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(7)
Date Referred: February 26, 1992

HOUSE COMMITTEE REPORT
FURTHER REFERRALS:

Date of Committee Action: 3/4/92

The JUDICIARY Committee considered: HB 468

HOUSE BILL NO. 468 ACTION AGAINST NONCOMPLYING CONTRACTORS

"An Act relating to unfair trade practices by construction contractors."

RECOMMENDATIONS:
be replaced with CS HB468 (Judiciary) the same title
 a new title
 have attached amendments(s)
 do pass
 do not pass
 no recommendations
 individual recommendations
 additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) _____ APPROVES PREVIOUS: (Dept/Date) _____
 fiscal impact _____ fiscal note(s) _____
 zero fiscal note _____ zero fiscal note(s) Labor 2/27/92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Dave Donley</i>	X				
<i>St. Murphy</i>	-				
<i>Ellis</i>	X	<i>Mark Stanley</i>		X	
		<i>Terry Marder</i>		X	
<i>Kevin Rod Powell</i>	-	<i>Kevin Rod Powell</i>			X

Dave Donley
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO : HB468

Revision Date: _____
 Title: "An Act relating to unfair trade practices by construction contractors."
 Sponsor: House Judiciary Committee
 Requestor: House Labor & Commerce

Department Affected: Labor
 BRU: Workers' Compensation
 Component: _____
Workers' Compensation
 COMPONENT SERIAL NO. 344

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS.CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Linda Rexwinkel, Director Phone: 264-2452
 Division: Workers' Compensation Date: 2/24/92
 Approved by Commissioner: John Abshire, Acting Commissioner
 Agency: Department of Labor Date: 2/24/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Alaska State Legislature



House of Representatives House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

MEMORANDUM

To: Members of the House Judiciary Committee

From: Representative Dave Donley **B**
Chair, House Judiciary Committee

Re: HB 468, An act relating to unfair trade practices by
construction contractors

Date: March 2, 1992

HB 468, an act relating to unfair trade practices by noncomplying contractors, addresses concerns both contractors and the labor community have about unfair bidding practices of contractors who are attempting to reduce their bids by misclassifying employees as independent contractors. Misclassification allows the bidder to escape payment of FICA taxes, workers' compensation, and unemployment contributions and resultingly reduce their bid.

The bill has two main provisions.

1. It provides a private cause of action to contractors workers, and unions that suffer damages by loss of a bid to sue winning bidders who reduced their bid by knowingly misclassifying employees as independent contractors. One exception to this provision is that a person who brings an action against a winning bidder may not collect damages if the defendant to the case establishes that the plaintiff also knowingly violated employment law by misclassifying an employæ as an independent contractor in their bid for the same contract.

2. It gives the attorney general authority to bring an action for civil penalties and injunctive relief against a person who knowingly violates the workers' compensation, unemployment contributions, and FICA withholdings by misclassifying an employee as an independent contractor.

While the State presently has the authority to address this misclassification in the bids it receives, many are concerned that the State is too overburdened to discover every case. For example, the IRS has recently estimated that 38% of employers misclassify workers as contractors. Therefore, HB 468 provides this private cause of action. It is similar to a bill presently introduced at the federal level to address this same concern.

HB 468 has the support of the Labor community and is not opposed by the Associated General Contractors.

DD/jmn

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 12, 1992

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 2/25/92

The LABOR AND COMMERCE Committee considered:

HB 468

HOUSE BILL NO. 468

ACTION AGAINST NONCOMPLYING CONTRACTORS

"An Act relating to unfair trade practices by construction contractors."

RECOMMENDATIONS:

be replaced with _____ the same title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): _____ (Dept)

APPROVES PREVIOUS: _____ (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note Dept of Labor

zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>[Signature]</i>	<input checked="" type="checkbox"/>				
<i>[Signature]</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>		<input checked="" type="checkbox"/>	
		<i>[Signature]</i>		<input checked="" type="checkbox"/>	

[Signature]
CHAIRMAN'S SIGNATURE

344

FY 98

0.0

0.0

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN
SEAT A

3111 "C" STREET, SUITE 450
ANCHORAGE, ALASKA 99503
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ALASKA LANDINGS • BENTZEN • BIRCHWOOD • CHESTER CREEK • HEATHER MEADOWS • LINCOLN PARK • MIDTOWN • NORTHSTAR
NORTHWOOD • ROMIG • ROOSEVELT PARK • SPENARD • THOMPSON • TURNAGAIN • WINDEMERE • WOODLAND PARK



CHAIRMAN
JUDICIARY COMMITTEE
VICE CHAIRMAN
REGULATION REVIEW COMMITTEE
MEMBER
RULES COMMITTEE
LABOR AND COMMERCE COMMITTEE

MEMORANDUM

To: Members of the House Labor and Commerce Committee

From: Representative Dave Donley 
Chair, House Judiciary Committee

Re: HB 468, An act relating to unfair trade practices by
construction contractors

Date: February 25, 1992

Thank you for hearing HB 468, an act relating to unfair trade practices by noncomplying contractors. This legislation addresses concerns both contractors and the labor community have about unfair bidding practices of contractors who are attempting to reduce their bids by misclassifying employees as independent contractors. Misclassification allows the bidder to escape payment of FICA taxes, workers' compensation, and unemployment contributions and resultingly reduce their bid.

The bill has two main provisions.

1. It provides a private cause of action to contractors workers, and unions that suffer damages by loss of a bid to sue winning bidders who reduced their bid by knowingly misclassifying employees as independent contractors. One exception to this provision is that a person who brings an action against a winning bidder may not collect damages if the defendant to the case establishes that the plaintiff also knowingly violated employment law by misclassifying an employee as an independent contractor in their bid for the same contract.



2. It gives the attorney general authority to bring an action for civil penalties and injunctive relief against a person who knowingly violates the workers' compensation, unemployment contributions, and FICA withholdings by misclassifying an employee as an independent contractor.

While the State presently has the authority to address this misclassification in the bids it receives, many are concerned that the State is too overburdened to discover every case. For example, the IRS has recently estimated that 38% of employers misclassify workers as contractors. Therefore, HB 468 provides this private cause of action. It is similar to a bill presently introduced at the federal level to address this same concern.

HB 468 has the support of the Labor community and is not opposed by the Associated General Contractors.

DD/jmn



UNITED BROTHERHOOD OF
Carpenters and Joiners of America

LOCAL UNION NO. 1281

407 DENALI

PHONE 276-3533

ANCHORAGE, ALASKA 99501

Fax: 276-7962



February 19, 1992

Representative David Finkelstein
State Capitol
Juneau, AK 99801

Dear Representative Finkelstein,

Carpenters Local 1281 is in 100% support of House Bill 468. This Bill will stop unscrupulous contractors from cheating the working man, the I.R.S., The Social Security Administration, Workmans Comp., and contractors that are willing to play by the law.

The Federal Government is in the process of passing a similar law, but it will only apply on Federal jobs. HB 468 will cover all projects.

If you have any questions, or concerns, please call.

Sincerely,

Royce R. Rock
Business Agent
Carpenters Local 1281

RRR/sh

and Labor Committee and S. 1622 to the Labor and Human Resources Committee.

MISCLASSIFICATION OF WORKERS/INDEPENDENT CONTRACTORS - H.R. 3813 - This bill would allow legitimate contractors bidding on federal jobs to bring a private right of action against successful bidders who have fraudulently misclassified their employees as independent contractors in order to avoid the payment of taxes and fringe benefits. H.R. 3813 has been referred to the Ways and Means Committee.

