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Oregon Supreme Court Case Reminds Businesses about the Complexity of Independent Contractor Classification

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Correctly classifying workers as either employees or independent contractors can be complicated and difficult. Multiple and different classification tests apply to a single working relationship – including, but not limited to, distinct tests for: (1) workers' compensation coverage and premiums; (2) wage-and-hour and civil rights issues; (3) federal taxes; and (4) state payroll and unemployment taxes. These tests are often subjective, and at times can conflict. Additionally, misclassifying a worker as an independent contractor can result in costly audits, assessments of back taxes, and stiff penalties.

The Oregon Supreme Court in *Broadway Cab LLC v. Employment Department*, 358 OR 431 (2015), ruled on December 10, 2015, that taxicab drivers working on behalf of a cab company were employees and not independent contractors. In that case, the court analyzed the test for independent contractors outlined in ORS 670.600 (which is used by the Oregon Department of Revenue, Oregon Employment Department, Oregon Construction Contractors Board, and Oregon Landscape Contractors Board), and explained how the company's workers did not satisfy the requirements to qualify as independent contractors under state law. As a result, the employer was found liable to the Oregon Employment Department for unemployment insurance taxes from the earnings of its taxicab drivers.

Relationship Between Company and Workers

The company in this case has a taxicab permit that required it to be capable of fulfilling requests for service from any location within Portland, Oregon, 24 hours per day, 7 days per week. To fulfill its obligations, the company contracted with individual taxicab drivers. All drivers were required to sign "Driver Agreements" that identified them as independent contractors. The Agreements all contained terms including: restrictions on the types of cars the drivers could use; requirements for paint and signage on the used taxicabs; limits on the maximum number of hours a driver could work; limits on the drivers' ability to hire or subcontract with other drivers; and the requirement that drivers pay fees to the company for services made available by it to the

drivers, whether or not the services were used by the drivers. The Agreements did not, however, require drivers to work a specific number of hours, or otherwise control how the drivers went about performing their driving duties. Additionally, taxicab drivers were paid by the individuals using the taxicabs, and not by the company.

Unemployment Independent Contractor Test

The test in Oregon for determining whether a worker is an independent contractor for unemployment insurance purposes is contained in ORS 670.600. The business seeking to classify a worker as an independent contractor has the burden of establishing that the elements of the test have been satisfied. Specifically, under ORS 670.600, an independent contractor is "a person who provides services for remuneration and who, in the provision of the services:

- (a) Is 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;
- (b) *** [I]s customarily engaged in an independently established business;
- (c) Is licensed under ORS chapter 671 or 701 if the person provides services for which a license is required under ORS chapter 671 or 701; and
- (d) Is responsible for obtain other licenses or certificates necessary to provide the services."

ORS 670.600(2).

As to the second element of the test, a person is "customarily engaged in an independently established business if any three of the following [five] elements are met:

- (a) The person maintains a business location:
 - (A) That is separate from the business or work location of the person for whom the services are provided; or
 - (B) That is in a portion of the person's residence and that portion is used primarily for the business.
- (b) The person bears the risk of loss related to the business or the provision of services...
- (c) 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.
- (d) The person makes a significant investment in the business...
- (e) 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."

Oregon Supreme Court's Decision

In ruling that the company's workers were employees rather than independent contractors, the Oregon Supreme Court focused on the "customarily engaged in an independently established business" element. Considering this element, the court determined the company did not prove: (1) the workers provided services for two or more different persons within a 12-month period or routinely engaged in the other required activities, or (2) the workers maintained a work location in their residence. The court further found that the taxicabs used by the workers were an extension of the company's business location, because its business was to provide taxicab services throughout the City of

Portland, and these services were carried out in the individual taxicabs being used by the drivers. As a result, the workers were not working in a business location separate from the company's location as required by the statute. Lastly, the company's Agreement with the drivers specifically precluded anyone other than the driver who had executed the Agreement from driving vehicles. As a result, the company's drivers were not allowed to hire other persons to provide or assist in providing the services the drivers contracted to perform on behalf of the company, and was not able to satisfy the "customarily engaged in an independently established business" element of ORS 670.600.

Takeaways for Oregon Employers

This case demonstrates how complicated and difficult it can be to determine whether a worker is an employee or an independent contractor. Each situation is necessarily fact-specific, and can involve multiple statutes. As a result, it is highly recommended that businesses consult with counsel to discuss its workers' classifications.