

## Employee or Independent Contractor: the Economic Realities Test

The rights of a worker depend on whether the person is an employee or an independent contractor under the law. Generally, workers who are economically dependent on a business are employees, whereas workers who operate their own businesses are independent contractors. A worker’s status as either an employee or independent contractor is determined by the reality of the work relationship, not a label or title given to a worker.

Oregon’s wage and hour regulations broadly define “employ” as “to suffer or permit to work.” When evaluating whether a person has performed work as an employee or an independent contractor, BOLI applies the “economic realities” test used by courts to determine employee status under the federal Fair Labor Standards Act.<sup>1</sup> Several factors make up the “economic realities” test, which is used to gauge the degree to which workers are economically dependent upon businesses to which they provide services.

It is important to note that:

- No single factor in the economic realities test is determinative for establishing that a worker is an independent contractor or an employee. Rather, the factors are considered in their totality and in relation to one another with the objective of determining, on the whole, whether a worker is economically dependent on a business to which services are rendered.
- The economic *realities* of a worker’s relationship with an employer or business and *not* a label given to that relationship determine whether the worker is providing services as an employee or an independent contractor.

An agreement between a worker and an employer which labels the worker as an independent contractor is not determinative when evaluating the worker’s status.

Economic Realities Test Factors	
Factor	Relevant Considerations <sup>2</sup>
1) The extent to which the work performed by the worker is an integral part of the alleged employer’s business.	Whereas the work of an independent contractor is unlikely to be integral to an employer’s business, an employee performs services which are integral to the operation of an employer’s business.  <b>Example:</b> For a construction company that frames residential homes, carpenters are integral to the employer’s business because the company is in

<sup>1</sup> While BOLI uses the “economic realities” test to determine whether there is an employment relationship for purposes of wage and hour law, it utilizes a different test, the “right-to-control” test, to determine whether a given worker is an employee or an independent contractor for purposes of civil rights law. It is also important to remember that other state agencies will make their own determination on whether a worker is an independent contractor or an employee. For example, ORS 670.600 is an Oregon statute that defines an “independent contractor” for the Department of Revenue, Employment Department, Construction Contractors Board, and Landscape Construction Board.

<sup>2</sup> The examples, which are taken from the U.S. Department of Labor’s *Administrator’s Interpretation No. 2015-1* (July 15, 2015), are intended to illustrate the application of the test factors. Modifying the facts of an example may alter the analysis. As mentioned above, no single factor is determinative.

	<p>business to frame homes, and carpentry is an integral part of providing that service.</p> <p>In contrast, the same construction company may contract with a software developer to create software that, among other things, assists the company in tracking its bids, scheduling projects and crews, and tracking material orders. The software developer is performing work that is not integral to the construction company’s business, which is indicative of an independent contractor.</p>
<p>2) The degree of control exercised by the alleged employer.</p>	<p>The nature and degree of an employer’s control is analyzed to determine whether the worker is economically dependent on the employer or, conversely, operates his or her own independent business. In order to be seen as a person operating his or her own business, a worker must have control over meaningful aspects of the work.</p> <p><b>Example:</b> A registered nurse who provides skilled nursing care in nursing homes is listed with Beta Nurse Registry in order to be matched with clients. The registry interviewed the nurse prior to her joining the registry, and also required the nurse to undergo a multi-day training presented by Beta. Beta sends the nurse a listing each week with potential clients and requires the nurse to fill out a form with Beta prior to contacting any clients. Beta also requires that the nurse adhere to a certain wage range and the nurse cannot provide care during any weekend hours. The nurse must inform Beta if she is hired by a client and must contact Beta if she will miss scheduled work with any client. In this scenario, the degree of control exercised by the registry is indicative of an employment relationship.</p> <p>Another registered nurse who provides skilled nursing care in nursing homes is listed with Jones Nurse Registry in order to be matched with clients. The registry sends the nurse a listing each week with potential clients. The nurse is free to call as many or as few potential clients as she wishes and to work for as many or as few as she wishes; the nurse also negotiates her own wage rate and schedule with the client. In this scenario, the degree of control exercised by the registry is not indicative of an employment relationship.</p>
<p>3) The permanency of the relationship.</p>	<p>An independent contractor generally provides services for a specific, defined period of time, whereas an employee is generally hired on a permanent or indefinite basis.</p> <p><b>Example:</b> An editor has worked for an established publishing house for several years. Her edits are completed in accordance with the publishing house’s specifications, using its software. She only edits books provided by the publishing house. This scenario indicates a permanence to the relationship between the editor and the publishing house that is indicative of an employment relationship.</p> <p>Another editor has worked intermittently with fifteen different publishing</p>