TIMBER HARVESTING - H.R. 2463 AND S. 1156 - Both bills provide a balanced approach to problems of timber harvesting on old growth federal lands. H.R. 2463 was reported by the National Parks and Public Lands Subcommittee and hearings have been held on S. 1156 by the Public Lands, National Parks and Forests Subcommittee.

LEAD ABATEMENT - Numerous bills related to reducing the risk of lead exposure have been introduced in the Congress. These bills generally seek to improve monitoring, detection and abatement of lead exposure hazards.

AMERICAN JOBS PROTECTION ACT - H.R. 3878 - This bill provides that when work is transferred to another country where the average wage is less than 50% of the average U.S. wage, or employment standards are substantially less effective than our own, the employer is required to provide protection to the U.S. workers left behind. H.S. 3878 was referred to the Education and Labor Committee.

TRADE - FAST TRACK FOR MEXICO - In the last session of Congress resolutions in the House and Senate to deny President Bush "fast track" authority for free trade negotiations with Mexico were defeated. S. Res. 109 has been introduced to allow the Congress the right to amend certain areas of an agreement which might be reached with Mexico. The free trade agreement with Mexico threatens the loss of thousands of American jobs.

EXTENSION OF UNEMPLOYMENT BENEFITS - Congress is pushing for extension of unemployment benefits, which are set to expire on June 13, to October 3, 1992. All states would be allowed to pay an additional 13 weeks of benefits through June 13, according to the plan being discussed. The House may also consider legislation permanently changing the formula for determining when unemployment benefits beyond the regular 26 weeks (so called "extended benefits") become available. President Bush agreed to an extension in his State of the Union speech.

HEALTH CARE REFORM - Over 30 bills have been introduced to provide for comprehensive health care reform. Some of these proposals include measures to place controls on health care costs, which are growing at over 10% per year and are projected to reach over \$750

NFIB Alaska

National Federation of
Independent Business

POSITION PAPER

OF

NATIONAL FEDERATION OF INDEPENDENT BUSINESS
(NFIB/ALASKA)

TO THE

HOUSE LABOR AND COMMERCE COMMITTEE

ON

HB 468

AN ACT RELATING TO UNFAIR TRADE PRACTICES BY
CONSTRUCTION CONTRACTORS.

State Office
9159 Skywood Lane
Juneau, AK 99801
(907) 789-4278



The Guardian of
Small Business

NFIB

National Federation of
Independent Business

December 1, 1989

MEMORANDUM

TO: State Directors
FROM: David Stephenson *ds*
SUBJ: Independent Contractor Status

In the last couple of months several State Directors have made inquiries on the issue of independent contractor status. Apparently, there are efforts in some states to more precisely define independent contractor status statutorily. Questions have been raised with respect to the method used by IRS to determine whether a worker is an employee or an independent contractor.

The IRS uses 20 common law factors to determine what constitutes an employee. These common law factors seek to assess to what extent an "employer" has control, or the right to control, those who work for him or her. These control factors include such things as hours of work, training, work premises, work tools, methods of payment and so forth.

Determining employee status is not a science. It is highly subjective and subject to individual interpretation. As GAO noted in a recent report to Congress, "...each [common law] factor may not apply, and if a factor does apply, its degree of importance can vary both from occupation to occupation and with the related facts and circumstances."

In short, IRS does not offer us a precise definition. Nor is it likely that any state will be able to construct a precise definition. That is not to say, however, that no state can improve upon the IRS method.

I have attached for your consideration excerpts from the September 1989 GAO report on the determination of independent contractor status. It includes a listing of the 20 common law factors used by the IRS. If your state has developed any novel approach to this issue, please share it with the group.

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Washington, DC 20024
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The Guardian of
Small Business

DES
cc: Steve Woods
Don Robinson
Barry Stephenson
Jim Buente

Attachments
4415g

Background

Employers decide whether to classify workers as independent contractors or employees. While both types of workers may provide similar services, employees do so under the direct control of the employer. Conversely, independent contractors, organized as sole proprietorships, partnerships, or corporations, provide services without the employers' direct control.

IRS guidance provides employers with criteria for classifying their workers, including 20 common law factors. (See app. I.) These factors revolve around the degree of, or right of, control an employer has over workers, such as their hours, space, and training. However, in determining the proper classification, these factors can be subjective; each factor may not apply, and if a factor does apply, its degree of importance can vary both from occupation to occupation and with the related facts and circumstances. Because of the subjective nature of the classification criteria, misclassification of workers can occur.

Employers also have economic incentives to misclassify. When employers classify employees as independent contractors, they can reduce their tax liability by not having to pay social security and federal unemployment compensation taxes. They also may avoid the costs from withholding income taxes or providing fringe benefits, as they do for employees. Other incentives for not treating workers as employees include the costs associated with minimum wage laws, worker's compensation insurance, state unemployment taxes, and collective bargaining.

When an employee is misclassified, federal tax revenues are lost. IRS studies show that independent contractors tend to underreport their income because they do not have their taxes withheld. For 1987, IRS estimated that sole proprietors, many of whom are independent contractors according to IRS officials, accounted for \$16 billion, or 34 percent, of the \$48.3 billion tax gap caused by individuals who did not fully report their income.²

Revenues are also lost because noncompliant employers and misclassified employees pay less tax. As previously mentioned, employers who misclassify employees as independent contractors do not pay social security or unemployment compensation taxes. Also, employees misclassified as independent contractors can reduce their tax liability by deducting business expenses that employees are not usually entitled to deduct. For example, independent contractors can deduct expenses for automobiles, homes, medical insurance, retirement plans, and business trips. If employees are entitled to a deduction, they can only deduct limited amounts.

IRS relies primarily on third-party leads to identify employers who misclassify. Leads on apparent cases of misclassification come from such sources as (1) workers who complain about their classifications, (2) IRS' examinations of business income tax returns, and (3) referrals by other

²IRS defines the tax gap as the difference between the amount of income taxes voluntarily paid by individuals and businesses and the amount of income taxes that are owed.

federal and state agencies. To confirm whether the apparent misclassification exists, IRS must first interview employers on their classification practices, using the 20 common law factors. If misclassification seems evident, IRS then must do employment tax examinations to verify whether the employers misclassified workers.

IRS has historically relied on the Examination Division to do employment tax examinations but over the years the Division's examinations have declined. In 1979, Examination did about 109,000 examinations, or 0.43 percent, of the employment tax returns filed. In 1988, Examination did about 24,000, or 0.09 percent, of the returns filed. According to National Office Examination officials, the decline in these examinations occurred because of restrictions on IRS' authority to correct all misclassifications, due to Section 530 of the Revenue Act of 1978.

Because of the decline in examinations and IRS' belief that misclassification is a serious problem, IRS' Collection Division instituted a nationwide employment tax examination program in 1987, which generally focuses on employers whose assets are \$3 million or less. In 1988, Collection did 1,120 examinations of which about 90 percent resulted in proposed tax assessments of over \$50 million and in the reclassification of 46,258 workers as employees. Reclassification places these employees under the income tax withholding system, which increases the likelihood that their tax liabilities will be identified and paid.

While third-party leads that initiated these employment tax examinations have proven to be helpful in identifying misclassification and generating proposed taxes, Collection officials recognize that the leads do not systematically cover the universe of employers who may be misclassifying workers. For example, the leads may not be identifying certain types of employers who have been most noncompliant in classifying workers. These officials said they have been exploring various methods to more systematically identify such employers and believed that using information returns could improve the identification process.

