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Interagency Compliance Network Report To the Oregon Legislature

**Bureau of Labor and Industries
Construction Contractors Board
Department of Consumer and Business Services
Department of Justice
Department of Revenue
Landscape Contractors Board
Oregon Employment Department**

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www.oregonindependentcontractors.com

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Executive Summary

In 2009, with House Bill (HB) 2815, the Oregon legislature created the Interagency Compliance Network (ICN) to improve compliance with Oregon's tax and employment laws. The ICN is comprised of seven state agencies that share information, collaborate on enforcement, and conduct educational outreach in accordance with Oregon Revised Statutes (ORS) 670.700. Every two years, the ICN is required to report on its activities, funding, and revenue impact. This report outlines events from calendar years 2021 and 2022.

Each ICN agency shares some nexus with issues around worker classification (the determination of whether a worker is an employee or independent contractor), under-the-table cash payments to workers, or related workplace and tax issues. The ICN creates a framework for these agencies to collaborate where their existing programs and activities relate to each other. Creation of the ICN did not change agencies' existing duties and responsibilities, nor did it provide additional statutory enforcement tools for each agency; instead, it fostered information sharing and collaboration among the agencies to further their common interests.

The ICN operates through a steering committee consisting of leadership from each statutory agency that meets quarterly to ensure the ICN is operating efficiently and fulfilling its goals. Additionally, the ICN has an Enforcement and Communications Group that meets monthly to collaborate on enforcement activities and share leads regarding potentially non-compliant entities as well as coordinate outreach events, website updates, and data collection for ICN reports.

Since the last ICN report, Oregon employers and workers along with ICN agencies continued to face intermittent business disruption with the COVID-19 pandemic, which impacted all Oregonians. The long-term effects of the pandemic have changed the way Oregon employers employ workers, where those workers perform their duties, and how many employers conduct business. Additionally, historic inflationary pressures on the cost of doing business and employing workers has added additional economic strain to employers' bottom lines. These changes have also had long term effects on ICN agencies, as they adjusted to changing the way service to employers is conducted while striving to meet the needs of the state and protecting Oregon workers and ensuring public safety, and the safety of their employees, with the continued enforcement of Oregon's employment and tax laws. Over the last two years, it has become apparent that ICN agencies will continue to function now and into the future with the "new normal."

Participating ICN Agencies

The minimum statutory membership of the ICN includes the following seven state agencies:

- Bureau of Labor and Industries (BOLI)
- Construction Contractors Board (CCB)
- Department of Consumer and Business Services (DCBS)
- Department of Justice (DOJ)
- Department of Revenue (DOR)
- Landscape Contractors Board (LCB)
- Oregon Employment Department (OED)

The ICN can permit additional membership from state agencies that have an interest in compliance with laws relating to taxation or employment by entering into an intergovernmental agreement with the ICN agencies. Coordination under the ICN extends beyond information sharing to include joint audits, uniform investigative and classification methodology, coordinated outreach, and policy development.

The work of the ICN, as well as the underlying worker classification problems the coordination seeks to address, impacts program administration in these agencies in different ways.

For the Oregon Employment Department, when workers are not properly classified, it means their wages have not been correctly reported and the employer has not paid all required unemployment insurance taxes. Starting January 1, 2023, misclassification will also affect the newly available Paid Leave Oregon program. This can delay benefit payments to claimants because there is no record of their earnings. It can also mean that because an employer has not paid all of the required contributions, the increased cost of covering benefits to its workers becomes socialized across those employers, and for Paid Leave Oregon the workers, who do pay their contributions, ultimately leading to a heavier unemployment insurance tax burden for those employers who are in compliance. Data collected by the Oregon Employment Department is used by other agencies and partners to make decisions and measure program effectiveness. When workers are misreported, the quality of the data that others rely on is degraded.

For the Department of Revenue, when workers are not properly classified, it means their wages have not been correctly reported and that the employer has not withheld payroll taxes, including the statewide transit tax, or district transit payroll taxes on wages that were paid. When companies misclassify workers, the Department of Revenue does not receive quarterly withholding tax payments due under Oregon law, and instead is reliant on the misclassified individual filing a personal income tax return and making estimated tax payments or payments at the end of the year. Individual workers who are misclassified may also mistakenly expense items that would not be allowed under proper classification. Under-the-table wages not reported on personal income tax returns directly result in lost withholding, statewide transit, and TriMet or Lane transit tax.

