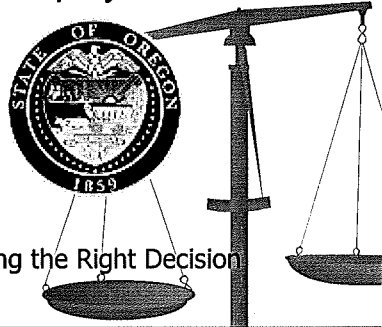


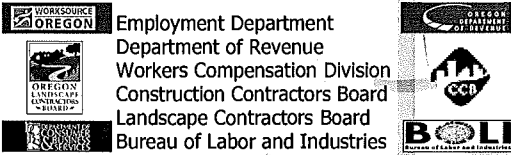
Independent Contractor or Employee?



Independent Contractor or Employee? Making the right decision

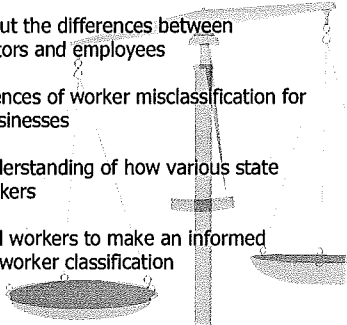
A presentation on worker classification and independent contractor issues in Oregon.

Sponsored by these Oregon Agencies:



Independent Contractor or Employee? Goals for this presentation:

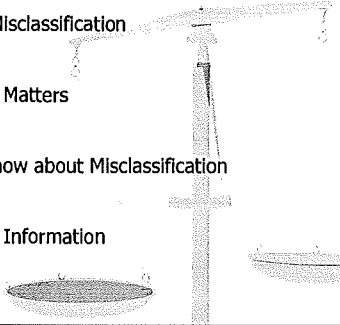
- Raise awareness about the differences between independent contractors and employees
- Outline the consequences of worker misclassification for both workers and businesses
- Promote a better understanding of how various state agencies classify workers
- Equip businesses and workers to make an informed determination about worker classification



Independent Contractor or Employee?

Goals for this presentation:

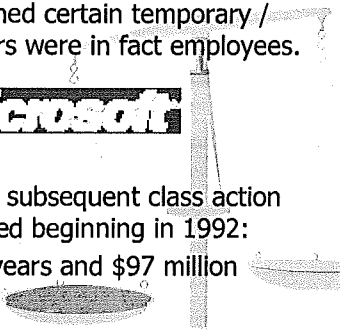
- The Issue: Worker Misclassification
- Why Misclassification Matters
- What You Need to Know about Misclassification
- What to Do with that Information



IRS determined certain temporary / contract workers were in fact employees.

Microsoft

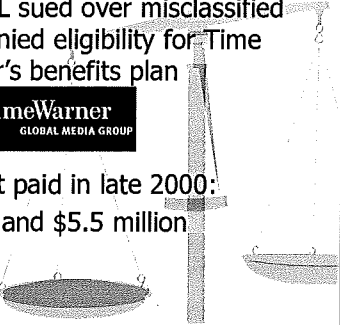
Settlement of subsequent class action lawsuits filed beginning in 1992:
Nearly 8 years and \$97 million

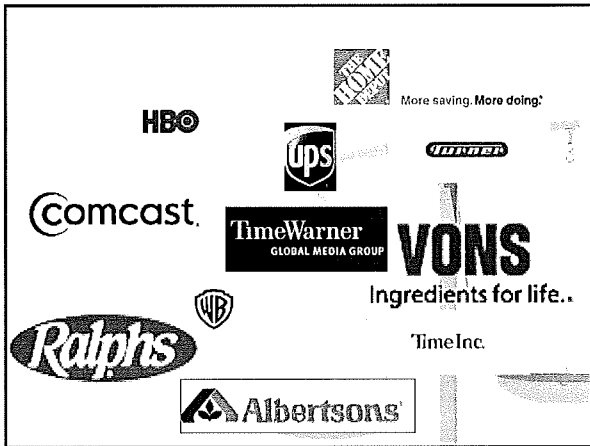


In 1998, US DOL sued over misclassified employees denied eligibility for Time Warner's benefits plan