Common Law Factors Used to Determine Workers' Classification

IRS uses 20 common law factors to determine whether workers are employees or independent contractors (see Internal Revenue Manual, 4600 Employment Tax Procedure, Exhibit 4640-1). Workers are generally employees if they:

1. Must comply with employer's instructions about the work.
2. Receive training from or at the direction of the employer.
3. Provide services that are intergrated into the business.
4. Provide services that must be rendered personally.
5. Hire, supervise, and pay assistants for the employer.
6. Have a continuing working relationship with the employer.
7. Must follow set hours of work.
8. Work full-time for an employer.
9. Do their work on the employer's premises.
10. Must do their work in a sequence set by the employer.
11. Must submit regular reports to the employer.
12. Receive payments of regular amounts at set intervals.
13. Receive payments for business and/or travelling expenses.
14. Rely on the employer to furnish tools and materials.
15. Lack a major investment in facilities used to perform the service.
16. Cannot make a profit or suffer a loss from their services.
17. Work for one employer at a time.
18. Do not offer their services to the general public.
19. Can be fired by the employer.
20. May quit work at any time without incurring liability.

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, MY NAME IS RESA JERREL, AND I REPRESENT THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS - NFIB/ALASKA. I WOULD LIKE TO THANK YOU FOR THE OPPORTUNITY TO COMMENT ON HB 468.

WE BELIEVE THAT IF YOU WANT TO ALLOW A PERSON THAT HAS SUFFERED DAMAGES TO SEEK INJUNCTIVE RELIEF, AS THE RESULT OF A COMPETITIVE BID WHERE THE SUCCESSFUL BIDDER KNOWINGLY TREATED AN EMPLOYEE AS AN INDEPENDENT CONTRACTOR - YOU SHOULD ALSO CONSIDER CLARIFYING THE DEFINITION OF AN "INDEPENDENT CONTRACTOR".

FOR SOME BACKGROUND INFORMATION: NFIB/ALASKA IS COMPRISED OF 5,240 SMALL AND INDEPENDENT BUSINESS OWNERS. THE LEGISLATIVE AGENDA OF NFIB/ALASKA IS DETERMINED BY OUR BALLOT. THE BALLOT IS OUR ANNUAL POLL OF OUR MEMBERSHIP ON A SERIES OF ISSUES DEEMED CRITICAL TO SMALL BUSINESS. A MAJORITY VOTE, OF THE MEMBERS IN RESPONSE TO THE POLL, SETS OUR POLICY AND POSITION ON LEGISLATIVE ISSUES.

THE FOLLOWING ARE PART OF THE RESULTS OF THE 1992 NFIB/ALASKA BALLOT QUESTIONS REGARDING INDEPENDENT CONTRACTORS:

1. SHOULD THERE BE A STANDARD DEFINITION OF INDEPENDENT CONTRACTOR FOR USE BY ALL STATE AGENCIES?

85% YES 7% NO 8% UNDECIDED

2. SHOULD THERE BE A SINGLE FORM USED TO REGISTER A PERSON'S INDEPENDENT CONTRACTOR STATUS WITH THE STATE THAT WOULD SERVE AS A DECLARATION OF HIS OR HER STATUS TO ALL STATE AGENCIES?

82% YES 10% NO 8% UNDECIDED

THE IRS USES TWENTY COMMON LAW FACTORS TO DETERMINE WHAT IS CONSIDERED AN "EMPLOYEE." THESE FACTORS ARE USED TO ASSESS TO WHAT EXTENT AN EMPLOYER HAS CONTROL OVER THOSE THAT WORK FOR HIM OR HER. BUT, THERE STILL IS CONFUSION AND MANY INCONSISTENCIES AMONG STATE AGENCIES REGARDING THE DEFINITION OF AN INDEPENDENT CONTRACTOR. THE

RESULT IS THAT WHILE A BUSINESS PERSON MAY BE CONSIDERED TO BE AN INDEPENDENT CONTRACTOR BY ONE STATE AGENCY, THAT PERSON MAY NOT QUALIFY FOR SUCH STATUS WHEN AUDITED BY ANOTHER DIVISION OF THE DEPARTMENT OF LABOR.

REQUIRING A SIMPLE FORM TO REGISTER A PERSON'S INDEPENDENT CONTRACTOR STATUS WOULD HELP TO END THE CONFUSION OVER WHO IS AND WHO IS NOT AN INDEPENDENT CONTRACTOR. THE CONFUSION HAS MADE IT DIFFICULT FOR LAWFUL BUSINESS OWNERS TO KNOW WHEN TO WITHHOLD AND PAY PAYROLL TAXES ON PERSONS PERFORMING SERVICES FOR THEM. IF AN INDEPENDENT CONTRACTOR COULD SIMPLY REGISTER THEMSELVES WITH THE STATE, THE CURRENT CONFUSION COULD BE MINIMIZED.

ATTACHED ARE THE TWENTY COMMON LAW FACTORS USED BY THE IRS, A RECENT NFIB WHITE PAPER ON THOSE GUIDELINES AND A SUMMARY AND COPY OF A LAW PASSED IN OREGON.

I LOOK FORWARD TO WORKING WITH YOU TO HELP CLARIFY THE DEFINITION OF AN INDEPENDENT CONTRACTOR.

THANK YOU FOR THE OPPORTUNITY TO TESTIFY ON THIS VERY IMPORTANT BILL.

Independent Contractor Status

Under FICA and FUTA

For federal tax purposes (FICA and FUTA) the determination of whether an individual is an employee or an independent contractor is derived from three tests.

Test I--Corporate Officers

For purposes of FICA and FUTA corporate officers are generally considered to be employees of the corporation, even if they are equity holders. There are some exceptions, however. Corporate officers who perform little or no services for the corporation and receive little or no remuneration (either directly or indirectly) may not be considered as employees.

Test II--The Common Law Rules For Determining Employee or Independent Contractor Status.

The common law rules of the IRS are used to determine employee or independent contractor status for purposes of FICA and FUTA. Generally, an individual is an employee if the person for whom he or she works has the right to direct and control that individual as to the way the individual works in terms of the final results and the details of when, where and how the work gets done. It should be noted that the employer need not actually exercise control for an employer-employee relationship to exist. The fact that the employer has the right to do so usually results in a determination of employee status. The IRS uses 20 common law factors to determine the extent of control exercised and therefore the status of the worker. Workers are generally considered to be employees if they:

*Must comply with the employer's instructions about the work in terms of when, where and how the work is to be performed. These instructions may be oral or in the form of written procedures such as a personnel manual.

*Receive training from or at the direction of the employer. Training by the employer or an experienced employee of the employer denotes a certain amount of control. This training can take several forms, including attendance at meetings, use of company policy and procedure manuals, and written correspondence.

*Provide services that are integrated into the business. In those cases where the success or continuation of the business is dependent upon the provision of certain kinds of services by an individual then it is assumed that the business owner exerts some control over the provision of these services.

*Provide services that are rendered personally. If an individual who is providing a service to a business has the right to hire a substitute without the permission of the business owner, it suggests a lack of control on the part of the owner. A service that must be rendered personally, however, indicates that the business owner has interest in the methods of delivering the

service as well as the end result.

