Interagency Compliance Network's Third Report to the Oregon Legislature

Bureau of Labor and Industries
Construction Contractors Board
Department of Consumer and Business Services
Department of Justice
Department of Revenue
Employment Department
Landscape Contractors Board

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www.oregonindependentcontractors.com

Executive summary

The 2009 Legislature created the Interagency Compliance Network (ICN) to improve employers' and workers' compliance with Oregon's tax and employment laws. The ICN is made up of seven state agencies. ORS 670.700 directs the ICN to focus on the classification of workers as independent contractors, improper cash payment to workers and compliance with employment and related tax requirements. (ORS 670.700). Misclassifying employees as independent contractors has significant implications for both the worker and business involved as well as the state. The ICN must report on its activities, funding and revenue impact to the Legislature every two years.

A common component covered in each of the previous reports, sharing of information among ICN member agencies, is the backbone of the ICN. Agencies continue to share information and that sharing is expanding. In June of 2014, the IRS authorized an agreement (the "P2B agreement") between the Employment Department (OED) and the Department of Revenue (DOR), permitting them to share data elements of federal tax information (FTI), which will allow the agencies to share leads that contain FTI. In October of 2014, OED, DOR and the IRS approved an implementation plan for the P2B agreement that identifies the policies and procedures for sharing this information.

ICN member agencies further the goals of the ICN using their regular operational resources. In 2014, OED was able to obtain one time funding from the U.S. Department of Labor to assist in increasing education, assistance and enforcement activities related to the misclassification of workers and this will help further ICN activities.

The ICN operates through a Steering Committee and subordinate workgroups, the key group being the Enforcement Group. These groups meet on a regular basis to further the agenda of the ICN and seek to expand ICN principles to include additional enforcement activities, sharing of information, educational outreach collaboration, and uniform reporting methods. ICN agencies are developing more robust tracking systems enabling better reporting of coordinated enforcement and outreach activities.

Since the March 2013 report, the ICN has faced major turnover in key ICN personnel and state agencies continue to face the challenge of operating and maintaining the same service level with diminishing resources. While this has slowed some enforcement efforts, ICN agencies have incorporated enforcement activities into their baseline operations and continue to take productive action. Obtaining dedicated funding for ICN activities would allow additional enforcement efforts for some member agencies with less impact to daily operations and could also help coordinate the efforts of the ICN members.

Participating ICN agencies

Seven state agencies make up the ICN:

- Bureau of Labor and Industries (BOLI)
- Construction Contractors Board (CCB)
- Department of Consumer and Business Services (DCBS)
- Department of Justice (DOJ)
- Department of Revenue
- Employment Department
- Landscape Contractors Board

The ICN has developed an action plan built on the following strategy areas reflected in this report:

- Outreach and assistance
- Enforcement
- Misclassification detection and referrals
- Internal Development

Outreach and Assistance

The ICN agencies identified public outreach and assistance as one of the group's four focus areas. The goal is to make it as easy as possible for businesses to understand and comply with the law. ICN agencies work cooperatively in public outreach. All public-facing material is subject to plain-language review, with the goal of making sometimes very technical information as understandable as possible for businesses and workers.

A complete overhaul of the ICN website is scheduled to be completed by the end of 2015. Input from the ICN agencies was requested at the monthly ICN Enforcement Group meeting, and initial updating began in January 2015. The update will take into account frequently asked questions from site visitors, ICN agency customers, and will be subject to review by outside groups for clarity and usability testing. The new website will meet statewide mandates for government website standards, be user-friendly, and provide the public with a single repository for newly developed literature and guidance, statistical information, hearing decisions from cases involving misclassified workers, and additional contact information.

An inventory of existing literature will be conducted followed by a review by the ICN agency owning the documents to ensure the information is still accurate and appropriate. Shared documents will be approved by all involved agencies. Existing literature may be maintained as-is if no changes are needed.

OED will start an inventory of the current educational outreach opportunities available now through ICN agencies and employer advocacy groups. The goal is to develop educational outreach seminars for ICN agencies to participate in. Through these educational opportunities, ICN agencies will seek feedback and recommendations from interested groups to include in the outreach and assistance programs and educational materials.

