



LPRO: LEGISLATIVE POLICY AND RESEARCH OFFICE

WORKER CLASSIFICATION

BACKGROUND BRIEF

The proper classification of workers as either employees or independent contractors impacts the rights and duties of Oregon businesses and workers and the funding of social benefit programs. A worker classified as an employee receives the benefit and protection of federal and state labor regulations and social benefit programs like federal Social Security and state unemployment insurance.

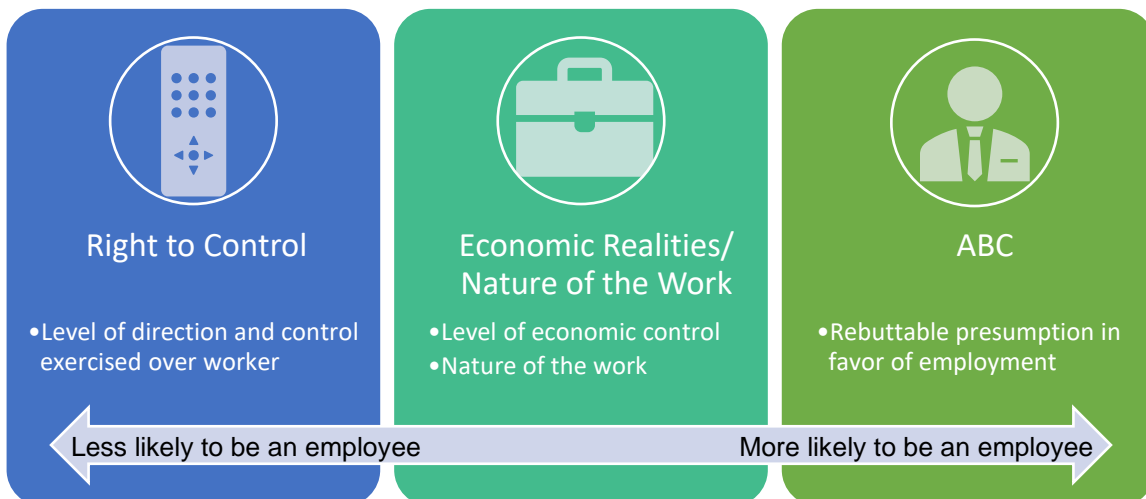
Employers bear the burden of complying with applicable labor laws and the payment of taxes that fund social benefit programs. Workers classified as independent contractors do not receive those protections and benefits, and the businesses that pay for their services do not bear the cost or burden of compliance. Employers that misclassify workers deny their employees workplace protections, create unfair competition for businesses that abide by the law, and deprive government of revenue used to fund social benefit programs.

TABLE OF CONTENTS	
WORKER CLASSIFICATION TESTS	1
INDEPENDENT CONTRACTORS	3
OREGON WORKER CLASSIFICATION	6

WORKER CLASSIFICATION TESTS

Worker classification tests vary depending on their application and can be tailored to achieve desired outcomes (Figure 1).

Figure 1: Common Worker Classification Tests



Source: Legislative Policy and Research Office

Policy makers and adjudicators inclined to “effectuate the broad remedial purposes” of a particular statutory worker benefit or protection tend to adopt tests which are more likely to find a worker is an employee for the purposes of that statutory scheme.¹ The following are all applicable standards for evaluating whether a worker is properly classified as an employee for certain statutory purposes. A table comparing the emphasis and application of common worker classification tests is in Appendix 1.

Common Law Right to Control Test

The right to control test uses multiple factors to determine whether a hired party is an employee based on the hiring party’s right to control the manner and means by which the product is accomplished.² Federal courts default to the right to control test whenever Congress either fails to define “employee” or provides a definition which is “completely circular and explains nothing.”³ The Internal Revenue Service maintains a list of 20 common law factors used to determine the right to control.⁴ Oregon courts use a simplified version with four factors to evaluate a putative employer’s right to control:⁵

- direct evidence of right or exercise of control;
- method of payment;
- the furnishing of equipment; and
- the right to fire.

Economic Realities Test

The economic realities test covers a broader group of relationships where the employee is economically dependent on the employer such that the employer is responsible for ensuring the worker receives specified worker benefits or protections.⁶ The test is more expansive in order to “effectuate the broad remedial purposes” of laws designed to protect workers.⁷ The test considers several of the common law factors, none of which is dispositive as the final determination depends “upon the circumstances of the whole activity.”⁸ The factors vary slightly based on application, but generally include:

- the degree of the alleged employer's right to control the manner in which the work is to be performed;
- the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- whether the service rendered requires a special skill;
- the degree of permanence of the working relationship; and

¹ *Real v. Driscoll*, 603 F.2d 748, 754 (1979), [SAIF Corp. v. DCBS Ins. Div.](#), 250 Or.App. 360, 365 (2012).