Time Warner
GLOBAL MEDIA GROUP


Settlement paid in late 2000:
2 years and \$5.5 million



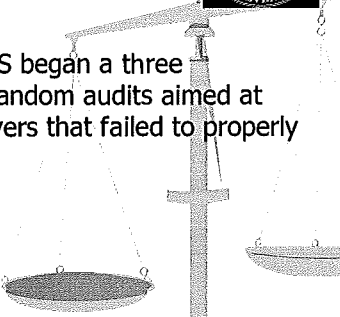



October 20, 2010, FedEx agreed to resolve a dispute with Montana's Attorney General over the classification of FedEx Ground delivery drivers (one of dozens of similar actions facing the company).

Cost for now:
\$2.3 million



On the Horizon

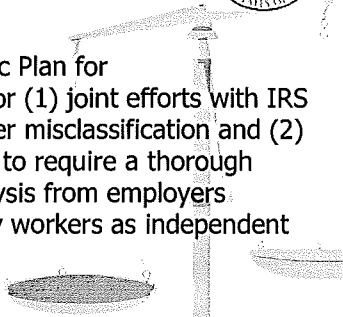


Early last year, IRS began a three year program of random audits aimed at identifying employers that failed to properly classify workers.

On the Horizon



US DOL's Strategic Plan for 2011-2016 calls for (1) joint efforts with IRS to detect and deter misclassification and (2) rule amendments to require a thorough written legal analysis from employers seeking to classify workers as independent contractors.

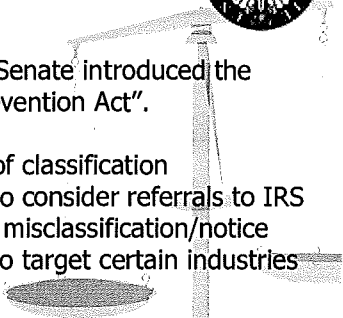


On the Horizon



In April, the U.S. Senate introduced the "Payroll Fraud Prevention Act".

- Requires notice of classification
- Directs US DOL to consider referrals to IRS
- Adds penalty for misclassification/notice
- Directs US DOL to target certain industries



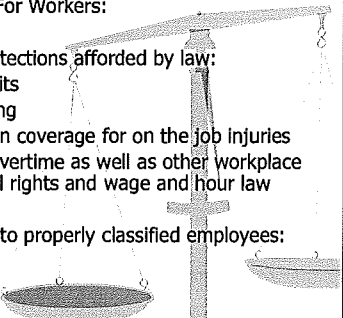
Independent Contractor or Employee?

The cost of getting it wrong:

For Workers:

- Loss of benefits and protections afforded by law:
- Unemployment benefits
 - Income tax withholding
 - Workers compensation coverage for on the job injuries
 - Minimum wage and overtime as well as other workplace protections under civil rights and wage and hour law

- Loss of benefits offered to properly classified employees:
- Sick leave
 - Vacation leave
 - Retirement benefits



Independent Contractor or Employee?

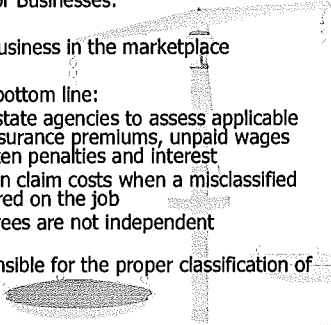
The cost of getting it wrong:

For Businesses:

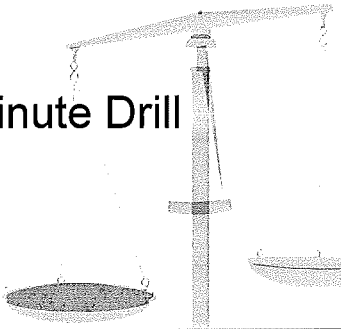
Unfair competition for business in the marketplace

Significant costs to the bottom line:

- Oregon law requires state agencies to assess applicable back taxes, unpaid insurance premiums, unpaid wages and overtime, and often penalties and interest
- Workers compensation claim costs when a misclassified worker has been injured on the job
- Statutory non-employees are not independent contractors
- Businesses are responsible for the proper classification of their workers



2 Minute Drill



Independent Contractor or Employee?

