirements differ depending on the type of lien being filed.

Type of Notice	Requirements
Information Notice to Owner about Construction Liens	This notice applies to the original owner. This notice also applies to the first purchaser of the property if it is sold before or within the 75-day period following completion
Notice of Right to Lien	This is a statutory form for giving notice of the right to lien Notice can be given at any time during the progress of the work The notice protects lien rights for work provided up to 8 days before the notice is given Notice is required for all residential work Notice is required only for material suppliers on commercial work
Notice to Mortgagee	Mortgagees also receive notice of the right to lien
Notice of Filing	Notice of filing is given to the owner and all mortgagees Notice of filing is given within 20 days after filing Notice includes the loss of costs, disbursements and attorney fees
Notice of Intent to Foreclose	Such notice is given to the owner and all mortgagees Such notice is given at least 10 days before a suit is filed

Notice of Right to a Lien

The *Notice of Right to a Lien* is a written form as described by statute. It is available through the CCB. It is usually mailed by certified mail, return receipt requested, to the owner of the project. There are lien services that provide this form and with whom you can contract to provide and deliver the *Notice of Right to a Lien.* Subcontractors or material suppliers do not always have to give the *Notice of Right to a Lien*; however, if the subcontractor or supplier chooses not to give the notice, they may give up their right to claim a lien.

This notice:

- gives the owner the name of the person who requested the subcontractor or supplier to provide services or materials
- identifies the subcontractor or supplier
- describes the work to be performed

If the notice is delivered during the progress of work and no later than eight working days from the date the subcontractor or supplier began to provide labor, material, equipment or services (not including Saturdays, Sundays, and holidays), the notice will allow the subcontractor or supplier to file a lien for all of its labor or materials.

Subcontractors on commercial projects may not have to provide this notice in order to preserve their lien rights. Since commercial improvements are more complex than residential improvements, it is advisable for contractors to seek legal advice in preserving and perfecting their lien rights against commercial property.

However, when a subcontractor provides material and labor to an improvement, the notice must be delivered to the mortgagees (lenders with a recorded interest in the property). This preserves the subcontractor's rights for payment of the materials portion of his or her lien claim. Suppliers must always deliver a notice to mortgagees to preserve their lien rights.

Information Notice to Owner about Construction Liens

The Information Notice to Owner about Construction Liens is given to the property owner. It defines lien law in non-technical terms and describes the rights and responsibilities of the owner and original contractor. You can get a copy of the form from the CCB website. It is only required by original contractors on residential projects when the contract price exceeds $1,000 and the residential project is a residential construction or improvement. The original contractor must give this notice even if they do not intend to record a construction lien. If the Information Notice to Owner about Construction Liens is not given when required, the original contractor cannot claim a lien.

In addition, the original contractor may be asked for written proof of delivery of this notice, which is normally done by providing the Information Notice to Owner about Construction Liens as signed by the property owner. It does not make a difference if the contractor delivers the Notice in person or by registered or certified mail. It is recommended that the property owner sign and date the Notice, even though it is not required, and the contractor retains a copy as proof of proper delivery.

Each original contractor gives an Information Notice to Owner about Construction Liens to:

- The first purchaser of residential property constructed by the contractor and sold within 75 days following the completion of construction.
- The owner at the time a contract is signed, or within five (5) days of a verbal agreement for a residential construction or improvement that exceeds a contract price of $1,000.

- The owner within five working days after the contractor determines, or should reasonably be able to determine, that the contract price on residential construction or improvement will exceed $1,000.

An Information Notice to Owner about Construction Liens need not be given when:

- The property owner is a contractor licensed with the CCB.
- The aggregate (total) contract price is $1,000 or less.

Original contractors should keep proof that the required Information Notice to Owner about Construction Liens was given. Make the notice part of the contract, or request that the owner sign a copy for your records. If you cannot prove the notice was given, and the owner denies receiving the notice, you may lose your lien rights and you may be subject to a fine or have your license suspended.

The following chart outlines when to send a notice of right to a lien to owners and mortgagees/lenders.

If you provide	And your contract is with all owners		And you do not have a contract with all owners	
	Send notice to owners?	Send notice to lenders?	Send notice to owners?	Send notice to lenders?
Residential				
Material only	No	Yes	Yes	Yes
Onsite labor and material	No†	Yes‡	Yes	Yes‡
Onsite labor only	No†	No	Yes	No
Rental equipment	No	No	No	No
Commercial				
Material only	No	Yes	Yes	Yes
Onsite labor and material	No	Yes‡	No	Yes‡
Onsite labor only	No	No	Yes	No
Rental equipment	No	No	No	No

† Information Notice to Owners may be required

‡ Notice is given to protect material portion of claim. See ORS 87.025.

After receiving the Notice of Right to a Lien, the owner may make a written demand for:

- a list of materials and supplies with the amount of costs incurred to date;
- a description of the labor or services supplied; or
- a statement of the contractual basis for supplying the materials, services or labor, including the percentage of the contract completed, and the costs incurred to the date of the demand.

The list or statement must be delivered by certified mail, return receipt requested, to the owner within 15 working days of receiving the owner's demand. If the information is not delivered within 15 working days from the date of the demand, your lien rights to recover attorney's fees and costs will be lost.

Required Pre-Claim Construction Notices

	Who gives it?	Who gets it?	When is it given?	How is it given?	Consequences for not giving notice?
Notice of Right to a Lien – Commercial Projects	Persons or entities who furnish materials only for commercial improvement **and** who do not have a contract with the owner must give notice to all owners, mortgagees, and lenders. Those who provide on-site labor and material for commercial improvement **and** who do not have a contract with the owner should give notice to mortgagees or lenders.	All owners of the commercial improvement. In addition, those persons or entities providing materials only or on-site labor and material **must** give the notice to all mortgagees or lenders to maintain priority and preserve the material portion of their claim.	This notice may be given at any time during progress of the improvement but only preserves the right to perfect a lien for those materials provided within a date that is not more than eight working days prior to providing the notice.	Registered or certified mail, return receipt requested, as proof that the notice was properly delivered. Also, this notice can be delivered in person.	Materials-only providers who fail to give this notice may lose their lien rights, even on commercial projects.
Information Notice To Owner About Construction Liens	Original contractors who contract directly with the owner or first purchaser of a *residential construction or improvement*. Original contractors need not provide this notice to an owner who is a licensed contractor.	The owner or first purchaser of the residential construction or improvement constructed by the contractor and sold before or within 75 days following the completion of construction.	At the time the written contract is signed for more than $1,000 to perform residential construction or improvements, including all labor, services, and materials furnished under the contract. If it is an oral agreement, the notice is delivered no later than five working days after the oral agreement is formed.	The notice may be hand-delivered or mailed, registered or, certified with return receipt requested. With either, the contractor must maintain proof of delivery for a period of two years.	If not given when required contractor will lose lien rights and could face suspension of license or a civil penalty.

Notice of Right to a Lien – Residential Projects	Persons or entities who provide materials only, on-site labor and material, on-site labor only or rental equipment on *residential buildings* **and** who do not have a contract directly with the owner.	All owners of the residential building or structure that contains not more than four units capable of being used or occupied by the owner as a residence. Those who supply materials only or on-site labor and materials **must** give the notice to all mortgagees to maintain priority and preserve rights to the material portion of a claim.	This notice may be given at any time during progress of the building or structure, but only preserves the right to perfect a lien for those materials, equipment, services or labor that was provided within a date that is not more than eight working days prior to providing the notice.	Registered or certified mail, return receipt requested, as proof that the notice was properly delivered. Also, this notice can be delivered in person.	Persons or entities lose their lien rights for debt from performance on residential building or structure.

The Notice of Right to a Lien preserves rights on commercial improvements and residential buildings that fall within the following definitions. Note that the definition of "residential building" for purposes of the Notice of Right to a Lien is different than the definition of "residential construction or improvement" for purposes of the Information Notice to Owner about Construction Liens.

Pre-Claim notice requirements are different for commercial and residential projects.

- **Commercial improvement** means any structure or building not used or intended to be used as a residential building, or other improvements to a site on which such a structure or building is to be located.
- **Residential building** means a building or structure that is or will be occupied by the owner as a residence and that contains not more than four units.

Following these definitions, a business that performs labor upon a commercial improvement, provides labor and material for a commercial improvement, or rents equipment used in a commercial improvement, need not give the Notice of Right to a Lien in order to perfect a lien. However, a Notice of Right to a Lien must be delivered to mortgagees (lenders with recorded interest) when materials are provided. This delivery of Notice preserves priority of the material portion of a potential lien claim over the mortgagee's recorded interest.

For purposes of the Information Notice to Owner about Construction Liens, residential construction or improvement is defined as follows: "Residential construction or improvement" means the original construction of residential property and constructing, repairing, remodeling, or altering residential property and includes, but is not limited to, the construction, repair, replacement, or improvement of driveways, swimming pools, terraces, patios, fences, porches, garages, basements, and other structures or land adjacent to a residential dwelling.

Recording a Claim of Lien

If payment of a debt is due to you and you've given the required pre-claim notices, your next step in recovering payment is to file a construction lien claim. The Claim of Lien must be recorded within 75 calendar days after the last substantial performance of labor, delivery of materials, or rental of equipment, or 75 days after the completion of construction, whichever is earlier.

A small amount of work or repairs on work that you previously performed incorrectly may not count as valid "last days." The requirements for the 75-day time period are the same for commercial and residential projects and are the same for original contractors and subcontractors. If the 75-day time period concludes on a day that the county recorder is closed, such as a

weekend or a holiday, a Claim of Lien must be filed before the weekend or holiday and before the time period expires.

Consequently, tracking the progress of work is critical, so you know when the 75-day period occurs. Others, like trustees of employee benefit plans, architects, engineers and other design professionals, must also file their liens within 75 days of when construction is substantially complete.

Types of Post-Claim Notices

There are two types of post-claim notices in Oregon: Notice of Filing a Claim of Lien and Notice of Intent to Foreclose. Everyone who records a Claim of Lien must give these notices. The notices are typically given to the owner of the property, as well as any lender who may have legal interest in the property (such as a mortgage). These rules are the same, whether the project is a commercial or residential project, and whether the lien claimant is an original contractor or subcontractor.

> After a lien is recorded, you are required to give post-claim notices.

Generally, claimants can include the Notice of Filing a Claim of Lien and Notice of Intent to Foreclose into one written notice. If the contractor does not deliver these notices, the lien may be valid but other rights will be lost, such as the right to recover attorney fees, costs, or disbursements.

Notice of Filing a Claim of Lien

A person filing a Claim of Lien must mail a written notice that the claim has been filed, no later than 20 days after the date of recording to the owner as well as to the mortgagee (bank or an individual who lends money). A copy of the Claim of Lien must be attached to the notice. A notice should be mailed to the owner who received the Notice of Right to a Lien unless the person giving notice knows that ownership of the property has changed. Likewise, a notice should be mailed to the mortgagee who received the Notice of Right to a Lien, unless the person giving the notice knows that the mortgagee for the property has changed.

Notice of Intent to Foreclose

A person intending to foreclose a lien must send a notice in writing, no later than 10 days before beginning the foreclosure action, to the owner of the property upon which the lien is claimed. The notice must state the intention to begin foreclosure of the lien. Notice must also be delivered to the mortgagee, unless the person giving notice knows the mortgagee has changed.

Information You Must Provide

After you send the Notice of Intent to Foreclose, the owner may demand a list of materials and supplies with the costs incurred to date, or a statement

of the contractual basis for the owner's obligation, for which a claim will be made by the contractor in foreclosure. If you do not deliver that list or statement within five calendar days from the date the owner demands it, you will lose your lien rights to recover attorney fees and costs.

Construction liens do not last forever. If the lien is not paid, you will need to begin foreclosure. A lien is foreclosed by filing a lawsuit.

Liens must be foreclosed within a short time period.

The lawsuit to foreclose a lien must be filed within 120 days after the lien is recorded. Attorneys need some time to evaluate your information and prepare the lawsuit. So, if you are not paid within 90 days of when your lien was recorded, you should seek legal advice to ensure you do not miss the deadline for filing your lawsuit to foreclose the lien.

The time periods in Oregon's Construction Lien Law were established by the legislature. Foreclosure must occur within the time period, and typically cannot be changed or extended even if the owner and lien claimant agree to do so.

There are consequences to not following lien law procedures.

If you do not give an Information Notice To Owner About Construction Liens:

- You lose your rights to pursue a lien claim.
- Your license can be suspended for a discretionary period of time
- You can be assessed a civil penalty for each offense if you are the original contractor.

Tips for Filing Liens

This following table provides information on some but not all of the steps and precautions that must be taken so that your claim of lien may be valid and may be enforced, if necessary. The Oregon Construction Lien Law is complicated, and the LCB advises that all procedures and follow-through on the preparation of any lien should be checked by an attorney. Also, construction lien statutes are amended on a regular basis by the Oregon Legislature and, as such, the general information contained in this summary may be dated. In addition, all contractors should make sure that they are licensed.

> **Note:** As with all the information in this guide, this is for general information only, and **must not be construed as legal advice**.

PRE-CLAIM NOTICES		
When	**Who**	**Action Required**
Before performing work	All original contractors who perform work for the owner of a "*residential structure*" or "*zero-lot-line dwelling*" if the aggregate contract price exceeds $2,000 (If original contract does not exceed $2,000 but subsequent negotiations result in contract being amended to exceed $2,000, original contractor must then deliver written contract).	Have a written contract required by ORS 87.037 (2007) (effective 1/1/08). See also ORS 701.005 definitions.

On date contract is signed (or within 5 days of agreement)	All original contractors engaged in residential construction that exceeds $1,000. (If original contract does not exceed $1,000, but subsequent negotiations result in contract being amended to exceed $1,000, original contractor must then send notice.) Original Contractor is defined at ORS 87.005(7).	Provide Information Notice to Owner to all owners. Must use the form provided by the Oregon Construction Contractors Board. (ORS 87.093)
Should be sent within 8 business days of first delivery of material or performance of labor.	All original contractors, subcontractors, and suppliers who are required to give this notice.	Provide Notice of Right to a Lien to all owners (ORS87.021) and mortgagees (ORS 87.025).
Within 15 business days after receipt of written demand from owner or mortgagee (for demands received before claim of lien is recorded).	All original contractors, subcontractors, and suppliers.	Send to owner or mortgagee a list of materials or labor, etc. with statement of charges and unpaid balance. The owner may, in the alternative, be provided with a statement of the contractual basis for supplying the materials, equipment, services or labor, including the percentage of the contract completed, and the charge therefore to the date of the demand. (ORS 87.027 (owners) & ORS 87.025 (mortgagees))

THE CLAIM		
When	**Who**	**Action Required**
Within 75 days after last substantial performance of labor, delivery of materials, or rental of equipment or 75 days after completion of construction, whichever is earlier.	All original contractors, subcontractors, and suppliers.	Record Claim of Lien in county where real property is located.(ORS 87.035)
POST-CLAIM NOTICES		
When	**Who**	**Action Required**
Within 20 days after the Claim of Lien is recorded.	All original contractors, subcontractors, and suppliers who have recorded a Claim of Lien.	Provide a Notice of Filing Claim of Lien to all owners and mortgagees with a copy of recorded Claim of Lien attached. (ORS 87.039)
Within 5 days after receipt of written demand from owner (for demands received after Claim of Lien is recorded.	All original contractors, subcontractors, and suppliers who have recorded a Claim of Lien.	Provide to owner a list of the materials and supplies with the charge therefore, or a statement of a contractual basis for the owner's obligation, with statement of charges and unpaid balance.(ORS 87.057)

Not less than 10 days before filing suit to foreclose Claim of Lien.	All original contractors, subcontractors, and suppliers who have recorded a Claim of Lien.	Provide Notice of Intent to Foreclose Claim of Lien to all owners and mortgagees. (ORS 87.057)
THE ACTION		
When	**Who**	**Action Required**
Within 120 days after Claim of Lien is Recorded.	All original contractors, subcontractors, and suppliers who have recorded a Claim of Lien.	File suit to foreclose lien. (ORS 87.055)

Chapter 12: Building Codes and Permits

What this chapter covers:

- What the Building Codes Division is.
- The process for making changes to Oregon building codes.
- Information about the codes used in Oregon.

The Building Codes Division

The Building Code Division (BCD) is part of the Oregon Department of Consumer and Business Services. The mission of the BCD is to work with Oregonians to ensure safe building construction while promoting a positive business climate within the state of Oregon. The BCD, in conjunction with its seven advisory boards, develops the statewide building code. The BCD also administers exams for specialty trade licenses and inspector certifications. Most permit and inspection services are provided by local city or county building departments. These services are essential in building safe and effective structures in Oregon.

The BCD does not administer codes for landscape construction in Oregon; however, when landscape contracting businesses perform construction work subject to the BCD, the codes must be adhered to. This is accomplished by:

- administering a uniform statewide building code that sets standards for construction
- providing code interpretation
- investigating license violations
- certifying inspectors and licensing trade professionals
- issuing certain construction and operating permits
- ensuring that cities and counties conduct plan reviews, issue permits and provide inspections according to the statutes, rules, and codes that govern these processes

The BCD has statutory authority for the enforcement and administration of the state building code. The BCD provides the following services:

- **Code development and interpretation.** BCD develops and maintains Oregon's construction codes and rules for use by state and local jurisdictions. BCD helps local building officials, contractors, and those who need authoritative interpretation of various specialty codes.

- **Compliance.** Services are provided to local jurisdictions, contractors, and the public to ensure compliance with the appropriate laws, including licensing, permitting and code requirements.
- **Licensing and certification.** BCD administers exams and issues licenses required for plumbing; electrical; elevator installation and repairs; boiler installation, maintenance and repair; and manufactured dwelling installation. BCD also processes and issues inspector certifications. BCD records continuing education credits for licensed and certified professionals.
- **Permits and inspections.** The BCD issues permits and administers the building code in a few smaller jurisdictions and for the elevator and boiler programs. The permit process includes the review of plans for construction. State inspection services are provided to manufacturers and dealers of prefabricated structures and components.

The BCD is assisted by seven advisory boards in adopting and amending the specialty codes. These boards also have varying levels of responsibility for specialty trade licensing, enforcement and code appeals. The following boards are comprised of industry and public representatives:

- Building Codes Structures Board
- Electrical and Elevator Board
- Oregon State Plumbing Board
- Mechanical Board
- Residential Structures Board
- Board of Boiler Rules
- Manufactured Structures and Parks Board

Process for Adopting and Revising Oregon Building Codes

The BCD is authorized by statutes to adopt uniform building codes in Oregon. The national model codes are amended and adopted in the state as Oregon specialty codes. Any individual can submit a code amendment proposal during the code adoption process. Codes are generally adopted every three years. Between national code adoptions, the Oregon specialty codes can be amended as allowed by the appropriate statutes. Since codes can change, contractors should consult with the jurisdiction that governs the site where the project is located. In preparing an estimate, the contractor should verify project code requirements, plan review requirements, the process for obtaining permits, and when to call for inspections.

Codes Used in Oregon

The following is a list of the codes used in Oregon. Refer to BCD's website at www.bcd.oregon.gov for information and recent changes. Changes made to the national model code are identified by a special mark, and for clarity, are generally printed on colored paper.

Code	Description
2008 Oregon Residential Specialty Code	Oregon adopted the *2008 Oregon Residential Specialty Code* effective April 1 of 2008. It is based on the 2006 edition of the ICC *International Residential Code*. The plumbing and electrical chapters of the International Code are not used in Oregon. The *Oregon State Plumbing Code* and the *Oregon State Electrical Code* apply in Oregon. The scope of this code has been expanded to include multifamily units and includes—with limitations—townhouses, apartments, and row houses including their accessory structures. (Row houses are covered in Appendix O of the *Oregon Residential Specialty Code*.) Low-rise multiple-family dwellings covered in Appendix N of the *2005 Oregon Residential Specialty Code* are now covered under the *Oregon Structural Specialty Code*.
2007 Oregon Structural Specialty Code (OSSC)	The OSSC consists of the 2006 edition of the *International Building Code with Oregon amendments*, which was adopted on April 1 of 2007. This code applies to all structures not regulated under the *Oregon Residential Specialty Code*, including: • Commercial structures • Transient lodging, such as hotels and motels • Certain residential structures subject to licensure by the Oregon Department of Human Services • Low-rise multiple family dwellings

2007 Oregon Mechanical Specialty Code (OMSC)	Oregon adopted the *2007 Oregon Mechanical Specialty Code (OMSC)*, which is based on the 2006 *International Mechanical Code*, Oregon amendments and the *2006 International Fuel Gas Code,* as an appendix, effective April 1 of 2007. The OMSC applies to all structures not covered under the *Oregon Residential Specialty Code*.
2008 Oregon Plumbing Specialty Code (OPSC)	Oregon adopted the *2008 Oregon Plumbing Specialty Code* effective April 1 of 2008. It is based on the 2006 edition of the *Uniform Plumbing Code*.
2008 Oregon Electrical Specialty Code (OESC)	Oregon adopted the *2008 Oregon Electrical Specialty Code* effective April 1 of 2008, which is based on the 2008 edition of the *National Electrical Code*. This code contains requirements for electrical installations.
2002 Oregon Manufactured Dwelling and Park Specialty Code	National standards are the *Manufactured Home Construction and Safety Standards,* the *Manufactured Home Procedural and Enforcement Regulations*, and the *1999 National Electrical Code.* Instructions for installations, alterations, and additions to manufactured dwellings in Oregon are found in the *2002 Oregon Manufactured Dwelling and Park Specialty Code*.
2007 Oregon Fire Code	The *2007 Oregon Fire Code* is based on the *2006 ICC International Fire Code* with Oregon amendments.

How to Use Appropriate Building Code Books

Although all the codes differ somewhat in their specific requirements, each code is arranged in a similar manner.

It is quite easy to use a code book. First, determine the term or subject area for which you need information. This is called the key word. Then look up that item in the index.

Statutes and Rules

The statewide building code covers the technical requirements of construction projects, while statutes and rules dictate licensing, permitting, and other administrative processes. The statutes and rules that govern BCD's activities can be found on its website at: www.bcd.oregon.gov.