*Hire, supervise, and pay assistants for the employer. An individual who performs these services for an employer is generally considered to be under the control of the employer, unless this is done under a contract that specifies that the individual is responsible for labor, materials and the end result of the work--not the methods of attainment.

*Have a continuing working relationship with the employer. The existence of such a relationship over a period of time indicates an employer-employee relationship, even if the work is part-time or seasonal.

*Must follow set hours of work. An individual who cannot control his own time is almost always an employee--not an independent contractor.

*Work full-time for an employer. Full-time work by an individual is considered indicative of control by the employer, since the individual is not free to offer his services to other parties. If, for example, an employer requires a certain volume of work that consumes all of the individual's working time, it is generally considered an employer-employee relationship. By contrast, an independent contractor is free to work whenever he chooses for whomever he chooses.

*Do their work on the employer's premises. This circumstance implies employer control especially if the work could be done off the premises. The use of office space, desk space, office equipment and services provided by the employer generally places the individual under the direction of the employer unless the worker has the option to use other space and facilities. Working off the employer's premises, on the other hand, does not imply independent contractor status if the work must be performed off the premises (construction work, for example).

*Must do their work in a sequence set by the employer. If the employer determines, or has the right to determine, the order of the work to be performed control may be implied.

*Must submit regular reports to the employer. Any type of oral or written reports indicates that the worker must account for his actions to the employer and this may imply control and direction.

*Receive payments of regular amounts at set intervals. Whenever payments to a worker are made on an hourly, weekly or monthly basis it is likely that an employee-employer relationship exists. Independent contractors are usually paid on a job basis or by commission. A guarantee by the employer of a minimum salary may give rise to an employer-employee relationship. The establishment of a drawing account by the employer for the benefit of the worker+ may imply an employment relationship if the worker is allowed to draw from the account at stated intervals and is not required to reimburse for any amount exceeding earnings.

*Receive payments for business and/or travel expenses. Payment of such expenses is indicative of control by the employer.

*Rely on the employer to furnish tools and materials. Independent contractors usually supply their own tools and materials. The furnishing of such items by the employer implies control.

*Lack a major investment in facilities used to perform the service. If the worker has a major investment in the work premises or equipment used to perform the work it is indicative of independent status. Employers routinely supply employees with items such as tools, manuals, instruction books, clothing, etc. and these are not considered facilities.

*Cannot make a profit or suffer a loss from their services. The possibility that the worker may profit or suffer a loss as a result of services performed is indicative of independent contractor status. An independent contractor has recurring liabilities and obligations and profit or loss is dependent on the relation between his receipts and expenditures.

*Work for one employer at a time. An individual who works for a number of employers at one time is usually thought to be free from the control of any employer thereby achieving independent status.

*Do not offer their services to the general public. Offering services to the general public usually connotes independent contractor status, especially if the individual has a place of business, advertises his services, and generally seeks to attract customers.

*Can be fired by the employer. An individual who can be fired from his or her employment position by the employer is an employee. Independent contractors cannot be fired, except to the extent that they do not adhere to some contractual obligation or specification.

*May quit work at any time without incurring liability. If a worker has the right to leave the employment at any time without incurring liability, then an employer-employee relationship exists. An independent contractor usually agrees to do a specific job for a specified commission, and if the contractor does not fulfill that obligation he can be held liable.

Test III--Statutory Employees

Four occupations that could not meet the employee-status test under the IRS common-law rules have been designated employees by congressional statute (agent-drivers or commission-drivers, full-time life insurance salespeople, homeworkers, and full-time traveling or city salespeople).

In order for an individual to be designated as a Test III statutory he or she must meet the specifications for one of the four designated occupations, as well as the following conditions:

*The worker must perform substantially all of the work personally;

*The worker must have no substantial investment in the facilities used to perform the work; and

*The work must be performed in a continuing relationship.

Statutory Nonemployees

In the Revenue Act of 1978 the Congress created a "safe haven" for taxpayers who had previously classified certain workers as independent contractors, but who might not actually meet the IRS test. This safe haven would be extended by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). These actions were taken to minimize employers' confusion about employment status while the Congress continued to seek a more definitive method of determining classifications.

Another provision of the TEFRA legislation designated qualified real estate agents and direct sellers as statutory nonemployees, thereby granting self-employed status to these individuals.

277.ATT
21-JAN-92

Oregon 1989

Independent Contractor Status Clarified

Responding to requests from NFIB/Oregon members and other business groups, the 1989 Oregon Legislature eliminated multiple and conflicting state agency definitions of "independent contractor" status. HB 2320, which was signed by the governor and will go into effect on October 3, 1989, establishes a uniform definition of independent contractor status that is to be used by all state agencies.

NFIB/Oregon resisted early attempts by organized labor to unfairly limit the ability of independent business owners to qualify as independent contractors. NFIB/Oregon members voted 79 percent in favor of a single definition for determining independent contractor status on the 1989 State Ballot.

Guardian Advisory Council member Greg Etchison of Vail Northwest Trucking, Springfield, helped the NFIB/Oregon lobbyists with amendments to the bill, making its implementation more practical for small businesses. Etchison also testified before the Senate Labor Committee and was a key influence behind moving the measure out of committee.

Under the provisions of HB 2320, all independent contractors will be required to meet each of the seven criteria listed below:

- Be free from direction and control over the means and manner of providing the labor and services;
- Be responsible for obtaining all assumed business registrations or professional occupation licenses required by state and local laws;

- Furnish all tools and equipment needed to perform contracted labor and services;

- Be the authority to hire and fire employees used to perform labor or services;

- Receive payment upon completion of the performance of specific portions of a project, or have payment arrangements on the basis of a periodic or annual retainer;

- Register with the state as required in Oregon Revised Statutes 701 (only for those industries that require registration with the Builders' Board); and

- File a tax return in the name of the business, or the individual's name, and include a schedule C, or farm schedule F.

An independent contractor must also meet the requirements of four out of the following six items. Due to NFIB/Oregon member input, the final language in this section of the bill was changed considerably in order to accommodate member positions taken in the 1989 State Ballot.

An independent contractor must:

- Carry out work at a location that is separate from the residence, or in a specific portion of the residence that is set aside as the location of the business;

- Provide commercial advertising, or business cards, or have a trade association membership;

- Have a telephone listing and service that is separate from the residence;

- Provide labor and services that are pursuant to written contracts;

- Provide labor and services that are for two or more different people in a year's time, and

- Assume financial responsibility for defective workmanship, or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance, or liability insurance related to the labor or services to be provided.

For further information in regard to the new independent contractor provisions, please contact the NFIB/Oregon Government Relations Office at 364-4450 in Salem. ■

REPRINT

B-Engrossed
House Bill 2320

Ordered by the Senate June 19
Including House Amendments dated February 10
and Senate Amendments dated June 19

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Joint Interim Committee on Labor)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Defines "independent contractor" for purposes of laws regarding income taxation, workers' compensation, unemployment compensation and registration of builders. **Requires agencies which administer those areas jointly to adopt rules to carry out provisions of Act.**
Repeals Enrolled House Bill 2048 (1989 regular session).

A BILL FOR AN ACT

1
2 Relating to independent contractors; creating new provisions; amending ORS 316.162, 656.005,
3 656.027, 656.029, 657.040 and 701.005; and repealing ORS 657.042 and section 1, chapter
4 _____, Oregon Laws 1989 (Enrolled House Bill 2048).