Some ICN agencies are already actively participating in or conducting outreach seminars. DOR routinely conducts seminars relating to misclassification of independent contractors and tools utilized by ICN agencies. DOR attended 55 events since the last Legislative Report. OED is working directly with DOR's Outreach Program Coordinator to share event leads, coordinate scheduling of events and topics presented, and unifying our outreach to ICN partner agencies and stakeholder groups. OED is committed to conducting these seminars statewide on at least a quarterly basis and seeks to include other ICN agencies whenever possible. Coordinating outreach with other ICN agencies will allow a greater amount of public accessibility and ICN visibility. OED and DOR are also working together on developing measures for reporting on the effectiveness and productivity of ICN outreach programs to be shared amongst all ICN agencies conducting outreach.

Objectives and Measures

The U.S. Department of Labor (DOL) grant recently awarded to OED identifies several tasks related to outreach and education:

- Review and update ICN website and education materials. Update communication tools and methods for both interagency and external communication.
- Create a process for maintaining, supporting and updating information on the ICN website.
- Plan and implement off-site educational outreach seminars to be performed at least quarterly.

Website Redesign

The ICN's website, www.oregonindependentcontractors.com, is at the heart of ICN's outreach efforts. The website was established in 2005 to help employers and workers understand independent contractor issues and as a vessel for communicating changes to classification requirements. With recent mandated changes occurring to www.oregon.gov, there is a desire to update the ICN website to a similar format. This is expected since www.oregonindependentcontractors.com redirects users to www.oregon.gov/IC.

The ICN Enforcement Group is identifying information on the website in critical need of updating, while OED has conducted a systematic review of the ICN website. The updated content will be reviewed and approved by the ICN Steering Committee. ICN Enforcement Group members will have the option of joining a workgroup established to assist in updating the existing website. The workgroup will identify any necessary changes and develop new navigation strategies before commencing with a new website build-out compliant with Department of Administrative Services' standards.

Continued Commitment

The ICN Steering Committee holds quarterly meetings and the ICN Enforcement Group has continued to hold monthly meetings to discuss cases of suspected misclassified workers and referral methods. All these meetings are useful collaborative opportunities where priorities and direction are planned.

Funding and Staffing

In September of 2014, DOL awarded $500,000 in one-time grant funds to OED to hire staff dedicated to addressing misclassified workers and for some existing support activities. The additional staff hired included a second ICN Auditor, responsible for conducting audits on businesses referred by ICN agencies or found to have a high likelihood for misclassification issues. The funding also allowed the hiring of an Interagency Liaison that will act as a liaison between the agencies, facilitate the update to the public website and literature, develop and perform educational outreach activities, and function as a primary point of contact for the public. Agencies participating in ICN activities include such activities in their normal, day-to-day operations without the benefit of external dedicated funding. While this works reasonably well for the regular employer outreach and enforcement activities ICN agencies conduct, the lack of dedicated resources to coordinate the ICN activities has presented challenges and contributed to the lack of momentum during the prior time of significant ICN agency staff turnover.

Enforcement

Ongoing Statistics

Auditors from OED and DOR conduct ICN audits. While member agencies regularly conduct audits that relate to the issues the ICN focuses on, the ICN specific audits, although done by an employee of either OED or DOR, look for misclassification or other issues potentially impacting all ICN member agencies. The total amount of payroll audited, the total unreported payroll, the number of misclassified workers, and many other data points of an audit are tracked and available for all agencies involved in the ICN. Audits also calculate the amount of taxes owed by businesses, including UI Tax, Transit Tax, and Withholding Tax (W/H).

The following table shows the results of ICN audits conducted by auditors dedicated to the ICN between July 2012 and December 2014:

ICN Audits

- Started 18 audits
- Completed 18 audits

Total payroll audited	$58,136,037
Total unreported payroll discovered in audits	$34,365,176
Total number of misclassified workers identified	795
Total UI Tax assessed through audits	$475,139
Total W/H Tax Assessed through audits	$204,019
Total Transit Tax Assessed through audits	$137,873

In addition to the above-mentioned audits, DOR has completed 15 audits jointly with OED and CCB, which were based on sharing information between agencies. DOR also has worked with CCB and DOJ on site visits to ensure job safety and environmental regulation compliance in the workplace.