Oregon independent contractor law:

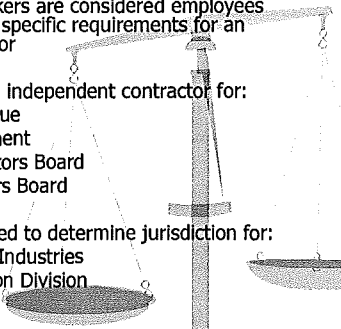
Under Oregon law, workers are considered employees unless they meet the specific requirements for an independent contractor

ORS 670.600 defines an independent contractor for:

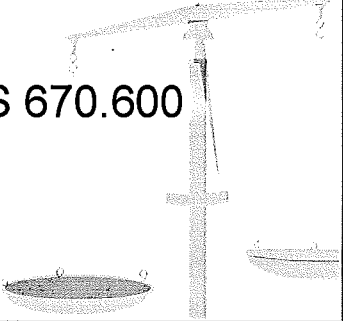
- Department of Revenue
- Employment Department
- Construction Contractors Board
- Landscape Contractors Board

Separate tests are applied to determine jurisdiction for:

- Bureau of Labor and Industries
- Workers Compensation Division



ORS 670.600



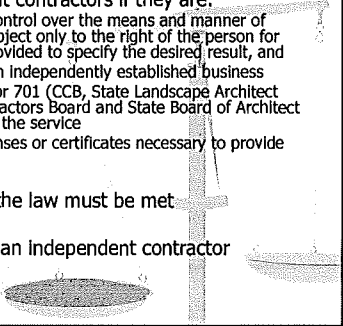
Independent Contractor or Employee?
ORS 670.600:

Workers are independent contractors if they are:

- Free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired result, and
- Customarily engaged in an independently established business
- Licensed under ORS 671 or 701 (CCB, State Landscape Architect Board or Landscape Contractors Board and State Board of Architect Examiners) if required for the service
- Responsible for other licenses or certificates necessary to provide the service

All the requirements of the law must be met

No single factor creates an independent contractor

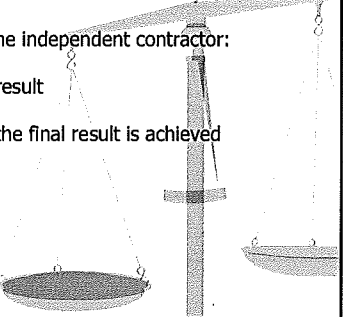


Independent Contractor or Employee?
ORS 670.600:

What does "free from direction and control" mean?

The person employing the independent contractor:

- May specify the final result
- May not specify how the final result is achieved



Independent Contractor or Employee?

ORS 670.600:

Customarily engaged in an "independently established business" (must meet 3 out of 5):

1. Maintain a business location that is:
 - a. Separate from the business or work location of the person contracting the services; or
 - b. that is in a portion of the worker's residence and that portion is used primarily for business.
2. Bear the risk of loss, shown by factors such as:
 - a. Entering into fixed price contracts;
 - b. Being required to correct defective work;
 - c. Warranting the services provided; or
 - d. Negotiating indemnification agreements or purchasing liability insurance, performance bonds, or errors and omissions insurance.

Independent Contractor or Employee?

ORS 670.600:

"Independently established business" (3 out of 5):

3. Provide contracted services for two or more different persons within a 12-month period, or routinely engage in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.
4. Make a significant investment in the business through means such as:
 - a. Purchasing tools or equipment necessary to provide the services;
 - b. Paying for the premises or facilities where the services are provided; or
 - c. Paying for licenses, certificates or specialized training required to provide the services.
5. Have the authority to hire and fire other persons to provide assistance in performing the services.

Independent Contractor or Employee?

ORS 670.600:

A person who files tax returns with a Schedule F and also performs agricultural services reportable on a Schedule C is not required to meet the "independently established business" provisions.