Permits

Permits are required for most new construction and alterations or additions to existing buildings, including structural, plumbing, mechanical, and electrical work. Individual city and county jurisdictions may have additional permit requirements based on local geographic, seismic, and climatic conditions. As a landscape contracting business owner or managing employee, you must make sure to obtain the required permits before the work is performed and to have the work inspected after the work is completed. Some of the required permits are:

- **Backflow Assemblies**. Backflow assemblies are for irrigation systems and water features. These plumbing fixtures may be required to be tested after installation and inspection before the permit is finalized.
- **Retaining Walls**. Depending on the requirements of the jurisdiction the business is performing work in, a retaining wall above a certain height (measured from the bottom of the base to the top of the wall) may require a permit, engineering, and inspection.
- **Driveways.** A driveway, for entering from a street onto a property, may require a permit.
- **Decks.** Decks that are a certain height off the ground or attached to a structure may require a permit.
- **Low Voltage.** Low voltage wiring for irrigation systems and low voltage lighting is a state mandate and may require a permit in many local areas.

CAUTION!

Never assume that you don't need a permit! Always check with the local building codes official BEFORE installing any of these items in a landscape. Failure to comply with permit requirements may result in civil penalties, loss of revenue and revocation of the Landscape Construction Professional and Landscape Contracting Business license.

There may be property owners who do not want a landscape contracting business to obtain a building permit even though they want the landscape contracting business to perform work. If a licensed landscape contracting business works without a required permit, the LCB may revoke or suspend the landscape contracting business license and assess a penalty.

In addition, BCD Compliance will take action against the landscape contracting business, which must comply with permit and building code requirements, since the person responsible for performing the work is responsible for obtaining permits.

Applying for a Permit

Landscape contracting business must apply for a required permit at the building department that has jurisdiction in the area where the landscape construction work will be performed. To find the appropriate building department, call the nearest city hall, give the address of the construction project or installation, and ask for contact information of the building jurisdiction that issues the permit. Be sure to provide the job site address and the type of work being performed. Contact the building official in the local jurisdiction if there are code or permit questions. There is a list of local building departments on the BCD's website: www.bcd.oregon.gov.

To apply for a permit, information about the project must be prepared before a plan review. If the jurisdiction does not require a plan review, the information needs to be presented when the permit application is submitted. Generally, the following project information is prepared and submitted in applying for a permit:

- address or directions to the job site where inspections will be conducted.
- local government or jurisdictional approvals, if needed, such as:
    - ♦ land-use actions completed
    - ♦ zoning approvals
    - ♦ sanitation verification and approval

  - ♦ fire district approval
  - ♦ septic system or sewer permit
  - ♦ water district approval
  - ♦ soils report
  - ♦ erosion control plan and required permit
- complete sets of legible plans, which include:
  - ♦ site or plot plan drawn to scale
  - ♦ foundation plan
  - ♦ basement and retaining walls
  - ♦ floor plans
  - ♦ cross section(s) and details
  - ♦ elevation views
  - ♦ wall bracing or lateral analysis plans
  - ♦ floor and roof framing assemblies
  - ♦ beam calculations
  - ♦ manufactured floor and roof truss design details
- energy code compliance
- engineer's calculations, if required

Note: Refer to applicable state and local building codes and to other local ordinances to find requirements for submitting drawings for a permit.

To obtain a permit, there must be a completed application and plans attached for review along with the appropriate payment for the permit. Fee schedules and valuation tables are available to help determine permit fees. The fee tables vary from jurisdiction to jurisdiction. Contact the jurisdiction in your area.

Online Permit Services

With the support and cooperation of local government and the construction industry, the BCD has established, and continues to expand, online permit services. The existing Quick Permits program, which began in just six jurisdictions, has expanded to 20 and continues to grow. Quick Permits allows contractors to apply and pay for multiple non-plan review permits from multiple building departments from a single online location at buildingpermits.oregon.gov.

Based on the success of the Quick Permits program, the legislature authorized the BCD to develop the Oregon e-Building Permits service, which will offer a full range of building department services online. This new system will provide online building department services for any location in the state through a one-stop website. Services will include:

- application, payment, and receipt of trade and building permits
- intake, review, and tracking of plans
- scheduling, tracking, and reporting of inspections
- tracking of construction and permit activity from plan review through final sign-off

Specialty Licenses

Generally, any person who installs, alters, or repairs another person's property involving selected specialty trade practices is required to be licensed with the BCD. Contractors or businesses with two or more specialty licenses in electrical, elevator, boilermaker, or plumbing trades may combine licenses and renew them at the same time.

Certain specialty trades must be licensed with the BCD, including:

- boiler or pressure vessel licensees Classes 1-6
- electrical journeymen in various classifications
- elevator journeymen
- manufactured dwelling installers
- plumbing journeymen in various classifications

Contact the BCD for a complete list of specialty trades that must be licensed or refer to the BCD website at www.bcd.oregon.gov.

Besides having a boiler, electrical, elevator, and/or plumbing license, businesses must also be licensed as contractors with the CCB.

In addition to any other sanction or penalty, the appropriate Board may suspend or revoke a license if the contractor does not comply with the requirements of that license, or engages in an act that causes the CCB or LCB to impose a sanction.

Penalties for working without a specialty license are established by the appropriate boards of the BCD. The BCD charges a penalty between $1,000 and $5000 for failure to obtain a permit, for working without the proper license, or for allowing others to work without the proper license.

Inspection Requirements

The permit holder requests inspections when each phase of the construction is ready. Usually, inspections are made within 48 hours of the request. If, however, the inspection is not made, the portion of construction requiring inspection must remain open until the inspector gives approval.

Type of Inspection	Description
Footing or foundation	Footing or foundation inspections are made after forms are set and steel is in place, but before concrete is placed.
Concrete slab or under-floor	Concrete slab or under-floor inspections are to be made after all in-slab or under-floor building services are installed, and plumbing and mechanical systems are installed, but before the concrete is poured or the deck or subfloor is installed.
Plumbing, mechanical, and electrical systems rough	Rough installations are required to be inspected and approved prior to the framing inspection. Some jurisdictions have multi-certified inspectors who can inspect these systems at the same time the framing inspection is done. Backflow installation inspections are normally done after the backflow has been installed.
Framing and masonry	Framing and masonry inspections are made after all mechanical, plumbing, and electrical systems are inspected, framing is completed, and fire-stopping is installed, but before the insulation is installed.
Insulation and vapor barrier	Insulation and vapor barrier inspections are made after all insulation and required vapor barriers are installed and before wall coverings are installed. (Attic and under-floor insulation visible at the time of the final inspection can be inspected at that time.)
Final inspection and the Certificate of Occupancy	Final inspections are made after the successful completion of all required inspections and before the structure is ready for occupancy. The final inspection ensures that there is no fire, life, safety, or health issues, and that the structure is code compliant for occupancy. After successful completion of final inspection, single residential or one-and two-family dwellings can be occupied. Other structures are issued a Certificate of Occupancy before occupancy is allowed. Contact the local jurisdiction to prepare for final inspection.

How to Help Inspections Go Smoothly

If you have questions about code or compliance for a project, call the local building jurisdiction before beginning work. It shows your intent to do proper work that passes inspections the first time. Here are several steps you can take to make sure the inspection goes smoothly:

- Make sure the project is ready for inspection.
- Put the Inspection Record Card in a weatherproof cover and post in an accessible and conspicuous place to allow the building official to make required entries, if required.
- Know the code and make sure your project is compliant with it.
- Relate to inspectors in a businesslike manner.

If you are not sure whether your project complies with code, check with the local building jurisdiction. The local building official would prefer to help before the project is finished than see incorrect work and have to re-inspect the project.

A landscape contracting business is responsible for knowing when work must be inspected, making timely requests for inspections, providing information for job-site inspections, and code compliance. Landscape contracting businesses have the right to appeal the decision of any inspector or local building official when they disagree with the application of the code. They can also propose code changes through the code adoption process.

The local building official has authority to interpret the code in applying it to a project. These interpretations must conform to, or be consistent with, the intent and purpose of the code.

The local building official is permitted to enter, at reasonable times, any building, structure, or premises to perform duties authorized by the code. This authority includes entry for cause of a possible violation, or for unsafe, dangerous, or hazardous conditions.

In addition to code-stimulated inspections, building officials in your jurisdiction may require other inspections to ensure compliance with special code requirements. Check with your local jurisdiction, for additional inspection requirements in the following categories: Mechanical, Plumbing, Electrical, and Manufactured Dwellings. Boilers and pressure vessels and elevators are inspected by the state.

Stop Work Orders

Local building officials have the right to issue a stop work order if they feel that work is unsafe, not covered by permits, or is otherwise not in compliance with the building codes. It requires the work listed in the stop work order to stop immediately.

To avoid getting a stop work order, do the following:

- make sure a valid permit is obtained
- make sure the inspector is informed about any corrections or violation notices
- execute the work in compliance with code provisions, approved plans or drawings, and other applicable laws

If a stop work order is posted on a job site, it is essential that you communicate with the person who posted it. The stop work order specifies what work must be stopped and as well as the conditions under which work may be resumed. The building official is not required to give notice before stopping the work.

Failure to comply with a stop work order can have very serious consequences, including civil penalties, permit or license revocation, or court action. In addition, an industrial accident that occurs after a stop work order can result in additional civil and even criminal liability.

> It is not uncommon for a stop work inspection to be issued for safety or code violations during a surprise inspection.

Sources of Building Codes

To purchase code books, contact any of the following:

- Building Tech Bookstore, Inc. (800-ASK-BOOK)
- www.buildingtechbooks.com
- University of Oregon Bookstore (541-346-4331) www.uobookstore.com
- Chemeketa Community College Bookstore (503-399-5131)
- bookstore.chemeketa.edu
- Oregon Building Officials Association (503-873-1157) www.oboaonline.org www.cbs.state.or.us/external/bcd/codestandards.html
- International Code Council (888-422-7233), www.iccsafe.org.

The following is a list of places to check if you wish to view code books without purchasing:

- most public and university libraries
- city and county building departments (see contact information in Appendix A)
- Building Codes Division www.bcd.oregon.gov (ICC codes are available for viewing on the BCD's website)

Chapter 13: Safety and Hazard Communication

What this chapter covers:

- What the Oregon Safe Employment Act is.
- Safety guidelines for specific types of landscape construction activities.
- What OR-OSHA is.
- Requirements for hazard communications.

Oregon Safe Employment Act

Oregon law requires that anyone in Oregon who advertises, operates as, or uses the title of a landscape contractor; landscape construction professional, or landscape contracting business must be licensed with the Landscape Contractors Board (LCB).

Before a licensed is issued, landscape construction professionals must take a comprehensive exam administered by the LCB. The exam includes questions about Oregon OSHA's workplace safety and health rules. This guide acquaints those who plan to take the exam with Oregon OSHA's requirements. Though some of the following information relates directly to landscape construction work, there are other safety regulations included below that may require additional licensing before a person can perform those functions.

The purpose of the Oregon Safe Employment Act (OSEA) is to ensure safe and healthful working conditions for every working person in Oregon. The Oregon Safe Employment Act says:

> "Every employer shall furnish employment and a place of employment that are safe and healthful for employees therein, and shall furnish and use such devices and safeguards and adopt and use such practices, means, methods, operations, and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees."

The Oregon Safe Employment Act defines an employee as anybody who works for pay (financial or anything of value) and is under the direction and control of an employer or anybody covered by workers' compensation insurance as a subject worker under ORS 656.

The Oregon Safe Employment Act defines an employer as any person who has one or more employees, or any sole proprietor or member of a partnership who elects workers' compensation coverage as a subject worker pursuant to ORS 656.128.

Rules for All Workplaces

The following are general rules that apply to all Oregon workplaces.

Employers must make a reasonable effort to ensure that employees do the following:

- work and act in a safe and healthful manner
- conduct their work in compliance with all applicable safety and health rules
- use all necessary means and methods to safely accomplish work
- not remove, displace, damage, or destroy safety devices or guards

Employers must investigate every employee lost-time injury.

Employers must ensure that their employees receive proper supervision and training.

Use of alcohol or illegal drugs on the job is not permitted; use of prescriptions drugs or medications that impair an employee's ability to work safely are also prohibited.

Recordkeeping and Reporting

Businesses that had more than 10 employees at any time during the last calendar year must keep Oregon OSHA injury and illness records.

Oregon OSHA's forms for recording and reporting workplace injuries and illnesses include the OSHA 300, 300-A, and DCBS Form 801.

- The OSHA 300 form is the Log of Work-Related Injuries and Illnesses.
- The OSHA 300-A is the Summary of Work-Related Injuries and Illnesses. Post the OSHA 300-A each Feb. 1st and keep it posted until April 30.
- The Department of Consumer Business Services (DCBS) Form 801 is the Workers and Employers Report of Occupational Injury or Disease.

Keep the OSHA 300 Log, OSHA 300-A, and the DCBS Form 801 for five years following the end of the calendar year that they cover.

You must report all fatalities and hospitalizations to Oregon OSHA: (800) 922-2689 or (503) 378-3272. Employee fatalities must be reported not more than eight hours after the occurrence or employer knowledge thereof, whichever comes first. Overnight hospitalization for medical

treatment must be reported no more than 24 hours after occurrence or employer knowledge thereof, whichever comes first.

> **Note:** Other Oregon OSHA rules may also require additional written records. Find out about these requirements in the guide, "Put It In Writing: The complete guide to Oregon OSHA's written requirements for the workplace." The guide is available on the Oregon OSHA Web site, www.orosha.org, under "Publications."

Safety Committees

Employers with 11 or more employees must have safety committees. Employers with 10 or fewer employees must also have safety committees if any of the following applies:

- The employer has had one or more employees lose time from work or on restricted work due to a work-related injury.
- The employer has a 0042, Landscaping, NCCI classification. (If you don't know your NCCI classification, check your workers' compensation insurance documents or ask your insurance carrier.)

Safety committees must have an equal numbers of employer and employee representatives. Businesses with 20 or fewer employees must have at least two safety committee representatives. Businesses with more than 20 employees must have least four safety committee representatives.

If your workplace has 10 or fewer employees—including part-time and seasonal employees—you can start a safety committee that meets the needs of your small business. Paperwork is minimal and the meetings are less formal than traditional safety committee meetings. Rules and procedures are in the booklet, "Safety Committees for workplaces with 10 or fewer employees." The guide is available on the Oregon OSHA Web site, www.orosha.org, under "Publications."

Safety Guidelines

This section lists safety guidelines for a number of activities and types of work.

Electrical Safety Guidelines

The following safety guidelines are for electrical wiring and equipment.

- Employers must ensure that electrical equipment is free from hazards that are likely to injure employees.
- The path to ground from circuits and equipment must be permanent and continuous.

- All lights for general illumination must have protection from accidental contact or breakage.
- Temporary lights must not be suspended by their electric cords.
- Flexible cords and cables must be protected from damage.
- Flexible cords and cables may not pass through doorways or other pinch points.
- Extension-cord sets used with portable electric tools and appliances must be the three-wire type and designed for hard or extra-hard use.
- Flexible cords must be used only in continuous lengths without splices or taps.
- There must be strain relief when flexible cords connect to devices and fittings.
- Flexible cords, extension cords, and cables must not be used as substitutes for fixed wiring, run through doorways or windows, be attached to building surfaces, or concealed behind walls or in ceilings or floors.

Ground-fault-circuit interrupters (GFCI) are life-saving devices that protect people from electrocution. Under normal conditions, electrical current moving through a circuit flows at the same rate (amperage) all along the circuit; amperage flowing away from the electrical source should be the same amperage returning to the source. GFCIs sense imbalances or differences along the electrical circuit and shut it down when needed.

Employers must use approved GFCIs with all 125-volt, single-phase, 15-, 20-, and 30-ampere receptacles for temporary power and make them available for use by employees on construction sites. GFCI protection must be at the outlet end of the circuit. Extension cords or other devices with listed GFCI protection identified as portable are acceptable.

Ladders

The following safety guidelines are for ladders.

- Inspect ladders and remove them from service if they are defective.
- There can be no dents, breaks, or bends in the side rails or rungs.
- Portable ladders must have non-slip bases.
- Use ladders only for purposes approved or recommended by the manufacturer.
- Do not load ladders beyond their working load rating.
- Train employees in the safe use of ladders.

- Do not use ladders on boxes, barrels, or other unstable bases.
- Do not use ladders with broken or missing steps, rungs, cleats, or broken side rails.
- A ladder for access to a roof must extend at least 3 feet above the access point.
- The climber must face the ladder and have free use of both hands when climbing up or down.
- There must be only one person at a time on a ladder unless its labeling says otherwise.
- Do not use stepladders more than 20 feet long.
- Do not climb on the back section of the ladder unless it has steps meant for climbing.
- Do not stand on the top step or top cap of a stepladder.
- Do not use stepladders in freestanding positions when not fully open.
- Ladder repairs must restore the ladder to its original design criteria.
- Face the ladder when climbing or descending.

Noise Exposure

Employers whose employees are exposed to noise levels that are equal to or greater than 85 dBA averaged over an eight-hour period must have hearing-conservation programs. The program must include audiometric testing, employee training, and personal hearing protection.

Flammable and Combustible Liquids (Gas and Diesel Fuel)

Flammable and combustible liquids are classified according to their flashpoints. Flammable liquids have a flashpoint below 100°F and are Class IA, Class IB, or Class IC. Combustible liquids have a flashpoint at or above 100°F and are Class II or Class III.

Storage Cans

Use storage cans that have been approved by the U.S. Department of Transportation (DOT) r a nationally recognized testing laboratory. They may be either metal or plastic and in quantities of 5 gallons or less.

Inside Buildings

Rules for storage of flammables and combustibles inside buildings vary depending on the class of liquid, the type of building, type of occupancy, protection systems (fire sprinklers), and types of containers.

Vehicle Transport

Gasoline and other low-flashpoint liquids carried on Class A, B, and D vehicles that transport workers must be in U.L.-approved closed safety containers that have a maximum 5-gallon capacity. Containers must be carried in a safe location outside the passenger compartment.

Medical Services and First Aid

Employers must furnish first-aid supplies for the types of injuries that could occur at their workplaces. First-aid supplies must be stored in unlocked protective containers that are readily accessible to all employees. Emergency medical services must be available for treating injured employees. If emergency medical services are not available, the workplace must have a qualified first-aid person.

Where employees handle substances that could injure them by getting into their eyes or onto their bodies, provide them with eyewash, shower, or both based on the hazard. Employers must also have emergency medical plans that ensure medical services are readily available to employees with work-related illnesses or injuries.

If a physician or an ambulance with emergency medical technicians is readily available, the plan must include a phone number that will summon the responder; 911 is acceptable in areas where the service is available. If medical services are not readily available, the employer must have a plan for responding to serious employee injuries.

Commercial and Industrial Vehicles

The following safety guidelines are for commercial and industrial vehicles.

- Employees younger than 18 cannot operate commercial or industrial vehicles.
- Only trained and authorized employees are permitted to operate vehicles.
- Employees are prohibited from operating unsafe vehicles.
- No one but the operator may ride on a vehicle unless there is a safe place for passengers.
- Employees must not drive vehicles up to anyone standing in front of a stationary object.
- All vehicles that have windshields must have powered wipers.
- Damaged windshields and windows that impair the operator's vision must be replaced.

- All vehicles must have brakes that will control them when they are fully loaded on any grade on which they operate.
- Parking brakes must be capable of holding loaded vehicles on any grade on which they operate that is free of ice or snow.
- All vehicles must be checked at the beginning of each shift to ensure that they are safe and free of apparent damage that could cause failure.
- All vehicles must have an audible warning device that can be clearly heard above surrounding noise.
- Vehicles with obstructed views to the rear must have backup alarms that can be heard above surrounding noise.

Powered Industrial Trucks

In addition to the preceding general safety guidelines for vehicles, there are additional safety guidelines for using powered industrial trucks (forklifts).

- Employers must ensure that employees who operate powered industrial trucks are competent; operators' competency must be evaluated at least once every three years.
- Employee training must include a combination of formal instruction, practical training, and evaluation.
- Employers must certify that each operator has received training; certification must include the operator's name, the training date, the certification date, and the trainer's name.
- At the beginning of each shift, operators must check all vehicles' service brakes, including trailer brake connections, hand brakes, emergency stopping brakes, tires, horns, steering, coupling devices, seat belts, operating controls, and safety devices.
- Spinner knobs are not permitted on steering wheels unless the steering mechanism prevents road reaction from transmitting to the steering wheel.
- No one, other than the operator, is permitted to ride on a powered industrial truck.
- Raising employees with a lift truck or loader requires a special platform that has standard guardrails and a guard to prevent them from contacting the lifting mechanism.

Earthmoving Equipment

All earthmoving equipment with roll-over protective structures must have seat belts (except earthmoving equipment in which the operator stands).

Equipment with an obstructed view to the rear must have a working back-up alarm that is distinguishable from surrounding noise.

Fuel-Powered Tools

The following safety guidelines are for fuel-powered tools of all kinds.

- Stop all fuel-powered tools while refueling or servicing them.
- All portable, power-driven circular saws must have guards.
- Crosscut table saws and rip saws must have hood guards.
- Use all tools with shields, guards, and attachments as recommended by the manufacturer.

Chain saws are particularly dangerous. The following safety guidelines are specifically for chain saws.

- Employees who use chain saws must wear chaps or leg protectors that cover the leg from the upper thigh to mid-calf. Leg protectors must be made of material designed to resist cuts.

> Safety counts: there is rarely a minor chain saw accident.

- All power chain saws must meet applicable requirements of ANSI B175.1-1985, Safety Code for Power Chain Saws.
- Inspect saws daily before use and keep in good repair at all times.
- Do not use saws with cracked or loose handlebars or defective parts.
- Stop chain-saw engines while refueling them.
- Chain saws must have an operable chain brake if originally designed and equipped with one.
- Chain brakes and other manufacturers' safety features must be maintained in proper working order.