² *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-327 (1992).

³ *Id.*

⁴ Internal Revenue Service, *Section 218 Training: How to Apply the Common Law Control Test in Determining an Employer/Employee Relationship*, <[Course: Applying Common Law Control Test for Employer/Employee Relationships \(ssa.gov\)](#)> (last visited November 17, 2021).

⁵ *Marcum v. SAIF*, 29 Or.App. 843, 845 (1977).

⁶ *Cejas Commercial Interiors, Inc. v. Torres-Lizama*, 260 Or.App. 87, 97 (2013).

⁷ *Driscoll* 603 F.2d at 754.

⁸ *Id.*

- whether the service rendered is an integral part of the alleged employer's business.

Nature of the Work Test

Similar to the economic realities test, the nature of the work test is used to effectuate the purposes of Oregon's workers' compensation statutes, which are "based on the theory that the cost of industrial accidents should be borne by the consumer as part of the cost of the product."⁹ The test consists of two elements:¹⁰

- the character of the person's work or business—its skill, its status as a separate enterprise, and the extent to which it may be expected to carry the burden of its accidents itself; and
- the relation of the person's work to the employer's business—how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether it is of sufficient duration to be the hiring of continuing services rather than contracting for a particular job.

ABC Test

The ABC test, named for its three-prong assessment, aims to prevent the misclassification of workers by establishing a rebuttable presumption in favor of employment. The burden is on the employer to prove that the worker is not an employee by showing:¹¹

- the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- the worker performs work that is outside the usual course of the hiring entity's business; and
- the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

At least fourteen states use the ABC test when determining eligibility for unemployment insurance (Appendix 1). California also uses the ABC test for wage and hour laws, independent contractors, and workers' compensation insurance.

INDEPENDENT CONTRACTORS

Since 1989, Oregon statute has used a common definition of "independent contractor" for the purposes of personal income tax, workers' compensation insurance, unemployment insurance, and landscape and construction contractor statutes.¹² Since 2005, specified agencies responsible for administering those laws are required to "cooperate as necessary in their compliance and enforcement activities to

⁹ *Woody v. Waibel*, 276 Or. 189, 195 (1976).

¹⁰ *DCBS Ins. Div.*, 250 Or.App. at 365.

¹¹ Anna Deknatel, Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J. L. & Soc. Change, 53, 65-74 (2015).

¹² *ORS 670.600 (2019)*, *S-W Floor Cover Shop v. National Council on Compensation Ins.*, 318 Or. 614, 625-628 (1994).

ensure...consistent interpretation and application” of the independent contractor provisions.¹³

Oregon Independent Contractor Test

Oregon law defines an independent contractor as a person who provides services for remuneration and who, in the provision of those services, is:¹⁴

- free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;
- customarily engaged in an independently established business; and
- responsible for obtaining licenses or certificates necessary to provide those services (Figure 2).

Figure 2: Oregon Independent Contractor Test



Source: Legislative Policy and Research Office

Oregon’s simplified right to control test is used to evaluate the direction and control exercised over the worker. Three of the five following requirements must be met to demonstrate the worker is “customarily engaged in an independently established business.”¹⁵

- The person maintains a separate business location from the business or work location of the person for whom the services are provided.
- The person bears the risk of loss related to the business based on contractual factors such as the requirement to correct defective work, a warranty for service provided, or an indemnification agreement, insurance policy, or similar mechanism to offset potential liability.
- The person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation, or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.
- The person makes a significant investment in the business such as purchasing necessary tools or equipment; paying for the premises or facilities where the services are provided; or paying for licenses, certificates, or specialized training.
- The person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.

¹³ [ORS 670.605 \(2019\)](#).

¹⁴ [ORS 670.600\(2\) \(2019\)](#), [OAR 471-031-0181](#).

¹⁵ [ORS 670.600\(3\) \(2019\)](#).