Even audits that are not formally tracked as being ICN work sometimes arise out of information and leads shared as a result of ICN agency cooperation and coordination. The sharing of non-ICN audit findings are extremely important among ICN agencies and are a great tool to use while conducting their day-to-day operations. Since July 2012, OED completed 3,015 audits; 24 of these audits were generated by external leads. The outcomes of these audits are:

Total payroll audited	$7,066,176
Total unreported payroll discovered in audits	$672,201
Total number of misclassified workers identified	78
Total UI Tax assessed through audits	$19,846

Since 2012, DOR conducted over 7,000 field investigations. More than 1,800 of these investigations were referrals from OED. These investigations resulted in approximately $188 million in underreported wages being discovered, and $15 million in withholding tax, and nearly $6 million in transit tax being assessed.

Over that same time, the DCBS Workers' Compensation Division (WCD), conducted over 9,600 field investigations to determine employer compliance with the requirement to provide workers' compensation coverage. WCD estimates that 25% of those investigations dealt with potential misclassification of employees as independent contractors. Civil penalties were issued in over 1,200 of those investigations; eight of the employers were identified through ICN action. The total civil penalties were over $30,300 for those eight employers. In the time since the last report was issued, BOLI collected unpaid prevailing wages for workers on public works projects totaling $271,580.73 for 63 workers in seven cases. In each of these cases, the classification of at least some of the workers as independent contractors was an issue. In addition, through BOLI's wage claim program, $4,304.65 was collected for two workers who were misclassified as independent contractors in two separate cases.

Ongoing enforcement efforts include monthly meetings between ICN agencies, which provide ICN agencies an opportunity to network and share referrals and leads. The Enforcement Group members provide coordination of detection methods, specific case details, and support each other in investigation of businesses or individuals suspected of fraud or classification errors.

The ICN Steering Committee continues to meet on a quarterly basis. The steering committee features collaboration between agencies regarding educational opportunities and methods, communication with the public, interagency communication, and promotes consistency and networking between agencies at a higher level than the Enforcement Group.

With additional funding for dedicated staff provided by the Department of Labor grant, ICN audits and detection of misclassified workers are expected to double before the end of 2016. This funding expires on September 30, 2016, at which point the additional resources dedicated to the outreach and additional enforcement activities will end. Typically, ICN audits are more complex and productive than a regular audit. This usually extends the duration of an ICN audit; however, the high number of misclassified workers detected and the additional taxes assessed allow a relatively small number of audits to have a disproportionate impact on compliance. The collaboration of Compliance Specialists from different agencies is also reflected in the productive assessments of ICN audits, allowing businesses to provide information to multiple agencies during a single audit rather than being subjected to audits by multiple agencies for the same time period. Referrals that do not end up being conducted by ICN auditors still will often involve joint efforts between DOR, DCBS, and OED auditors.

Misclassification Detection and Referrals

With the hiring of the additional ICN Auditor and Compliance Analyst by OED, more time will be dedicated to identifying patterns, industries, and behaviors displayed by those entities having a high level of misclassified workers or misreported payroll. New tools are being developed within the ICN agencies including a Business Intelligence tool (BI) with a constantly expanding group of data sources accessed for retention in the OED data warehouse. BI will be used to analyze historic audit data and identify which businesses have the highest number of misclassified workers and improperly assessed taxes based on industry, geographic location, and other factors determined to be relevant. This data will be taken into account when selecting businesses for future ICN audits.

To share information among the participating agencies, the ICN created the High-risk Employers Database (HRED). The database enables ICN auditors to compare employer 1099 data with 1040 individual return data. Discrepancies between these documents can indicate a higher likelihood of misclassified workers. This database also provides industry-specific information. DOR also utilizes the iWire system, allowing employers to electronically submit W-2 and 1099 information for tax purposes. The system allows for analysis and comparison with other data to identify misclassification.

Referrals generated at monthly Enforcement Group meetings will continue to be a tool for determining best courses of action within the ICN. Shared leads are no longer focused solely on misclassified workers, and now include cash payments (under the table), unlicensed businesses, safety and risk violations, and many other compliance issues. Use of BI tools combined with the other pre-existing detection and data resources housed within the ICN agencies will increase the number of productive referrals given to the ICN auditors resulting in a projected 200% increase of identified misclassified workers and tax assessments by October 2016. ICN Auditors are each anticipated to discover $6.2 million in unreported payroll per quarter and 102 misclassified workers per quarter.