Tree and Shrub Services

Tree work is not considered landscape construction work. Check with the Construction Contractors Board about proper licensing for working on trees above 15 feet in height or that have a diameter greater than 4 inches measured 12 inches above the soil line. This information is provided as a safety guide to those who are properly licensed to perform this work.

Tree and shrub services have a number of safety guidelines because of the additional inherent risks.

In addition to the general safety and first-aid procedures described earlier, tree and shrub services must do the following:

- Employees must be able to provide cardiopulmonary resuscitation (CPR) if necessary.

- Employees must be trained in tree-top rescue procedures.
- Employers must furnish first-aid supplies for the types of injuries that could occur at their workplaces.
- First-aid supplies must be stored in unlocked protective containers that are readily accessible to all employees.

Traffic control

Employers must control pedestrian and vehicular traffic at all job sites on or adjacent to highways, streets or railways. Traffic controls must conform to the American National Standards Institute (ANSI) D6.1e-1989, "Manual on Uniform Traffic Control Devices for Streets and Highways."

Tools

There are a number of safety guidelines for operating specific tools.

Sprayers

Sprayers and related equipment must have slip-resistant cover material on all walking and working surfaces. In addition, moving equipment on which workers stand and spray must have a guard railing around the work area that complies with the requirements in OAR 437, Subdivision D: Walking-Working Surfaces (1910.21 – 1910.32).

Stump Cutters

Stump cutters must have enclosures or guards that protect the operator. In addition, all operators and workers in the immediate area must wear eye protection.

Electric tools

All portable electric hand tools must have a three-wire cord with the ground wire permanently connected to the tool frame and a means for grounding the other end, or be double insulated.

Work procedures

The following guidelines apply to safety for specific work situations.

Climbing

Workers who climb in trees must always do the following:

- A tree worker must be tied in with an approved climbing rope and safety saddle when working 10 feet or more above the ground.
- The worker must use a climbing rope even when working from a ladder or scaffold.

- Climbers must inspect tree limbs while climbing.
- Climbers must secure themselves with the climbing line before starting the climb and must remain tied in until the work is done and they are back on the ground.

Pruning and Trimming

Workers who prune and trim trees must always do the following:

- Hang pole pruners and pole saws securely in a vertical position. Do not hang them on utility wires or cables or leave them in the tree overnight. Always hang pruners and saws so that the sharp edges are away from workers.
- Hook a scabbard or sheath to the climbing belt or safety saddle to carry a handsaw.
- Give warning before dropping a limb.
- Attach a line separate from the climbing line to limbs that cannot be dropped or that are too heavy.
- Remove cut branches or climbing ropes from trees overnight.
- Inspect ropes for cuts or abrasions before starting work; if any are found, discard the rope, use it for some other purpose, or cut the defective section off.
- Have a second worker nearby during all tree working operations.
- Be above large limbs when lowering them.
- Use guidelines, hand lines, or tag lines when conditions warrant.

Cabling

Workers using cables must always do the following:

- Branches must be brought together by using a block and tackle, a hand winch, a rope, or a rope with a come-along.
- No more than two workers may be in a tree during cabling installation.
- When releasing the block and tackle, workers in trees must be off to one side in case the lag hooks pull out. Ground workers must not stand under the tree while cable is installed.
- Workers should carry tools for cabling, bark tracing, and cavity work in a bag or belt designed for that purpose.

Tree-felling

Before felling trees, workers must develop a safety plan that ensures that:

- Consideration is given to the tree and the surrounding area for anything that may create a hazard when the tree falls, including the shape and lean of the tree, wind force and direction, decayed or weak spots, and the location of other employees or structures.
- There is a planned escape route and the work area is cleared to permit safe working conditions.
- All tree workers know exactly what to do during tree-falling.
- Workers not directly involved are at least two tree lengths away from the tree being felled.
- A notch and back-cut is used in felling trees more than 5 inches in diameter, breast height.
- Ripping or slicing cuts are not used to fall a tree.
- The depth of the notch is about one-third the diameter of the tree.
- The height of the notch is about 21/2 inches for each foot in diameter of the tree.
- The back-cut must be made higher than the apex of the notch to prevent kickback.
- An audible warning is given to those in the area just before the tree falls.
- Wedges, block and tackle, rope, or wire cable is used if there is a risk the tree could fall the wrong way or damage property (unless there is an electrical hazard).
- Limbs are removed so that the tree will fall clear of wires and other objects.
- Special precautions are taken to rope rotten or split trees to prevent them from falling in unexpected directions.
- The faller retreats to a safe location just before the tree falls.

Chippers

Chippers must meet the following safety criteria:

- Enclose rotating chipper components in a housing capable of retaining broken chipper knives or foreign material.
- Feed chutes and side members must prevent the operator from contacting rotating blades under normal operating conditions.
- Chippers that have mechanical infeed systems must have:
  - ♦ An infeed hopper that measures at least 85 inches from the blades or knives to ground level at the center line of the hopper

    - ♦ A flexible anti-kickback device in the feed hopper that protects the operator and others from flying chips.

- A shut-off switch must be within convenient reach of the operator.
- Chippers that do not have mechanical infeed systems must have a quick-stop/reversing device on the infeed across the top and along each side of the hopper, as close to the feed end of the hopper as practicable. The device must be within convenient reach of the operator.

In addition, workers who operate or work near chippers must always do the following:

- Chipper operators must be familiar with the manufacturers' operating instructions, maintenance procedures, and safe work practices.
- Follow energy-control procedures in Subdivision 2/J, 19 10.147, (Control of hazardous energy) to prevent accidental restart of equipment during shutdown for service or maintenance.
- Guard exposed adjacent blades when replacing chipper blades.
- Close and secure all access panels before operating the chipper.
- When feeding the chipper, make sure that a coworker is nearby.
- Do not feed foreign objects into the chipper.
- Feed chippers from the side of the center line; turn away from the feed table as materials are drawn into the rotor. Feed chippers from curbside whenever practical.
- Ensure that feed and discharge chutes are in place to prevent contact with rotating blades when the chipper is operating.
- Trailer chippers must be chocked or otherwise secured when detached from trucks.
- Before towing a chipper, cross safety chains under the tongue of the chipper and attach them to the towing vehicle.
- Employees in the immediate area of an operating chipper must wear appropriate personal protective equipment.
- Employees feeding chippers must not wear loose clothing, gauntlet-type gloves, rings, or watches.

Storm Work and Emergencies

Only authorized representatives of the electric utility system operator may perform tree work in situations involving energized electrical power conductors.

In an emergency due to tree operations, suspend work and notify the system operator immediately.

Trenching

A trench is defined as a narrow excavation (the depth greater than the width) not more than 15 feet wide at the bottom. An excavation is any man-made cut, cavity, trench, or depression in the earth's surface formed by removing the earth.

- Before digging, determine the estimated location of utility installations (sewer, telephone, fuel, electric, water lines, or any other underground installations).
- Before employees begin work in an area exposed to public vehicular traffic, they must wear warning vests or other suitable garments marked with or made of high visibility material.
- A competent person must inspect excavations and adjacent areas at least daily for possible cave-ins, failures of protective systems and equipment, hazardous atmospheres, or other hazardous conditions. Remove exposed employees from hazardous areas until the areas are safe. Inspect excavations after heavy rains and activities such as drilling or blasting that may increase the potential for hazards.
- Protect employees who work in excavations more than 5 feet deep by sloping or benching the sides, shoring the sides, or placing a shield between the sides of the excavation and the work area.
- Do not excavate below the level of the base or footing of any foundation or retaining wall unless a support system is in place, the excavation is in stable rock, or a registered professional engineer determines that the force exerted by the weight of structure will not endanger employees working in the excavation.
- Do not excavate under sidewalks or pavement unless an appropriately designed support system is in place or equally effective method is used.

Storing Materials

Oregon OSHA prohibits storing anything in a way that creates a hazard. Piles and stacks must be stable and not a hazard to employees. **Always store chemicals according to the information on the labels or material safety data sheets.** Storage requirements for flammables and combustibles vary according to the type of material, the type of container, and the storage area.

OR-OSHA

OR-OSHA offers a wide variety of safety and health services to employers and employees:

Service	Description
Consultative Services	Offers no-cost on-site safety and health assistance to help Oregon employers recognize and correct workplace safety and health problems. Provides consultations in the areas of safety, industrial hygiene, ergonomics, occupational safety and health programs, assistance to new businesses, the Safety and Health Achievement Recognition Program (SHARP), and the Voluntary Protection Program (VPP).
Enforcement	Offers pre-job conferences for mobile employers in industries such as logging and construction. Provides abatement assistance to employers who have received citations and provides compliance and technical assistance by phone. Inspects places of employment for occupational safety and health hazards and investigates workplace complaints and accidents.
Appeals, Informal Conferences	Provides the opportunity for employers to hold informal meetings with OR-OSHA on concerns about workplace safety and health. Discusses OR-OSHA's requirements and clarifies workplace safety or health violations. Discusses abatement dates and negotiates settlement agreements to resolve disputed citations.

Standards & Technical Resources	Develops, interprets, and provides technical advice on safety and health standards. Provides copies of all OR-OSHA occupational safety and health standards. Publishes booklets, pamphlets, and other materials to assist in the implementation of safety and health standards and programs. Operates a Resource Center containing books, topical files, technical periodicals, a video and film lending library, and more than 200 databases.
Public Education & Conferences	Conducts conferences, seminars, workshops, and rule forums. Coordinates and provides technical training on topics such as confined space, ergonomics, lockout/tagout, and excavations. Provides workshops covering management of basic safety and health programs, safety committees, accident investigation, and job safety analysis. Manages the Safety and Health Education and Training Grant Program, which awards grants to industrial and labor groups to develop training materials in occupational safety and health for Oregon workers.

For more information, call the OR-OSHA office nearest you. *(All phone numbers are voice and TTY.)*

<table>
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Safety

Safety is the responsibility of the employer. Though a business may think they have told their employees how to be safe, the employer’s actions and enforcement procedures are vital in maintaining a safe work place and jobsite

Oregon OSHA governs workplace safety in Oregon and there are many areas of concern that a landscape contracting business must pay attention to in order to be incompliance with the laws that govern workplace safety. OR-OSHA has publicized a pamphlet entitled Information for the Landscaping Professional (which has been incorporated onto this manual) which outlines many of the rules for working in the landscape profession including construction and maintenance.

Some areas of safety the Board feels are vital are "briefly" covered in the publication and though your business is required to comply with all laws

governing workplace safety, the Board has chosen to include some specific safety information in this manual.

First Aid

Medical Services and First Aid

(a) The employer shall insure the availability of medical personnel for advice and consultation on matters of occupational health.

(b) Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.

(c) In the absence of an infirmary, clinic, hospital, or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first aid training from the U.S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.

- First aid supplies shall be easily accessible when required.
- The contents of the first aid kit shall be placed in a weatherproof container with individual sealed packages for each type of item, and shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.

(d) Proper equipment for prompt transportation of the injured person to a physician or hospital, or a communication system for contacting necessary ambulance service, shall be provided.

Noise

General Requirements

An employer must have in place an effective hearing conservation program whenever employee noise exposures equal or exceed an 8-hour Time Weighted Average (TWA) of 85 decibels measured on the A-scale (85 dBA). A TWA of 85 dBA corresponds to a noise dose of 50%, also called the action level.

Employers must provide protection against the harmful effects of noise when employees are exposed to excessive noise levels (exceeding a TWA of 85 dBA) on the job. If you must raise your voice or shout to be heard above the noise in the workplace, this rule may apply. The following is a summary of the major sections of the rules.

Noise Monitoring

Conduct noise monitoring; include all employees affected by noise exceeding 85 dBA, TWA. Noise dosimetry is a method used to measure noise exposure. Not all employees need to be sampled; however, the noise monitoring must be representative of each affected employee's job. The monitoring should be designed to identify employees for inclusion in a Hearing Conservation Program. All employees must be notified of noise monitoring results that exceed 85 dBA, TWA.

Noise Controls

If noise levels exceed a TWA of 90 dBA, all feasible measures must be taken to reduce the noise exposure of employees to below 90 dBA. Whenever feasible engineering, administrative, or work-practice controls can be instituted, although insufficient to reduce exposure below the PEL, they shall be required in conjunction with personal protective equipment (PPE) to reduce exposure to the lowest practical level.

A Hearing Conservation Program

A hearing conservation program must be implemented for all employees exposed to noise levels above a TWA of 85 dBA. These five basic components comprise an effective Hearing Conservation Program:

- Exposure Monitoring
- Audiometric Testing
- Hearing Protection
- Employee Training
- Recordkeeping

Audiometric Testing

Establish and maintain an annual testing program if results from the initial monitoring equal or exceed a TWA of 85 dBA.

Baseline audiograms are required within six months from the date of an employee's first exposure to noise above 85 dBA. Subsequent audiograms are compared to the baseline audiogram to determine hearing loss. Audiometric tests must be performed and the audiogram evaluated by a licensed or certified audiologist, otolaryngologist, or other physician, or by a certified CAOHC technician.

Before testing employees, advise them to avoid activities that expose them to high levels of noise and to avoid non-occupational exposure (or use hearing protection) within the 14 hours prior to the test.

Compare the employee's annual audiogram to the baseline audiogram. If the comparison shows a standard threshold shift, the employer must either accept the results or retest the employee within 30 days.

Repeat the hearing test annually for all employee exposures over 85 dBA.

Follow-up Procedures

Within 21 days of receiving the report, notify, in writing, each employee whose audiogram shows a ***standard threshold shift (STS)***. Employees with a documented hearing loss must be fitted with hearing protectors, trained in their use and care, and required to use them. Employees who were already using hearing protectors must be refitted and retrained. Some employees may need to be referred to a qualified specialist for additional evaluation.

Standard Threshold Shift (STS)

A STS is a change in hearing, or loss, compared to the baseline of an average of 10 dB or more at 2000, 3000, and 4000 Hertz in either ear.

Employees who show an STS and are exposed to a TWA of 85 dBA or above, and employees exposed above 90 dBA, must wear protectors on the job.

Recordkeeping and Reporting

See OAR 437-001-0700(11), Recordkeeping and Reporting, for occupational hearing loss recording criteria (OSHA 300 log).

Hearing Protectors

Provide a variety of hearing protectors at no cost to the employees. Ensure proper initial fitting and correct use of all hearing-protection devices.

Hearing Protector Attenuation

Hearing protectors must attenuate (reduce) noise levels to a TWA of 90 dBA, or to 85 dBA for employees who have had a STS.

Training Program

Annually train employees in the Hearing Conservation Program on the following:

1. The effects of noise on hearing.
2. The purpose of hearing protection.

3. The advantages and disadvantages of various types of hearing protection.
4. Selection, use, and care of hearing protection.
5. The purpose of audiometric testing.

Pesticide Safety

Employers must provide information to pesticide handlers that describe appropriate personal protective equipment, hazards, mixing and application procedures, and first aid for exposure.

Pesticide labels and material safety data sheets include important information such as personal protective equipment requirements, first aid, and proper handling methods.

Employers must consider weather conditions such as temperature and wind in determining if it is safe for handlers to apply pesticides.

Employees must clean up spills promptly to avoid future exposures.

Personal Protective Equipment

Employers must assess their workplaces to determine if there are hazards that require employees to use personal protective equipment (PPE). They must document, in writing, the date of the assessment and who performed it. Employers must provide their employees with the appropriate PPE and require them to use it.

Before they use their PPE, employees must be trained so that they know how to use and maintain it properly. Employers must also keep records of employees who received training that include the employee's name, the type of training, and the training date.

High-visibility Garments

Employees who work where they could be struck by motor vehicles must wear highly visible upper-body garments that contrast sufficiently with the surroundings so that they stand out. During the evening, employees must wear reflective material visible from all sides for 1,000 feet.

Eye and Face Protection

Employees must use eye or face protection when they are exposed to flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases, or vapors.

Employees who wear prescription lenses must use eye or face protection that can be worn over the lenses without disturbing the proper position of the lens.

Employees who use lasers must have laser safety goggles that protect them from the specific wavelength of the laser and the laser's energy.

Respiratory Protection

Employers whose employees are exposed to respiratory hazards that cannot be controlled with engineering controls must implement comprehensive written respiratory programs. Programs must include the following:

- procedures for selecting respirators
- medical evaluations for employees required to use respirators
- fit-testing procedures for tight-fitting respirators
- procedures for proper use of respirators in emergencies
- procedures and schedules for cleaning, disinfecting, storing, and inspecting respirators
- training employees in the proper use of respirators, including putting on, removing, and maintaining them

Employers must provide respirators, training, and medical evaluations at no cost to employees.

Head Protection

Employees must wear hardhats if they work in areas where they could be struck in the head from falling or flying objects. Hardhats must meet the specifications in American National Standards Institute, Z89.1-1969.

Foot Protection

Employees must use protective footwear when they work in areas where there is danger of a foot injury.

Hand Protection

Employees must use appropriate hand protection when they handle hazardous substances or work with materials that could cause severe cuts, burns, or abrasions.

Equipment

Rollover Protective Structures (ROPS) For Material Handling Equipment.

(a) Coverage.

(1) This section applies to the following types of material handling equipment: To all rubber-tired, self-propelled scrapers, rubber-tired front-end loaders, rubber-tired dozers, wheel-type agricultural and industrial tractors,

crawler tractors, crawler-type loaders, and motor graders, with or without attachments, that are used in construction work. This requirement does not apply to side-boom pipe-laying tractors.

(2) The promulgation of specific standards for rollover protective structures for compactors and rubber-tired skid-steer equipment is reserved pending consideration of standards currently being developed.

(b) Equipment manufactured on or after September 1, 1972. Material handling machinery described in paragraph (a) of this section and manufactured on or after September 1, 1972, shall be equipped with rollover protective structures which meet the minimum performance standards prescribed in §§1926.1001 and 1926.1002, as applicable.

(c) Equipment manufactured before September 1, 1972.

(1) All material handling equipment described in paragraph (a) of this section and manufactured or placed in service (owned or operated by the employer) prior to September 1, 1972, shall be fitted with rollover protective structures no later than the dates listed below:

(i) Machines manufactured on or after January 1, 1972, shall be fitted no later than April 1, 1973.

(ii) Machines manufactured between July 1, 1971, and December 31, 1971, shall be fitted no later than July 1, 1973.

(iii) Machines manufactured between July 1, 1970, and June 30, 1971, shall be fitted no later than January 1, 1974.

(iv) Machines manufactured between July 1, 1969, and June 30, 1970, shall be fitted no later than July 1, 1974.

(v) Machines manufactured before July 1, 1969: Reserved pending further study, development, and review.

(2) Rollover protective structures and supporting attachment shall meet the minimum performance criteria detailed in §§1926.1001 and 1926.1002, as applicable or shall be designed, fabricated, and installed in a manner which will support, based on the ultimate strength of the metal, at least two times the weight of the prime mover applied at the point of impact.

(i) The design objective shall be to minimize the likelihood of a complete overturn and thereby minimize the possibility of the operator being crushed as a result of a rollover or upset.

(ii) The design shall provide a vertical clearance of at least 52 inches from the work deck to the ROPS at the point of ingress or egress.

(d) Remounting. ROPS removed for any reason, shall be remounted with equal quality, or better, bolts or welding are required for the original mounting.

(e) Labeling. Each ROPS shall have the following information permanently affixed to the structure:

(1) Manufacturer or fabricator's name and address;

(2) ROPS model number, if any;

(3) Machine make, model, or series number that the structure is designed to fit.

(f) Machines meeting certain existing governmental requirements. Any machine in use, equipped with rollover protective structures, shall be deemed in compliance with this section if it meets the rollover protective structure requirements of the State of California, the U.S. Army Corps of Engineers, or the Bureau of Reclamation of the U.S. Department of the Interior in effect on April 5, 1972. The requirements in effect are:

- State of California: Construction Safety Orders, issued by the Department of Industrial Relations pursuant to Division 5, Labor Code, §6312, State of California.
- U.S. Army Corps of Engineers: General Safety Requirements, EM-385-1-1 (March 1967).
- Bureau of Reclamation, U.S. Department of the Interior: Safety and Health Regulations for Construction. Part II (September 1971).

Hazard Communication

The use of chemicals and pesticides, which includes but is not limited to insecticides, miticides, fungicides, herbicides, and rodenticides is a disputed topic in the landscape industry. Some choose to not use them, others do and their use continues to play a significant role in the preparation for, installation of and maintenance of landscape work in Oregon. Whether the landscape contracting business uses fertilizers, low hazard chemicals, or those that are considered dangerous, it is vital that the business know how to properly use and store these chemicals. Training of employees and obtaining the proper Oregon license for the application of these chemicals is the responsibility of the business owner or management of the business.

The pesticide division of the Department of Agriculture along with the Occupational Safety and Health Administration regulates the use and application of chemicals for the landscape industry and other chemical users. If the landscape contracting business that you own or manage stores or applies pesticides make sure the proper licensing for pesticide application is obtained for the business through the Oregon Department of Agriculture: Pesticides Division 635 Capitol Street, Salem, OR 97301, pestx@oda.state.or.us.

What Is a Hazardous Chemical?

OR-OSHA's hazard communication rule, 1910.1200, defines a hazardous chemical as "any element, chemical compound, or mixture that is a physical hazard or a health hazard."

Chemicals that are physical hazards are unstable and, when handled improperly, can cause fires or explosions. A chemical that is a physical hazard has one of the following characteristics:

- It's a combustible liquid.
- It's a compressed gas.
- It's explosive.
- It's flammable.
- It's water-reactive.
- It starts or promotes combustion in other materials.
- It can ignite spontaneously in air.

Chemicals that are health hazards can damage an exposed person's tissue, vital organs, or internal systems. Generally, the higher the chemical's toxicity, the lower the amount or dose necessary for it to have harmful effects. The effects vary from person to person, ranging from temporary discomfort to permanent damage, depending on the dose, the toxicity, and the duration of exposure to the chemical.

Hazardous chemicals can have short-term and long-term effects.