The use of a common definition does not mean consistent results across statutory programs. In a 2018 decision, the Supreme Court of Oregon rejected the argument that Oregon’s common statutory definition of “independent contractor” must result in consistent treatment of workers across all statutory programs.¹⁶ While the court did conclude in a prior case that the intent of the common definition was to achieve consistent treatment of workers across statutory programs, the shared definition does not supersede the unique statutory requirements and exemptions for each program.¹⁷

Interagency Compliance Network

Since 2009, the Interagency Compliance Network (ICN) requires the following state agencies to enter into an intergovernmental agreement to “establish consistency in agency determinations relating to the classification of workers (Table 1).”¹⁸ Activities of the ICN are detailed in a biennial report to the Governor and the Legislative Assembly.¹⁹

Table 1: ICN Agencies and Related Interests

Oregon Agency	Role in Worker Classification
Department of Justice (DOJ)	Works with ICN members to identify criminal misconduct by regulated entities and individuals.
Department of Revenue (DOR)	Administration of personal income taxes. Misclassified workers may not have their wages reported accurately and payroll taxes withheld.
Oregon Employment Department (OED)	Administration of UI taxes and benefits. Misclassification can result in delayed benefit payments to claimants and higher taxes for compliant employers.
Construction Contractors Board (CCB) Department of Consumer and Business Services, Building Codes Division (BCD) Landscape Contractors Board (LCB)	Licensing of construction and landscape contractors. Each agency engages in field enforcement to ensure contractors properly classify workers and address worker classification, UI tax, and WC insurance in their pre-license and continuing education curricula for licensees.
Bureau of Labor and Industries (BOLI)	Administration of state wage and hour regulations. Misclassification can result in employers failing to comply with worker protection requirements like minimum wage and overtime, rest and meal periods, and sick leave.
Department of Consumer and Business Services, Workers’ Compensation Division (WCD)	Administration of WC insurance requirements. Misclassification can result in lack of coverage for injured workers and increased insurance costs for complying employers.

Source: Legislative Policy and Research Office
Data: Interagency Compliance Network

¹⁶ [ACN Opportunity, LLC v. Employment Department](#), 362 Or. 824, 845 (2018).

¹⁷ *Id.*

¹⁸ [ORS 670.700 \(2019\)](#).

¹⁹ [ORS 670.705 \(2019\)](#).

ICN audits have identified thousands of misclassified workers. DOR and OED each conduct compliance audits on behalf of other ICN agencies. ICN payroll audits conducted from 2015 to 2019 identified over 16 thousand misclassified workers and \$130 million in unreported payroll (Table 2).²⁰

Table 2: ICN Audit Results 2015-2019

Year	Payroll Audited	Misclassified Workers Identified	Unreported Payroll Discovered	UI Tax Assessed through Audits
2015	\$13,476,844	112	\$12,017,338	\$137,052
2016	\$17,584,509	217	\$13,563,149	\$279,834
2017	\$17,959,996	539	\$15,893,494	\$448,610
2018	\$31,906,750	6,986	\$73,057,510	\$1,821,071
2019	\$18,503,051	8,310	\$17,144,652	\$373,376
Total	\$99,431,150	16,164	\$131,676,143	\$3,059,943

Source: Legislative Policy and Research
Data: Interagency Compliance Network

ICN agencies are concerned about the expansion of gig economy service providers. While these businesses present as third parties where users can hire independent contractors, the 2021 ICN report notes these “employment opportunities” often fail to meet Oregon’s independent contractor test.²¹ ICN audit efforts continue to focus on gig employers, but the report notes gig audits are time consuming and tend to result in litigation once an assessment is issued.

OREGON WORKER CLASSIFICATION

Oregon workers are classified as employees or independent contractors for the purposes of several state statutory schemes.

Wage and Hour Laws

Oregon’s wage and hour laws include a minimum wage, break and meal requirements, overtime, equal pay for equal work, sick time, family and medical leave, and laws designed to protect against discrimination based on immutable traits and sexual harassment.

The economic realities test is used to determine whether a worker is an employee for the purposes of Oregon’s wage and hour laws.²² Because the state minimum wage statute is patterned after the Fair Labor Standards Act (FLSA), Oregon courts have determined that the same worker classification test federal courts apply to FLSA should be used when determining the application of Oregon’s minimum wage laws.²³

²⁰ Agencies were unable to conduct joint ICN audits in 2020 due to the COVID-19 pandemic.

²¹ Interagency Compliance Network, *Report the Oregon Legislature*, 13-14 (March 2021), available at <<https://www.oregon.gov/ic/Documents/2021%20ICN%20Legislative%20Report.pdf>> (last visited November 17, 2021).