OED will continue to provide audit data to DOR on a quarterly basis. While this data is not explicitly ICN related, the fact that the information is shared between agencies maintains the spirit of ICN values and assists with coordinated enforcement activities. Efforts on developing more streamlined and uniform reporting mechanisms between all ICN agencies are already underway within the Enforcement Group.

Internal Development

As the ICN evolves, the members representing each agency must adapt to changing conditions and standards in order to maintain success. Internal processes, statutes, and administrative rules are analyzed for effectiveness and frequency of application. ICN agencies are in the process of establishing a repository of all laws and rules regarding exceptions to employment and how workers are classified. Maintaining and sharing all exceptions in a common area will allow easier application of these laws and rules while providing consistent information to the public and policy makers.

The ability and act of sharing information is the key element of the ICN. Efforts are made to promote collaboration between agencies as a matter of efficiency and customer service. Communication between the agencies and members of the Enforcement Group and Steering Committee is critical. The minutes from each meeting are distributed via e-mail with follow-up action items assigned to appropriate members. A methodology for sharing information and creating a unified reporting method for audits, educational outreach effectiveness, and referrals is in development. Representatives from the individual agencies are sharing report formats and data points in order to determine the most effective way to communicate ICN performance to a broad audience including other agencies, the public, and the Oregon Legislature.

Additional steps will be taken to conduct systematic reviews of each ICN agencies' existing statutes and administrative rules regarding exemptions to the definition of employment and how independent contractors are identified. Each agency is also examining the ability to submit decisions from contested audits for display on the revised ICN website, allowing precedential decisions to be easily accessed by the public. Efforts are underway to develop a method for sharing presentation schedules between agencies to optimize outreach efforts.

The ICN agencies are developing a coordinated audit plan designed to increase efficiency, record performance measures, and create a training plan for more effective ICN participation. This plan will set specific deadlines and feature measurable deliverables once implemented.

Early on in the ICN's existence, one of the areas it explored was creating a single appeal path when there are issues involving potentially misclassified workers. This was to address the current situation where if multiple agencies look at the employment status of workers for a single business, there can end up being more than one legal dispute, in more than one legal forum, about the same issue. There was significant discussion about this, but no resolution was reached. There are advantages to a more consolidated appeal system. It could reduce contradictory decisions and reduce having the same issue litigated multiple times with the same parties – saving resources for the businesses and agencies involved.

Despite these potential advantages, the challenges are significant. Currently these appeals are heard in different places – some in Tax Court, some in administrative hearings and others in

Circuit Court. Procedures and substantive laws are not always the same. Getting consensus among the stakeholders can be challenging. The ICN plans to further explore ways to create options to combine multiple possible appeal routes into more consolidated processes for at least some situations. This may result in possible legislative concepts or pilot programs.

Next steps

The Steering Committee will continue to meet quarterly to monitor expectations and provide guidance to each aspect of the ICN. The Employment Department and DOR will each continue to fund a full-time compliance specialist to audit accounts for both agencies.

The other agencies outlined in HB 2815, while not having staff dedicated exclusively to ICN activities, will participate in the ICN Enforcement Group, sharing leads, identifying problematic industries, and discussing and planning audits. Agencies also continue to share leads on the HRED that is hosted by DOR.

We will track the education, assistance and enforcement activities associated with the monies received from the U.S. Department of Labor, and actively take steps to improve the public's understanding of worker misclassification and related issues. These steps include:

- a complete overhaul of the ICN website appearance
- a systematic, multi-agency review of resource documents on the ICN website
- development of updated or newly developed resource documents on the ICN website
- creation and implementation of educational outreach seminars designed to communicate classification practices and issues to the public

Public feedback and analyzed website analytics will provide additional opportunities to identify communication needs, information the public desires, and the effectiveness of the program. ICN members will also closely monitor the number of misclassified workers identified by tax audits conducted by not only ICN auditors but also field auditors responding to information shared as part of the ICN work. Communication will be encouraged, with audit data from each participating ICN agency being documented and analyzed for trends. Statistical information will be shared with the public via the ICN website as well as with all agencies participating in the ICN.

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