Health effects range from short-duration symptoms that often appear immediately (acute effects) to persistent symptoms that usually appear after longer exposures (chronic effects). Health effects can be classified by how they affect tissue, vital organs, or internal systems:

- Carcinogens cause cancer.
- Corrosives damage living tissue.
- Hematopoietic agents affect the blood system.
- Hepatotoxins cause liver damage.
- Irritants cause inflammation of living tissue.
- Nephrotoxins damage cells or tissues of the kidneys.
- Neurotoxins damage tissues of the nervous system.
- Reproductive toxins damage reproductive systems, endocrine systems or a developing fetus.
- Sensitizers cause allergic reactions.

A chemical is hazardous if it is listed in one of the following documents:

- OR-OSHA Division 2, Subdivision Z safety and health rules, *Toxic and Hazardous Substances;* Division 3, Subdivision Z, *Toxic and Hazardous Substances* (Construction); Division 4, Subdivision Z, *Chemical/Toxins* (Agriculture)
- *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment* (latest edition). Published by the American Conference of Industrial Hygienists (ACGIH)
- *The Registry of Toxic Effects of Chemical Substances*, published by the National Institute for Occupational Safety and Health (NIOSH)

The key to handling a hazardous chemical safely is to know its properties and be able to answer questions like:

- Is it explosive or toxic?
- Under what conditions is it explosive?
- How is the chemical toxic?
- What are the symptoms of toxicity and how fast do they appear?
- What kinds of clothing or equipment can protect employees from it?
- What should employees do if it's on fire?

For comprehensive summaries about most hazardous substances, see www.atsdr.cdc.gov.10.

The Essence of Hazard Communication

The essence of hazard communication is a warning. We use thousands of chemical products throughout our lives, at home and at work. But most of us would be hard-pressed to distinguish safe products from hazardous ones without a warning—the familiar skull and crossbones, for example. The warning tells us the product is hazardous, that it can harm us if we use it improperly.

In the workplace, hazard communication ensures that workers who may be exposed to hazardous chemicals know about the chemicals' hazards and understand how to protect themselves from exposure.

The Hazard Communication Process

Hazard communication begins when chemical manufacturers and importers evaluate their products to determine each product's chemical hazards.

Next, they prepare a material safety data sheet—known by the abbreviation MSDS—for each product. An MSDS includes detailed information about the

product's hazards. Manufacturers and importers must include an MSDS and a warning label with each container of product that they ship to a customer.

The part of the process that affects your workplace is the written hazard communication plan. The plan, which you produce, must identify hazardous chemicals at your workplace and describe how you will use material safety data sheets, warning labels, and training to protect employees and keep them informed about the product's chemical hazards.

Hazard Communication Rules

OR-OSHA's hazard communication rules affect all Oregon workplaces that have employees who may be exposed to hazardous chemicals. The purpose of these rules is to ensure that workers who use hazardous chemicals know why the chemicals can harm them and *how* to handle the chemicals safely.

Hazard communication warns us that a chemical product is hazardous and tells us how the product can harm us if we use it improperly.

These are the general steps in the hazardous communication process:

1. Chemical manufacturers or importers determine if the chemicals they produce are hazardous.
2. The manufacturers or importers document the chemical's hazards on material safety data sheets (MSDS's).
3. Each hazardous chemical that is sold to a customer must include an MSDS and a warning label that identifies the chemical and warns of its hazards.
4. Your workplace purchases hazardous chemical products from a manufacturer, distributor, or importer.
5. You prepare a written hazard communication plan that identifies the hazardous chemicals your employees may be exposed to and describes how you will use MSDS's, container warning labels, and training to keep them informed.

Preparing a Written Hazard Communication Plan

A hazard communication plan identifies the hazardous chemicals at your workplace and describes how you will use material safety data sheets, container warning labels, and training to inform employees. You must prepare a written hazard communication plan if employees at your workplace use or may be exposed to hazardous chemicals.

You need to prepare a written hazard communication plan.

The plan must be specific to your workplace and include the following parts:

The part	What to do
Hazardous chemical list	• List the hazardous chemicals to which employees may be exposed in your workplace. The list must include hazardous chemicals in all forms – liquids, solids, gases, vapors, fumes, and mists. If the chemical is hazardous and an employee could be exposed to it, include it on the list. • Match each chemical on the list with its material safety data sheet. • Update the list to keep it current.
Labels and other forms of warning	Describe how you will ensure that each hazardous chemical container has a label that identifies the chemical and has an appropriate hazard warning.
Material safety data sheets	Describe where you will keep material safety data sheets and whom to contact if one is missing or incomplete.
Employee training	Describe how you will train employees about chemical hazards to which they may be exposed; include how employees can protect themselves, how to read warning labels and material safety data sheets, and where employees can review material safety data sheets.
Hazardous non-routine tasks	Describe how you will inform employees about hazardous chemicals to which they may be exposed during non-routine tasks; identify the tasks and the information that you will provide.
Hazardous chemicals in pipes	Describe how you will inform employees about hazardous chemicals in pipes that run through their work areas.
Information for contractors	Describe how you will inform contractors' employees about hazardous chemicals to which they may be exposed at your workplace and what they can do to protect themselves.

Using Material Safety Data Sheets

A material safety data sheet contains detailed information about a hazardous chemical product's health effects and physical and chemical characteristics and safe practices for using it.

Chemical manufacturers and importers must prepare a material safety data sheet for each hazardous chemical product they produce. Distributors are responsible for ensuring that you have a material safety data sheet for each hazardous chemical product they sell to you.

What to do if you use hazardous chemical products at your workplace

You must have a current material safety data sheet for each product. Employees must be able to review material safety data sheets in their work area at any time. You can keep material safety data sheets in a notebook or on a computer; however, employees must be able to obtain the information immediately in an emergency.

One person should be responsible for managing all the material safety data sheets at your workplace. The person should ensure that the list of hazardous chemicals is current, that the identity of each chemical on the list matches its identity on its material safety data sheet, and that incoming hazardous-chemical containers have material safety data sheets.

When you no longer use a hazardous chemical, you don't need to keep its material safety data sheet. However, you do need to keep a record for at least 30 years of the chemical's identity, locations, and the years in which it was used in your workplace. For more information about record-keeping requirements, see OSHA Standards, 29 CFR, Part 1910.1020(d)(ii)(B), "Access to employee exposure and medical records."

Information Required on Material Safety Data Sheets

Chemical manufacturers and importers must prepare a material safety data sheet for each hazardous chemical product they ship to you. The following information must appear on each sheet.

Required information	**Description**
Identity of the chemical	Typically, a common chemical name. (The identity of the chemical on the material safety data sheet must match its identity on the container label.)
Physical and chemical characteristics	For example: vapor pressure, flashpoint, and solubility.
Physical hazards	For example: potential for fire, explosion, or reaction with water or other chemicals.

Health hazards	For example: signs and symptoms of exposure, and medical conditions that might be aggravated by exposure.
Primary routes of chemical entry	How the chemical enters the body.
Permissible exposure limit (PEL)	The maximum amount of the chemical that one can be exposed to during an eight-hour work shift.
Carcinogenicity	Based on findings in the National Toxicology Program Annual Report on Carcinogens or the International Agency for Research on Cancer Monographs (latest editions).
Precautions for safe use	How to handle the chemical safely, hygiene and protective practices, and cleanup procedures for spills and leaks.
Control measures	The engineering controls, safe work practices, and personal protective equipment necessary to control exposure.
Emergency and first-aid procedures	How to respond to spills, leaks, contamination, and overexposure.
Preparation date	The date the material safety data sheet was prepared or updated.
Name, address and phone number	Who to contact for more information on the chemical's hazards and emergency-response procedures

Using Container Warning Labels

The purpose of a container warning label is to warn employees about the container's contents and to refer employees to an appropriate material safety data sheet for more information about the chemical's physical and health hazards. Manufacturers, importers, and distributors must ensure that each hazardous chemical product sold to you has a label that includes the chemical's identity, a hazard warning, and a name and address for additional information about the product.

If you use hazardous chemicals at your workplace, you must ensure that each hazardous chemical container has a legible label, in English, that identifies the chemical and warns of its hazards.

Original containers of hazardous chemicals from a manufacturer, importer, or distributor must have warning labels. Don't remove or deface them.

If you transfer a hazardous chemical from a labeled container to an unlabeled container, label the container.

An Exception for Portable Containers

You don't need to put a *warning* label on a portable container if you use it to transfer a hazardous chemical from a labeled container. However, the chemical in the container must be for immediate use. This means "the hazardous chemical will be under the control of and used only by the person who transfers it from a labeled container and only within the work shift in which it is transferred." See 1910.1200 (c), Definitions.

A warning label must identify the chemical—a common chemical name or a code name is acceptable—and displays a hazard warning such as **DANGER** or the familiar skull and crossbones. In addition, the warning label must also show the following:

> There are specific things a warning label must show.

- The identity of the chemical on the label, on its material safety data sheet, and on your hazardous chemical list must match.
- If you're not sure that a hazardous chemical container is properly labeled, contact the manufacturer or supplier.
- Make someone at your workplace responsible for ensuring that all hazardous chemical containers are properly labeled.

Hazard Communication Training Employees

If you have employees who may be exposed to hazardous chemicals, you must inform them about the chemicals and train them when they are hired and whenever they are exposed to a new chemical hazard or a process change. Required employee training covers:

- where to find and how to read the hazard communication plan, the list of hazardous chemicals, and material safety data sheets
- the operations in which hazardous chemicals are used
- the physical and health hazards of hazardous chemicals used by employees
- the meaning of warning labels on hazardous chemical containers and on pipes that contain hazardous substances
- how to recognize emergencies involving hazardous chemicals
- how to use personal protective equipment

Choose a person as trainer who understands the above topics and has the skills to conduct the training. It's important that employees are taught which hazardous chemicals they may be exposed to and understand how to use

the information on container warning labels and material safety data sheets to protect them.

Use a form such as this one to document that an employee has been trained about hazardous chemicals used in the workplace as required by OR-OSHA hazard communication rules.

I have been informed about the hazardous chemicals that I may be exposed to during my work and I have received training on the following topics:

- An overview of the requirements in OR-OSHA's hazard communication rules.
- Hazardous chemicals present in the workplace.
- The written hazard communication plan.
- Physical and health effects of the hazardous chemicals.
- Methods to determine the presence or release of hazardous chemicals in the work area.
- How to reduce or prevent exposure to these hazardous chemicals through use of exposure controls/work practices and personal protective equipment.
- Steps we have taken to reduce or prevent exposure to these chemicals

Call Before You Dig

When you are going to excavate on a person's property, the landscape contracting business my request a "locate" to determine where buried utilities are located.

This section contains some of the common questions about excavating.

Q. It is my understanding that I only have to call for locates if I dig more than 12 inches deep. Is that correct?

A. No. The definition of excavation is very clear: any operation in which earth, rock or other material is moved or displaced by any means. That definition includes backhoes, trenchers, augers, drilling machines, blasting, graders, bulldozers, etc. There are a few, very limited exemptions to this rule. Responding to an emergency, road or ditch maintenance less than 12 inches in depth that does not lower the original grade or original ditch flow line and tilling of the soil for agricultural purposes conducted on private property that is not within the boundaries of a recorded right-of-way or easement for underground facilities. If those exact conditions cannot be met, then a locate request must be made.

The confusion about the "less than 12 inch depth" for a locate request comes from the exemption for homeowners. However, even a homeowner must meet four specific requirements to get the exemption. The four requirements are:

1. The excavator is a tenant or an owner of private property.
2. The excavation is on private property of that owner or tenant.
3. The excavation is less than 12 inches deep.
4. The excavation is not within an established easement.

All four of these conditions must be met or the homeowner or tenant must call for locates.

Other than the exemptions discussed above, any person performing excavation activities must call for locates, regardless of depth.

Q. Do I need to call for a locate even if I am digging in private property?

A. Yes. Even tenants or owners of private property planning to dig, must call for locates as required by Oregon law. These laws can be found in ORS 757.542 -562 and 757.993 and in Oregon Administrative Rules, Chapter 952.

Q. You mean, even if I am planting a rose bush I have to call?

A. Yes! Buried facilities are located everywhere and they may run right through your yard even though you are not aware of it. Make the free call. Its good insurance and you will feel better knowing what may be buried on the property.

Q. What is the penalty if I don’t call for a locate?

A. According to 757.993, the penalty for violation of utility excavation notification provisions are:

(1) Except as provided in subsection (2) of this section and in addition to all other penalties provided by law, every person who violates or who procures, aids or abets in the violation of any rule of the Oregon Utility Notification Center shall incur a penalty of not more than $1,000 for the first violation and not more than $5,000 for each subsequent violation.

(2) In addition to all other penalties provided by law, every person who intentionally violates or who intentionally procures aids or abets in the violation of any rule of the Oregon Utility Notification Center shall incur a penalty of not more than $5,000 for the first violation and not more than $10,000 for each subsequent violation.

Chapter 14:
EPA, DEQ, and Water Rights

What this chapter covers:

- Water rights in Oregon.
- Water quality regulations and best practices.
- Regulations and best practices for drinking water.

Water Is a Finite Resource

Water is a finite resource in Oregon even though Oregon is known for its perpetual rainfall and wet weather. Landscape Irrigation uses a large amount of water and it is said that 50% of the water that a consumer uses is for watering their landscape. Also during construction of a project, the careful attention needed to decrease runoff and erosion and to insure there is proper and legal drainage systems cannot be overstated.

The amount of water that can be potentially saved and the impact of proper water control during construction and after is of significant concern to a professional landscape contracting business. Knowing the laws that surround water and its usage is vital for a landscape contracting business that designs and installs landscape projects. Making sure the source of water is protected and water rights are observed and complied with is of major concern to the landscape contracting business during the design and construction phases. Attention to these details will help promote a more professional landscape construction industry and sustain the planet on which we live.

The Water Code

Under Oregon law, all water is publicly owned. With some exceptions, cities, farmers, factory owners, and other water users must obtain a permit or water right from the Water Resources Department to use water from any source— whether it is underground, or from lakes or streams. Generally speaking, landowners with water flowing past, through, or under their property do not automatically have the right to use that water without a permit from the Department.

Prior Appropriation

Oregon's water laws are based on the principle of prior appropriation. This means the first person to obtain a water right on a stream is the last to be

shut off in times of low stream flows. In water-short times, the water right holder with the oldest date of priority can demand the water specified in their water right regardless of the needs of junior users. If there is a surplus beyond the needs of the senior right holder, the water right holder with the next oldest priority date can take as much as necessary to satisfy needs under their right and so on down the line until there is no surplus or until all rights are satisfied. The date of application for a permit to use water usually becomes the priority date of the right.

There are four fundamental provisions of water usage:

- **Beneficial purpose without waste:** Surface or groundwater may be legally diverted for use only if it is used for a beneficial purpose without waste.
- **Priority:** The water right priority date determines who gets water in a time of shortage. The more senior the water right, the longer water is available in a time of shortage.
- **Appurtenancy:** Generally, a water right is attached to the land described in the right, as long as the water is used. If the land is sold, the water right goes with the land to the new owner.
- **Must be used:** Once established, a water right must be used as provided in the right at least once every five years. With some exceptions established in law, after five consecutive years of non-use, the right is considered forfeited and is subject to cancellation.

Generally, Oregon law does not provide a preference for one kind of use over another. If there is a conflict between users, the date of priority determines who may use the available water. If the rights in conflict have the same date of priority, then the law indicates domestic use and livestock watering have preference over all other uses. However, if a drought is declared by the Governor, the Department can give preference to stock watering and household consumptive purposes, regardless of the priority dates of the other users. Groundwater rights for geothermal uses, such as heating or air conditioning, are always junior in priority to other uses of water unless the water is also used for another purpose, such as irrigation, or injected back into the groundwater reservoir.

Some uses of water are exempt from the requirement to obtain a permit. These are called "exempt" uses. Exempt uses of surface water include:

- **Natural springs:** use of a spring that, under natural conditions, does not form a natural channel and flow off the property where it originates at any time of the year.
- **Stock watering:** where stock drink directly from a surface water source and there is no diversion or other modification to the source.

Also, use of water for stock watering from a permitted reservoir to a tank or trough, and, under certain conditions, use of water piped from a surface source to an off-stream livestock watering tank or trough.

- **Salmon:** egg incubation projects under the Salmon and Trout Enhancement Program (STEP) are exempt. Also, water used for fish screens, fish ways, and bypass structures.
- **Fire control:** the withdrawal of water for emergency fire fighting or certain non-emergency fire fighting training.
- **Forest management:** certain activities such as slash burning and mixing pesticides. To be eligible, a user must notify the Department and the Oregon Department of Fish and Wildlife and must comply with any restrictions imposed by the Department relating to the source of water that may be used.
- **Certain land management practices:** where water use is not the primary intended activity.
- **Rainwater:** collection and use of rainwater from an artificial impervious surface (like a parking lot or a building's roof).

Groundwater (well water) exempt uses include:

- stock watering
- lawn or noncommercial garden: watering of not more than one-half acre in area
- single or group domestic purposes, not exceeding 15,000 gallons per day
- single industrial or commercial purposes, not exceeding 5,000 gallons per day
- down-hole heat exchange uses
- watering school grounds, ten acres or less, of schools located within a critical groundwater area

Note: While these water uses do not require a permit, the use is only allowed if the water is used for a "beneficial purpose without waste" and may be subject to regulation in times of water shortage. Wells supplying water for exempt groundwater uses must comply with Oregon's minimum well construction standards for the construction, maintenance, and abandonment of any well.

For more information about water rights in Oregon go to http://www1.wrd.state.or.us/pdfs/aquabook.pdf

Water and air quality in Oregon is governed by the Oregon Department of Environmental Quality and is delegated authority from the Federal

Environmental Protection Agency to administer federal programs that affect air and water quality in the state. This agency is responsible for controlling the discharge of pollutants into all public water and air, which includes but is not limited to noise; erosion control; garbage; water and air pollutants discharged from factories, buildings or other potential pollutant source; pesticide disposal; sewage; storm water; wet lands and any other source that could potentially affect Oregon's water, air and environment adversely.

Water Quality Regulations and Best Practices

The Water Quality Division of DEQ is responsible for protecting Oregon's public water for a wide range of uses. DEQ sets water quality standards to protect "beneficial uses," such as recreation, fish habitat, drinking water reservoirs, and natural settings. DEQ monitors water quality by regularly sampling rivers and streams in Oregon.

Contractors should use work practices that prevent sediment runoff and pollution to waterways, and should follow federal, state, and local requirements. DEQ technical specialists can assist your business in ensuring construction activities near Oregon waters comply with these requirements. When you begin a new construction project, review the scope with a DEQ or city representative to become familiar with the requirements that apply to your specific activities.

The water quality activities and regulatory requirements described in this section are listed in the following table.

Activi	Regulatory Requirements
Protect drinking water quality	Federal Safe Drinking Water Act; OAR Chapter 340, Division 40
Minimize and control runoff	http://www.cicacenter.org/pdf/ORESCManual.pdf
Maintain drainage systems for construction washing	http://www.deq.state.or.us/WQ/wqpermit/docs/general/wpcf1700b/bmp.pdf
Water well constructors	Licensed contractors with the Oregon Water Resources Department who follow reporting requirements in constructing new wells, altering or converting existing wells.
Underground injection control systems (U IC).	Register new and existing systems; must obtain rule authorizing WPCF permit or decommission UIC 60 – 90 day notice to DEQ prior to construction or 30-day notice to

(Any fluid injection into the subsurface)	DEQ when system is decommissioned or abandoned.
Construct subsurface sewage disposal system	Permit required. Specialty licensed contractor performs work.
Storm water management	NPDES Permit 1200C and erosion control plan when one acre of more is disturbed.
Construction washing near waterways	NPDES 1700-A or B permit.
Construction activity in natural waterways	Section 404 permit from Army Corps of Engineers. DEQ 401 certificate. Removal – Fill Permit from Oregon Division of State Lands.

Potable or Drinkable Water Quality

Many rural Oregonians use groundwater as their sole source of drinking water. During construction activities, contractors can protect this water supply and avoid possible contamination by:

- locating all new sources of private or community drinking water away from potential pollution sources
- avoiding the use of old wells and the areas around them as disposal sites
- making sure wells have a proper seal
- locating septic drain fields at a safe distance from wellheads
- installing injection systems properly to prevent any injections and/or contaminants from reaching the aquifer

Water Well Constructors

Any person who engages in a business or activity that involves constructing new wells or altering, deepening, abandoning, or converting existing wells must possess a license from the Oregon Water Resources Department (OWRD). OWRD regulates activities to prevent waste and contamination of groundwater, including setting and enforcing standards for well construction, and inspecting well construction.

The two types of water well constructor's licenses are a Water Supply Well Constructor License and a Monitoring Well Constructor License.

Before obtaining a well constructor's license, the constructor must pass a written examination, have the required experience, and pay the licensing fee. Before advertising services or entering into contracts for well construction, the licensed well constructor must provide a $10,000 surety bond or irrevocable letter of credit to the OWRD. This bond is in addition to the surety bond required for the CCB license. Licensed constructors must display their license and photo identification when requested by OWRD personnel. For renewal of the two-year water well constructor's license, constructors must pay a license renewal fee and complete continuing education requirements.

The licensed constructor must follow reporting requirements and regulations administered by OWRD. Before beginning work, the constructor reports certain information about the well to the OWRD. During progress of work, the constructor keeps a log of each well and furnishes a certified copy of a well report to the OWRD within 30 days of completion of work. For more information, you may refer to OWRD's website at www.wrd.state.or.us on Water Quality.

Minimizing and Controlling Runoff

By using methods that control runoff, contractors limit specific pollutants from being discharged into the water. Erosion occurs when exposed soil is washed away by rain or snowmelt and deposited directly into surface water and streams. Contractors can minimize soil erosion by disturbing as little land as possible during construction, and using methods that allow storm water to soak in rather than "runoff" to nearby streams and rivers.