²² *Torres-Lizama*, 260 Or.App. at 102-103.

²³ *Id* at 96-103.

BOLI and the courts also apply the economic realities test for other wage and hour law claims.²⁴

Personal Income Tax

Employers are required at the time wages are paid to an employee to deduct and withhold taxes which DOR calculates are substantially equivalent to the amount of state income tax for which the employee will be liable.²⁵ Tax withholdings must be remitted quarterly to DOR, which considers the withholding to be in part payment of the employee's income for that taxable year.²⁶

Oregon tax law uses the right to control test to determine who is an employer and who is an employee. "Employer" is defined as a person who exercises direction and control over the work of another person or, in truly circular fashion, any person required to comply with the duties of an employer under the state's personal income tax statutes.²⁷ "Employee" is defined as an individual in the service of another who has the right to control their work.²⁸

Unemployment Insurance (UI)

Oregon employers pay a UI payroll tax that is held in the Unemployment Compensation Trust Fund to pay benefits to eligible unemployed workers. "For the purposes of [UI] tax liability, Oregon law begins with the presumption that a person who performs services for remuneration is an employee, and the employer must pay [UI] taxes on that person's wages."²⁹ An "employer" employs one or more individuals in each of 18 separate weeks during any calendar year or has total payroll of at least \$1,000 in any calendar quarter.³⁰ "Employment" is service for an employer performed for remuneration under any contract of hire and does not include specified services.³¹

An Oregon employer is liable for the payment of UI taxes until it shows to the satisfaction of the Oregon Employment Department that the worker in question is an independent contractor.³² The burden is on the employer to show that the worker meets the conditions under the Oregon independent contractor test.³³

Workers' Compensation

Oregon employers are required to carry workers' compensation insurance for all subject workers or to be self-insured.³⁴ Subject workers are all workers not explicitly exempt in statute; independent contractors are explicitly exempt.³⁵

²⁴ [Presley v. Bureau of Labor and Industries](#), 200 Or.App. 113, 117 (2005).

²⁵ [ORS 316.167 \(2019\)](#), [ORS 316.172 \(2019\)](#).

²⁶ [ORS 316.168 \(2019\)](#), [ORS 316.187 \(2019\)](#).

²⁷ [ORS 316.162\(1\) \(2019\)](#).

²⁸ [OAR 150-316-0255\(5\)](#).

²⁹ [Employment Department](#), 362 Or. at 826-827.

³⁰ [ORS 657.025 \(2019\)](#).

³¹ [ORS 657.030 \(2019\)](#).

³² [ORS 657.040 \(2019\)](#).

³³ [Employment Department](#), 362 Or. at 827.

³⁴ [ORS 656.017 \(2019\)](#).

³⁵ [ORS 656.027 \(2019\)](#).

Finders of fact currently use both the right to control and the nature of the work tests to decide if an individual is a subject worker. The inquiry begins with the right to control test. If there is some evidence of the employer's right to control, then the inquiry continues to the nature of the work test. "The decision-maker must consider the factors relevant to both tests and decide, in light of all the relevant factors, whether the individual in question is a 'worker' subject to the 'direction and control' of an 'employer' as those terms are used in [statute]."³⁶

Recent statutory changes will most likely limit the application of the right to control test to determining if a worker is an independent contractor. Effective January 1, 2022, House Bill 3188 (2021) removes the direction and control requirement from the relevant definitions of "employer" and "worker" and clarifies that a worker is "any person, other than an independent contractor, who engages to furnish services for a remuneration."³⁷ The inclusion of the direction and control requirement necessitated the current two-step inquiry and created a grey area where a worker could be neither a subject worker eligible for workers' compensation protection nor an independent contractor. By removing the direction and control requirement, the measure seeks to eliminate this grey area and the first step of the inquiry, allowing finders of fact to consider only the nature of the work.

The right to control test is still part of the shared "independent contractor" definition, and finders of fact will most likely continue to apply that test when considering whether a worker is exempt as an independent contractor.

Public Employee Retirement Benefits

Public Employee Retirement System (PERS) membership is limited to the employees of a public employer hired before August 29, 2003.³⁸ "Employee" includes employees and public officers but does not include persons engaged as independent contractors and seasonal, emergency, or casual workers whose employment does not total 600 hours in any calendar year.³⁹

Oregon Public Service Retirement Plan (OPSRP) members must be eligible employees in a qualifying position with a participating public employer hired on or after August 29, 2003.⁴⁰ "Eligible employee" means a person who performs service for a participating public employer and does not include persons engaged as independent contractors.⁴¹ "Qualifying position" means one or more jobs with one or more participating public employers in which an eligible employee performs 600 hours or more of service in a calendar year.⁴²

³⁶ [SAIF Corp. v. DCBS Ins. Div.](#), 250 Or.App. 360, 370 (2012).

