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## LC 3492

### **Brief summary**

Amends workers' compensation law so that any person who performs services for remuneration and is not an independent contractor qualifies as a worker.

### **Analysis**

#### **What the law currently does**

Oregon's workers' compensation law, ORS chapter 656, provides that all "workers" are entitled to workers' compensation coverage unless they fall under a specific exemption. A "worker" is defined as any person who (1) provides services for remuneration and (2) is subject to the direction and control of an employer.

A different law, ORS 670.600, provides a statutory definition of "independent contractor." To meet this definition, a person who provides services for remuneration must satisfy three requirements:

1. The person must be free from direction and control over the means and manner of providing the services.
2. The person must be customarily engaged in an independently established business. To meet this requirement, a person must satisfy at least three factors of a five-factor subtest.<sup>1</sup>

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<sup>1</sup> These factors are:

- a. Having a business location,
- b. Bearing a risk of loss,
- c. Having or soliciting multiple clients,
- d. Making a significant investment in the alleged business, and
- e. Having the authority to hire and fire helpers.

3. If the work performed requires a construction contractor's license or landscape contractor's license, the person must hold that license. If the work requires another license, the person must be responsible for obtaining it.

The division is required to use this definition when determining whether a person is an independent contractor. However, the Oregon Supreme Court has found that the analysis used to determine whether someone is a "worker" under ORS chapter 656 is not the same as the "independent contractor" analysis under ORS 670.600.<sup>2</sup> As a result, whether a person is an independent contractor does not directly affect their entitlement to workers' compensation coverage in most cases.

## What will change if the bill is enacted

If LC 3492 is enacted, ORS chapter 656 will be amended to define a "worker" as a person who (1) provides services for remuneration and (2) is not an independent contractor as defined by ORS 670.600.

## Likely impacts, results, or consequences if the bill is enacted

If LC 3492 is enacted, the division and its stakeholders will be required to use a new analysis when determining whether a person is a worker. This would have several consequences for the workers' compensation system.

### **Most people who qualify as workers under current law would continue to qualify as workers.**

Current law defines a worker as any person who (1) provides services for remuneration and (2) is subject to the direction and control of an employer. To qualify as an independent contractor under ORS 670.600, a person must be free from direction and control over the means and manner of providing services.

The courts have found that "the same 'direction and control' test appears in both [ORS chapter 656] and ORS 670.600".<sup>3</sup> In other words, both tests consider the same factors in order to determine whether a third party has a "right to control" a person.

As a result, the vast majority of people who qualify as workers under current law would also qualify as workers under LC 3492. This is because a person who is subject to the direction and control of an employer under ORS chapter 656 can never qualify as an independent contractor under ORS 670.600.

Notwithstanding the compatibility between the two tests, the division's analysis would change slightly under LC 3492:

1. ORS 670.600 was enacted in 1989, so "right to control" case law developed after that year may not be controlling under ORS 670.600's "direction and control" test. Further review is needed to determine how this would affect the division's analyses.

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<sup>2</sup> *S-W Floor Cover Shop v. Nat'l Council on Compensation Ins.*, 318 Or 614 (1994)

<sup>3</sup> *Id.*

2. Under current law, the “nature of the work” test is used when the “right to control” test is inconclusive. This would no longer be appropriate under LC 3492, because the courts have never found that this test should be used when evaluating direction and control under ORS 670.600.
3. The meaning of “direction and control” under ORS 670.600 is interpreted by rule under OAR 436-170. The division would need to apply these rules when using the “direction and control” test. Notably, these rules treat freedom from direction and control over the “means” and “manner” of providing services as distinct elements of the direction and control test, both of which must be satisfied for a person to qualify as an independent contractor.

### **Some people who do not currently qualify as workers would newly qualify as workers**

Under current law, a person must be subject to the direction and control of an employer to qualify as a worker. Under LC 3492, this would no longer be a requirement.

As a result, people who are free from direction and control, but who do not qualify as independent contractors because they do not meet other requirements for that classification, would newly qualify as workers. An example would be a person who is free from direction and control, but who does not qualify as having an independently established business because they work for a single client, do not have the authority to hire helpers, and have no fixed business location.

Some of these “new” workers would be entitled to workers’ compensation coverage. Others would not be entitled to coverage because of existing exemptions in ORS chapter 656, such as the exemptions for newspaper carriers, truck drivers who lease or own their vehicles, and taxi drivers.