5 **Be It Enacted by the People of the State of Oregon:**

6 **SECTION 1.** As used in various provisions of ORS chapters 316, 656, 657 and 701, an individual
7 or business entity that performs labor or services for remuneration shall be considered to perform
8 the labor or services as an "independent contractor" if the standards of this section are met:

9 (1) The individual or business entity providing the labor or services is free from direction and
10 control over the means and manner of providing the labor or services, subject only to the right of
11 the person for whom the labor or services are provided to specify the desired results;

12 (2) The individual or business entity providing labor or services is responsible for obtaining all
13 assumed business registrations or professional occupation licenses required by state law or local
14 government ordinance for the individual or business entity to conduct the business;

15 (3) The individual or business entity providing labor or services furnishes the tools or equip-
16 ment necessary for performance of the contracted labor or services;

17 (4) The individual or business entity providing labor or services has the authority to hire and
18 fire employes to perform the labor or services;

19 (5) Payment for the labor or services is made upon completion of the performance of specific
20 portions of the project or is made on the basis of an annual or periodic retainer;

21 (6) The individual or business entity providing labor or services is registered under ORS chap-
22 ter 701, if the individual or business entity provides labor or services for which such registration is
23 required;

24 (7) Federal and state income tax returns in the name of the business or a business Schedule
25 C or farm Schedule F as part of the personal income tax return were filed for the previous year if
26 the individual or business entity performed labor or services as an independent contractor in the
27 previous year; and

NOTE: Matter in bold face in an amended section is new; matter [italic and bracketed] is existing law to be omitted.

1 (8) The individual or business entity represents to the public that the labor or services are to
2 be provided by an independently established business. An individual or business entity is considered
3 to be engaged in an independently established business when four or more of the following circum-
4 stances exist:

5 (a) The labor or services are primarily carried out at a location that is separate from the res-
6 idence of an individual who performs the labor or services, or are primarily carried out in a specific
7 portion of the residence, which portion is set aside as the location of the business;

8 (b) Commercial advertising or business cards as is customary in operating similar businesses
9 are purchased for the business, or the individual or business entity has a trade association mem-
10 bership;

11 (c) Telephone listing and service are used for the business that is separate from the personal
12 residence listing and service used by an individual who performs the labor or services;

13 (d) Labor or services are performed only pursuant to written contracts;

14 (e) Labor or services are performed for two or more different persons within a period of one
15 year; or

16 (f) The individual or business entity assumes financial responsibility for defective workmanship
17 or for service not provided as evidenced by the ownership of performance bonds, warranties, errors
18 and omission insurance or liability insurance relating to the labor or services to be provided.

19 **SECTION 1a.** In accordance with ORS 183.310 to 183.550, those agencies responsible for the
20 administration of ORS chapters 316, 656, 657 and 701, jointly shall adopt rules to carry out the
21 provisions of section 1 of this Act.

22 **SECTION 2.** ORS 316.162 is amended to read:

23 316.162. As used in ORS 316.162 to 316.212:

24 (1) "Number of withholding exemptions claimed" means the number of withholding exemptions
25 claimed in a withholding exemption certificate in effect under ORS 316.182, except that if no such
26 certificate is in effect, the number of withholding exemptions claimed is considered to be zero.

27 (2) "Wages" means remuneration for services performed by an employe for an employer, includ-
28 ing the cash value of all remuneration paid in any medium other than cash, except that "wages"
29 does not include remuneration paid:

30 (a) For active service in the Armed Forces of the United States as to which no withholding is
31 required by the Internal Revenue Code.

32 (b) To an employe of a common carrier to the extent that sections 1512 and 11504, title 49,
33 United States Code prohibits the remuneration from withholding for state income taxes.

34 (c) For domestic service in a private home, a local college club or a local chapter of a college
35 fraternity or sorority.

36 (d) For casual labor not in the course of the employer's trade or business.

37 (e) To an employe whose services to the employer consist solely of labor in connection with the
38 planting, cultivating or harvesting of seasonal agricultural crops if the total amount paid to such
39 employe is less than \$300 annually.

40 (f) To seamen who are exempt from garnishment, attachment or execution under title 46 of the
41 United States Code.

42 (g) To persons temporarily employed as emergency forest fire fighters.

43 (h) To employes' trusts exempt from tax under provisions of the federal Internal Revenue Code.

44 (i) For services performed by a duly ordained, commissioned or licensed minister of a church in

1 the exercise of the minister's ministry or by a member of a religious order in the exercise of reli-
2 gious duties required by such order, which duties are not commercial in nature.

3 (j) For services performed by an independent contractor, as that term is defined in sec-
4 tion 1 of this 1989 Act.

5 (3) "Employer" means:

6 (a) A person who is in such relation to another person that the person may control the work
7 of that other person and direct the manner in which it is to be done; or

8 (b) An officer or employe of a corporation, or a member or employe of a partnership, who as
9 such officer, employe or member is under a duty to perform the acts required of employers by ORS
10 316.167, 316.182, 316.197, 316.202 and 316.207.

11 SECTION 3. ORS 656.005 is amended to read:

12 656.005. (1) "Average weekly wage" means the Oregon average weekly wage in covered em-
13 ployment, as determined by the Employment Division of the Department of Human Resources, for
14 the last quarter of the calendar year preceding the fiscal year in which the injury occurred.

15 (2) "Beneficiary" means an injured worker, and the husband, wife, child or dependent of a
16 worker, who is entitled to receive payments under this chapter. However, a spouse of an injured
17 worker living in a state of abandonment for more than one year at the time of the injury or subse-
18 quently is not a beneficiary. A spouse who has lived separate and apart from the worker for a period
19 of two years and who has not during that time, received or attempted by process of law to collect
20 funds for support or maintenance, is considered living in a state of abandonment.

21 (3) "Board" means the Workers' Compensation Board.

22 (4) "Carrier-insured employer" means an employer who provides workers' compensation cover-
23 age with a guaranty contract insurer.

24 (5) "Child" includes a posthumous child, a child legally adopted prior to the injury, a child to-
25 ward whom the worker stands in loco parentis, an illegitimate child and a stepchild, if such
26 stepchild was, at the time of the injury, a member of the worker's family and substantially dependent
27 upon the worker for support. An invalid dependent child is a child, for purposes of benefits, re-
28 gardless of age, so long as the child was an invalid at the time of the accident and thereafter re-
29 mains an invalid substantially dependent on the worker for support. For purposes of this chapter,
30 an invalid dependent child is considered to be a child under 18 years of age.

31 (6) "Claim" means a written request for compensation from a subject worker or someone on the
32 worker's behalf, or any compensable injury of which a subject employer has notice or knowledge.

33 (7)(a) A "compensable injury" is an accidental injury, or accidental injury to prosthetic appli-
34 ances, arising out of and in the course of employment requiring medical services or resulting in
35 disability or death; an injury is accidental if the result is an accident, whether or not due to acci-
36 dental means. However, "compensable injury" does not include:

37 (A) Injury to any active participant in assaults or combats which are not connected to the job
38 assignment and which amount to a deviation from customary duties; or

39 (B) Injury incurred while engaging in or performing, or as the result of engaging in or per-
40 forming, any recreational or social activities solely for the worker's personal pleasure.

41 (b) A "disabling compensable injury" is an injury which entitles the worker to compensation for
42 disability or death.

43 (c) A "nondisabling compensable injury" is any injury which requires medical services only.