	<p>houses over the past several years. She markets her services to numerous publishing houses. She negotiates rates for each editing job and turns down work for any reason, including because she is too busy with other editing jobs. This lack of permanence with one publishing house is indicative of an independent contractor relationship.</p>
<p>4) The skill and initiative required to perform the work.</p>	<p>A worker’s business skills, judgment and initiative, rather than his or her technical skills, indicate whether a worker is economically independent from the business. If the work requires technical skills but is not reliant on such business skills to perform the work, then the worker is likely an employee.</p> <p><b>Example:</b> A highly skilled carpenter provides carpentry services for a construction firm; however, such skills are not exercised in an independent manner. For example, the carpenter does not make any independent judgments at the job site beyond the work that he is doing for that job; he does not determine the sequence of work, order additional materials, or think about bidding the next job, but rather is told what work to perform where. In this scenario, the carpenter, although highly-skilled technically, is not demonstrating the skill and initiative of an independent contractor (such as managerial and business skills). He is simply providing his skilled labor.</p> <p>In contrast, a highly skilled carpenter who provides a specialized service for a variety of area construction companies, for example, custom, handcrafted cabinets that are made-to-order, may be demonstrating the skill and initiative of an independent contractor if the carpenter markets his services, determines when to order materials and the quantity of materials to order, and determines which orders to fill.</p>
<p>5) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer</p>	<p>A worker with his or her own business may experience either a profit or loss, often dependent upon his or her managerial skills to administer the business. An employee’s ability to earn more is dependent upon his or her ability to work and the employer making work hours available, not the managerial skills of the worker.</p> <p><b>Example:</b> A worker provides cleaning services for corporate clients. The worker performs assignments only as determined by a cleaning company; he does not independently schedule assignments, solicit additional work from other clients, advertise his services, or endeavor to reduce costs. The worker regularly agrees to work additional hours at any time in order to earn more. In this scenario, the worker does not exercise managerial skill that affects his profit or loss. Rather, his earnings may fluctuate based on the work available and his willingness to work more. This lack of managerial skill is indicative of an employment relationship between the worker and the cleaning company.</p> <p>In contrast, a worker provides cleaning services for corporate clients,</p>

	<p>produces advertising, negotiates contracts, decides which jobs to perform and when to perform them, decides to hire helpers to assist with the work, and recruits new clients. This worker exercises managerial skill that affects his opportunity for profit and loss, which is indicative of an independent contractor.</p>
<p>6) The extent of the relative investments of the worker and alleged employer.</p>	<p>The nature and extent of the relative investments from the employer and the worker help determine whether the worker has an independent business. An independent contractor usually makes investments that support the business beyond any one particular job. Investments may enable the business to expand, change its costs or otherwise change the manner and extent of how it provides goods or services. If the worker’s investment is relatively minor compared to the employer’s, then the worker may be economically dependent on the employer.</p> <p><b>Example:</b> A worker providing cleaning services for a cleaning company is issued a Form 1099-MISC each year and signs a contract stating that she is an independent contractor. The company provides insurance, a vehicle to use, and all equipment and supplies for the worker. The company invests in advertising and finding clients. The worker occasionally brings her own preferred cleaning supplies to certain jobs. In this scenario, the relative investment of the worker as compared to the employer’s investment is indicative of an employment relationship between the worker and the cleaning company. The worker’s investment in cleaning supplies does little to further a business beyond that particular job.</p> <p>A worker providing cleaning services receives referrals and sometimes works for a local cleaning company. The worker invests in a vehicle that is not suitable for personal use and uses it to travel to various worksites. The worker rents her own space to store the vehicle and materials. The worker also advertises and markets her services and hires a helper for larger jobs. She regularly (as opposed to on a job-by-job basis) purchases material and equipment to provide cleaning services and brings her own equipment (vacuum, mop, broom, etc.) and cleaning supplies to each worksite. Her level of investments is similar to the investments of the local cleaning company for whom she sometimes works. These types of investments may be indicative of an independent contractor.</p>

**Additional Information**

For additional information, please visit the Wage and Hour Division’s website at: <http://www.oregon.gov/BOLI/WHD/pages/index.aspx> or the Oregon Independent Contractors website at: <http://www.oregon.gov/IC>. Contact us directly via email: [whdscreener@boli.state.or.us](mailto:whdscreener@boli.state.or.us) or telephone: 971-673-0844 (Ore. Relay TTY: 711). Se habla español.