In the short term, the reclassifications caused by LC 3492 may lead to an increase in premium disputes as insurers begin collecting premium based on the payroll of for “new” workers. There may also be an increase in litigation over denials based on determinations that a claimant is not a worker as the industry adapts to the new standard.

In addition, the division’s noncomplying employer claim investigations may become lengthier and more complex in cases where a potential worker is free from direction and control but does not fall under a specific exemption. This is because investigators would need to consider factors not considered under the current analysis. Lengthier investigations could lead to delays in workers receiving medical treatment and time loss payments, at least initially. However, because the division is required by statute to refer noncomplying employer claims to its assigned claims agent within 60 days of receipt, the impact would be limited.

The division estimates that it completes fewer than 20 investigations that would need to determine independent contractor status per year. The division only makes determinations about whether a person is entitled to coverage when the person’s alleged employer does not have workers’ compensation coverage. In most cases where the division determines that a person is not entitled to coverage, it is because that worker falls under a specific exemption.

The division believes that the overall number of people who would newly qualify as workers under LC 3492 is relatively small. However, it is difficult to produce an accurate estimate the number of “new” workers, because no agency currently collects data on this population. As a result, the division will not be able to fully quantify the impact of the LC until after it takes effect.

## Questions/relevant information for the bill sponsor or primary proponent

- A person would no longer need to be subject to the direction and control of an employer to qualify as a “worker” under LC 3492. However, an “employer” would still be defined as a person with a right to direct and control the services of a worker.

Since the requirement to provide workers’ compensation coverage falls on the employer, this could create ambiguity as to whether workers who are not subject to direction and control are entitled to coverage. The division has conveyed this issue to the bill sponsor.

- Another bill introduced this session, HB 2489, would amend ORS 670.600 by adding the economic reality test as an additional level of analysis. Since this would result in fewer people qualifying as independent contractors, the expansion of workers’ compensation entitlement under LC 3492 would be much greater if HB 2489 is also enacted.

## Legislative history

### Has this bill been introduced in a prior session?

No    Yes   Years   Bill numbers

### Does this bill amend current state or federal law or programs?

No    Yes

ORS 656.005

### Is this bill related to a legal decision?

No    Yes   Case citation, AG opinion, date, etc.

### Should another DCBS division review this measure?

No    Yes   Divisions

Division of Financial Regulation, Workers’ Compensation Board, Director’s Office (Small Business Ombudsman)

## Other impacts

### Does this bill have a fiscal impact to DCBS?

No  Yes  Unknown Explain

The division only makes determinations about whether a person is entitled to coverage when the person's alleged employer does not have workers' compensation coverage, and in most cases these determinations are based on whether a person falls under an exemption rather than whether the person is a worker. Because of this, the bill is unlikely to have a significant fiscal impact on DCBS. However, the impact will change if other bills are enacted that amend ORS 670.600 or affect the current exemptions under workers' compensation law.

### Does this bill have an economic impact to stakeholders?

No  Yes  Unknown Explain

Employers who are not currently required to have workers' compensation coverage because their employees do not qualify as workers may be required to obtain coverage under this bill. Employers who are carrier-insured may have to pay additional premium based on the payroll of reclassified workers.

Insurers may have increased legal costs due to premium disputes and appeals of denials based on determinations that a claimant is not a worker.

## Sponsors

Rep. Holvey

## Possible interested stakeholders

Employers, insurers, self-insured employers, service companies, labor groups, workers' compensation attorneys.

## Public policy topics

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| <input type="checkbox"/> Agency operations                          | <input type="checkbox"/> Other lines of insurance                |
| <input type="checkbox"/> Building codes                             | <input type="checkbox"/> Prescription drugs                      |
| <input type="checkbox"/> Financial institutions and lending         | <input type="checkbox"/> Property and casualty insurance         |
| <input type="checkbox"/> Health insurance                           | <input type="checkbox"/> Public records/public meetings law      |
| <input checked="" type="checkbox"/> Involvement with other agencies | <input type="checkbox"/> Rulemaking                              |
| <input type="checkbox"/> Licensure                                  | <input type="checkbox"/> Securities                              |
| <input type="checkbox"/> Manufactured structures                    | <input type="checkbox"/> Task force/reports                      |
| <input type="checkbox"/> MLAC legislative review                    | <input type="checkbox"/> Worker safety                           |
| <input type="checkbox"/> New program                                | <input checked="" type="checkbox"/> Workers' compensation system |
| <input type="checkbox"/> Nondepository programs                     | <input type="checkbox"/> Other                                   |