In the interest of protecting property owners, the Construction Contractors Board and the Landscape Contractors Board both conduct a field enforcement program to ensure that contractors properly classify their workers. They share enforcement information with the other ICN members. The agencies address worker classification, employment tax, and workers' compensation requirements in their pre-license and continuing education curricula for licensees. Both agencies disseminate information to the public regarding licensing requirements and how to verify the status of contractor licenses.

For the Bureau of Labor and Industries, misclassification may result in workers being denied the protections available to them under the state's wage and hour regulations. By misclassifying its employees as independent contractors, an employer may fail to meet its obligations to pay employees minimum wages and overtime, provide employees with rest and meal periods, permit employees to accrue and use sick time, and maintain adequate records of hours worked and wages earned. The informal nature of payments by cash tends to promote disputes concerning hours worked and wages paid, and results in inadequate recordkeeping on the part of employers.

For the Department of Consumer and Business Services, Workers' Compensation Division, identifying and investigating employers that are attempting to gain an unfair business advantage by not purchasing required insurance, or misclassifying their workers, helps to level the economic playing field for all employers in Oregon. Additionally, these actions help ensure that workers who are injured on the job receive timely benefits by way of being able to file a claim with their employer's insurer. Robust compliance enforcement also helps reduce the amount of public funds needed to cover the cost of claims belonging to noncomplying employers. Sharing information with, and receiving information from ICN partner agencies, along with participation in the compliance "sweeps," are additional tools that the Department of Consumer and Business Services uses to ensure that employers are complying with workers' compensation insurance coverage requirements. The interaction with partner agencies also provides valuable opportunities to discuss respective policies and approaches to ensure employer compliance, and to collaborate on issues and challenges that may impact the work of the Department of Consumer and Business Services.

The Department of Justice works to assist local, state, and federal law enforcement agencies in the investigation and suppression of organized crime, and to investigate the investment of funds in Oregon that have been generated by criminal activities. In light of those mandates, the Department of Justice's participation in the ICN is focused primarily on working with other members of the ICN to identify criminal misconduct by regulated entities and individuals.

The ICN has continued to focus on the following priorities over the past two years: Outreach and Assistance; Enforcement Activities; Internal Development; and External Factors.

Outreach and Assistance

A primary focus of the ICN is sharing information, educating the public about how to comply with employment and tax laws, coordinating outreach events, and providing resources to the public. Whether information is provided through in-person presentations, publications, or the state’s independent contractor website, all ICN partner agencies have participated in educational outreach over the past two years. Worker classification issues can be complex; therefore, a primary goal of the ICN is to make it as easy as possible for everyone to understand the applicable laws and requirements.

Table 1 contains data regarding outreach in 2021 and 2022 by ICN agencies where the content involved the ICN:

Table 1

Agency	Total Number of Events Attended	Number of Collaborative Events (with other ICN agencies)
CCB	74	31
DCBS	22	5
DOR	112	18
OED*	0	0
LCB	12	1

*OED was unable to attend outreach events in 2021 and 2022 due to resource constraints caused by the COVID-19 pandemic, the modernization project, and implementing Paid Leave Oregon. OED anticipates conducting ICN specific outreach in mid-2023.

ICN Website – The state’s independent contractor website (www.oregon.gov/IC) features resources such as industry-specific examples of employee versus independent contractor scenarios, video presentations, outside resources for businesses, and literature repositories. The ICN website contains informational brochures in English, Spanish, Russian, Vietnamese, and Korean. The site also provides contact information and links for each of the statutory ICN agencies, directing businesses to agency-specific information related to employment and tax issues. ICN agencies promote the website during outreach activities and there were more than 36,460 hits on the website during 2021 and 2022.