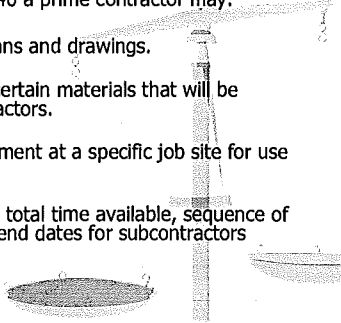
Establishing a business entity such as a corporation or limited liability company, does not, by itself, determine that the individual providing services will be considered an independent contractor.

Independent Contractor or Employee?

ORS 670.600:

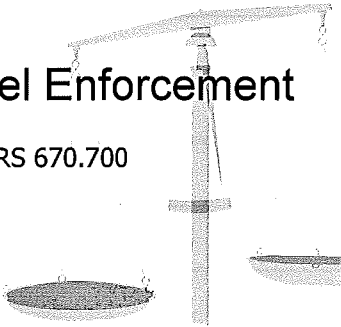
Under OAR 812-003-0240 a prime contractor may:

- Provide necessary plans and drawings.
- Specify and provide certain materials that will be installed by subcontractors.
- Provide certain equipment at a specific job site for use by subcontractors.
- Schedule and change total time available, sequence of work, or the start or end dates for subcontractors working on a project.

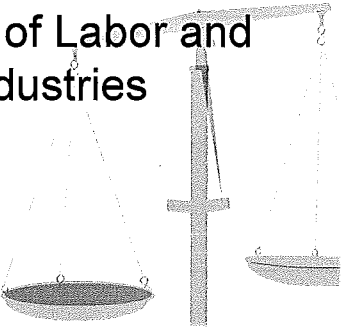


State Level Enforcement

ORS 670.700



Bureau of Labor and Industries



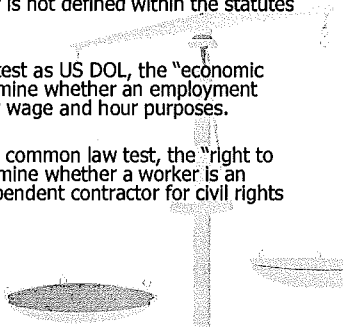
Independent Contractor or Employee?

Bureau of Labor and Industries:

Independent Contractor is not defined within the statutes enforced by BOLI.

BOLI applies the same test as US DOL, the "economic reality" test, to determine whether an employment relationship exists for wage and hour purposes.

BOLI applies a separate common law test, the "right to control" test to determine whether a worker is an employee or an independent contractor for civil rights law.



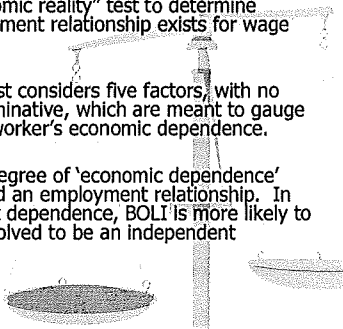
Independent Contractor or Employee?

BOLI – Wage and Hour Law:

BOLI applies the "economic reality" test to determine whether an employment relationship exists for wage and hour purposes.

The economic reality test considers five factors, with no single factor determinative, which are meant to gauge the degree of the worker's economic dependence.

Where there is a high degree of 'economic dependence' BOLI is likely to find an employment relationship. In the absence of that dependence, BOLI is more likely to find the worker involved to be an independent contractor.

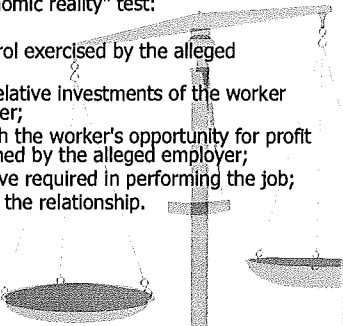


Independent Contractor or Employee?