44 (8) "Compensation" includes all benefits, including medical services, provided for a compensable

1 injury to a subject worker or the worker's beneficiaries by an insurer or self-insured employer pur-
2 suant to this chapter.

3 (9) "Department" means the Department of Insurance and Finance.

4 (10) "Dependent" means any of the following-named relatives of a worker whose death results
5 from any injury and who leaves surviving no widow, widower or child under the age of 18 years:
6 Father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, brother,
7 sister, half sister, half brother, niece or nephew, who at the time of the accident, are dependent in
8 whole or in part for their support upon the earnings of the worker. Unless otherwise provided by
9 treaty, aliens not residing within the United States at the time of the accident other than father,
10 mother, husband, wife or children are not included within the term "dependent."

11 (11) "Director" means the Director of the Department of Insurance and Finance.

12 (12) "Doctor" or "physician" means a person duly licensed to practice one or more of the heal-
13 ing arts in this state within the limits of the license of the licentiate. "Attending physician" means
14 a doctor or physician who is primarily responsible for the treatment of a worker's compensable in-
15 jury. "Consulting physician" means a doctor or physician who examines a worker or the worker's
16 medical record to advise the attending physician regarding treatment of a worker's compensable
17 injury.

18 (13) "Employer" means any person, including receiver, administrator, executor or trustee, and
19 the state, state agencies, counties, municipal corporations, school districts and other public corpo-
20 rations or political subdivisions, who contracts to pay a remuneration for and secures the right to
21 direct and control the services of any person.

22 (14) "Guaranty contract insurer" and "insurer" mean the State Accident Insurance Fund Cor-
23 poration or an insurer authorized under ORS chapter 731 to transact workers' compensation insur-
24 ance in this state.

25 (15) "Insurance and Finance Fund" means the fund created by ORS 705.145.

26 (16) "Invalid" means one who is physically or mentally incapacitated from earning a livelihood.

27 (17) "Medically stationary" means that no further material improvement would reasonably be
28 expected from medical treatment, or the passage of time.

29 (18) "Noncomplying employer" means a subject employer who has failed to comply with ORS
30 656.017.

31 (19) "Party" means a claimant for compensation, the employer of the injured worker at the time
32 of injury and the insurer, if any, of such employer.

33 (20) "Payroll" means a record of wages payable to workers for their services and includes
34 commissions, value of exchange labor and the reasonable value of board, rent, housing, lodging or
35 similar advantage received from the employer. However, "payroll" does not include overtime pay,
36 vacation pay, bonus pay, tips, amounts payable under profit-sharing agreements or bonus payments
37 to reward workers for safe working practices. Bonus pay is limited to payments which are not an-
38 ticipated under the contract of employment and which are paid at the sole discretion of the em-
39 ployer. The exclusion from payroll of bonus payments to reward workers for safe working practices
40 is only for the purpose of calculations based on payroll to determine premium for workers' com-
41 pensation insurance, and does not affect any other calculation or determination based on payroll for
42 the purposes of this chapter.

43 (21) "Person" includes partnership, joint venture, association and corporation.

44 (22) "Self-insured employer" means an employer or group of employers certified under ORS

1 656.430 as meeting the qualifications set out by ORS 656.407.

2 (23) "State Accident Insurance Fund Corporation" and "corporation" mean the State Accident
3 Insurance Fund Corporation created under ORS 656.752.

4 (24) "Subject employer" means an employer who is subject to this chapter as provided by ORS
5 656.023.

6 (25) "Subject worker" means a worker who is subject to this chapter as provided by ORS
7 656.027.

8 (26) "Wages" means the money rate at which the service rendered is recompensed under the
9 contract of hiring in force at the time of the accident, including reasonable value of board, rent,
10 housing, lodging or similar advantage received from the employer, and includes the amount of tips
11 required to be reported by the employer pursuant to section 6053 of the Internal Revenue Code of
12 1954, as amended, and the regulations promulgated pursuant thereto, or the amount of actual tips
13 reported, whichever amount is greater. The State Accident Insurance Fund Corporation may estab-
14 lish assumed minimum and maximum wages, in conformity with recognized insurance principles, at
15 which any worker shall be carried upon the payroll of the employer for the purpose of determining
16 the premium of the employer.

17 (27) "Worker" means any person, including a minor whether lawfully or unlawfully employed,
18 who engages to furnish services for a remuneration, subject to the direction and control of an em-
19 ployer and includes salaried, elected and appointed officials of the state, state agencies, counties,
20 cities, school districts and other public corporations, but does not include any person whose services
21 are performed as an inmate or ward of a state institution.

22 (28) "Independent contractor" has the meaning for that term provided in section 1 of this
23 1989 Act.

24 SECTION 4. ORS 656.027 is amended to read:

25 656.027. All workers are subject to ORS 656.001 to 656.794 except those nonsubject workers de-
26 scribed in the following subsections:

27 (1) A worker employed as a domestic servant in or about a private home. For the purposes of
28 this subsection "domestic servant" means any worker engaged in household domestic service.

29 (2) A worker employed to do gardening, maintenance, repair, remodeling or similar work in or
30 about the private home of the person employing the worker.

31 (3)(a) A worker whose employment is casual and either:

32 (A) The employment is not in the course of the trade, business or profession of the employer;

33 or

34 (B) The employment is in the course of the trade, business or profession of a nonsubject em-
35 ployer.

36 (b) For the purpose of this subsection, "casual" refers only to employments where the work in
37 any 30-day period, without regard to the number of workers employed, involves a total labor cost
38 of less than \$200.

39 (4) A person for whom a rule of liability for injury or death arising out of and in the course of
40 employment is provided by the laws of the United States.

41 (5) A worker engaged in the transportation in interstate commerce of goods, persons or property
42 for hire by rail, water, aircraft or motor vehicle, and whose employer has no fixed place of business
43 in this state.

44 (6) Workers of any city having a population of more than 200,000 that provides by ordinance or

1 charter compensation equivalent to compensation under ORS 656.001 to 656.794.

2 (7) Sole proprietors. When labor or services are performed under contract, the sole pro-
3 prietor must qualify as an independent contractor.

4 (8) Partners who are not engaged in work performed in direct connection with the construction,
5 alteration, repair, improvement, moving or demolition of an improvement on real property or
6 appurtenances thereto. When labor or services are performed under contract, the partnership
7 must qualify as an independent contractor.

8 (9) A corporate officer who is also a director of the corporation and has a substantial ownership
9 interest in the corporation, regardless of the nature of the work performed by such officer. However,
10 if the activities of the corporation are conducted on land that receives farm use tax assessment
11 pursuant to ORS 215.203 and ORS chapter 308, corporate officer includes all individuals identified
12 as directors in the corporate bylaws, regardless of ownership interest, and who are members of the
13 same family, whether related by blood, marriage or adoption. When labor or services are per-
14 formed under contract, the corporation must qualify as an independent contractor.

15 (10) A person performing services primarily for board and lodging received from any religious,
16 charitable or relief organization.

17 (11) A newspaper carrier utilized in compliance with the provisions of ORS 656.070 and 656.075.

18 (12) A person who has been declared an amateur athlete under the rules of the United States
19 Olympic Committee or the Canadian Olympic Committee and who receives no remuneration for
20 performance of services as an athlete other than board, room, rent, housing, lodging or other rea-
21 sonable incidental subsistence allowance, or any amateur sports official who is certified by a re-
22 cognized Oregon or national certifying authority, which requires or provides liability and accident
23 insurance for such officials. A roster of recognized Oregon and national certifying authorities will
24 be maintained by the Department of Insurance and Finance, from lists of certifying organizations
25 submitted by the Oregon School Activities Association and the Oregon Park and Recreation Society.

