



Oregon

Theodore R. Kulongoski, Governor

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October 27, 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. In July of this year, these agencies proposed rules and two hearings were held. The agencies subsequently determined that those proposed rules were not sufficient to implement independent contracting law, and have re-filed notice of proposed rulemaking with the Oregon Secretary of State.

The division welcomes public comment on proposed changes and has scheduled a public hearing:

When	Where
11-15-2006 10:00 a.m.	Fishbowl Conference Room, Dept. of Revenue 955 Center St NE, Salem, Oregon

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

Comment period closes: November 15, 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 currier or in-person delivery)
PO Box 14480, Salem, OR 97309-0405
Email - fred.h.bruyns@state.or.us
Phone - (503) 947-7717; Fax - (503) 947-7581

*Please see additional information about proposed rule 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	350 Winter Street NE, Rm 27 PO Box 14480, Salem, OR 97309-0405 Address	OAR CHAPTER 436 Administrative Rules Chapter Number
Fred Bruyns Rules Coordinator		(503) 947- 7717 Fax (503) 947-7581 Telephone

RULE CAPTION

Implementation of ORS 670.600 related to independent contractors.

November 15, 2006 Hearing date	10:00 a.m. * Time	Oregon Department of Revenue; Fishbowl Conference Room; 955 Center St NE, Salem OR 97301-2555 Location	Staff Hearings Officer
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***Register to testify beginning at 9:45. Call 503-947-2099 to make other arrangements.**

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

RULEMAKING ACTION

ADOPT: OAR 436-170

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 to provide guidance to agencies referenced in ORS 670.600 as to how the statute will be implemented; to clarify the meaning of terms used in ORS 670.600; and to provide guidance to interested persons as to how the agencies referenced in ORS 670.600 will apply the provisions of that statute.

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

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 15, 2006
Last Day for Public Comment

/s/ John L. Shilts
Authorized Signer and Date

10-12-06

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

Agency and Division

OAR CHAPTER 436
Administrative Rules Chapter Number

In the Matter of

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

Rule Caption: Implementation of ORS 670.600 related 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 and providing additional guidance as to how the agencies will apply and interpret the statute.

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? A steering committee, including stakeholders and agency staff, consulted with small businesses during development of proposed rules. An Advisory Committee consisted of members from state agencies as well as representatives of small businesses, including construction, landscaping, trucking, and others.

Administrative Rule Advisory Committee consulted?: Yes If not, why?:

/s/ John L. Shilts

10-12-06

Signature and Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name



Independent Contractors
Proposed Oregon Administrative Rules
Chapter 436, Division 170

For Public Hearing, November 15, 2006

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All new text

436-170-0002 Purpose of Rule

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 that all five agencies apply and interpret ORS 670.600 in a consistent manner; 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

436-170-0100 Statutory Requirements

ORS 670.600 imposes three requirements that a person must meet in order to be an “independent contractor.” The first requirement is that an “independent contractor” must be “free from direction and control over the means and manner” of providing services to others. The second requirement is that an “independent contractor” must be engaged in an “independently established business.” The third requirement is related to licenses or certificates when a license or certificate is required by law to provide the particular services.

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

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROPOSED INDEPENDENT CONTRACTORS RULES

436-170-0200 Direction and Control Test

(1) 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 the "direction and control" test:

(a) "Means" are resources used or needed in performing services. To be free from direction and control over the means of providing services an independent contractor must determine which resources to use in order to perform the work, and how to use those resources. 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.

(b) "Manner" is the method by which services are performed. To be free from direction and control over the manner of providing services an independent contractor must determine how to perform the work. 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.

(c) "Free from direction and control" means that the independent contractor is 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 does not matter whether that person actually exercises the right of control.

(2) Right to specify results to be achieved. Specifying the final desired results of the contractor's services does not constitute direction and control over the means or manner of providing those services.

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

436-170-0300 Independently Established Business Test

ORS 670.600 describes the characteristics of an independently established business, and requires an independent contractor to demonstrate at least three of them. Those characteristics include:

- (1) Maintaining a separate business location;
- (2) Bearing the risk of economic loss related to the conduct of the business;
- (3) Providing services to two or more different customers;
- (4) Making a significant investment in the business; and
- (5) Having the authority to hire and fire others to help in the business.

436-170-0400 Licensing Requirement

(1) To be considered an independent contractor, a person or business must be licensed under ORS chapter 671 (landscaping business) or ORS chapter 701 (construction contractor) if performing services for which a license is required under those laws.

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PROPOSED INDEPENDENT CONTRACTORS RULES

(2) To be considered an independent contractor, a person or business performing services, other than landscaping or construction described in section (1), must be responsible for obtaining any licenses or certificates that are needed to lawfully provide those services.

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

436-170-0500 Special rules for application of “direction and control” test in construction and landscape industries

(1) The provisions of this rule apply to:

(a) Architects licensed under ORS 671.010 to 671.220;

(b) Landscape architects licensed under ORS 671.310 to 671.479;

(c) Landscaping businesses licensed under ORS 671.510 to 671.710;

(d) Engineers licensed under ORS 672.002 to 672.325; and

(e) Construction contractors licensed under ORS chapter 701.

(2) The following facts do not indicate that a licensee described in section (1), that is paying for the services of a subcontractor in connection with a construction or landscape project, is exercising direction or control over the manner or means by which the subcontractor is performing work:

(a) The licensee provides plans, drawings, or specifications that are necessary for the project to be completed.

(b) The licensee specifies materials, appliances or plants by type, size, color, quality, manufacturer, grower, or price, which materials, appliances or plants are necessary for the project to be completed.

(c) The licensee provides materials, appliances, or plants of a type ordered or authorized by the customer or specified in the general contract, plans, drawings or specifications, including, but not limited to, roofing materials, framing materials, finishing materials, stoves, ovens, refrigerators, dishwashers, air conditioning units, heating units, sod and seed for lawns, shrubs, vines, trees, or nursery stock, which are to be installed by subcontractors in the performance of their work, and which are necessary for the project to be completed.

(d) The licensee provides equipment (such as scaffolding or fork lifts) at the job site, which equipment is for use on that job site only, by all or a significant number of subcontractors requiring such equipment.

(e) The licensee has the right to schedule, or does schedule, the total amount of time available for performing the work, the sequence of performing the work, or the start or end dates for subcontractors working on a project.

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PROPOSED INDEPENDENT CONTRACTORS RULES

(f) The licensee reserves the right to change, or does change, the total amount of time for performing the work, the sequence of performing the work, or the start or end dates for subcontractors working on a project.

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

436-170-0600 Circumstances in which special rules for construction and landscape industries will not apply

The special rules set forth in OAR 436-170-0500 for application of the “direction and control” test to the construction and landscape industries do not apply in any situation in which a construction contractor would be subject to sanctions under ORS 701.135(1)(g), or a landscaping business would be subject to sanctions under ORS 671.610(5) for violating rules concerning the number of exempt contractors working on the same task on the same job or work site.

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