



# Oregon

Theodore R. Kulongoski, Governor

Department of Consumer and Business Services  
Workers' Compensation Division  
350 Winter St. NE  
PO Box 14480  
Salem, OR 97309-0405  
1-800-452-0288, (503) 947-7810  
TTY (503) 947-7993  
www.wcd.oregon.gov

July 18, 2006

## Proposed Changes to Workers' Compensation Rules

The Workers' Compensation Division proposes to adopt new administrative rules:

- **OAR chapter 436, division 170, Independent Contractors:**

Senate Bill 323, passed by the 2005 Oregon Legislature, directs several state agencies to work together to provide consistent application of laws affecting independent contractors. Five agencies, including the Workers' Compensation Division of the Department of Consumer and Business Services, are proposing adoption of identical rules.

The division welcomes public comment on proposed changes and has scheduled two public hearings:

When	Where
Sept. 15, 2006, 11:00 a.m.	City Hall; Council Chambers, 710 NW Wall Street, Bend OR
Sept. 22, 2006, 1:00 p.m.	Oregon Dept. of Revenue; Fishbowl Conference Rm; 955 Center St NE, Salem OR

**How to provide comment:** Come to the hearings and speak, submit written testimony, or both.

**Comment period closes:** November 1, 2006

If you have questions, or wish to submit written testimony, please contact: Fred Bruyns, Rules Coordinator, Workers' Compensation Division, 350 Winter Street NE (for courier or in-person delivery); PO Box 14480, Salem, OR 97309-0405; Email - [fred.h.bruyns@state.or.us](mailto:fred.h.bruyns@state.or.us), Phone - (503) 947-7717; Fax - (503) 947-7581

### Proposed Oregon Administrative Rules (all new text)

#### 436-170-0002 Purpose

**The Landscape Contractors Board, Department of Revenue, Department of Consumer and Business Services, Employment Department, and Construction Contractors Board must adopt rules together to carry out ORS 670.600. ORS 670.600 defines how a person qualifies to be an "independent contractor" for purposes of the programs administered by these agencies. This rule is intended to ensure consistent application and interpretation of ORS 670.600 by all five agencies; to clarify the meaning of terms used in ORS 670.600; and, to the extent possible, to enable interested persons to understand how all five agencies will apply ORS 670.600.**

Stat. Auth.: ORS 656.726(4); 670.605; Stats. Implemented: ORS 316.162; 670.600

#### 436-170-0005 Definitions of terms used in ORS 670.600

**ORS 670.600 states that an "independent contractor" must be "free from direction and control over the means and manner" of providing services to others. The agencies that have adopted this rule will use the following definitions in their interpretation and application of ORS 670.600:**

**(1) "Means" are resources used or needed in performing services. Depending upon the nature of the business, examples of the "means" used in performing services might include such things as tools or equipment, labor, devices, plans, materials, licenses, property, work location, and assets, among other things.**

**(2) "Manner" is the method by which services are performed. Depending upon the nature of the business, examples of the "manner" by which services are performed might include such things as work schedules, and work processes and procedures, among other things.**

**(3) "Free from direction and control" means that the independent contractor is free from actual control over the means or manner by which the independent contractor provides services, and free from the right of another person to control the means or manner by which the independent contractor provides services. If the person for whom services are provided has the right to control the means or manner of providing the services, it doesn't matter whether that person actually exercises the right of control.**

Stat. Auth.: ORS 656.726(4); 670.605; Stats. Implemented: ORS 316.162; 670.600

*Please see additional information about proposed changes and the public hearing on subsequent pages.*

Secretary of State  
**NOTICE OF PROPOSED RULEMAKING HEARING**

A Statement of Need and Fiscal Impact accompanies this form.

Dept of Consumer and Business Services,  
Workers' Compensation Division  
Agency and Division

OAR CHAPTER 436  
Administrative Rules Chapter Number

Fred Bruyns	PO Box 14480, Salem, OR 97309-0405; 350 Winter Street NE, Rm 27, Salem, OR 97301-3879	(503) 947- 7717 Fax (503) 947-7581
Rules Coordinator	Address	Telephone

**RULE CAPTION**

**Defines terms "means" and "manner" as used in ORS 670.600(2)(a) relating to independent contractors.**

September 15, 2006	11:00 a.m.*	City Hall; Council Chambers 710 NW Wall Street, Bend OR 97701	Bill Boyd
Hearing date	Time	Location	Hearings Officer
September 22, 2006	1:00 p.m. *	Oregon Department of Revenue; Fishbowl Conference Room; 955 Center St NE, Salem OR 97301-2555	Bill Boyd
Hearing date	Time	Location	Hearings Officer

**\*NOTE: The hearings will begin at times shown and end when all present who wish to testify have done so. Written testimony will be accepted through November 1, 2006.**

*Auxiliary aids for persons with disabilities are available upon advance request.*

**RULEMAKING ACTION**

**ADOPT:** OAR 436-170-0002, 436-170-0005

ORS 656.726; ORS 670.605

Stat. Auth.

Oregon Laws 2005, Chapter 533 (Enrolled Senate Bill 323)

Other Authority

ORS 316.162; ORS 670.600

Stats. Implemented

**RULE SUMMARY**

**The agency proposes to adopt OAR chapter 436-170. These proposed rules:**

Describe the factors agencies will consider in determining whether a person is free from direction and control over the "means" and "manner" of providing services, as those terms are used in ORS 670.600(2)(a).