26 (13) Volunteer personnel participating in the ACTION programs, organized under the Domestic
27 Volunteer Service Act of 1973, P.L. 93-113, known as the Foster Grandparent Program and the
28 Senior Companion Program, whether or not the volunteers receive a stipend or nominal reimburse-
29 ment for time and travel expenses.

30 (14) A person who has an ownership or leasehold interest in equipment and who furnishes,
31 maintains and operates the equipment. As used in this subsection "equipment" means:

32 (a) A motor vehicle used in the transportation of logs, poles or piling.

33 (b) A motor vehicle used in the transportation of rocks, gravel, sand, dirt or asphalt concrete.

34 (c) A motor vehicle operated as a taxicab as defined in ORS 767.025.

35 (15) A person engaged in the transportation of the public for recreational down-river boating
36 activities on the waters of this state pursuant to a federal permit when the person furnishes the
37 equipment necessary for the activity. As used in this subsection, "recreational down-river boating
38 activities" means those boating activities for the purpose of recreational fishing, swimming or
39 sightseeing utilizing a float craft with oars or paddles as the primary source of power.

40 (16) A person who performs volunteer ski patrol activities who receives no wage other than
41 noncash remuneration.

42 (17) A person 19 years of age or older who contracts with a newspaper publishing company or
43 independent newspaper dealer or contractor to distribute newspapers to the general public and
44 perform or undertake any necessary or attendant functions related thereto.

1 **SECTION 5. ORS 656.029 is amended to read:**

2 656.029. (1) If a person awards a contract involving the performance of labor where such labor
3 is a normal and customary part or process of the person's trade or business, the person awarding
4 the contract is responsible for providing workers' compensation insurance coverage for all individ-
5 uals, other than those exempt under ORS 656.027, who perform labor under the contract unless the
6 person to whom the contract is awarded provides such coverage for those individuals before labor
7 under the contract commences. If an individual who performs labor under the contract incurs a
8 compensable injury, and no workers' compensation insurance coverage is provided for that individ-
9 ual by the person who is charged with the responsibility for providing such coverage before labor
10 under the contract commences, that person shall be treated as a noncomplying employer and bene-
11 fits shall be paid to the injured worker in the manner provided in ORS 656.001 to 656.794 for the
12 payment of benefits to the worker of a noncomplying employer.

13 (2) If a person to whom the contract is awarded is exempt from coverage under ORS 656.027,
14 and that person engages individuals who are not exempt under ORS 656.027 in the performance of
15 the contract, that person shall provide workers' compensation insurance coverage for all such indi-
16 viduals. If an individual who performs labor under the contract incurs a compensable injury, and
17 no workers' compensation insurance coverage is provided for that individual by the person to whom
18 the contract is awarded, that person shall be treated as a noncomplying employer and benefits shall
19 be paid to the injured worker in the manner provided in ORS 656.001 to 656.794 for the payment of
20 benefits to the worker of a noncomplying employer.

21 *[(3) A person, other than a partnership engaged in work performed in direct connection with the*
22 *construction, alteration, repair, improvement, moving or demolition of an improvement on real property*
23 *or appurtenances thereto, who submits proof of compliance with ORS 657.042, is conclusively presumed*
24 *to be an independent contractor and is not eligible to receive benefits under this chapter unless the*
25 *person has obtained coverage for such benefits pursuant to ORS 656.128.]*

26 *[(4)]* (3) As used in this section:

27 (a) "Person" includes partnerships, joint ventures, associations, corporations, governmental
28 agencies and sole proprietorships.

29 (b) "Sole proprietorship" means a business entity or individual who performs labor without the
30 assistance of others.

31 **SECTION 6. ORS 657.040 is amended to read:**

32 657.040. (1) Services performed by an individual for remuneration are deemed to be employment
33 subject to this chapter unless and until it is shown to the satisfaction of the assistant director that:

34 (a) Such individual is an independent contractor, as that term is defined in section 1 of
35 this 1989 Act; or

36 *[(1)]* (b) Such individual has been and will continue to be free from control or direction over the
37 performance of such services, both under a contract of service and in fact; and

38 *[(2)(a)]* (c) Such individual customarily is engaged in an independently established business of
39 the same nature as that involved in the contract of service. [; or]

40 *[(b) Such individual holds oneself out as a contractor and employs one or more individuals to as-*
41 *sist in the actual performance of services and who meets the following criteria shall be deemed to have*
42 *an independently established business:]*

43 *[(A) The individual customarily has two or more effective contracts except when the individual*
44 *performs services as a faller or buckler in the logging industry.]*

1 *[(B) The individual as a normal business practice utilizes separate telephone service, business*
2 *cards and engages in such commercial advertising as is customary in operating similar businesses.]*

3 *[(C) The individual is recognized by the Department of Revenue as an employer.]*

4 *[(D) The individual furnishes substantially all of the equipment, tools and supplies necessary in*
5 *carrying out the contractual obligations.]*

6 (3) (2) A finding that an individual performed services for an employing unit and earned less
7 than the minimum amount necessary to qualify for benefits under ORS 657.150 based on earnings
8 from that employing unit shall not be considered in determining whether such service is employment
9 under subsection (1) of this section.

10 SECTION 7. ORS 701.005 is amended to read:

11 701.005. As used in this chapter:

12 (1) "Board" means the Builders Board.

13 (2) "Builder" means a person who, *[in the pursuit of an independent business]* for
14 compensation, undertakes or offers to undertake or submits a bid, or for compensation and with
15 the intent to sell the structure arranges to construct, alter, repair, improve, move over public
16 highways, roads or streets or demolish a structure or to perform any work in connection with the
17 construction, alteration, repair, improvement, moving over public highways, roads or streets or
18 demolition of a structure, and the appurtenances thereto. "Builder" includes, but is not limited to:

19 (a) A person who purchases or owns property and constructs or for compensation arranges for
20 the construction of one or more structures with the intent of selling the structure or structures;

21 (b) A school district, as defined in ORS 332.002, that permits students to construct a structure
22 as an educational experience to learn building techniques and, upon completion of the structure, the
23 district sells the completed structure; *[or]*

24 (c) A community college district, as defined in ORS 341.005, that permits students to construct
25 a structure as an educational experience
26 to learn building techniques and upon completion of the structure, the district sells the completed
27 structure; or *[.]*

28 (d) An individual or business entity that is an independent contractor, as that term is
29 defined in section 1 of this 1989 Act.

30 (3) If a builder is registered for residential work only, "structure" means a residence, including
31 a site-built home, a modular home constructed off-site, a condominium and a mobile home, a duplex
32 or multiunit residential building consisting of four units or less. If a builder has extended registra-
33 tion to include work performed on buildings of all types as provided in ORS 701.060, "structure"
34 means all types of buildings, regardless of use.

35 SECTION 8. ORS 657.042 and section 1, chapter _____, Oregon Laws 1989 (Enrolled House
36 Bill 2048), are repealed.

37

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EASTERN EDITION

TUESDAY, AUGUST 28, 1990

CHICOPPEE, MASSACHUSETTS

50 CENTS

Labor Letter

A Special News Report on People
And Their Jobs in Offices,
Fields and Factories

A NEW CONNECTICUT LAW targets construction-firm cheaters.