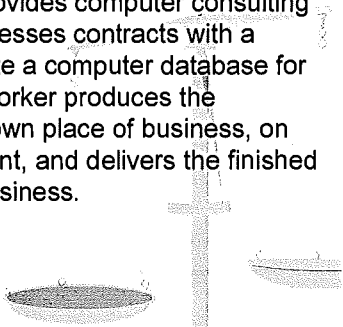
BOLI – Wage and Hour Law:

The factors of the "economic reality" test:

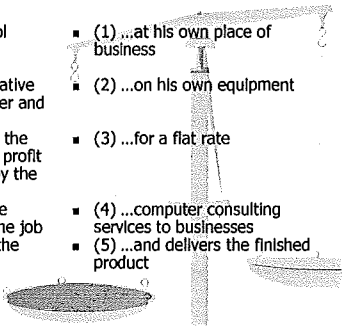
1. The degree of control exercised by the alleged employer;
2. The extent of the relative investments of the worker and alleged employer;
3. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;
4. The skill and initiative required in performing the job;
5. The permanency of the relationship.



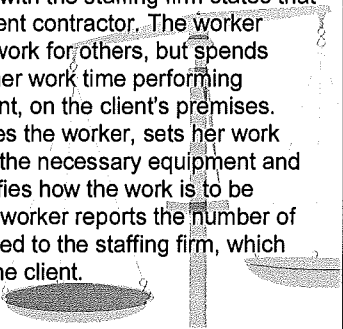
A worker who provides computer consulting services to businesses contracts with a business to create a computer database for a flat rate. The worker produces the database at his own place of business, on his own equipment, and delivers the finished product to the business.

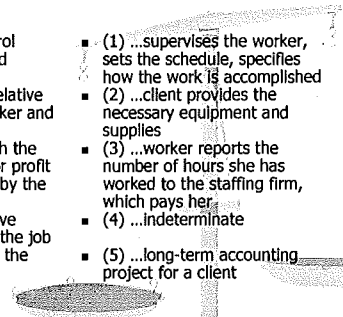


- (1) The degree of control exercised by the alleged employer
 - (2) The extent of the relative investments of the worker and alleged employer
 - (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer
 - (4) The skill and initiative required in performing the job
 - (5) The permanency of the relationship
- (1) ...at his own place of business
 - (2) ...on his own equipment
 - (3) ...for a flat rate
 - (4) ...computer consulting services to businesses
 - (5) ...and delivers the finished product



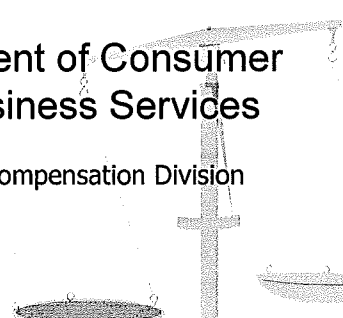
A staffing firm hires a worker and sends her to perform a long term accounting project for a client. Her contract with the staffing firm states that she is an independent contractor. The worker retains the right to work for others, but spends substantially all of her work time performing services for the client, on the client's premises. The client supervises the worker, sets her work schedule, provides the necessary equipment and supplies, and specifies how the work is to be accomplished. The worker reports the number of hours she has worked to the staffing firm, which pays her and bills the client.





- (1) The degree of control exercised by the alleged employer
- (2) The extent of the relative investments of the worker and alleged employer
- (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer
- (4) The skill and initiative required in performing the job
- (5) The permanency of the relationship

- (1) ...supervises the worker, sets the schedule, specifies how the work is accomplished
- (2) ...client provides the necessary equipment and supplies
- (3) ...worker reports the number of hours she has worked to the staffing firm, which pays her
- (4) ...indeterminate
- (5) ...long-term accounting project for a client



**Department of Consumer
and Business Services**

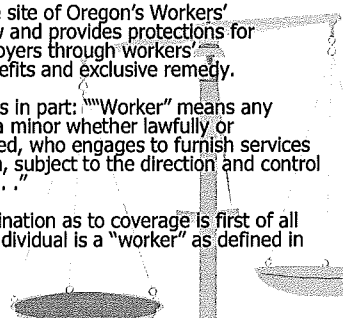
Workers Compensation Division

Independent Contractor or Employee?
Workers Compensation Division:

ORS chapter 656 is the site of Oregon's Workers' Compensation Law and provides protections for workers and employers through workers' compensation benefits and exclusive remedy.

