

**Hearing Officer Report for:** Administrative Rules Public Hearing  
**Date:** November 15, 2006  
**Hearing Location:** Fishbowl Conference Room  
Oregon Department of Revenue  
955 Center St. NE Salem, OR. 97301  
**Hearing Officer:** Joseph Royston

A public hearing was held on Wednesday, November 15, 2006 for public testimony on proposed rules in the Fall, 2006 process. The department also invited oral and written comments outside of the public hearing.

The hearing opened at 10:00 AM and closed at 12:00 Noon

**Public Testimony**

**Oral Comments:**

**Jaye Caroline Fraser, Assistant Council for Legal Services, SAIF Corporation**

Jaye opened her statements referring to OAR, chapter 436, Division 170, independent contractor rules and noted that “we (SAIF) were comfortable with the rule, as originally drafted, and we do have some concerns with the revisions.”

**OAR 436-170-0200 – Direction and Control Test**

Jaye continued, “Specifically in 436-170-0200 there are some descriptions of ‘means’ and ‘manner’ and some of the language driving ‘means’ and ‘manner’ is very vague and we’re concerned that it will create more confusion than clarity. We recommend removing these description words and tighten things up a bit.” Jaye noted, “We also believe that the rule should clarify that in some instances ‘means’ may be dictated by the work that needs to be done. We want to make sure that we don’t end up with someone suddenly having the role of directing and controlling the service when all they’re really doing is saying that ‘I want it to look like this’.”

**436-170-0300 – Independently Established Business**

Jaye then moved on to SAIF’s concerns with 436-170-0300. “Our concern is that part of the rule making left some of the statutory elements out, which is confusing.

So either include them all or keep them out, and hopefully they can help clarify the statute.”

436-170-0500 – Special Rules for Application of the “Direction and Control’ Test in Construction and Landscape Industries

Jaye Continued, “Additionally, we are concerned with 0500, that there seems to be some arbitrary distinction between construction and landscape contractors and engineers on one hand and other types of persons. We’re not sure where the statute specifies this.”

OAR 436-170-0600 – Circumstances in which Special Rules for Construction and Landscape Industries will not Apply

Jaye stated, “Finally, there is a concern that there are some special rules that are not applicable to construction and landscape industries and, again, there isn’t anything in statute that provides this kind of distinction. It is, once again, an arbitrary method of pulling different laws into different rules that shouldn’t be there.”

**Written Comments:**

**Letter from Jaye Caroline Fraser, Assistant Council for Legal Services, SAIF Corporation (exhibit “C”)**

Jaye wrote, on behalf of SAIF to address their concerns with “some provisions of the proposed rules as outlined” in the letter.

OAR 436-170-0002 – Purpose of Rule

“SAIF concurs that this section is consistent with the statutory scheme created by the legislature.”

OAR 436-170-0100 – Statutory Requirements

Jaye states that because “...this section presents the ‘independently established business’ element of ORS 670.600(2)(b) as required in all cases.” And “...ORS 670.600(4) recognizes an exception to that requirement when the person receives income from farm labor or services, reports that income on schedule C of an income tax return, and files a schedule F with the return. Technically, therefore, the proposed rule conflicts with the statute by failing to recognize this exception.”

She goes on to say, “SAIF suggest this conflict be fixed by inserting the word ‘generally’ in the first line of the proposed rule between ‘ORS 670.600’ and ‘imposes.’ This amendment would accomplish the rules educational purpose, while accurately reflecting that the statement is not without exception.”

#### OAR 436-170-0200 – Direction and Control Test

The written exhibit addressing OAR 436-170-0200 conforms to the oral testimony submitted with additional recommendations. “SAIF recommends removing the equivocal words in the statement so that it would read as follows: ‘Examples of the ‘means’ used in performing services include tools or equipment, labor, devices, plans, materials, licenses, property, work location, and assets.’ The rule also should clarify that if, in some specific instances, certain of these ‘means’ are dictated by the results specified by the person for whom the services are provided, then that fact would prevent the conclusion that the person for whom the services were provided was ‘directing’ or ‘controlling’ the person providing the services. Otherwise, however, directing or controlling any of the specified ‘means’ should disqualify the person providing the services from being considered an ‘independent contractor’ within the meaning of the statute. SAIF recommends that analogous changes be made to the identical ambiguous terminology in the paragraph of the rule that discusses the ‘manner’ in which the services are provided.”

#### 436-170-0300 – Independently Established Business

The written exhibit addressing OAR 436-170-0300 conforms to the oral testimony submitted.

#### OAR 436-170-0400 – Licensing Requirements

“OAR 436-170-0400, entitled ‘Licensing Requirements,’ provides a brief summary of this element of ORS 670.600. It provides little, if any, information beyond the language of the statute. The rule, therefore, appears unnecessary.”

#### 436-170-0500 – Special Rules for Application of the “Direction and Control’ Test in Construction and Landscape Industries

The written exhibit addressing OAR 436-170-0500 conforms to the oral testimony submitted with an additional recommendation. “The rule would be clearer and more defensible, therefore, if it asserted and explained why the various actions

specified in the rule constitute specifying the desired results, rather than simply asserting that they do not constitute direction and control when done by certain classes of persons.”

OAR 436-170-0600 – Circumstances in which Special Rules for Construction and Landscape Industries will not Apply

The written exhibit addressing OAR 436-170-0600 conforms to the oral testimony submitted with an additional recommendation. “...this appears to be an attempt to enforce construction and landscape contractor law through the independent contractor rules. This rule should be deleted from the proposed rules and moved to rules promulgated under the ORS chapters relating to construction and landscaping contractors.”

**Faxed Letter from Joe Lymp, OCLA Legislative Committee Chair, Deschutes Environmental Services, Inc. (exhibit “E”)**

Mr. Lymp faxed a letter, on behalf of the Oregon Landscape Contractors Association, in order to “go on the record in support of the proposed amendments to OAR 812, the Independent Contractors definitions.” “We believe the proposed amendments would provide a realistic definition of independent contractor for the purposes of persons supplying services on their construction projects.”