Some of those methods are:

- using gravel or masonry blocks instead of asphalt for paving projects
- using grassy swales along roadways to collect water instead of curbs, gutters, or storm drains
- creating shallow, grassy swales between parking rows instead of pushing up islands
- using oil-sediment catch basins, compost filters, or similar bio-filters in parking areas

Drainage Systems for Construction Washing

Contractors often wash and rinse buildings, equipment, and large tools at the construction site. Pollutants from construction washing can run off into rivers or streams and leach into groundwater. Contractors can avoid construction washing runoff by:

- directing the wash water into an oil and water separator, if construction equipment and washing must be done on-site
- never directing wash water to any type of injection system (for example, drywell, sump, french drains, drill hole or perforated pipe)
- using biodegradable washing detergent since detergents or cleaners containing phosphates are prohibited from washing into groundwater or surface water
- minimizing the use of soaps, detergents, and chemicals used on-site
- sweeping paved areas instead of washing with water
- using absorbents to remove leaks or spills, such as hydraulic fluid from a broken line, and never washing them into storm drains
- contacting the Department of Human Services for information on controlling runoff if washing a building that has lead-based paint

If construction equipment cleaning and washing must be done on-site, check with the jurisdiction for approval to dispose of treated wash water into the sanitary sewer system. If the jurisdiction does not allow such disposal, contractors must obtain a permit to dispose of the wastewater into a ditch or stream. DEQ or a local jurisdiction may penalize contractors who fail to obtain the required approval(s).

Dry Wells, Sumps, French Drains, and Infiltration Drains

When contractors install or decommission dry wells, sumps, French drains, and infiltration drains, these activities discharge water, wastewater, or storm water into groundwater. Consequently, contractors must provide an underground injection control (UIC) system to properly manage or direct subsurface water. A UIC is any system, structure, or activity that disposes of surface water to groundwater by placing fluid below the ground or subsurface. In UIC installation, there are specific setback requirements from drinking water wells.

Common underground injection systems in Oregon include:

- storm water wells
- catch basins with sumps
- dry wells and French drains
- subsurface septic systems with drain or leach fields (serving 20 or more people)
- industrial and commercial process or wastewater disposal wells
- cooling water return flow wells
- aquifer recharge and aquifer remediation wells

- geothermal recharge and gray water disposal systems

Since 1999, anyone operating a UIC system must register the system due to potential adverse impacts on the drinking water supply. A database of registered UIC systems is available to contractors and the public.

All existing and new underground waste/washwater discharge systems must either be registered and rule authorized under a state Water Pollution Control Facility (WPCF) permit for UICs, or they must be decommissioned and closed.

When conducting a job-site investigation, a contractor needs to identify all UICs in the same manner as underground utilities or underground storage tanks. If the project requires retrofitting an existing UIC to accommodate new construction or remodeling, the retrofitted UIC must comply with current regulations, especially registration.

A contractor must register new injection systems 60 to 90 days before use to allow time for potential design changes to meet site requirements. Some large injection systems may also need an individual operating permit from DEQ. For more information on the registration process and to determine authorization for the injection system, contact DEQ. Registration forms are available on the DEQ's website at www.deq.state.or.us/wq/groundwa/uichome.htm.

Decommissioning or abandonment of an injection system requires a 30-day notice to DEQ. DEQ may also require sampling of and proper disposal of likely contaminants, especially oils and metals, prior to closure.

Sewage Disposal Service Business Licenses

If contractors plan to perform sewage disposal service activities, they must apply for a sewage disposal service license from DEQ. Sewage disposal services include:

- constructing sewage disposal systems, including the placement of portable toilets or any part thereof
- pumping out or cleaning sewage disposal systems, including portable toilets or any part thereof
- disposing of material derived from the pumping out or cleaning of sewage disposal systems
- grading, excavating, and earth-moving work connected with sewage disposal activities, including drainfield trenches and excavating for tank placement

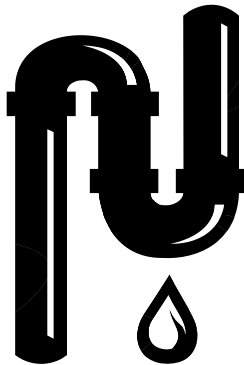
When obtaining a license, the applicant must submit the application and fee to DEQ. DEQ requires a bond or other security for sewage disposal services

in addition to the license. The licensee is responsible for complying with statutes and regulations pertaining to subsurface sewage disposal.

Contractors who plan to build an onsite wastewater treatment system must receive a license from DEQ prior to performing the work.

As part of the license, DEQ requires an annual inspection of the pumping equipment, and requires accurate records of septage collection and disposal to be retained. DEQ requires a Construction-Installation permit or a Water Pollution Control Facilities (WPCF) permit before construction or repair of an on-site sewage disposal system can begin.

Construction-Installation Permit



DEQ or the contract county issues a Construction-Installation permit for residential septic systems and, generally, for septic systems that serve small commercial facilities. Construction of the system must comply with regulations and specific conditions in the issued permit. After installing the system, the installer must notify DEQ or the contract county to schedule an inspection of the system before covering it. Once a contractor properly installs the system, DEQ or the contract county issues a Certificate of Satisfactory Completion that approves the installation and allows use of the system.

Contractors can obtain permits through an application process by contacting the appropriate contract county or DEQ office. The overseeing agency will issue or deny a permit within 20 days of receiving a complete application and associated fee. The permit is valid for one year, but a contractor may renew it.

Water Pollution Control Facilities (WPCF) Onsite Permits

The DEQ WPCF permit is an operational permit that must be kept in force for as long as the septic system is in use. Since 2003, it is required for:

- septic systems over 2,500 gallons per day
- systems to serve facilities with high-strength wastewater, such as restaurants
- sand filters serving other than a residence
- holding tanks
- complex treatment and disposal systems

A WPCF permit takes about 90 to 180 days to obtain, and the processing time may take longer if there is considerable public interest and involvement. DEQ may require a public notice and hearing.

Sewer Hookups into a Municipal Sanitary Sewer

Contractors must have a license and required bonding with the CCB if they intend to construct drain and sewage lines that hook up to a municipal system. Before beginning the project, a contractor should check local requirements as well.

Storm Water Management

Contractors are required to obtain a National Pollutant Discharge Elimination System (NPDES) permit for construction activities that disturb one or more acres. Contractors should also check with the appropriate local government jurisdictions to learn if there are additional erosion and sediment control ordinances in affect.

National Pollutant Discharge Elimination System (NPDES) Permit

DEQ has established a NPDES #1200-C Permit for construction activities such as clearing, grading, and excavation that can result in runoff or storm water discharges. Before beginning a project that will disturb one or more acres of land, contractors must apply for a NPDES #1200-C Permit, which is good for all phases of a project and is renewable. As part of the permit application process, contractors must submit an erosion control plan. DEQ, or a local agency under DEQ's jurisdiction, administers the permit and approves the contractor's erosion control plan. DEQ enforces the requirements of the permit by assessing penalties.

The erosion control plan must include:

- a narrative site description
- site maps and construction plans
- planned erosion and sediment controls, and an implementation schedule
- any local erosion control and sediment requirements

Current research shows that new erosion control management practices are much more effective than outdated ones and can save significant money. For example, compost berms, socks, and blankets (simply a 3-to 6-inch thick layer of finished compost) can replace sediment fences and hydroseeding with less installed costs and no removal or disposal costs. They also capture water, turbidity, suspended solids, and bind up pollutants better. For more information, refer to the storm water website at

www.deq.state.or.us/nwr/stormwater.htm select Reports—Construction Site Storm Water Flocculation Report.

Turbidity Water Quality Standard

Turbidity refers to particles in the water that block or reduce the amount of light reaching plants and animals in the stream. High turbidity is usually indicated by muddy, murky, or cloudy water. Construction activities that erode dirt, sand, or silt into the water increase these turbid conditions.

Every site must meet the state water quality standard for turbidity whether or not a permit is required. Contractors should verify the current standard with the appropriate DEQ jurisdiction before they begin construction activities.

Water Quality Requirements for Specific River Basins

The Tualatin River sub-basin and the Oswego Lake area have additional special erosion and storm water regulations. The requirements of these regulations are similar to the NPDES #1200-C Permit with the exception that they are applicable to all construction projects, not just projects that are one or more acres, and may require permanent storm water quality control facilities.

Construction Washing Near Waterways

Construction washing near or in state waters is a point source discharge requiring an NPDES 1700-A or B permit. Similar to storm water runoff, DEQ has established this general permit for construction washing.

Exemptions, Special Requirements, and Limitations

The following exempt activities do not need a permit:

- Washing of buildings is permitted when there is no runoff off-site or discharge to surface waters, storm sewer or injection systems (such as dry wells), and no use of chemicals, soaps, detergents, steam, or heated water.
- Washing of roads, parking lots, sidewalks, and other paved surfaces is permitted if surfaces are swept prior to washing, and there is no runoff off-site or discharge to surface waters, storm sewers or injection systems.
- Washing of construction equipment and vehicles at construction sites for the removal of accumulated dirt is permitted when there is no runoff off-site or discharge to surface waters, storm sewers, or injection systems. Cleaning must be restricted to the exterior of the vehicle or equipment.

To protect water quality, both permitted and exempt activities must follow these special requirements:

- acids, bases, metal brighteners, steam, or heated water are prohibited
- biodegradable, phosphate-free cleaners with cold water are allowed
- permit does not cover hydro-blasting activities

Discharge of wash water should be minimized but is permitted if there is no runoff off-site or discharge to surface waters, storm sewers, or injection systems.

Construction Activities in Natural Waterways

DEQ issues "401 certifications" to review and certify that a project meets state water quality standards. In addition to DEQ, other state and federal agencies also regulate activities that affect ground or surface waters, state waters, and wetlands. Some of the activities and agencies include:

- dredging and filling activities require a Section 404 permit issued by the Army Corps of Engineers
- construction activities affecting navigable waters are regulated by the Federal Waters and Harbor Act
- prior to removal or fill of material in state waters or wetlands, the Oregon Department of State Lands issues a Removal-Fill permit

Any filling, installation of piling, or construction on navigable waterways or rivers requires a Section 404 permit from the U.S. Army Corps of Engineers. The type of permit depends on the impact the project will have on the waterways. The permit must be approved before construction activities begin.

Any dredging, filling, or alteration of a stream requires a Removal-Fill Permit from the Oregon Division of State Lands. These activities remove, fill, or alter more than 50 cubic yards of material within the bed or banks of state waters. The permit application is jointly processed with the U.S. Army Corps of Engineers. Examples of these activities include removing gravel, replacing riprap, reclaiming land, relocating or altering river channels, and preparing pipeline crossings.

Site preparation is critical to the construction process. Care should be taken to reduce surface water runoff, maintain soil health, and prevent the destruction of natural features such as wetlands.

Preserving Wetlands, Streams, Lakes, Trees, and Meadows

Preserving natural features both maintains good environmental quality and enhances the livability of a community.

A wetlands area is any land where saturation with water is the dominant factor in determining the nature of soil development and the types of plants and animals living in the soil and on the surface. Water may not always be present on the surface of the wetland area.

Wetlands naturally filter water that passes through them and are extremely sensitive to any disturbance. The best method of protecting a wetlands area is to avoid disturbing it or to minimize the disturbance. Contractors should protect wetlands by:

- Obtaining all necessary permits before filling or building on wetlands.
- Installing and maintaining oil and sediment traps in storm drains.
- Using biofiltrations, such as bags filled with chips or bales of straw, during construction to control erosion.
- Maintaining a vegetative buffer around all surface waters. Buffers provide natural filtration and absorption of pollutants.

If you must disturb wetlands in your project, the permit(s) you obtain may require you to balance that disturbance by building or enhancing other wetlands areas.

Maintaining Soil Function and Existing Vegetation

Natural landscaping that contains healthy, established plants and organically rich soils minimizes erosion potential and reduces landscaping costs to the contractor. Plants that are native to the area are more resistant to diseases and pests. This reduces the need for chemical treatments, which have many potential long-term health effects for plants, animals, and the building users. Contractors should retain topsoil and native plants at construction sites, remove non-native invasion plants, and support any new landscaping required with healthy soils.

The following techniques are some ways to maintain soil function and existing vegetation:

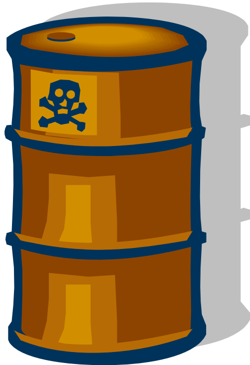
- Clear the minimum amount of land needed for each project.
- Clear grasses/shrubs by hand mowing or cutting instead of removal.
- Fence critical areas, such as tree root zones to avoid destruction.
- Reuse excavated soils in landscaping.
- Minimize use of herbicides and pesticides.

Chapter 15:
Pesticide Law

What this chapter covers:

- The requirements for pesticide licenses.
- The types of pesticide licenses.

Do You Need a Pesticide License?



Landscape construction frequently requires the application of pesticides in the preparation of the property for landscaping work and in maintaining the landscape after the installation. If your business is going to apply pesticides, licensing with the Department of Agriculture may be required. The information provided in this manual is not to be taken as the final authority whether or not licensing is required but should be used as a guide to determine if there is a potential need for the license. Contact the Department of Agriculture for a final determination for your business.

You need a pesticide license when:

- buying or applying restricted-use pesticides
- applying pesticides (including herbicides) to someone else's property
- applying pesticides as a public employee while using a fuel or electric-powered sprayer or spreader
- giving advice on how to use a restricted-use pesticide or which restricted-use pesticide will work best

You do not need a pesticide license when:

- applying a pesticide on a person's owned or leased property (no restricted-use pesticide applications)
- applying a pesticide on property owned or leased by an employer while acting as an employee (no restricted-use pesticide applications)
- giving advice on general-use pesticides
- performing structural pest inspections for individuals buying or selling a home (see special situations page)

You also do not need a pesticide license to apply pesticides while doing lawn maintenance, but only if all of the following are true:

- The applications are made to small residential lawns or gardens only (vs. applications to commercial properties).
- You are not using restricted-use pesticides.
- You are not using fuel or electric-powered sprayers or spreaders.
- The use of pesticides is not stated in your advertisements, contracts, or invoices.

Types of Pesticide License

There are several types of pesticide license.

A commercial pesticide applicator's license is issued to an individual. To obtain a commercial pesticide applicator's license, you must pass tests on laws and safety as well as at least one of the following testing

- Agriculture Herbicide
- Agriculture Insecticide and Fungicide
- Agriculture Livestock Pests
- Agriculture Soil Fumigation
- Agriculture Vertebrate Pests
- Aquatic
- Demonstration and Research
- Forest; I.I.H.S. General Pest Control
- I.I.H.S. Moss Control
- I.I.H.S. Space Fumigation
- I.I.H.S. Structural Pest Control
- I.I.H.S. Wood Treatment
- Marine Fouling Organism Control
- Ornamental and Turf Herbicide
- Ornamental and Turf Insecticide and Fungicide
- Public Health
- Right-of-Way
- Regulatory Weed Control (Public Applicators and Trainees only)
- Seed Treatment

A commercial pesticide applicator's license lets you:

- use general or restricted-use pesticides on someone else's property, but only if employed by a company carrying the commercial operator license
- use restricted-use pesticides on your own (or your employer's) non-agricultural land
- supervise a licensed commercial pesticide trainee
- tell someone how to use a restricted-use pesticide or which restricted-use pesticide will work best (limited to the categories on your license)

A commercial operator license is issued to a company. Obtaining this license is done by application, with no test required. It lets a business use pesticides on someone else's property. For corporations, at least one employee must be licensed as a commercial pesticide applicator. For sole proprietors or partnerships, the owner or at least one partner must be licensed as a commercial pesticide applicator. The business must also show proof of insurance for pesticide applications and the categories must match the type of pesticide work that will be done.

This license cannot be issued to a public agency.

A pesticide consultant license is issued to an individual. To obtain a pesticide consultant license, you must pass a test on pesticide consulting. A pesticide consultant license lets you tell someone how to use a restricted-use pesticide or which restricted-use pesticide will work best.

The demonstration and research option lets you create demonstration plots or do research on pesticides.

> **Note:** If you have a pesticide consultant license, you may obtain the private pesticide applicator license without passing the private pesticide applicator test.

A pesticide dealer license is issued to a company. Obtaining this license is done by application, with no test required. It lets a business sell restricted-use pesticides to licensed pesticide users.

A private applicator license is issued to an individual. To obtain a private applicator license, you must pass the private pesticide applicator test. It lets you use restricted-use pesticides on agricultural land, including farmland, ranches, forestland, nurseries, and orchards. It also lets you supervise a co-worker or employee applying a restricted-use pesticide. The private applicator license covers all agricultural pesticide uses.

A public applicator license is issued to an individual. To obtain a public applicator license, you must pass tests on laws and safety as well as at least one testing category. In addition, you must work for a state or federal agency, county, city, municipality, irrigation district, railroad, public utility,

telephone company, school, or other public employer. The public applicator license lets you:

- use restricted-use pesticides for your public employer
- use fuel or electric-powered sprayers or spreaders
- tell someone how to use restricted-use pesticide or which restricted-use pesticide will work best (limited to categories on your license)
- supervise a licensed public pesticide trainee

The categories must match the type of pesticide work that will be done.

A trainee license is issued to an individual. There are two types of trainee license: the immediately supervised pesticide trainee license and the directly supervised pesticide trainee license. Both types can be either a public or a commercial trainee license. They also allow you to use pesticides while supervised by a licensed commercial or public pesticide applicator. In addition, the trainee and supervisor categories must match the type of pesticide work that will be done.

The immediately supervised pesticide trainee license requires the supervisor to be on site at all times during spraying and within five minutes travel time from trainee. Obtaining this license is done by application, with no test required.

The directly supervised pesticide trainee license only requires the supervisor to be able to help the trainee by phone or radio during the application, but the supervisor does not need to be on site. To obtain this license, you must pass the directly supervised trainee test.

Chapter 16:
Americans with Disabilities Act (ADA)

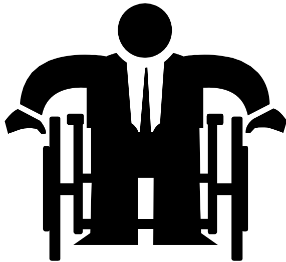
What this chapter covers:

- The ADA and state disability laws prohibit discrimination in hiring and placement against persons with disabilities who are otherwise qualified and who can perform the essential functions of a job.
- Reasonable accommodations must be made for disabled employees.
- Buildings must be accessible to disabled employees.

CAUTION!

The material in this chapter is for informational purposes only. It should not be considered to be legal advice. The LCB **strongly** advises you to consult an attorney versed in employment law for specific questions about employee disabilities and the ADA.

Disability Discrimination



Since 1994, the federal Americans with Disabilities Act (ADA) prohibit employers of 15 or more employees from discriminating against qualified individuals with disabilities. An employer with 15 or more employees cannot discriminate against a qualified individual with a disability because of the disability. The ADA applies to discrimination during employment-related activities like job application procedures, hiring or firing, promotions, compensation, fringe benefits, training, or conditions of employment.

Under both state and federal law, a "person with a disability" is any of the following:

- an individual who has a physical or mental impairment that substantially limits one or more major life activities
- a person who has a record of such an impairment
- a person who is regarded as having such an impairment.

Discrimination because of a disability is against the law.

It is against Oregon law for any private sector employer of six or more employees to discriminate in employment because an otherwise qualified person has a disability. However, an employer may require

that an employee not pose a direct threat to the health or safety of the employee and/or others in the workplace. Direct threat is defined as a significant risk of substantial harm that cannot be eliminated or reduced with reasonable accommodation. It is advised that follow these recommendations regardless of the number of employees in the landscape contracting business. Seek legal advice if any circumstance arises where ADA accommodations may be necessary.

The employer cannot discriminate in:

- refusing to hire, employ, or promote
- preventing or terminating from employment
- compensation
- terms, conditions, or privileges of employment

Under both laws, mentally and physically disabled people are protected from discrimination. Employers may not discriminate against people who have impairments like depression, just as they may not discriminate against people with physical disabilities such as people in wheel chairs.

Reasonable Accommodation

The ADA and Oregon's disability law require not only that employers not discriminate based on disability, but that employers provide reasonable accommodation to an otherwise qualified person if such accommodation would allow the person to perform the essential functions of the job the person holds or desires. Reasonable accommodation is a modification or adjustment that enables a person with a disability to apply for a job (for example, holding a job interview in an accessible location), to perform the essential functions of a position (for example, purchasing an amplifier to allow a hearing-impaired person to talk on the telephone), or to enjoy the same benefits and privileges of employment as other employees (for example, holding a business function in a location accessible to all employees).

Reasonable accommodation becomes unreasonable if it would cause the employer an undue hardship. An undue hardship is an action that is significantly difficult or expensive in relation to the size of the employer, the resources available, and the nature of the business.

When you are interviewing, because you cannot ask medically-related questions of an applicant, you cannot discuss reasonable accommodation unless the applicant initiates the discussion. However, once a person is hired, if the need for accommodation is obvious (for example, the individual uses a wheelchair), you may ask what accommodations the person will need. If the disability is not obvious, the burden is on the employee to tell their employer about the disability and the need for accommodation. Once alerted of a disability, you should begin an interactive process with the

employee to learn what accommodation, if any, the employee needs. With this information, you can decide if and how the accommodation can be provided.

If an employee approaches you about a physical or mental impairment that is affecting his or her job performance, you have a duty to reasonably accommodate that employee if the impairment substantially limits any major life activities. The key to the accommodation process is open communication with your employee. Ask specifically about the impairment and how this impairment is affecting their job. Then talk with the employee about steps you can take to help them perform the job. This could mean changing the physical environment in your workplace. Examples are providing a chair with more back support for an employee with a back disability or providing a magnified viewing screen on a computer monitor for an employee with a vision problem. This could also mean relaxing or changing company policies. For instance, you might let a person take more breaks during the day if the worker has a mental disability that affects concentration.

If employers have questions about their obligations under the Oregon or federal disability law or any other employment laws, they may call the Technical Assistance for Employers Program at the Oregon Bureau of Labor and Industries at 503-731-4200 in Portland. Technical Assistance offers a telephone information line, materials and seminars.

