



MEMORANDUM

March 30, 2021

To: Management-Labor Advisory Committee

From: Sally Coen, Administrator, Workers' Compensation Division

Subject: HB 3188 – response to questions raised by committee members

At the March 26, 2021 meeting, members raised some questions about how changes to the definition of 'employer' under HB 3188-1 would affect Oregonians.

Current law defines an 'employer' as a person who (1) contracts to pay remuneration for services performed by another person and (2) has a right to direct and control those services. A 'worker' is defined as a person who (1) performs services for remuneration and (2) is subject to the direction and control of an employer. Because these two definitions mirror each other, a person who qualifies as a worker will always have an employer, and vice versa.

The law further requires that an employer must provide coverage if it is a 'subject employer'. An employer meets the definition of 'subject employer' if it employs at least one subject worker. Current law defines 'subject worker' as a worker who does not fall under a specific exemption. The provisions of ORS chapter 656 do not apply to a worker or employer that is not subject.

HB 3188 amends the definition of 'worker' to mean a person who (1) performs services for remuneration, and (2) is not an independent contractor as defined by ORS 670.600. As discussed in our February 23, 2021, memo (attached), a person could qualify as a worker under the new definition even if they were free from direction and control. However, HB 3188 does not change the current definition of 'employer,' which includes only persons who have a right to direct and control the services of others.

The result is that under HB 3188 as introduced, a person could qualify as a worker but have no employer. If that person was entitled to coverage as a subject worker, it is not clear who, if anyone, would be responsible for providing that coverage. The -1 amendments to HB 3188 address this inconsistency by deleting the language on direction and control from the definition of 'employer.'

Committee members have expressed concern that under the revised definition, Oregonians who hire individuals to do yardwork, dog walking, or automotive repair could be deemed to be employers. However, only a *subject* employer is required to provide coverage. In other words, even if a person qualifies as an employer, they are not required to provide coverage to a person who is covered by a specific exemption. Several exemptions under current workers' compensation law address the kinds of services committee members had questions about, and these are addressed in more detail below.

One way to make it more clear that only subject employers are required to provide coverage would be to incorporate the definition of 'subject employer' into the definition of 'employer' under ORS 656.005. Sample language is provided at the end of this memo.

Exemptions

Most exemptions under current workers' compensation law are under ORS 656.027. Some of these exemptions date back to the 1965 law changes that made providing coverage mandatory for most employers. Many more exemptions have been added over the years. The following exemptions are relevant to the current discussion:

- ORS 656.027(1): Exempts a person employed as a domestic servant in or about the private home¹ of their employer.
- ORS 656.027(2): Exempts a person employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of their employer.
- ORS 656.027(3): Exempts a worker whose employment is casual, if that employment is not in the course of the employer's business or if the employer has no other subject workers. Employment is "casual" when the total labor cost is less than \$500 in any 30-day period.

The intent of these exemptions was to protect private citizens from liability towards persons they employed on a casual basis or to work in their homes or yards.

At the March 26, 2021, meeting, one committee member asked if a homeowner who paid a young person to shovel their walkway would qualify as an employer under the -1 amendments. The answer is probably yes. However, the homeowner would not qualify as a *subject* employer due to the exemptions under ORS 656.027(2) or (3). As a result, they would not be required to provide workers' compensation coverage.

A witness brought up the example of a person who hires someone to walk their dog or repair their car. As long as the total labor cost of the service was less than \$500 in any 30 day period, the person would not qualify as a *subject* employer due to ORS 656.027(3).

¹ Exemptions for work done in or about a private home may not apply if the homeowner conducts business from the home and the work is connected to that business. See *Fincham v. Wendt*, 59 Or. App. 416, 1982.

As we have noted previously, the specific facts of the situation will determine whether a worker is entitled to coverage as a subject worker or whether they fall under an exemption. HB 3188 changes the initial analysis of who is a worker and employer, but it does not change the exemptions. A person who falls under an exemption will still not be entitled to coverage under HB 3188, even if they are a worker and the person paying them is an employer.