Educational Outreach Presentations – Educational outreach has been significant over the past two years despite continuing restrictions due to the COVID-19 pandemic. ICN agencies have attended more than 220 outreach events, including 45 collaborative events, covering different issues throughout the state. Although each agency retains its own outreach practices, collaborative efforts have continued among ICN agencies. The Construction Contractors Board’s

continuing education program involved other ICN agencies presenting information to businesses on many occasions. Agencies provide materials for distribution whenever in-person collaboration is not possible. This practice has led to stronger relationships between the agencies and better customer service to those seeking information.

The effectiveness of ICN collaboration has caused additional collaboration beyond ICN agencies, including the Secretary of State's office, the Oregon Health Authority, and units not traditionally part of the ICN such as the Office of Administrative Hearings, Business Oregon, and the Oregon Health Insurance Marketplace. Establishing and maintaining these relationships has given those agencies additional resources to direct Oregon businesses to the information they need to help ensure compliance. These other agencies and business units frequently share outreach opportunities and invite ICN agencies to specialized events based on perceived audience interest in ICN materials.

For ICN agencies, most events are sponsored by a third party provider. Due to the COVID-19 pandemic, in 2021, many of those sponsored events had been cancelled. In 2022, as in-person events started to make a comeback, ICN agencies once again started participation. This in-person participation is in addition to participation in virtual or hybrid outreach events. As Oregon continues to adjust to the new paradigm, ICN agencies and partners are hopeful to participate in more in-person activities during the next reporting cycle.

Enforcement Activities

The ICN was established to increase compliance with employment and tax laws. Education about what is required leads many businesses into compliance. For others, it is not a matter of understanding the requirements, but instead a challenge for ICN agencies to identify people, businesses, and industries that may be intentionally trying to circumvent their requirements under Oregon law. To ensure that outreach and educational efforts are successful, each ICN agency conducts some form of compliance activity or enforcement on businesses subject to employment and tax laws. Whenever possible, ICN compliance specialists are mindful of situations where other ICN agencies would be interested in participating with compliance checks to ensure efficient enforcement activity.

Enforcement and Communications Group Activities – To coordinate enforcement processes, ICN agencies have developed an ICN Enforcement and Communications Group that meets monthly. The group shares information about non-compliant entities, offers assistance with audits, shares success stories, and discusses newly identified methods used by non-compliant entities to avoid legal responsibilities.

❖ **ICN Audits** – The Department of Revenue and the Oregon Employment Department each conduct compliance audits on behalf of other ICN agencies. Both agencies have auditors that conduct joint audits covering the programs administered by the agencies including preparing tax assessments resulting from the audit.

To benefit the work of the individual agencies, and as a convenience to employers, the Oregon Employment Department and Department of Revenue coordinate joint ICN audits. In 2021, the Department of Revenue and the Oregon Employment Department joint ICN audits uncovered an additional \$1.9 million in unreported payroll during the course of these audits, generating an additional \$38 thousand in unemployment tax assessments.

In 2022, the Department of Revenue and Oregon Employment Department joint ICN audits uncovered an additional \$23.1 million in unreported payroll, generating an additional \$553 thousand in unemployment tax assessments.

Table 2 describes the results of the joint audits:

Table 2

Joint ICN Unemployment Insurance and Payroll Audits			
ICN Audit Results (Calendar Year)	2021 Audits	2022 Audits	Total Audits
Total unreported payroll discovered in audits	\$1,958,759	\$23,109,794	\$25,068,554
Total number of misclassified workers identified	104	700	804
Total Unemployment Insurance Tax assessed through audits	\$38,327	\$553,826	\$592,153

❖ **Compliance Audits and Investigations** – Each agency conducts compliance audits and may share results with other agencies during or after the audit. This allows other ICN agencies to see non-compliance issues during the normal course of business. While the varying ICN agencies are tasked with differing core responsibilities, sharing the information gleaned from these audits is vital to other ICN agencies when identifying non-compliant entities. Agencies sometimes conduct combined activities, with compliance staff from multiple agencies going on enforcement sweeps or conducting audits. When a change is made to an employer’s quarterly payroll report, the Oregon Employment Department shares audit information with the Department of Revenue on a quarterly basis.