If you have questions about reasonable accommodations you may call the Job Accommodation Network at 800-ADA-WORK. This is a confidential service provided by the federal government. Employers can call this number and get expert advice about certain jobs and disabilities.

Good Hiring Practices

As an employer, you must be careful not to discriminate against any applicants who apply for positions at your landscape contracting business, whether they have disabilities or not. This means you may not ask questions during an interview about an applicant's physical or mental state or any past medical problems, or include these kinds of questions on applications. If it is obvious that an applicant has a physical or mental disability that might affect his or her ability to do the job, you may ask the person to describe or demonstrate how they would perform the job. You may ask applicants about their attendance rate at previous jobs, but may not ask about how often they took sick leave, or about injuries or illnesses.

Essential Job Functions

Essential functions are the fundamental job duties of a position. If you prepare a written description before advertising or interviewing applicants for a job, the

> It's a good idea to develop job descriptions that list both the essential and nonessential functions of the job.

position description is considered proof of the essential functions of the job. A person is considered qualified for the job if he or she can perform the essential functions of the job, with or without reasonable accommodation by the employer.

You do not have an obligation to hire people with disabilities if they lack the skills and experience to perform the essential functions of a job. With a written job description that lists the essential job functions, you can show that your reason for rescinding a job offer or firing an employee was based on the person's failure to perform the duties that all employees in the position are required to perform.

A job function may be essential for any of several reasons, including:

- The position exists to perform that function.
- A limited number of employees are available among whom the performance of that job function can be distributed.
- The function may be highly specialized so that a person is hired for his or her expertise and ability to perform that particular function.

After Hiring

Once you have offered the job and before the worker actually begins the position, you may require a physical abilities test to make sure he or she can perform the job duties, but only if you require the same test of everyone in that job category. When determining if a disabled person can perform the essential functions of a job, you have a duty to find out if a reasonable accommodation would help them perform the job. This could mean that you would take away minor or incidental duties from a job, but it does not mean that you need to change the essential functions of the job. For example, if an office clerk position requires that most of the work time is spent filing but occasionally requires driving a car to make deliveries; you might need to assign the driving function to someone else to accommodate an employee whose disability prevents driving. But a delivery service would not be required to accommodate a disabled person who cannot drive if the job requires that most of the work time involves driving. If a person to whom you have extended a job offer cannot perform the essential functions of the job with or without reasonable accommodation of any disability they may have, you may rescind the job offer before the person actually starts.

Once an employee has begun working for your landscape contracting business you may request information about his or her physical or mental health only if the reason is job related and consistent with business necessity. For example, if you notice an employee has developed a limp in his or her walk, but the essential functions of their position do not require a

lot of walking, you may not ask him or her for medical information about the condition.

Medical Examinations

It is a violation of ORS 659.436 for an employer to conduct a medical examination of a job applicant, to ask whether the applicant is a disabled person, or to make inquiries as to the nature or severity of any disability of the applicant. Some exceptions are noted in the rule. It is acceptable to have all job applicants undergo a medical examination but only if it is directly related to the essential functions of the job.

Similarly, except as provided in ORS 659.448, an employer cannot require an employee to submit to a medical examination, cannot ask if the employee is a disabled person, and cannot make inquiries of an employee as to the nature or severity of any disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity.

It is acceptable for an employer to conduct voluntary medical examinations, including voluntary medical histories that are part of an employee health program available to employees at the job site. For example, the employer could offer free chest X-rays or free cancer screening, but purely on a voluntary basis.

An employer may make inquiries into the ability of an employee to perform job-related functions.

Building Accessibility

Building accessibility is important to you as an employer if you have a disabled employee. It is also important if your landscape contracting business is installing landscaping work that needs to be accessible by a person with disabilities.

Both the ADA and Oregon law prohibit discrimination against disabled people in places of public accommodation. All businesses are required to ensure that their public areas are accessible for disabled customers. This requirement affects all businesses that serve the public, such as restaurants, movie theaters, hotels, grocery stores, gift shops, coffee houses, doctor's offices, stadiums and arenas, and bookstores.

All new public facilities that were built after January 26, 1993 must comply with the ADA Accessibility Guidelines. In Oregon, all new public facilities and all those that undergo major renovations that change the usability of a building also need to comply with the Uniform Building Code. Renovations do not include normal maintenance, painting, or other superficial changes. This law is enforced by the Building Codes Division of the Oregon Department of

Consumer and Business Services, which can be contacted at 503-378-4133 in Salem.

The ADA and Oregon law also require that buildings built before 1993 must be accessible to the disabled. Architectural barriers must be removed if this can be done without significant difficulty or expense. For example, wheelchair ramps must be made available for customers, aisle ways must be made wide enough for wheelchairs, and bathrooms must have grab bars and door hardware. The Oregon Building Codes Division also enforces this law.

The ADA has specific guidelines for walkways. Please keep these in mind for the work you may perform:

- **1:12 SLOPE (5 Degrees):** This is the ADA recommended slope for commercial or public access ramps. This 5 degree angle is the best solution for manual wheelchair users who will be propelling themselves up the ramp and for users of electric wheelchairs and scooters.
- **2:12 SLOPE (9.5 Degrees):** This slope is not recommended for commercial use by ADA standards, but can be used in residential applications. This slope usually works with an able assistant to push the mobility equipment from behind (or walk along-side while powering the equipment up with no rider) for those unable to power themselves up the ramp. For those powering themselves up the ramp with manual wheelchair (strong users only), electric scooters or electric wheelchairs, please check the manufacturer's specifications for the safe climbing grade of the equipment.
- **3:12 SLOPE (14.5 Degrees):** At this angle, stability and use become a concern for mid-wheel drive electric wheelchairs and ground clearance of most 3 and 4 wheel scooters. Use this only for residential use for loading unoccupied electric wheelchairs and scooters that have the ground clearance to clear this steep angle. Long ramps should have a maximum gradient of 1:14, with a landing every 8 m.

The Building Code Division enforces this regulation as well as other mandated regulations involved with construction. The federal Architectural and Transportation Barriers Access Board can also answer questions you may have about these requirements. It can be reached at 800-USA-ABLE.

Chapter 17: Public Contracts

What this chapter covers:

- Information about contracting with the state of Oregon.
- How to do business with various Oregon state agencies.
- How to find jobs with the state of Oregon.

CAUTION!

The material in this chapter is for informational purposes only. The LCB is not liable nor in any way responsible for how this information is shared or used. Websites and agencies referenced within this chapter are independent entities and responsible for the content of their sites. Should you have problems with the sites please report the problem to the web contact for the individual sites.

Oregon Business Information Guide

Landscape Contracting Business owners may find that the process of responding to state-issued contract opportunities challenging at first. However, businesses that follow the prescribed processes often discover it is well worth the effort.

Business owners interested in state contracts must be prepared to follow statutes and rules that are designed to protect the interests of Oregon taxpayers. State agencies offer a range of contract opportunities valued from a few dollars to millions of dollars. Most agencies have authority to spend up to $150,000 independent of the State Procurement Office (SPO). For many of the larger contracts and price agreements, agencies turn to SPO for assistance. Most of those contract opportunities are posted in the Oregon Procurement Information Program (ORPIN).

Doing Business with the State of Oregon

This guide will help you, the landscape contracting business owner or managing employee, locate information and services you need to successfully compete for government contracts.

Not long ago people expected to use a phone and rolodex to do most of their business; not so today. No matter what the business focus, from software consultant to construction management; computers, cell phones and other web enabled devices are a daily requirement for business success. The most important investment a business owner will make is purchasing a good computer and having the internet connection to support it.

If you do not have a computer of your own, or if connections in your area are difficult to use, local libraries, community colleges, and Small Business Development Centers often have computers that are available for public use. Many of these locations will also have information for small business owners on programs or resources in your area.

Government business is good business if you are ready to take the big step.

The first question to ask should be "is government business part of my business plan?" Your special product or service may or may not be something government agencies would purchase. Many business owners believe that government contracts provide a secure and steady revenue stream; however, businesses must have both the capacity and capability to provide services to meet the needs of agencies or entities.

Contracts up to $5,000 may be established with a business through a purchase document, phone, or fax quote, depending on specific agency policy. It is important that businesses get signed orders from authorized personnel before filling an order or beginning work on a contract.

Contracts that range between $5,000 and $150,000 are considered informal contracts. These may be released in a variety of ways. There may be a quote process or a formal bid process used to select a vendor.

Agencies generally handle smaller contracts without the help of the State Procurement Office. Most contract opportunities are posted on Oregon Procurement Information Network (ORPIN), the State's online procurement information system. A contact name and phone number for the buyer is always listed at the top of the screen when you open a contract opportunity.

For contracts over $150,000 (formal solicitations) or complex procurements the State Procurement Office often oversees the procurement process. These contract opportunities are posted on ORPIN for the amount of time required under Oregon Revised Statute. Most major contract opportunities will be on the ORPIN system for two to four weeks. The procurement analyst in charge of the solicitation will have contact information on the document. Business owners or agents are encouraged to contact the analyst with questions or concerns regarding the posted bid or RFP notices. (See ORS 279 A B & C for the law governing this.)

Business owners or agents are encouraged to keep track of closing dates for the solicitation and other important submittal information.

Formal solicitations are governed by statute and both the business representative and the procurement analyst must follow the prescribed statutes and rules connected to the specific type of procurement.

Doing Business with the Department of Administrative Services State Procurement Office and State Agencies

The State Procurement Office (SPO) performs many duties in addition to establishing and administering contracts. Below is a list of other services and programs offered through DAS-SPO.

Oregon Procurement Information Network (ORPIN)

ORPIN is the State's official procurement website. State agencies and many local governments use the site to post contract opportunities.

The ORPIN website provides suppliers with a one-stop place to find contract opportunities for the state.

Qualified Rehabilitation Facility Program (QRF)

The QRF program administers contracts that state and local governments have established with Oregon QRFs. This program provides over 6,000 jobs to Oregonians with disabilities. Contracts range from e-waste recycling and disposal to janitorial and grounds keeping.

Oregon Cooperative Procurement Program (ORCPP)

The ORCPP program saves Oregon citizens millions of dollars each year by developing cooperative purchasing agreements between state and local governments. The increased volume achieved by purchasing supplies and services cooperatively provides government offices better pricing on supply and service contracts. Businesses benefit because one contract will often create multiple sales opportunities.

Training and Outreach

The training and outreach team provides services to state and local government offices for procurement education. In addition, the training team provides training to suppliers on how to use ORPIN. The team also makes regular visits to business conferences and business organizations to give seminars on doing business with the State.

Suppliers are encouraged to contact DAS-SPO for a list of upcoming events and ORPIN training opportunities.

Rules and Policy

DAS-SPO is responsible for writing Rules and Policies to guide agencies under DAS Authority in their procurement practices. Rules are an extension of State Statutes that help to clarify the intent of the law.

The Rules Team invites stakeholders from agencies to provide input on purchasing Rule and Policy. All Rules are vetted through public hearings.

Finding Jobs with the State

There are many websites and services available for companies wanting to do business with the state of Oregon.

Secretary of State's Office, Corporate Division

http://www.filinginoregon.com/business/index.htm

This site will provide you with resources you need to register your business. The Oregon Business Wizard feature will help you determine the forms you will be required to complete when you register your business in Oregon.

Oregon Business Development Department

http://www.oregon.gov/ECDD/index.shtml

The Oregon Business Development Department (OBDD) hosts a variety of small business support programs. Funded primarily by Oregon Lottery, OBDD employs Business Development Officers who are located regionally throughout the state. The Business Development Officers can provide business owners with a variety of resources in their region.

Call the Small Business Services Coordinator at (503) 986-0161for additional information.

Special Business Certifications and Programs

In Oregon, Minority, Women and Emerging Small Businesses (MWESB) have the ability to become state certified. The program is a benefit to many small businesses that do business with Oregon State government. The Oregon Department of Transportation uses many certified MWESB suppliers on ODOT projects. Other agencies and local governments also utilize the state certified MWESB list to find suppliers of goods and services. For more information contact: http://www.oregon.gov/ECDD/OMWESB/

Governor's Advocate for Minority, Women and Emerging Small Businesses

http://governor.oregon.gov/Gov/MWESB/index.shtml

The primary role of the Advocate is to create business opportunities for Minority, Women and Emerging Small Businesses. The Advocate reports directly to the Governor, Legislature and the Department of Administrative Services Director's Office on projects and programs that assist MWESB certified companies in Oregon.

Oregon Department of Transportation, (ODOT) Office of Civil Rights

http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/

The ODOT Office of Civil Rights is funded by the Federal Highway Administration. The goal of ODOT's Civil Rights Office is to ensure that Oregon's DMWESB community is included in contracts related to highway, road and bridge projects. The Civil Rights team provides a variety of small business services and programs to support the development of local firms. ODOT is the only state agency with programs that specifically target disadvantaged minority, women and emerging small businesses. ODOT offers a Professional and Technical Service Contracting Program and a Small Contractor Training Program. Both programs provide developmental business opportunities that assist business owners in growing their businesses.

Small Business Administration (SBA)

http://www.sba.gov/localresources/index.html

The SBA has a wide variety of services to offer small businesses of all types. The U.S. Small Business Administration (SBA) has a certification process for the 8(a) Business Development Program to assist small businesses. This program assists in the development of small companies owned and operated by individuals who are identified as socially and/or economically disadvantaged. AT LEAST 51% ownership must be held by the disadvantaged individual to qualify for the 8(a) program

Chapter 18:
Commercial Drivers Licenses

What this chapter covers:

- What a Commercial Driver's License is.
- What the Oregon Commercial Driver's License is.
- How to obtain an Oregon Commercial Driver's License.

Commercial Drivers Licenses

Many landscape contracting businesses may find themselves in a situation where a person driving for them may be required to have a Commercial Driver's License (CDL). It is required if you drive certain kinds of commercial vehicles, notably those carrying heavy loads or operating vehicles that have a gross vehicle weight beyond a certain limit or that exceed a certain restriction. This requirement could jeopardize the business's ability transport materials to a job site if the driver does not have the CDL. The owner/managing employee of a business must make sure that the people who are driving these vehicles are legally licensed to do so.

> A CDL is different from the Oregon operator's or chauffeur's licenses.

History of the CDL Program

Driving certain commercial motor vehicles (CMVs) requires special skills and knowledge. Prior to implementation of the Commercial Driver's License (CDL) Program, in a number of states and the District of Columbia, any person licensed to drive an automobile could also legally drive a tractor-trailer or a bus. Even in many of the states that did have a classified licensing system, a person was not skills tested in a representative vehicle. As a result, many drivers were operating motor vehicles that they may not have been qualified to drive. In addition, many drivers were able to obtain driver's licenses from more than one state and hide or spread convictions among several driving records and continue to drive.

The Commercial Motor Vehicle Safety Act of 1986 was signed into law on October 27, 1986. The goal of the Act is to improve highway safety by ensuring that drivers of large trucks and buses are qualified to operate those vehicles and to remove unsafe and unqualified drivers from the highways. The Act retained a state's right to issue a driver's license, but established

minimum national standards states must meet when licensing commercial motor vehicle (CMV) drivers.

The Act corrects the situation that existed prior to 1986 by making it illegal to hold more than one license and by requiring states to adopt testing and licensing standards for truck and bus drivers to check a person's ability to operate the type of vehicle he/she plans to operate.

> **Note:** The Act does not require drivers to obtain a separate federal license. It merely requires states to upgrade their existing testing and licensing programs, if necessary, to conform with the federal minimum standards.

The Act places requirements on the CMV driver, the employing motor carrier, and the states.

A CDL can only be issued in the driver's state of legal residence. If you have a CDL, you can have no other driver's license in any other state. Oregon driver licensing standards require CMV drivers to obtain an Oregon CDL when driving applicable vehicles.

When an Oregon CDL Is Required

Drivers have been required to have a CDL in order to drive a CMV since April 1, 1992. An Oregon CDL is required if you operate any of the following commercial motor vehicles:

- a vehicle with a manufacturer's gross vehicle weight rating (GVWR) of more than 26,000 lbs
- a vehicle towing a unit with a manufacturer's GVWR of more than 10,000 lbs. when the GVWR exceeds 26,000 lbs
- a vehicle used to carry: (a) 15 or more passengers (excluding the driver), or (b) 15 or fewer people (including the driver) when carrying children to or from school and home regularly for compensation
- a vehicle carrying hazardous materials in amounts requiring placarding

As with other driving licenses, the Oregon CDL is good throughout the entire United States.

The Oregon CDL

For Oregon CDLs, Oregon determines the license fee, the license renewal cycle, most renewal procedures, and the age, medical and other driver qualifications of its intrastate commercial drivers. Interstate drivers must meet the Federal driver qualifications specified in 49 CFR 391.

All CDLs must contain the following information:

- the words "Commercial Driver's License" or "CDL"

- the driver's full name, signature, and address
- the driver's date of birth, sex, and height
- color photograph or digitized image of the driver
- the driver's state license number
- the name of the issuing state
- the date of issuance and the date of the expiration of the license
- the class(es) of vehicle that the driver is authorized to drive
- notation of the "air brake" restriction, if issued
- the endorsement(s) for which the driver has qualified

Oregon also issues learner's permits for purposes of behind-the-wheel training on public highways. Learner's permits are issued for limited time periods. Learner's permit holders are required to be accompanied by someone with a valid CDL appropriate for that vehicle

Oregon CDL Classifications

Oregon CDL license classifications are based directly on the federal standard for license classifications. The license classifications identify the types of vehicle that you may operate.

A Class A CDL allows you to operate any vehicle or combination of vehicles with a gross vehicle weight rating (GVWR) of 26,001 or more pounds provided the GVWR of the vehicle(s) being towed is in excess of 10,000 pounds. A Class A license also allows you to operate Class B and C vehicles.

> A person may not operate any vehicle for which an endorsement is required unless the person obtains the endorsement.

A Class B CDL allows you to operate any single vehicle with a GVWR of 26,001 pounds or more (or a gross combination weight rating of 26,001 pounds or more) and towing trailers/vehicles rated at 10,000 pounds GVWR or less. A Class B license also allows you to operate Class C vehicles.

A Class C CDL authorizes the operation of any of the following:

- any vehicle that is designed to transport 16 or more persons, including the driver, if the GVWR is less than 26,001 pounds and the person has a passenger endorsement
- any vehicle used in the transportation of hazardous materials, in quantities that require placarding by law, if the GVWR is less than 26,001 pounds and the person has a hazardous materials endorsement
- any vehicle that is owned or leased by, or operated under contract with a mass transit district or a transportation district when the vehicle

is actually being used to transport passengers for hire, regardless of the number of passengers, if the GVWR of the vehicle is less than 26,001 pounds and the person has a passenger endorsement

In addition to the basic CDL testing requirements (described in CDL Testing on page 250), you must also pass the following tests for each license class.

License Class	**Tests**
Class A	• written combination vehicles endorsement test • pre-trip inspection test • behind-the-wheel drive test in a Class A commercial vehicle
Class B	• behind-the-wheel drive in a Class B commercial vehicle • pre-trip inspection test
Class C	• written passenger and/or hazardous materials endorsement test • behind-the-wheel drive test in a Class C commercial vehicle

License Endorsements

Drivers who operate special types of CMVs also need to pass additional tests to obtain endorsements on their CDL. Endorsements are necessary for certain commercial driving requirements.

Code	Endorsement	Description	Testing Requirements
T	DOUBLE or TRIPLE TRAILERS	For vehicles with double or triple trailers.	Knowledge test only
P	PASSENGER	For vehicles designed to carry 16 or more people (including the driver), or those carrying 15 or fewer people (including the driver) transporting children to or from school and home regularly for compensation.	Knowledge and skills tests
N	TANK VEHICLES	For vehicles designed to haul liquids or liquefied gases in bulk in permanently mounted tanks or portable tanks rated at 1,000 gallons or more.	Knowledge test only
H	HAZARDOUS MATERIALS	For carrying hazardous materials in amounts requiring placards.	Knowledge test only
X	HAZARDOUS TANK	Designating a Tank (N) vehicle that carries Hazardous Materials (H).	Combination of the Tank Vehicle and Hazardous Materials endorsements

Obtaining an Oregon CDL

The general procedure for obtaining an Oregon CDL is as follows:

1. Show your Oregon driver license.
2. Show the Department of Transportation Physical Examination Form (or a medical waiver) for all Oregon examinations that apply to your license class and endorsement requirements.
3. Show proof of social security number, such as your Social Security card.
4. Meet Oregon driver record eligibility requirements.
5. Fill out an application including certifications.
6. Pass the required knowledge and vision tests (before a CDL Temporary Instruction Permit will be issued).
7. Pay the Oregon CDL fees.
8. Schedule, take, and pass your Oregon CDL skills test.

Medical Certificates

Applicants for an Oregon CDL must pass a Department of Transportation (DOT) medical examination performed in accordance with CFR 49 §391.41 and CFR 49 §391.43. Federal Motor Carrier Safety Regulations require drivers to pass a physical examination once every 2 years. The main physical requirements include good hearing, 20/40 vision with or without glasses or corrective lenses, and a 70-degree field of vision in each eye. Drivers must not be colorblind.

DOT medical examinations are conducted by a licensed medical examiner as defined in CFR 49 §390.5. This includes but is not limited to medical doctors (MD), osteopaths (DO), naturopaths (ND), advanced practice nurses (APN), physicians assistants (PA), and chiropractors (DC).

To find a medical examiner, you can contact your primary care provider to inquire if they will conduct a DOT medical exam. You may also find a medical examiner in the yellow pages of your telephone book or online by using an Internet directory or search engine.

Physical qualifications for a CDL are listed in CFR 49 §391.41. If you do not meet the vision or diabetes physical qualification standards or have a loss or impairment of limbs (arms, hands, fingers, legs or feet), and you want to operate an interstate CMV, you may be able to satisfy alternative physical qualifications or qualify for an exemption. Contact the Oregon State office of FMCSA at (503) 399-5775 for additional details. Information is also available on the FMCSA web site.