ORS 656.005(30) states in part: "Worker" means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer"

The controlling determination as to coverage is first of all whether a given individual is a "worker" as defined in statute.

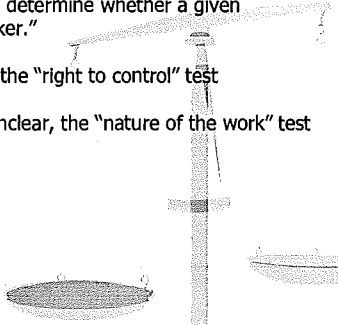


Independent Contractor or Employee?

Workers Compensation Division:

Two tests are utilized to determine whether a given individual is a "worker."

1. The primary test is the "right to control" test
2. Where it remains unclear, the "nature of the work" test is applied

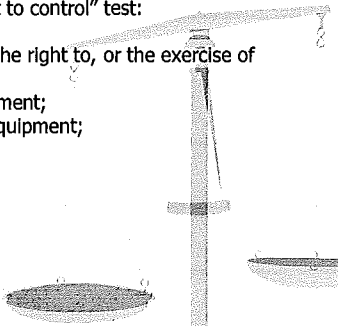


Independent Contractor or Employee?

WCD – Right to Control:

The factors of the "right to control" test:

1. Direct evidence of the right to, or the exercise of control;
2. The method of payment;
3. The furnishing of equipment;
4. The right to fire.

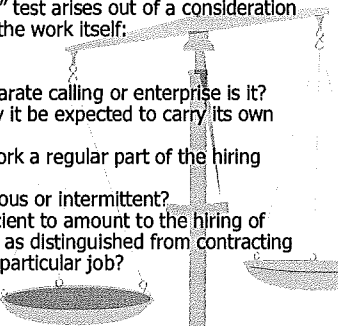


Independent Contractor or Employee?

WCD – Nature of the Work:

The "nature of the work" test arises out of a consideration of the character of the work itself:

- A. How skilled is it?
- B. How much of a separate calling or enterprise is it?
- C. To what extent may it be expected to carry its own accident burden?
- D. How much is the work a regular part of the hiring entity's business?
- E. Is the work continuous or intermittent?
- F. Is its duration sufficient to amount to the hiring of continuous services as distinguished from contracting for completion of a particular job?



Independent Contractor or Employee?

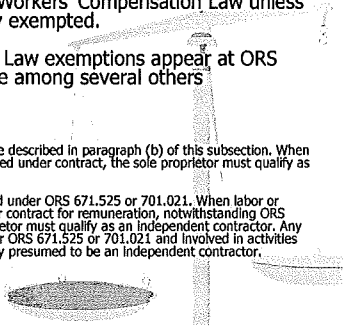
WCD – Exemptions:

Workers are subject to Workers' Compensation Law unless they are specifically exempted.

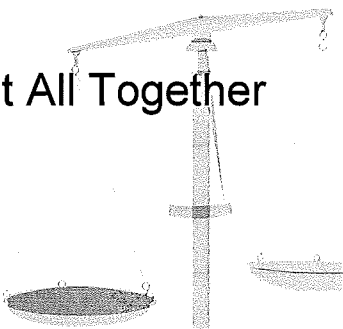
Workers' Compensation Law exemptions appear at ORS 656.027 and include among several others

Sole proprietors:

- (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 licensed under ORS 671.525 or 701.021. 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 licensed under ORS 671.525 or 701.021 and involved in activities subject thereto is conclusively presumed to be an independent contractor.