The Oregon Employment Department and the Department of Revenue conduct regular compliance audits in order to provide information to businesses and ensure that employers understand and follow the law regarding taxation and employment. While these audits are not always conducted jointly with other agencies, the Oregon Employment Department and the Department of Revenue share audit results with each other any time that a change is made to the information originally provided by the employer.

In 2021 and 2022, the Oregon Employment Department compliance audits were reduced due to focus on direct services to customers, including processing and payment of needed UI benefits, and focus on modernizing the UI tax payment and reporting system (Frances). The OED continued support of the ICN partnership and through completion of regular compliance audits is indicated in Table 3.

Table 3

Year	Audits Completed	Payroll Reviewed	Unreported Wages Found	Misclassified Workers Found	Additional UI Tax Assessed
2021	168	\$61,381,593	\$1,806,592	281	\$28,877
2022	421	\$141,154,855	\$6,336,684	645	\$107,316

While the Department of Revenue’s core system (GenTax) has automated much of the non-filing identification and notice processes, the Department of Revenue continues to maintain an audit presence to fulfill the aims of the ICN. In 2021, 1,490 Department of Revenue investigations identified \$5,860,776.75 in underreported payroll tax. In 2022, Department of Revenue investigations identified an additional \$4,550,059.52 in underreported payroll tax.

The Department of Consumer and Business Services, Workers’ Compensation Division conducts investigations of workers’ compensation insurance coverage violations, which may result in penalties being assessed against non-compliant employers. If misclassification of workers or unreported payroll is identified, the Department of Consumer and Business Services shares those findings with the Oregon Employment Department and the Department of Revenue. If the Department of Consumer and Business Services identifies Construction Contractors Board and/or Landscape Contractors Board violations (specifically contractors with employees and no active workers’ compensation insurance) during an investigation, those findings are shared with the respective agencies.

The Bureau of Labor and Industries conducts investigations into wage claims and complaints from workers and others, which may result in determinations of unpaid wages and civil penalties against non-compliant employers. During the period covered by this report, the Bureau of Labor and Industries investigated 59 cases involving possible misclassification of employees as independent contractors, unpaid interns, or volunteers. Unpaid wages owed to workers in these cases totaled \$18,876.59. In these cases, the Bureau of Labor and Industries was able to facilitate the restitution of \$15,246.51 in unpaid wages for Oregon workers.

Detection Efforts – Agencies in the ICN continue to work together to identify methods of detecting those businesses and individuals operating outside of the law.

- ❖ **Sweeps** – ICN enforcement activities include the use of “sweeps,” where ICN agencies travel to regions of the state together and conduct a coordinated investigation of a worksite to ensure that all compliance issues involving licensing, workers, safety, and payroll are being addressed. These sweeps have proven to be successful beyond the particular investigation as they provide public awareness of compliance requirements being investigated.
 - Interagency cooperation – the Department of Revenue, Construction Contractors Board, Department of Consumer and Business Services, and the Bureau of Labor and Industries participated in joint sweeps. Oregon Employment Department and Landscape Contractors Board were readily available by phone for assistance.
 - The Department of Revenue conducted one independent sweep and three joint sweeps with the other ICN agencies. In total, DOR visited 443 job sites in which 502 businesses were checked for compliance. Of the 754 employees interviewed, 123 were found to be misclassified.

- The Department of Consumer and Business Services, Workers' Compensation Division participated in three sweeps during 2022, visiting 98 construction sites in total. As a result, 14 investigations were opened for possible noncompliance related to workers' compensation coverage. At least three employers were found to not have coverage and ultimately came into compliance. No sweeps were performed during 2021 due to COVID-19 restrictions.
- The Landscape Contractors Board investigators performed more than 224 jobsite checks throughout the state in calendar years 2021 and 2022. These jobsite checks resulted in potential enforcements that were referred to other agencies as warranted. The majority of the referrals went to the Construction Contractors Board and the Department of Consumer and Business Services.

- ❖ **Cash Payments** – To reach and dissuade businesses that pay cash to employees “under the table,” the Construction Contractors Board has taken charge of outreach in this area and developed an educational video as part of its continuing education requirements for construction contractors. The audience for this video is general construction contractors, but the message is appropriate for any business that pays cash to employees.