**Request for public comment:** The Workers' Compensation Division requests public comment on whether other options should be considered for achieving the rules' substantive goals while reducing the negative economic impact of the rules on business.

Address questions to: Fred Bruyns, Rules Coordinator; 503-947-7717; fax 503-947-7581; e-mail [fred.h.bruyns@state.or.us](mailto:fred.h.bruyns@state.or.us)

Proposed rules are available on the Workers' Compensation Division's Web site:

<http://wcd.oregon.gov/policy/rules/rules.html#proprules> or from WCD Publications, 503-947-7627, fax 503-947-7630.

November 1, 2006

Last Day for Public Comment

/s/ John L. Shilts

Authorized Signer and Date

7/13/06

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

\*The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday.

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Secretary of State  
**STATEMENT OF NEED AND FISCAL IMPACT**

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Department of Consumer and Business Services,  
Workers' Compensation Division  

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Agency and Division

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OAR CHAPTER 436  
Administrative Rules Chapter Number

In the Matter of  
The Adoption of OAR: )  
436-170, Independent Contractors )  
)

**Rule Caption:**  
**Defines terms "means" and "manner" as used in ORS 670.600(2)(a) relating to independent contractors.**

**Statutory Authority:** ORS 656.726; ORS 670.605

**Other Authority:** Oregon Laws 2005, Chapter 533 (Enrolled Senate Bill 323)

**Stats. Implemented:** ORS 316.162; ORS 670.600

**Need for the Rule(s):** The 2005 Legislative Assembly instructed five agencies (Department of Revenue, Employment Department, Department of Consumer and Business Services, Construction Contractors Board, and Landscape Contractors Board) to engage in joint rulemaking to clarify how agencies will determine whether a business is an "independent contractor." This proposed rule is designed to respond to that legislative directive by explaining some of the terms used in the definition of "independent contractor" in ORS 670.600.

**Documents Relied Upon, and where they are available:**

Enrolled Senate Bill 323 – Oregon Laws 2005, chapter 533; Independent Contractor Advisory Panel meeting minutes; relevant cases of the Oregon Court of Appeals and Oregon Supreme Court:

- S-W Floor Cover Shop v. Nat'l Council on Comp. Ins.*, 318 Or 614, 872 P2d 1 (1994)
- Stamp v. DCBS*, 169 Or App 354, 357, 9 P3d 729 (2000)
- Woody v. Waibel*, 276 Or 189, 192, n 2, 554 P2d 492 (1976)
- Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 619, 43 P3d 1106 (2002)
- Harris v. State Ind. Acc. Com.*, 191 Or 254, 269, 230 P2d 175 (1951)
- Demilly v. Butler Amusements, Inc.*, 177 Or App 106; 33 P3d 343 (2001)

These records are available for public inspection in the Administrator's Office, Workers' Compensation Division of the Department of Consumer and Business Services, 350 Winter Street NE, Salem, Oregon 97301-3879, upon request and between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. Please call (503) 947-7717 to request copies.

**Fiscal and Economic Impact, including Statement of Cost of Compliance:**

By defining terms used in ORS 670.600, these proposed rules may facilitate compliance by Oregon businesses with statutory requirements for independent contracting. During insurers' audits of employers' premium, some presumed independent contractors are determined to be employees, who are subject to the workers' compensation law. When such misclassifications can be averted, businesses can better manage their potential liability for premium and claims. Businesses may see a decrease in costs to comply, because of fewer misclassifications of workers, fewer penalties (with associated interest), and reduced litigation. However, the agency projects that these proposed rules will not have a measurable fiscal impact, positive or negative, on any affected party, including the Department of Consumer and Business Services, local governments, injured workers, Oregon employers, workers' compensation insurers, self-insured employers, or worker leasing companies and their clients.

**Cost of compliance effect on small businesses:**

**(a) An estimate of the number of small businesses subject to the proposed rule and identification of the types of businesses and industries with small businesses subject to the proposed rule:**

All small businesses in Oregon that pay individuals to provide services are potentially subject to the proposed rule. The 2004 US Census reports indicate that of the 105,449 Oregon businesses with employees, 101,905 had from one to 49 employees and would be defined as "small business." (See <http://censtats.census.gov/cgi-bin/cbpnaic/cbpsect.pl>)

**(b) A brief description of the projected reporting, recordkeeping and other administrative activities required for compliance with the proposed rule, including costs of professional services:**

The rule changes do not increase the reporting, recordkeeping or other administrative activities for businesses. The rule changes will not increase costs of compliance for businesses. By providing additional guidance as to what certain statutory terms mean, businesses may see a decrease in costs to comply because of fewer misclassifications of workers. The amount of savings, if any, cannot be determined because the department does not know how many businesses may avoid misclassifications.

**(c) An identification of equipment, supplies, labor and increased administration required for compliance with the proposed rule:**

None.

**How were small businesses involved in the development of this rule?**

An Advisory Committee consisted of members from state agencies as well as representatives of businesses, including construction, landscaping, trucking, and others.

**Administrative Rule Advisory Committee consulted?: Yes**

If not, why?:

*/s/ John L. Shilts*

*7-13-06*

**Signature and Date**

John L. Shilts, Administrator, Workers' Compensation Division

**Printed name**