Putting It All Together

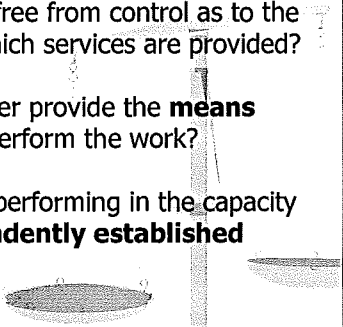


ORS 670.600	Right-to-Control Test
Department of Revenue Employment Department Construction Contractors Board Landscape Contractors Board	Bureau of Labor and Industries - Civil Rights Division & Workers' Compensation Division
Worker must meet all of the requirements of ORS 670.600 to be considered an independent contractor.	Four factors of the test are weighed to determine whether a worker is free from the right to control of the business receiving the worker's services. No single factor is determinative.
1 Free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired result; and 2 Customarily engaged in an independently established business; and 3 Licensed under ORS 671 or 701 (CCA, State Landscape Architect Board or Landscape Contractors Board and State Board of Architect (Examined) if required for the service; and 4 Responsible for other licenses or certificates necessary to provide the service	1 Direct evidence of the right to, or the exercise of, control; 2 The method of payment; 3 The furnishing of equipment; 4 The right to fire.
The classification of a worker under any of these tests is not determinative for the classification of that worker under the remaining tests. The text of ORS 670.600 as well as additional information regarding the criteria listed above is available at: www.oregonindependentcontractors.com .	

Independent Contractor or Employee?

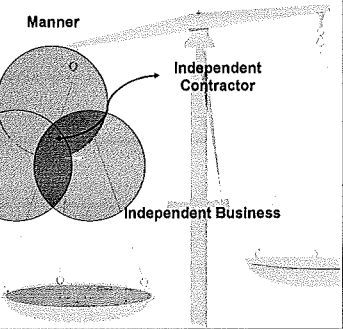
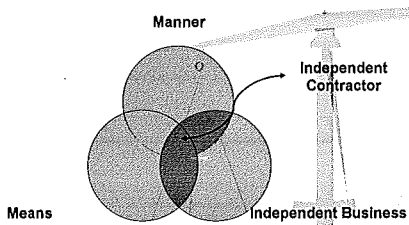
As Easy as 1, 2, 3..., Sometimes

1. Is the worker free from control as to the **manner** in which services are provided?
2. Does the worker provide the **means** necessary to perform the work?
3. Is the worker performing in the capacity of an **independently established business**?



Independent Contractor or Employee?

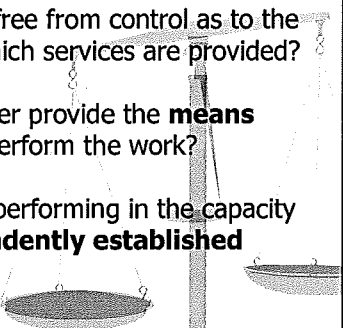
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Independent Contractor or Employee?

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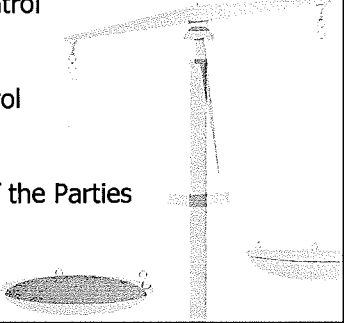
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Independent Contractor or Employee?

As Easy as 1, 2, 3..., Sometimes

1. Behavioral Control
2. Financial Control
3. Relationship of the Parties



Independent Contractor or Employee?

A Summary:

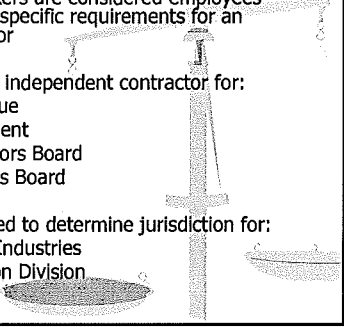
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Independent Contractor or Employee?

More information is available at

www.OregonIndependentContractors.com

For general questions about Oregon's independent contractor laws or about information on our website, email ic.info@state.or.us.

For specific Oregon agency information, email:

Employment Department taxinfo@emp.state.or.us	Department of Revenue ic.info.dor@state.or.us
Workers Compensation Division wcd.employerinfo@state.or.us	Bureau of Labor and Industries boll.mail@state.or.us
Construction Contractors Board ccb.info@state.or.us	Landscape Contractors Board lcb.info@state.or.us