The Department of Justice, the Oregon Employment Department and the Department of Revenue have been working closely together to identify businesses that deliberately circumvent state laws and employ methods to avoid detection by ICN agencies, such as paying employees “under the table” in cash.

- ❖ **Referrals** – Many ICN investigations are initiated based on referrals from the public. Each agency has its own method for taking complaints from the public. These complaints, when relevant to other ICN agencies, are shared at monthly Enforcement and Communications Group meetings. The ICN website has a method for submitting complaints, which can be anonymous. Complaints submitted through the ICN website are reviewed and forwarded to partner agencies that would be interested depending on the nature of the complaint. There were 40 complaints received through the ICN website and distributed to ICN agencies from 2021 through the end of 2022. Customers can also call a single point of contact with questions about the ICN, classification, or resources. These calls are usually handled with one-call resolution, with occasional referral to other agencies when necessary. Currently, the Oregon Employment Department manages the emails and calls generated from the ICN website.

In 2021 and 2022, the Department of Consumer and Business Services, Workers' Compensation Division referred 147 cases to ICN partner agencies and a total of 172 to all outside agencies. DCBS believes the actual number of referrals to be significantly higher given gaps in tracking stemming from staff turnover. In 2021 and 2022, the Department of Consumer and Business Services, Workers' Compensation Division received 255 referrals from outside agencies. These referrals may not always have resulted in an enforcement order, but they provided the opportunity to make contact and educate contractors on the requirements of having workers' compensation insurance for their workers. Like with the tracking of referrals made, tracking was incomplete due to staff turnover and the actual

number of referrals received is likely much higher than indicated. With the staffing situation stabilizing, the division does not expect these gaps in tracking to continue.

Department of Justice Involvement – The Department of Justice has been actively participating in ICN enforcement activities by requesting information from agencies in order to gain evidence for prosecutions and develop strategies for case development. The Department of Justice is instrumental in representing agencies during the appeal process that results from ICN enforcement efforts. They continue to participate in ICN meetings and request assistance from ICN agencies to develop cases. The Department of Justice provides legal assistance to the Department of Revenue in their attempts to collect tax debts owed by businesses. In 2022, they reviewed and supported OED’s ability to use ORS 657.861(3) to issue estimated adjustments when an employer fails to comply with records requests for an audit.

Recidivism – The ICN also focuses on identifying whether previously audited businesses remain compliant after being investigated. The Department of Revenue and the Oregon Employment Department analyze whether businesses subject to an audit actually file returns for the periods for which they were audited. Of the nine ICN audits completed in 2021, four continue to submit timely payroll reports, two have since closed, and three are in settlement negotiations.

While this is not a definitive indicator of continued compliance, it does provide a partial picture of ongoing compliance by employers. The only way to determine if employers are remaining fully compliant is to perform another payroll audit. The Oregon Employment Department typically does not conduct follow-up audits within a three-year period, but does investigate complaints or referrals about the business if they receive any.

Complaints about recently audited businesses misclassifying workers are rarely received. Most complaints received are on businesses that either have never been audited or have a current audit scheduled. Compliance Specialists also identify new businesses who have not been following requirements and work with them to bring them into compliance.

Internal Development

The ICN is constantly working to improve methods and expand its abilities to educate the public, encourage compliance with tax and employment laws, and enhance each agency's collaborative abilities. This section describes some of the proposed efforts underway for improvement.

Non-ICN Agency Involvement – On many occasions, agencies outside the ICN have played roles in furthering ICN goals, especially with educational outreach. Often successful interactions with the public resulted from sharing information about presentation opportunities, referrals to business conferences, and recommending ICN speakers to certain groups. The Oregon Secretary of State's Office of Small Business Advocacy continues to be a steadfast supporter of ICN activity, as has the Oregon Health Authority and the Office of Administrative Hearings. Whether these relationships can be leveraged further to include compliance issues is worth exploring, taking into account the interests of all agencies and the requirement of new interagency agreements for ICN inclusion.

