



Is the claimant an independent contractor and thus a non-subject worker pursuant to Oregon law?

By Kelly J. Niemeyer ■ March 11, 2016

When an employer hires services from an “independent contractor,” the contractor does not qualify as a “subject worker” and is exempted from coverage under Oregon workers’ compensation law. Employers are not required to purchase workers’ compensation coverage for an independent contractor or the independent contractor’s employees. Litigation arises when there is a dispute as to whether the person actually qualifies as an independent contractor versus a subject worker. This is a fluid area of the law and can often be contentious.

Is claimant an independent contractor?

Pursuant to ORS 670.600(2), “independent contractor” means a person who provides services for remuneration and who, in the provision of the services is:

- free from direction and control over the means and manner of the services; and
- is responsible for obtaining all licenses or certificates necessary to provide the services.

Is claimant a subject worker?

The first step in assessing an individual’s “subject worker” status is to assess whether that individual is an actual “worker.”¹ “Worker” is defined by ORS 656.005(30), which provides, in part, that a “worker” is any person who engages to furnish services for a remuneration, subject to the direction and control of an employer.

What analysis is necessary?

The “right to control” and the “nature of the work” tests are the primary considerations made when determining subject worker versus independent contractor status.

Considerations relative to the “right to control” test include whether the employer had control over the time, place and way in which the work was performed.² Notably, the State of Oregon published a guide for determining how different state agencies have come to distinguish between employees and independent contractors. Factors weighed when assessing the “right to control” test include whether there is:

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Is the claimant an independent contractor? (continued)

- direct evidence of the employer exercising control over the worker;
- the method of payment;
- how equipment is furnished, and;
- the right to fire.

If the “right to control” test is inconclusive, the Oregon Workers’ Compensation Division and Board turn to the “nature of the work” test. This test has five factors to supplement the “right to control” test:

- how much the work is a regular part of the employer’s business;
- how skilled the work is;
- whether the work is continuous or intermittent;
- whether the work is of continuous duration or for the length of one particular job;
- whether the worker carries his or her own accident burden.

The Board employs a balancing test of sorts when assessing whether a worker qualifies as a “subject worker” versus an “independent contractor.”

Consult Defense Counsel

If there is any question upon your initial assessment of a claim as to whether the claimant qualifies as a “subject worker” or an “independent contractor” your defense counsel should be consulted. While the above recitation provides a very brief and general overview of the factors to be considered and the way in which they are assessed, this area of the law is complicated, has additional factors to be considered and requires proper investigation and legal assessment before a decision as to non-compensability on this basis is appropriate.

The attorneys at Reinisch Wilson Weier PC are happy to provide assistance on cases that raise issues relative to a claimant’s subject worker status. ■

¹ *S-W Floor Cover Shop v. Nat’l Council on Comp. Ins.*, 318 Or. 614, 622, 872 P.2d 1 (1994).

² *HDG Enterprises, Inc. v. Nat’l Council on Comp. Ins.*, 121 Or. App. 513, 518, 856 P.2d 1037, 1040 (1993).

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