If you cannot meet the medical qualifications for CMV interstate commerce operation, you may qualify for a Waiver of Physical Disqualification. This waiver, available from DMV, permits operation of a CMV used in Oregon intrastate commerce only. Call (503) 945-0891 for specific details.

After the exam, the examiner will provide you with a medical examiner's certificate that you must show to DMV and carry with you whenever you operate a commercial motor vehicle (CMV). Even if you don't have a CDL, a medical examiner's certificate is also required if you operate a CMV in interstate commerce that:

- has a gross vehicle rating in excess of 10,000 pounds, or
- is designed or used to transport more than 8 passengers (including the driver) for compensation.

Note: If your medical examiner does not have the required forms, they may be obtained from J.J. Keller (item WW-015-MP) by calling 1-877-564-2333 or the Willamette Traffic Bureau (item 202B and 20A) by calling 1-800-727-7293 or (503) 236-1183. You can also obtain the forms online by using the "Medical Examinations and Reports" link at www.jjkeller.com or by using the "Driver Qualification" link at http://www.wtbtraffic.com. The medical examiner can also print a copy of the forms directly from the FMCSA web site.

Medical examiners certificates are valid for no more than two years. Some medical conditions may require you to have a physical examination more frequently and others may disqualify you from driving a CMV.

Eligibility

To be eligible for a Commercial Drivers License (CDL), you must:

- Have or meet the qualifications for a Non-Commercial Class C driver license. This means you must pass the non-commercial Class C tests before applying for a Class B CDL.
- Be 21 years old. You may obtain an Oregon CDL at 18 years if all commercial driving is done within Oregon and if no hazardous materials requiring placarding are transported and if you do not drive double or triple trailer rigs.
- Indicate on the Commercial Driver License Application that you have at least one year's driving experience in at least a non-commercial Class C vehicle.
- Pass a CDL general knowledge test and any required CDL endorsement knowledge tests.
- Pass a vision screening.

- Meet the medical and physical requirements necessary to obtain a valid medical examiner's card or a medical waiver before taking any CDL skills test.
- Pass a CDL skills test.
- Otherwise qualify for the license based on your driving record.

To prevent drivers from applying for licenses in another state after their licenses have been revoked, all states exchange information about CMV drivers, traffic convictions, and disqualifications through the Commercial Driver's License Information System (CDLIS) and the National Driver Register (NDR). As part of the CDL application process, states use both the CDLIS and NDR to check a driver's record, and the CDLIS to make certain that the applicant does not already have a CDL.

Note: Members of the enforcement community seeking access to CDLIS data should visit the FMCSA Technical Support Web site. Carriers needing CDLIS data should seek a commercial company that provides a clearinghouse service for this information, or contact the driver's state of licensure.

You may also be eligible for a CDL if you meet the requirements to be grandfathered. For more information on grandfathering, see Grandfathering for Qualified Applicants on page 250.

You are disqualified from obtaining an Oregon CDL if any of the following are true:

- if you possess a license from any state other than Oregon
- if you are currently subject to any disqualification of your commercial driving privilege from Oregon or any other state
- if your license is currently suspended, revoked, denied, or cancelled
- if you have a conviction for operating a commercial motor vehicle while impaired in the 24 months immediately preceding application

(For more information on disqualifications, see CDL Disqualifications on page 252.)

Fees

The DMV requires that you pay for tests in advance. If you are taking a test and paying by check, please bring separate payment (such as two checks): one for your tests and one for issuing your license or instruction permit.

Note: If you bring one check and fail your test, DMV can not refund cash for more than half the amount of the check or $50, whichever is less. Under no circumstances can the DMV refund any amount of a third-party check.

Current fees (2010) are as follows:

Service	Charge
Regular Class C driver license (non-commercial)	$60.00 (8-yr)
Commercial driver license, Class A, B, or C (applicant already has Oregon license)	$35.00 (4-yr) $75.50 (8-yr)
Commercial driver license (applicant does not have an Oregon license)	$135.50 (8-yr)
CDL instruction permit	$23.50
CDL written tests (except combination vehicles test)	$10
CDL combination vehicles knowledge test	no fee
CDL drive test	$70
CDL drive test to remove air brake restriction	$56
Oregon CDL Certificate of Test Completion	$40

License Exemptions

Even though you may operate vehicles that normally require a CDL, there are some exemptions. All active duty military drivers were waived from the CDL requirements by the Federal Highway Administrator. The Act also gives states the discretionary right to waive firefighters, emergency response vehicle drivers, farmers and drivers removing snow and ice in small communities from the CDL requirements, subject to certain conditions.

In addition, a state may also waive the CDL knowledge and skills testing requirements for seasonal drivers in farm-related service industries and may waive certain knowledge and skills testing requirements for drivers in remote areas of Alaska. These drivers are issued restricted CDLs. A state can also waive the CDL hazardous materials endorsement test requirements for part-time drivers working for the pyrotechnics industry, subject to certain conditions.

If you think you may be exempt from needing a CDL, check with the Oregon DMV for the current waivers and exemptions. At this time, you may be exempt from the requirements for possessing a CDL if you are in any of the following criteria:

- active duty military with military licenses may operate military vehicles
- firefighters who meet approved training standards may operate authorized emergency vehicles
- farmers may operate heavy equipment without a CDL in certain cases

- individuals may operate motor homes or other vehicles used exclusively to transport personal possessions or family members for non business purposes

Grandfathering for Qualified Applicants

The Act gives states the option to grandfather drivers with good driving records from the skills test. To qualify for grandfathering, the driver must have a good driving record in combination with certain driving experience, or the driver must have previously passed an acceptable skills test and have a current license and a good driving record.

A good driving record means a driver can certify that, during the 2-year period immediately prior to applying for a CDL he/she:

- has not had more than one license
- has not had any license suspended, revoked, or canceled
- has not had any convictions in any type of motor vehicle for major disqualifying offenses
- has not had more than one conviction for any type of motor vehicle for serious traffic violations
- has not had any violation of state or local law relating to motor vehicle traffic control arising in connection with any traffic accident, and has no record of an accident in which he/she was at fault

To qualify for grandfathering with driving experience, the driver must be able to certify and providence evidence that he/she is regularly employed in a job requiring operation of a CMV, and has either previously taken a behind-the-wheel skills test in a representative vehicle or has operated a representative vehicle for at least 2 years immediately preceding application for a CDL.

CDL Testing

The Federal Highway Administration (FHWA) has developed and issued standards for testing and licensing CMV drivers. Among other things, the standards require states to issue CDLs to their CMV drivers only after the driver passes knowledge and skills tests administered by the state related to the type of vehicle to be operated.

Knowledge Tests

There are two kinds of tests: knowledge tests and skills tests. All CDL applicants must take the general knowledge test. You may take knowledge tests at any full-service DMV office without an appointment. Because of the

amount of time necessary to take the tests, many offices do not conduct knowledge tests after 4:00 p.m. weekdays and after 11:00 a.m. on Saturday. Go early enough to give yourself plenty of time to take the test before the office closes.

Depending on the license class and endorsements you need, you may need to take additional knowledge tests, as shown below:

Test	Take If...
Passenger Transport	...you want to drive a bus
Air Brakes	...your vehicle has air brakes
Combination Vehicles	...you want to drive combination vehicles
Hazardous Materials	...you want to haul hazardous material or waste in amounts that require placarding
Tankers	...you want to haul liquids in bulk
Doubles/Triples	...you want to pull double or triple trailers

The general knowledge test contains at least 30 questions. To pass the knowledge tests (general and endorsement), applicants must correctly answer at least 80 percent of the questions.

You can retake a knowledge test as many times as you need to. The first three times you fail a knowledge test, you can retake the test the next day. After failing the test a fourth time, you must wait 28 days before you can try again.

Skills Tests

If you pass the required knowledge test(s), you can take the CDL skills tests. The skills test covers three types of general skills that will be tested: pre-trip inspection, basic vehicle control, and on-road driving. You must take these tests in the type of vehicle for which you wish to be licensed.

- **Pre-trip vehicle inspection** You are tested to see if you know whether your vehicle is safe to drive. You are asked to do a pre-trip inspection of your vehicle and explain to the examiner what you would inspect and why.
- **Basic vehicle control** You are tested on your skill to control the vehicle. You will be asked to move your vehicle forward, backward, and turn it within a defined area. These areas may be marked with traffic lanes, cones, barriers, or something similar. The examiner tells you how each control test is to be done.
- **On-road test** You are tested on your skill to safely drive your vehicle in a variety of traffic situations. The situations may include left and right turns,

intersections, railway crossings, curves, up and down grades, and single or multi-lane roads, streets, or highways. The examiner tells you where to drive.

Skills tests are normally given at an approved third-party testing site in your area. The skills test can vary. The latest procedures are indicated in the Oregon CDL Course. To pass the skills test, applicants must successfully perform all the required skills (listed in 49 CFR 383.113). The skills test must be taken in a vehicle representative of the type of vehicle that the applicant operates or expects to operate.

States develop their own tests, which must be at least as stringent as the Federal standards. Model driver and examiner manuals and tests have been prepared and distributed to the states to use, if they wish.

Note: If a driver either fails the air brake component of the general knowledge test or performs the skills test in a vehicle not equipped with air brakes, the driver is issued an air brake restriction, restricting the driver from operating a CMV equipped with air brakes.

Third-Party Skills Testing

Other states, employers, training facilities, governmental departments and agencies, and private institutions can serve as third-party skills testers for the state. For third-party skills testing, the following must be adhered to:

- Tests must be the same as those given by the state.
- Examiners must meet the same qualifications as state examiners.
- The state must conduct an on-site inspection at least once a year.
- At least annually, state employees must evaluate the programs by taking third-party tests as if they were test applicants, or by testing a sample of drivers tested by the third party and then comparing pass/fail rates.
- The state's agreement with the third-party skills tester must allow the FHWA and the state to conduct random examinations, inspections, and audits without prior notice.

CDL Disqualifications

There are many reasons that your Oregon CDL can be suspended or revoked. The most common reasons are improper use of alcohol or drugs, traffic violations, and failure to notify. The Oregon CDL course details all of the rules regarding suspension or revocation.

Alcohol or drug use is not tolerated and your record will follow you throughout the United States forever!

Within 30 days of a conviction for any traffic violation, except parking, a driver must notify his/her employer, regardless

of the nature of the violation or the type of vehicle which was driven at the time. If a driver's license is suspended, revoked, canceled, or if he/she is disqualified from driving, his/her employer must be notified. The notification must be made by the end of the next business day following receipt of the notice of the suspension, revocation, cancellation, lost privilege or disqualification.

> If your Oregon CDL is revoked, you are not allowed to replace it with a CDL from another state.

DMV will suspend your commercial driving privileges for 60 days if you are convicted of two of the offenses listed below within a three year period. DMV will suspend your commercial driving privileges for 120 days if you are convicted of three or more of these offenses within a three year period.

While operating any type of motor vehicle (commercial or non-commercial) while holding a valid CDL:

- reckless driving (ORS 811.140);
- exceeding the speed limit while driving 100 mph or more; or
- exceeding the speed limit by 30 mph or more when the court imposes a suspension.

While operating a Commercial Motor Vehicle (CMV):

- operating the vehicle 15 miles per hour or more above the posted limit;
- operating the vehicle without driving privileges;
- failing to carry a driver license or presenting the driver license to a police officer;

Driving on the left side of a curve, grade, intersection, or rail crossing;

- failing to drive within a lane;
- unsafe passing on the left or right;
- following too closely;
- violating any law related to traffic control if the violation is connected to a fatal accident; or
- violating any law of another jurisdiction that corresponds to an Oregon law described above.

If you get multiple serious violation suspensions and one or more of these suspensions is still in effect, any additional serious violations suspensions imposed will run consecutively to any serious violation suspension already in effect.

DMV will suspend your commercial driving privileges for at least 1 year if you are convicted of any one of the offenses listed below while operating a

commercial motor vehicle (CMV) or while operating your personal vehicle and holding a CDL:

- being under the influence of alcohol as prescribed by State law;
- being under the influence of a controlled substance;
- having an alcohol concentration of 0.04 or greater while operating a CMV;
- refusing to take an alcohol test as required by a State or jurisdictions under Implied Consent laws;
- leaving the scene of an accident;
- using the vehicle to commit a felony (includes but not limited to assault, criminal mischief, fleeing or attempting to elude, murder, negligent homicide, manslaughter, unauthorized use);
- driving a CMV when, as a result of prior violations committed operating a CMV, the CDL is revoked, suspended or canceled, or you are disqualified from operating a CMV; or
- causing a fatality through the negligent operation of a CMV, including but not limited to motor vehicle manslaughter, homicide by motor vehicle and negligent homicide.

The CDL suspension will be for at least 10 years if you are convicted of two or more of these offenses. DMV may reinstate your license after 10 years only if you qualify under OAR 735-070-2000, retest, and pay both CDL issuance and reinstatement fees.

DMV will also suspend your commercial driving privileges for life if you are convicted of using a vehicle (commercial or non-commercial) in the commission of a felony involving manufacturing, distributing, or dispensing a controlled substance. The suspended privileges may never be reinstated.

FMCSA requires DMV to suspend your driving privileges if you fail to appear in court or fail to pay a traffic fine for a traffic violation or traffic crime in any state while holding a CDL or operating a CMV.

FMCSA may require DMV to impose an emergency disqualification for up to one year if they determine you pose an imminent hazard. FMCSA defines imminent hazard as "the existence of a condition that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury or endangerment."

DMV will suspend your commercial driving privileges for 60 days if you are convicted of one of the railroad crossing violations listed below while operating a commercial motor vehicle:

- failure to stop for a railroad signal in violation of ORS 811.455;
- failure to follow rail crossing procedures for high risk vehicles in violation of ORS 811.460;
- obstructing a rail crossing in violation of ORS 811.475; or
- failure of the operator of a commercial motor vehicle to slow down and check that tracks are clear of an approaching train in violation of ORS 811.462.

If you get a second railroad crossing conviction within three years, the suspension period is 120 days. A third or subsequent conviction within three years will result in a suspension of CDL privileges for 1 year.

DMV will suspend your commercial driving privileges if you are convicted of violating an out-of-service order.

The suspension periods are as follows:

- 180 days if a first out-of-service violation and you are not transporting hazardous materials or operating a vehicle designed for 16 or more passengers, including the driver.
- 1 year if a first out-of-service violation and you are transporting hazardous materials or operating a vehicle designed to transport 16 or more passengers, including the driver.
- 3 years if a second or subsequent out-of-service violation within 10 years and you are not transporting hazardous materials or operating a vehicle designed for 16 or more passengers, including the driver.
- 5 years if a second or subsequent out-of-service violation within 10 years and you are transporting hazardous materials or operating a vehicle designed for 16 or more passengers, including the driver.

Oregon law requires that DMV suspend your commercial driving privileges in accordance with the Professional License Act of 1993 for failure to pay child support. The suspension is imposed and cleared upon appropriate notification by a District Attorney or Support Enforcement Division.

> **Note:** For disqualification purposes, convictions for out-of-state violations are treated the same as convictions for violations that are committed in the home state. The Commercial Driver's License Information System (CDLIS) ensures that convictions a driver receives outside his or her home state are transmitted to the home state so that the disqualifications can be applied.

If a CDL holder is disqualified from operating a CMV, the state may issue him/her a license to operate non-CMVs. However, drivers who are disqualified from operating a CMV cannot be issued a conditional or

"hardship" CDL or any other type of limited driving privileges to continue driving a CMV.

States have the option to reduce certain lifetime disqualifications to a minimum disqualification period of 10 years if the driver completes a driver rehabilitation program approved by the state. Check with the Oregon DMV for the current regulations and policies on disqualifications.

The Federal penalty to a driver who violates the CDL requirements is a civil penalty of up to $2,500 or, in aggravated cases, criminal penalties of up to $5,000 in fines and/or up to 90 days in prison. Employers may not knowingly use a driver who has more than one license or whose license is suspended, revoked or canceled, or is disqualified from driving. Violation of this requirement may result in civil or criminal penalties. An employer is also subject to a penalty of up to $10,000, if he or she knowingly uses a driver to operate a CMV without a valid CDL.

Appendix A: Specific Laws

What this appendix covers:

- Specific Oregon regulations for landscape contracting businesses and professionals.

There are some specific laws that the LCB wants to address in this manual that are often overlooked and not complied with by many landscape contracting businesses in Oregon. The LCB is bringing them to your attention to help decrease the unpleasant encounters between the landscape contracting business and the Board.

ORS 671.525 APPLICANT FOR LANDSCAPE CONTRACTING BUSINESS LICENSE REQUIRED TO BE AN INDEPENDENT CONTRACTOR; CLASSES OF LICENSURE.

(1) An applicant for a landscape contracting business license must qualify as an independent contractor, under ORS 670.600, to be licensed with the state Landscape Contractors Board.

(2) The Board shall establish two classes of independent contractor licensees:

(a) The nonexempt class is composed of the following entities:

(A) Sole proprietorships, partnerships, corporations and limited liability companies with one or more employees; and

(B) Partnerships, corporations and limited liability companies with more than two partners, corporate officers or members if any of the partners, officers or members are not part of the same family and related as parents, spouses, siblings, children, grandchildren, sons-in-law or daughters-in-law.

(b) The exempt class is composed of all sole proprietorships, partnerships, corporations and limited liability companies that do not qualify as nonexempt.

(3) All partnerships, corporations and limited liability companies applying for a landscape contracting business license must have a federal tax identification number.

(4) If a licensee who qualifies under subsection (2)(b) of this section hires one or more employees, or falls into any of the categories set out in subsection (2)(a)(B) of this section, the licensee is subject to penalties

under ORS 671.997 and must submit proof that the licensee qualifies under subsection (2)(a) of this subsection.

(5) The decision of the Board that a licensee is an independent contractor applies only when the licensee is performing work of the nature described in ORS 671.520 and 671.530.

Meaning: In order for a landscape contracting business to be granted a license with the LCB, the business must operate as an independent contractor. This means that the business must meet the conditions set out in ORS 670.600 which is discussed earlier in the manual.

ORS 671.530 (6): LANDSCAPE CONSTRUCTION PROFESSIONAL OR LANDSCAPE CONTRACTING BUSINESS LICENSE REQUIRED; USE OF TITLE; SCOPE OF LANDSCAPE CONSTRUCTION PROFESSIONAL LICENSE.

(6) A landscape construction professional is authorized to perform landscaping work only while in the employ of a landscape contracting business licensed and bonded as required by ORS 671.510 to 671.760. If the landscape construction professional is the sole proprietor, the landscape construction professional must also obtain a license as a landscape contracting business.

Meaning: an individual who has passed the examination to become a licensed landscape construction professional must either own or be employed by a licensed landscape contracting business before this person can perform landscape work. The individual is not the contractor, the business is.

ORS 671.540(1)(q)&(r): APPLICATION OF ORS 671 .510 TO 671 .760. ORS 671 .510 TO 671.760 AND 671.990 (2) DO NOT APPLY TO:

(q) An employee of a licensed landscape contracting business when performing work for the business under the direct supervision of a licensed landscape construction professional.

(r) An employee of a worker leasing company or temporary service provider, both as defined in ORS 656.850, when performing work for a licensed landscape contracting business under the direct supervision of a licensed landscape construction professional

Meaning: any unlicensed person performing landscape work as an employee of a licensed landscape contracting business is only exempt from being licensed with the LCB if they are under the "direct" supervision of a licensed landscape construction professional. Even when the individual is employed by the business if the condition of being directly supervised by a licensed landscape construction professional is not met, the employee could be cited for not being licensed (the exemption is not met) and face civil penalties. It

is the responsibility of the business to require direct supervision and the LCB has made a rule to this effect in OAR 808-003-0018

ORS 671.550: AUTHORITY OF BOARD TO INVESTIGATE; CONFIDENTIALITY OF INFORMATION

(1) The State Landscape Contractors Board may inquire into and inspect:

(a) Any services performed or materials furnished by a licensee under ORS 671.510 to 671 .710.

(b) The financial records of a person who it reasonably believes is operating in violation of ORS 671.530.

(c) The services performed or materials furnished by a person who it reasonably believes is operating in violation of ORS 671.530.

(2) Except when used for legal action or to determine negligent or improper work under ORS 671.703, the information obtained by an inspection authorized by this section is confidential. However, the Board shall furnish copies of any inspection to the licensee or other person that is subjected to an inspection.

Meaning: This statute give the Board authority to investigate the work a licensee performs and the material the licensee supplies on a project. It also gives the Board authority to investigate the services and financial records of any person who the Board believes is operating as a landscape contracting business without being properly licensed.

ORS 671.555 INVESTIGATION OF PERSON ENGAGED IN LANDSCAPE CONTRACTING BUSINESS; PROCEDURES; ORDERS TO STOP WORK.

(1) The State Landscape Contractors Board may investigate the activities of any person engaged in the landscape contracting business to determine compliance with ORS 671.510 to 671.710.

(2) With the approval of the city or county, the Board may conduct investigations with city or county inspectors, provided that the city or county is reimbursed by the Board for the costs of such investigations.

(3) Any inspector authorized by the Board to determine compliance with the provisions of ORS 671.510 to 671.710 is authorized to require any person who is engaged in any activity regulated by ORS 671.510 to 671.710 to demonstrate proof of compliance with the licensing requirements of ORS 671.510 to 671.710. If a person who is contracting directly with the owner of the property does not demonstrate proof of compliance with the license requirements of ORS 671.510 to 671.710, the inspector shall give notice of noncompliance to the person. The notice of noncompliance shall be in writing, shall specifically state that the person is not in compliance with the licensing requirements of ORS 671.510 to 671.710 and shall provide that unless the person demonstrates proof of

compliance within two days of the date of the notice, the inspector may by order stop all work then being done by the person. The notice of noncompliance shall be served upon the person and shall be served upon or delivered to the owner of each property upon which the person is then performing work under contract. If more than one person is the owner of any such property, a copy of the notice need be given to only one of such persons. If after receipt of the notice of noncompliance the person fails within the two-day period specified in the notice to demonstrate proof of compliance with the registration requirements of ORS 671.510 to 671.710, the inspector is authorized to order the work stopped by notice in writing served on any persons engaged in the activity. Any person so notified shall stop such work until proof of compliance is demonstrated. However, the inspector may not order the work stopped until at least two days after the copies of the notice of noncompliance have been served upon or delivered to the owners.