Excluded Workers – Oregon law has many different exemptions from the definitions of employment, with some exemptions applying only to some programs or requirements. The exclusions used by the Oregon Employment Department, the Department of Revenue, and Construction Contractors Board are found in ORS 657.030 and 657.040 through 657.094. The exclusions used by the Department of Consumer and Business Services are found in in ORS 656.027 and others. Some of these exclusions are identical to each other, but others are not.

Prior to January 1, 2022, the Department of Consumer and Business Services used a different definition of employment than the Oregon Employment Department, the Department of Revenue, and Construction Contractors Board. In 2021, with HB 3188, the Oregon legislature amended the Department of Consumer and Business Services' definition to be consistent with ORS 670.600.

External Factors

ICN agencies must react to certain situations beyond the control of the ICN. While ICN agencies take neutral stances on the following topics, they can require a reassessment of how an agency will conduct business.

Court Decisions – The Oregon Court of Appeals issued an opinion in *SAIF Corp. v. Ward*, 307 OR App 337 (2020) on October 21, 2020, that interprets “leasehold interest” as used in ORS 656.027(15). The court found that to have a leasehold interest, a worker must have the right to possess, use and control the vehicle for purposes other than providing it to the carrier. The court found that a worker who does not have this right is not covered by the exclusion in ORS 656.027(15) and is therefore a subject worker unless covered by another exclusion. The Oregon Supreme Court affirmed the decision of the Oregon Court of Appeals in *SAIF Corp. v. Ward*, 369 Or 384 (2022) on March 24, 2022.

The Oregon Supreme Court’s ruling has the potential to have a significant impact on the trucking industry. Businesses will need to examine their current practices and possibly make changes in accordance with the ruling. Additionally, companies with workers’ compensation coverage may have increased premiums to pay for drivers that were previously thought to be exempt.

Following the ruling, the Department of Consumer and Business Services, Workers’ Compensation Division issued an industry notice to employers, insurers, agents, and brokers describing the possible impacts. The Department of Consumer and Business Services, Workers’ Compensation Division also enlisted the assistance of the Oregon Department of Transportation Motor Carrier Division, the Oregon Trucking Association, the National Council on Compensation Insurance, the Department of Consumer and Business Services’ Small Business Ombudsman, and the Department of Consumer and Business Services Division of Financial Regulation to help communicate this critical information to interested parties. So far, the Workers’ Compensation Division has only seen a handful of cases impacted by this ruling.

Gig Economy Service Providers – Gig economy employers have continued to expand in Oregon since our last report. New mobile apps and their respective “employment opportunities” seem to appear daily. Much has been in the news on a national basis regarding the employment status of those providing services to these entities. In Oregon, there has been a focus on gig employers as part of the ICN audit efforts. The goal is always to have at least one ongoing audit of a gig employer.

Gig audits are time consuming and tend to be very litigious once an assessment is issued. Although some of these service providers meet the definition of an independent contractor per ORS 670.600, most do not. The battle to bring non-complaint employers within regulation will continue for some time, with the ultimate goal of achieving voluntary compliance.

Conclusion - Issues with misclassification of independent contractors happens in part from ambiguity in the definition of independent contractor as provided in ORS 670.600. The definition of independent contractor provides employers discretion in making these determinations. For employers seeking to “game the system,” misclassifying workers as independent contractors comes with presumed financial benefits to the employer. This financial incentive may inadvertently create an opportunity in which bad actors may (mis)classify employees as independent contractors and hope that ICN agencies that perform compliance audits, do not audit the business side. As we have seen in past recessions, the pressure that struggling Oregon businesses are under during difficult economic times may lead to increased misclassification to avoid paying payroll taxes for some time.

The test in ORS 670.600 depends on weighing a number of different factors, which means investigating worker classification concerns can be a resource intensive process for agencies, and can lead to even more resource-intensive litigation. The test in ORS 670.600 also means that even after this process has been completed, a business might make a minor change in its relationship with workers, requiring the investigation and potential litigation cycle to begin again. Regardless, greater investment in ICN agency enforcement reach will increase the likelihood that those businesses misclassifying workers to avoid correct application of Oregon law are discovered and employees are appropriately classified. This approach also minimizes any major impacts to businesses who appropriately classify workers as independent contractors.

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