Addendum: possible amendments to ORS 656.005

656.005 Definitions.

...

(13)(a) “Employer” means any person, including receiver, administrator, executor or trustee, and the state, state agencies, counties, municipal corporations, school districts and other public corporations or political subdivisions, that contracts to pay a remuneration for and secures the right to direct and control the services of any person.

(b) For purposes of this chapter, “subject employer” means an employer that is subject to this chapter as provided by ORS 656.023.

[(b)] (c) Notwithstanding paragraph (a) of this subsection, for purposes of this chapter, the client of a temporary service provider is not the employer of temporary workers provided by the temporary service provider.

[(c)] (d) As used in paragraph [(b)] (c) of this subsection, “temporary service provider” has the meaning for that term provided in ORS 656.850.

...

[(27) “Subject employer” means an employer that is subject to this chapter as provided by ORS 656.023.]



MEMORANDUM

February 25, 2021

To: Management-Labor Advisory Committee

From: Sally Coen, Administrator, Workers' Compensation Division

Subject: LC 3492/HB 3188 – definition of “worker” and “employer”

During the committee's Feb. 19, 2021 meeting, members asked about the kinds of people who would be newly entitled to workers' compensation coverage under LC 3492 (now HB 3188.)

The division does not believe the impact of HB 3188 would fall in particular professions or occupations. Instead, a limited number of individuals working in a variety of fields would become newly entitled to coverage. In most cases, whether a person would be affected would be based on their degree of independence from their clients or employers. As under current law, this analysis is done on a case-by-case basis.

Oregon's workers' compensation law provides that all 'workers' are entitled to workers' compensation coverage, unless they fall under a specific exemption. Under current law, a person who performs services for remuneration qualifies as a worker if they are subject to the direction and control of an employer.

Under HB 3188, a person who performs services for remuneration would qualify as a worker unless they instead met the definition of an independent contractor. To qualify as an independent contractor, a person must meet three requirements:

- The person must be free from direction and control over the means and manner of providing the services.
- The person must satisfy any three of five criteria in the 'independently established business' test (discussed in more detail below.)
- If the work being performed requires a license, the person must have that license or be responsible for obtaining it.

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The courts have found that ‘direction and control’ has the same meaning in both the definition of ‘worker’ under ORS chapter 656 and the definition of ‘independent contractor’ under ORS 670.600¹. As a result, a person who works for pay and is subject to direction and control would be a worker under both current law and HB 3188. A person would newly qualify as a worker under HB 3188 if they were free from direction and control, but did not qualify as an independent contractor.

If a person is free from direction and control, the most likely reason why they would not qualify as an independent contractor is that they do not satisfy at least three of the criteria in the ‘independently established business’ subtest. These criteria are:

- (a) Having a business location, which can include a home office,
- (b) Bearing a risk of loss,
- (c) Having or soliciting multiple clients,
- (d) Making a significant investment in the business, and
- (e) Having the authority to hire and fire helpers.

Whether a person satisfies a majority of the criteria will not necessarily depend on the kind of work they do. For example, within the same field, some individuals may have multiple clients while others work for a single client on a long-term basis. Contract terms on issues such as work defects and subcontracting, which affect criteria (b) and (e), may also vary from one situation to the next.

Members should also be aware that even if a person newly qualifies as a worker, they may not be entitled to workers’ compensation coverage because of exemptions under current law. For example, taxi drivers, truck drivers, and sole proprietors with construction contracting licenses are all exempt under certain circumstances.

For these reasons, the division does not believe the impact of HB 3188 would be limited to certain occupations or industries. Instead, the division believes the bill would have a more limited impact across a variety of fields.

¹ In both definitions, the determination of whether a person is subject to direction and control is based according to whether the alleged employer has a ‘right to control’ their services, which is determined by consideration of the following factors:

- (1) whether the employer retains the right to control the details of the method of performance
- (2) the extent of the employer’s control over work schedules
- (3) whether the employer has power to discharge the person without liability for breach of contract
- (4) whether the employer furnishes equipment, and
- (5) payment of wages.