(4) Notwithstanding subsection (3) of this section, the Board may order work stopped immediately if the landscape contracting business working on a worksite cannot demonstrate that the business has been licensed by the Board at any time within the two years immediately preceding work on the worksite.

(5) The Board has the power to administer oaths, issue notices and subpoenas in the name of the Board, compel the attendance of witnesses and the production of evidence, hold hearings and perform such other acts as are reasonably necessary to carry out its duties under ORS 671.510 to 671.710.

(6) If any person fails to comply with a subpoena issued under subsection (5) of this section or refuses to testify on matters on which the person may be lawfully interrogated, the Board shall compel obedience in the manner provided in ORS 183.440.

Meaning: This statute gives the Board the authority to investigate any activity of any person, licensee or not, engaged in landscape contracting work in Oregon and to subpoena witnesses and compel attendance at hearing and administer oaths. If a person fails to comply with a subpoena the Board can take legal action against the person in court. This statute also allows the Board to work in conjunction with other law enforcement agencies to compel compliance and allows the LCB to issue stop work orders under certain conditions.

ORS 671.563 APPLICANT NOTICE OF UNPAID JUDGMENTS, AWARDS AND ORDERS; RULES.

An applicant for the renewal of a landscape construction professional license or landscape contracting business license shall include in the application to the State Landscape Contractors Board notice of any unpaid court judgment,

arbitration award or administrative agency final order entered or issued in any jurisdiction that requires the applicant to pay damages arising out of the performance of, or a contract for, landscaping work. The Board may adopt rules that require an applicant to provide additional information regarding a judgment, arbitration award or agency final order described in this section and the status of any appeal or exceptions.

Meaning: Every licensee (individual or business) must at the time of renewal provide the Board with information about any court decision that has been levied against the licensee for the performance of landscape work (no matter where) and inform the Board how the issue is being resolved before the Board decides to issue or not issue a new license to the licensee.

ORS 671.565 (1)(b): LANDSCAPE CONTRACTING BUSINESS LICENSE REQUIREMENTS; FEES; EMPLOYEES; FILING OF SECURITY; INSURANCE; BASIS FOR INDEPENDENT CONTRACTOR STATUS.

(1) Each person applying for a landscape contracting business license shall:
(b) Employ at least one person with a landscape construction professional license to supervise the landscaping operation of the business.

Meaning: Every landscape contracting business must have at least one owner or employee who has obtained the landscape construction professional license to supervise the landscape operations of the business. This includes the direct supervision of unlicensed employees of the business. Direct supervision is defined in rule: OAR 808-002-0328.

ORS 671.575(3): LICENSE REQUIRED TO OBTAIN JUDICIAL OR ADMINISTRATIVE REMEDY; EXCEPTION.

(3) If a landscape contracting business falsely swears to information provided under ORS 671.560 or 671.565 or knowingly violates the provisions of ORS 656.029, 670.600, 671.560 or 671.565, the landscape contracting business may not file a lien, file a claim with the State Landscape Contractors Board or bring or maintain in any court of this state a suit or action for compensation for the performance of any work or for the breach of any contract for work which is subject to ORS 671.510 to 671.760 and 671.997

Meaning: If a landscape contracting business makes false statements on the application; has employees when they state they are exempt and knowingly attempts to not pay worker's compensation; or fails to meet the qualifications for an independent contractor then that business cannot collect for work they have performed nor can they file suit or file a claim against another business for breach of contract or negligent work. If the business wants to get paid then the business needs to make sure there is no fraudulent conduct associated with obtaining the business license or unethical employment activities associated with the business.

ORS 671.578: SUIT FOR DAMAGES FOR MISREPRESENTATION; ATTORNEY FEES.

If any person suffered costs or damages as a result of an individual providing a false or invalid State Landscape Contractors Board number or otherwise misleading a person with respect to licensing with the Board, that person may bring suit in a court of competent jurisdiction to recover damages. The court may award reasonable attorney fees to the prevailing party in an action under this section.

Meaning: If any consumer or other person was damaged because the business falsely represented that the business was licensed by the LCB, court costs and reasonable attorney fees can be awarded to the prevailing party in a court action.

ORS 671.580 LANDSCAPE CONSTRUCTION PROFESSIONAL LICENSE NOT TRANSFERABLE.

A landscape construction professional license issued pursuant to ORS 671.560 is a personal privilege and is not transferable

Meaning: A licensed landscape construction professional cannot allow another person to use or buy the individual license.

ORS 671.600: NEW LICENSE REQUIRED UPON CHANGE OF OWNERSHIP; NOTIFICATION OF CHANGE OF ADDRESS.

(1) A new landscape contracting business license shall be required whenever there is a change in ownership, irrespective of whether the business name is changed. As used in this subsection, "change in ownership" does not include a change in the holders of corporate stock.

(2) If a licensee moves to another location, re-licensing is not required but the licensee must notify the State Landscape Contractors Board promptly of the new address.

ORS 671.603(1): PERSONS REQUIRED TO GIVE NOTIFICATION OF CHANGE OF ADDRESS; COMMUNICATIONS DELIVERED TO LAST-KNOWN ADDRESS.

(1) A landscape construction professional or person operating as a landscape contracting business shall notify the State Landscape Contractors Board of a change of address for the professional or business that occurs while the professional or business is licensed by the Board or within one year after a license expires. The landscape construction professional or landscape contracting business shall ensure that the Board receives notice of the change of address no later than the 10th day after the change of address occurs.

Meaning: Licensees, both individual and business, must notify the Board within 10 calendar days after the change of address occurs. Failure to do so can result in a civil penalty for the landscape contracting business **[OAR 808-005-0020].**

ORS 671.605 Effect of change in partners or corporate officers.

A partnership or corporation licensed as a landscape contracting business shall notify the State Landscape Contractors Board immediately upon any change in partners or corporate owners or in the percentage of an ownership interest in the landscape contracting business. Upon a change in partners, a licensed partnership immediately shall apply for a new license and pay to the Board the fee required by ORS 671.650 for an original license.

Meaning: If a business entity changes ownership, except for corporations, then the business must apply for a new business license. The effect of a business changing from a sole proprietor to a corporation means there is a change in the ownership of the business and a new "baby" is born and a new license is required. The notification of address change is addressed more specifically in ORS 671.603 below.

ORS 671.610(1)(o)(p): GROUNDS FOR SANCTIONS AGAINST LICENSE; SUSPENSION OR REFUSAL OF LICENSE WITHOUT PRIOR HEARING; HEARING; EFFECT OF REVOCATION; CIVIL PENALTY.

(1) In addition to any civil penalty assessed under ORS 671.997, the State Landscape Contractors Board may suspend, revoke or refuse to issue or renew the license of a landscape construction professional or landscape contracting business that does any of the following:

(o) Engages in conduct as a landscape construction professional or landscape contracting business that is dishonest or fraudulent or that the Board finds injurious to the welfare of the public.

(p) Fails to comply with the requirements of ORS 652.120.

Meaning: For paragraph (1) (o) above, if the Board determines that an individual licensee or licensed business entity is falsely advertising, is taking money without performing work, fails to pay suppliers when the money has been received by the business, fails to pay minimum wages or overtime wages, fails to comply with employment laws, fails to pay a fine issued by another state agency or the federal government, writes bad checks, etc., **[**see **OAR 808-002-0330]** the Board can suspend the license and issue civil penalties.

For paragraph (1) (p) above, if the Board determines that a landscape contracting business has employees and does not establish regular payday; pay intervals; or an agreement to pay wages at future date the Board can suspend the license and issue civil penalties.

ORS 671.613: SANCTION FOR FAILURE TO COMPLY WITH CERTAIN LAWS.

(1) The failure of a landscape contracting business to comply with the provisions of this section and ORS 279C.800 to 279C.870, 656.021, 657.665, 670.600, 671.520, 671.525, 671.530 and 671.575 or to be in conformance with the provisions of ORS 279.835 to 279.855 or ORS chapter 279A, 279B, 279C, 316, 571, 656 or 657 is a basis for suspension of the landscape contracting business license, revocation of the landscape contracting business license, refusal to issue or reissue a landscape contracting business license, assessment of a civil penalty as set forth in ORS 671.997 or a combination of these sanctions.

Meaning: Failure of the landscape contracting business to properly follow the laws surrounding public contracts (prevailing wage) and to abide by the employment laws, specifically workers compensation, unemployment tax, and payroll tax requirements can result in the suspension of the landscape contracting business license and the assessment of a civil penalty.

ORS 671.625: MINIMUM STANDARDS FOR CONTRACTS AND BILLINGS; RULES; COMPLIANCE; EFFECT OF NONCOMPLIANCE.

(1) The State Landscape Contractors Board shall by rule adopt minimum standards for written contracts and billings of the landscape contracting businesses. The standards shall set forth requirements for information that must be contained in contracts and billings. The information required shall be any information the Board determines is necessary to provide protection for consumers of the services and materials provided by landscape contracting businesses.

(2) Work by a landscape contracting business subject to ORS 671.510 to 671.710 shall only be performed subject to a written contract. Any contract or billing for such work must conform to the standards adopted under subsection (1) of this section.

(3) A contract that does not substantially comply with this section may not be enforced by a landscape contracting business in any court or other proceedings within this state

Meaning: If landscaping work is done by a landscape contracting business without a written contract or if the written contract does not substantially meet the standards as set forth **in OAR 808-002-0020** the business cannot collect from the consumer, nor can the landscape contracting business enforce the contract in any court within the state of Oregon. This doesn't mean that the consumer can't enforce the contract; it is purely a consequence for the landscape contracting business. This is a very rigid requirement for landscape contracting businesses.

OAR 808-003-0010 ADVERTISING

(1) All written advertising, except telephone and internet directory line listings, shall include the landscape contracting business license number.

(2) Advertising shall include, but not be limited to:

(a) Newsprint classified advertising and newsprint display advertising for work subject to ORS 671 .510 through 671 .710;

(b) Telephone or internet directory space ads, display ads and line listings;

(c) Business cards;

(d) Business flyers;

(e) Business letterhead;

(f) Business signs at construction sites; and

(g) Websites.

(3) No person shall advertise under the heading of "landscape construction professional, landscape contractor, landscape contracting business" or any other heading that would lead any person to believe the business is a landscape contracting business in any advertising media unless the person holds an active landscape contracting business license.

Meaning: All written advertisement must include the 4 digit landscape contracting business number in the advertisement. The law allows for an exception from this requirement in telephone and internet directory line listings where no other information about the business is given. The law also specifies that the heading of "landscape contractor" or any other heading that indicates the business is a landscape contracting business requires an active landscape contracting business license with the LCB. Failure by a landscape contracting business to include this 4 digit number can result in civil penalties up to $500.

OAR 808-003-0018: EMPLOYMENT, CHANGE OF LICENSE PHASE, SUPERVISORY RESPONSIBILITIES

(1) If a landscape contracting business employs only one licensed landscape construction professional, that licensed landscape construction professional must hold a license covering each phase of landscaping work that the business offers and must be on the payroll each hour or meet the salary test for salaried, exempt employees during the time the landscape contracting business is performing landscape work related to the landscape construction professional's phase of license.

(2) If a landscape contracting business employs more than one licensed landscape construction professional the combined licenses must cover each phase of landscape contracting that the business offers and the licensed

landscape construction professionals must be on the payroll each hour or meet the salary test for salaried, exempt employees during the time the landscape contracting business is performing landscape work related to each landscape construction professional's phase of license.

In conjunction with the above rule, see:

OAR 808-003-0040: LIMITATION OF SERVICE BY LICENSE

(1) A licensed landscape contracting business shall perform only those phases of landscape work for which its owners or employees who are landscape construction professionals are licensed.

(2) The landscape work a licensed landscape contracting business offers to perform shall be limited to the following:

(a) An all phase license holder is entitled to perform all areas of landscape work, plus the installation of backflow prevention assemblies unless, in lieu of Backflow Prevention, the landscape construction professional has signed an agreement with the Board prior to April 30, 1996 stating that the contractor will not perform Backflow Prevention work;

(b) An irrigation; no backflow limited license holder may only perform irrigation functions;

(c) A sod and seed limited license holder may only perform grass seed planting or sod laying;

(d) A tree limited license holder may only install new or transplant trees;

(e) A standard limited license holder may perform all areas of landscape work except irrigation and the installation of backflow assemblies;

(f) An irrigation plus backflow license holder may perform only irrigation and the installation of backflow assemblies.

(g) A probationary All Phase Plus Backflow license holder may perform all areas of landscape contracting, provided all landscaping work on any given landscape job as defined in OAR 808-002-0495 must not exceed a total contract amount of $15,000,

(h) If a landscape contracting business holds a probationary license and two or more claims are filed against the landscape contracting business within a 12 month period the owner or employee who holds the probationary license and is providing supervision as described in ORS 671.540(15) and (16) or 671.565(1)(b) may be required to take specific continued education hours (CEH) as required by the Board that are related to the claim issues. Failure to complete the required CEH within the specified time frame may result, in addition to any civil penalties, revocation, refusal to renew or suspension of the probationary license of the landscape construction professional.

<u>Meaning:</u> A landscape contracting business can only advertise for and/or perform the phase of landscape work for which it is licensed based upon the phase of license of the licensed landscape construction professional(s) that either own or are employed by the landscape contracting business. OAR 808-003-0200 allows a landscape contracting business to bid on a contract that is outside the phase of its license if it enters into a subcontract with a landscape contracting business that is licensed in that phase of work. Working outside the scope of a license can result in civil penalties and suspension of license.

<u>ORS 447: PLUMBING 447.060 ENGAGING IN CERTAIN PLUMBING WORK NOT AFFECTED.</u>

(1) ORS 447.010 to 447.156 do not apply to a person:

<u>(2) A landscape contracting business licensed under ORS 671.560 is not required to be licensed under ORS 447.010 to 447.156 to install, repair or maintain backflow assemblies</u> for irrigation systems and ornamental water features if the work is performed by an individual who is licensed as required by ORS 671.615 and is an owner or employee of the landscape contracting business. The repair and maintenance of the backflow assembly must be performed by a tester certified under ORS 448.279. The registration exemption established under this subsection does not exempt the landscape contracting business from the inspection and permit requirements of ORS 447.010 to 447.156.

<u>Meaning:</u> A landscape contracting business licensed through the LCB can perform the installation, repair and maintenance on backflow assemblies for irrigation systems and ornamental water features only if the work is performed by a person who has passed the backflow section of the LCB irrigation exam. The repair and maintenance of the backflow assembly however can only be done by a person who has the tester certification under the Oregon Health Department.

<u>ORS 479.940 ELECTRICAL ACTIVITIES NOT SUBJECT TO LICENSURE UNDER ORS 479.510 TO 479.945; IDENTIFICATION CARDS.</u>

(1) The licensure provisions of ORS 479.510 to 479.945 do not apply to the following activity on Class II and III systems in one and two family dwellings regulated under the Low-Rise Residential Dwelling Code:

(a) Pre-wiring of cable television and telephone systems owned by the owner of the residence;

(b) Garage door openers;

(c) Vacuum systems;

(d) Audio and stereo systems;

(e) HVAC;

(f) Landscape sprinkler controls;

(g) Landscape lighting; and

(h) Doorbells.

(2) The provisions of subsection (1) of this section apply only to persons or businesses licensed and in good standing with the Construction Contractors Board.

(3)(a) The licensure provisions of ORS 479.510 to 479.945 do not apply to a business licensed under ORS 671.510 to 671.710 when making installations of landscape irrigation control wiring and outdoor landscape lighting involving a Class II or Class III system that does not exceed 30 volts and 750 volt-amperes.

(b) A business exempt from licensing under this section shall issue an identification card to its landscape irrigation control wiring or outdoor landscape lighting installer. The form for the identification card shall be provided by the State Landscape Contractors Board. The identification card shall include the name of the installer, the name and State Landscape Contractors Board identification number of the landscape contracting business and the date of issue of the identification card. The card shall be carried by the installer at the job site when performing the allowed electric installations.

Meaning: A landscape contracting business that is licensed with the LCB can install irrigation control wiring and outdoor landscape lighting for systems that do not exceed 30 volts and 750 volt-amperes. However, each individual of the business that is installing this wiring must carry an identification card that is supplied by the LCB. This card is on the LCB website:

http://www.lcb.state.or.us/LCB/docs/LowvoltageIDCard.instructions.pdf

ORS 571: NURSERY LICENSE

571.045 Exemption from licensing requirements. ORS 571.055 (1) and 571.057 do not apply to:

(2) A person licensed as a landscape contracting business under ORS 671.560 and 671.565 who does not grow plants, does not store plants except as provided by the State Department of Agriculture by rule, and acquires all plants from a nursery licensed under this chapter.

In conjunction with this statute, the following Administrative rule applies:

OAR 603-054-0080: LICENSE REQUIREMENT FOR PERSONS DOING LANDSCAPE CONTRACTING BUSINESS

The Department, as required by ORS 571.045(2), hereby establishes that any person doing landscape contracting business that stores plants for more than one year, operates as a grower, dealer or agent, keeps plants for propagation, advertises nursery stock for sale, or sells nursery stock, must obtain a nursery license.

ORS 571.135: SHIPPING PERMITS, SHIPPING INVOICES AND BILLS OF LADING ACCOMPANYING SHIPMENTS AND DELIVERIES; RETENTION; EXCEPTIONS

(3) A shipping invoice or bill of lading shall accompany a commercial shipment or delivery of nursery stock to be offered for sale. If a shipping invoice accompanies the shipment or delivery, the shipping invoice shall include the following:

(a) The name and address of the owner of the nursery stock.

(b) The nursery license number of the owner of the nursery stock.

(c) The point of origin of the nursery stock.

(d) The specific destination to which the nursery stock is being shipped or delivered.

(e) A description or inventory of the nursery stock in sufficient detail to allow identification of the nursery stock being shipped or delivered. The description or inventory shall include, at a minimum, the numbers, sizes and varieties of plants included in the shipment or delivery.

(f) The signature of the nursery stock carrier or the carrier's agent.

5) Each of the following persons shall retain a copy of the signed shipping invoice or the bill of lading for a commercial shipment or delivery of nursery stock to be offered for sale:

(a) The owner of the nursery stock.

(b) The carrier or carrier's agent transporting the nursery stock.

(c) The person taking delivery of the nursery stock at the shipment or delivery destination.

(6) Subsections (3) and (5) of this section do not apply to:

(b) A commercial shipment or delivery of nursery stock in the possession of a business licensed by the State Landscape Contractors Board.

Meaning: A landscape contracting business does not have to have a nursery license to procure and sell nursery stock if the business does not store the plants for more than one year and acquires the plants from a licensed nursery. Also, if the landscape contracting business is transporting plants from one place to another, the business does not have to have a shipping invoice or bill of lading. (This is a law to try to stop illegal transport of nursery stock and the stealing of nursery stock in Oregon).

ORS 656: WORKERS COMPENSATION

656.027 WHO ARE SUBJECT WORKERS. All workers are subject to this chapter except those non-subject workers described in the following subsections:

(7)(a) Sole proprietors, except those described in paragraph (b) of this subsection. When labor or services are performed under contract, the sole proprietor must qualify as an independent contractor.

(b) Sole proprietors actively registered under ORS 671.525 or licensed under ORS 701.035. When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005 (30), the sole proprietor must qualify as an independent contractor. Any sole proprietor registered under ORS 671.525 or licensed under ORS 701.035 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(23)(a) Partners who are actively registered under ORS 671.525 or licensed under ORS 701.035 and who have a substantial ownership interest in a partnership. If all partners are members of the same family and are parents, spouses, sisters, brothers, daughters or sons, daughters-in-law or sons-in-law or grandchildren, all such partners may elect to be non-subject workers. For all other partnerships registered under ORS 671.510 to 671.710 or licensed under ORS chapter 701, the maximum number of exempt partners shall be whichever is the greater of the following:

(A) Two partners; or

(B) One partner for each 10 partnership employees.

(b) When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005 (30), the partnership qualifies as an independent contractor. Any partnership registered under ORS 671.525 or licensed under ORS

701.035 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(24)(a) Corporate officers who are directors of a corporation actively registered under ORS 671.525 or licensed under ORS 701.035 and who have a substantial ownership interest in the corporation, regardless of the nature of the work performed. If all officers of the corporation are members of the

same family and are parents, spouses, sisters, brothers, daughters or sons, daughters-in-law or sons-in-law or grandchildren, all such officers may elect to be non-subject workers. For all other corporations registered under ORS 671.510 to 671.710 or licensed under ORS chapter 701, the maximum number of exempt corporate officers shall be whichever is the greater of the following:

(A) Two corporate officers; or

(B) One corporate officer for each 10 corporate employees.

(b) When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005 (30), the corporation qualifies as an independent contractor. Any corporation registered under ORS 671.525 or licensed under ORS 701.035 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(25)(a) Limited liability company members who are members of a company actively registered under ORS 671.525 or licensed under ORS 701.035 and who have a substantial ownership interest in the company, regardless of the nature of the work performed. If all members of the company are members of the same family and are parents, spouses, sisters, brothers, daughters or sons, daughters-in-law or sons-in-law or grandchildren, all such members may elect to be non-subject workers. For all other companies registered under ORS 671.510 to 671.710 or licensed under ORS chapter 701, the maximum number of exempt company members shall be whichever is the greater of the following:

(A) Two company members; or

(B) One company member for each 10 company employees.

(b) When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005 (30), the company qualifies as an independent contractor. Any company registered under ORS 671.525 or licensed under ORS 701.035 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

Meaning: All employees of a landscape contracting business must be covered with worker's compensation but there are some exceptions if the business entity is different than a sole proprietor. Any business licensed with the LCB is presumed to be an independent contractor and subject to ORS 670.600.

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