³⁷ [Section 1, Chapter 257, Oregon Laws 2021.](#)

³⁸ [ORS 238.015 \(2019\).](#)

³⁹ [ORS 238.005\(8\) \(2019\).](#)

⁴⁰ [ORS 238A.100 \(2019\).](#)

⁴¹ [ORS 238A.005\(4\) \(2019\).](#)

⁴² [ORS 238A.005\(15\) \(2019\).](#)

The Legislative Assembly added the common law test to the definition of “employee” and “eligible employee.” During the 2021 regular session, the Legislative Assembly expanded the definition of “employee” in the PERS statutes and “eligible employee” in the OPSRP statutes to include the “usual common law rules applicable in determining the employer-employee relationship.”⁴³ The change aligns the PERS and OPSRP statutory definitions of “employee” with federal tax law.

The measure was brought in the wake of a 2019 Oregon Supreme Court decision to exclude from PERS membership a person who worked for a PERS participating employer but is paid by a third party.⁴⁴ The decision reversed a longstanding PERS practice to treat common law employees, who work under the direction and control of a PERS employer but who may not be on that employer’s payroll, as employees for the purposes of PERS membership and benefits.

STAFF CONTACT

Tyler Larson, Analyst
Legislative Policy and Research Office
503-986-1556
tyler.larson@oregonlegislature.gov

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⁴³ [Section 1, Chapter 136, Oregon Laws 2021, 26 U.S.C. 3121\(d\)\(2\).](#)

⁴⁴ [Eugene Water and Electric Board v. Public Employees Retirement Board](#), 365 Or. 59 (2019).

Appendix 1: Common Worker Classification Tests and their Application

Test	Purpose	Application
Common Law or “Right to Control” Test	To evaluate the level of direction and control exercised over the worker using British common law factors	<p>Oregon</p> <ul style="list-style-type: none"> • Independent contractors • Personal income tax and payroll tax withholding • Unemployment insurance • Workers’ compensation insurance <p>Federal</p> <ul style="list-style-type: none"> • Americans with Disabilities Act • Employee Retirement Income Security Act • Federal tax code • National Labor Relations Act • Occupational Safety and Health Act • Social Security Act • Uniformed Services Employment and Reemployment Rights Act
Economic Realities Test	To effectuate the broad remedial purposes of laws designed to protect workers by considering the level of economic control exercised over the worker using factors from the right to control test.	<p>Oregon</p> <ul style="list-style-type: none"> • Wage and hour laws <p>Federal</p> <ul style="list-style-type: none"> • Age Discrimination in Employment Act • Fair Labor Standards Act • Family and Medical Leave Act • Title VII of the Civil Rights Act
Nature of the Work Test	To effectuate the purposes of Oregon’s workers’ compensation statutes by considering the character of the work and the relation of that work to the putative employer’s business.	<p>Oregon</p> <ul style="list-style-type: none"> • Workers’ compensation insurance
ABC Test	To prevent the misclassification of workers by presuming an employment relationship until the hiring entity proves the worker is an independent contractor.	<p>Alaska</p> <ul style="list-style-type: none"> • Unemployment insurance <p>California</p> <ul style="list-style-type: none"> • Wage and hour laws • Independent contractors • Unemployment insurance • Workers’ compensation insurance <p>Indiana</p> <ul style="list-style-type: none"> • Unemployment insurance <p>Louisiana</p> <ul style="list-style-type: none"> • Unemployment insurance <p>Maine</p> <ul style="list-style-type: none"> • Unemployment insurance

		<p>Maryland • Unemployment insurance</p> <p>Massachusetts • Unemployment insurance</p> <p>Nebraska • Unemployment insurance</p> <p>Nevada • Unemployment insurance</p> <p>New Hampshire • Unemployment insurance</p> <p>New Jersey • Unemployment insurance</p> <p>New Mexico • Unemployment insurance</p> <p>Tennessee • Unemployment insurance</p> <p>Vermont • Unemployment insurance</p>
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Source: Legislative Policy and Research Office
Data: Legislative Policy and Research Office