Companies that lose contracts can sue winning bidders who evade paying unemployment and workers' compensation, under a law taking effect Oct. 1. James Lohr, director of the Carpentry Industry Partnership, a labor-industry group based in Norwalk, says such practices are "a severe problem for legitimate contractors" who make the required payments.

"I can now make the enforcement people do their job," says Michael Hobbs, a New Canaan contractor. The IRS says that at least \$1.6 billion a year in tax revenue has been lost nationally; it estimates that 38% of employers misclassify workers as contractors, avoiding unemployment, workers' compensation and Social Security taxes. Joint union-industry groups in California and Illinois show interest in similar legislation.

hurdle to industrial development in New Mexico. We've had people who have left the state and others who say they won't come here because of this law," Carruthers says he will not sign a purely cosmetic bill, and he wants a measure that cleans up the law.

By Mary Ellen

WORKERS' COMPENSATION

Connecticut takes aim at workers' comp fraud

The State of Connecticut is cracking down on firms and individuals that knowingly misrepresent workers as independent contractors in order to save on unemployment and workers' compensation insurance costs when bidding construction projects.

A new law that takes effect Oct. 1 gives "any person, firm, association or corporation" injured by the skimping the right to sue for damages in state court. Previously, only the state and workers could sue. Public Act 90-273 covers any "competitive bid for a project involving construction, repair, remodeling, alteration, rehabilitation, conversion, modernization, improvement, rehabilitation, replacement or renovation of a building or structure."

"This is a severe problem for legitimate contractors that are paying benefits, as required by law, but are at a competitive disadvantage when bidding against companies that do not pay benefits," says Jim Lohr, executive director of the Carpentry Industry Partnership, a Norwalk-based labor-management organization that supported the legislation.

According to the group, the typical Connecticut commercial contractor has hourly labor costs of \$27.78. Such firms can save 25% by misclassifying workers as independent contractors because they do not have to pay unemployment taxes (\$1.08), workers' compensation insurance (\$4.57) and Social Security (\$1.33).

Under the new law, employee status will be determined according to the federal tax code. It generally treats an individual as an employee if the employer "has the right to discharge the employee and the employer supplies the employee with tools and a place to work." In an independent contractor situation, the Internal Revenue Service says the employer has "the right to control or direct only the result of the work and not the means and methods of accomplishing the result." ■

RIGGING

Masts take a chopper ride

Chicago's year-old AT&T Corporate Center redefined itself on the city skyline last week when a crew of riggers, with a big lift by a helicopter, topped off its 60-story frame with four new decorative steel spires.

Each of the spires was broken down into three interlocking sections and airlifted from a nearby parking lot with a helicopter crane. Two of them reach 170 ft and the others are 167 ft tall. The five-hour operation required 12 lifts and cost the building's owner, Stein & Co., Chicago, about \$565,000.

"In all, we probably lifted about 170,000 lb of iron up there," says Pat Higgins, president of Higgins Tower Service Inc., Muskego, Wis. "It's the heaviest lift we've been involved with since the Sears Tower."

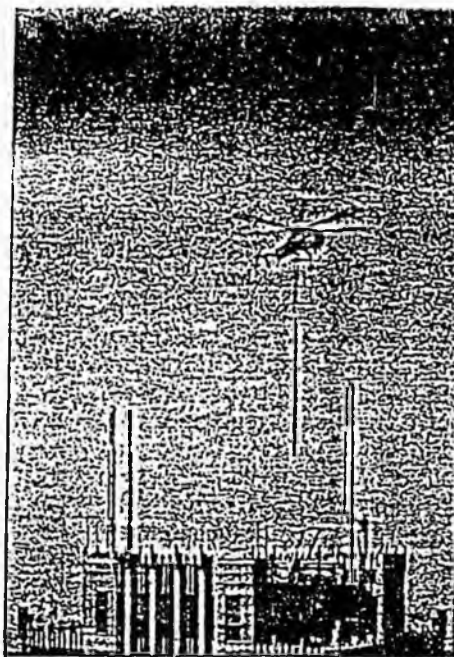
Two of the four lower sections of the spires weighed roughly 19,000 lb, bumping right up against the helicopter's lifting capacity. "Our limit is 20,000 lb," notes David Horton, manager of heavy lift operations for Erickson Air Crane Co., Central Point, Ore.

The firm often lifts at or near capacity, says Horton, but usually not on downtown high-rise projects like AT&T. "That's what makes this job unique," he says.

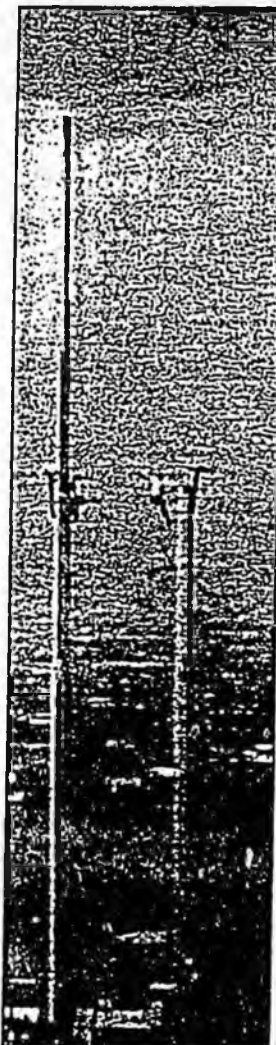
The chopper first lifted the bottom sections, lowering them into 34-ft-deep wells in the tower. Dampening devices were installed about 23 ft up the sections to reduce the amplitude and acceleration of wind sway. Two of the bottom sections are 57 ft tall. The other two are 54 ft tall. All have a 36-in. base diameter and taper gradually to 12 in. at the top of the third section.

The helicopter crane then lifted each of the four 68-ft-tall middle sections, setting them onto the bases where crews made connections. The spires were topped by 45-ft-long peak sections.

"It requires an exper-



Helicopter crane topped off the roof of Chicago's AT&T Corporate Center with four new steel spires last week. The job required 12 lifts and was done early on Sunday morning, when the bustling Loop district is relatively empty of bystanders.



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Illegal 'Subcontracting'

To the Editor:

"New Rows to Hoe in the 'Harvest of Shame'" (Week in Review, July 25) attributes many of the problems afflicting the farm workers to "the growing practice of defining migrant laborers as independent subcontractors, rather than employees."

Unfortunately, farmers aren't the only employers who misclassify employees as "independent" subcontractors. More and more contractors in the construction industry are employing workers as independent subcontractors to avoid paying legally mandated benefits — workers' compensation, unemployment insurance and Social Security — to gain a competitive bidding advantage, according to industry witnesses who testified before Congress last April.

The General Accounting Office estimated that in 1984 alone the Federal Government lost \$1.6 billion in tax revenues because of employee misclassification. The lost revenues represent nearly 10 percent of the entire Department of Housing and Urban Development budget for that year. This scheme not only cheats taxpayers, but also hurts employees who do not receive their benefits, and contractors, both union and nonunion, who lose jobs to unscrupulous employers who knowingly break the law.

Misclassifying employees is a national epidemic in the construction industry that involves an alarming number of large contractors who do business with major corporations and the Federal Government. Recently, for example, a large Massachusetts contractor, Total Property Services of New England, was convicted in Connecticut for labor violations related to employee misclassification while remodeling a General Mills Red Lobster restaurant. The contractor, which also does millions of dollars of business with the Federal Government, is under investigation by the General Services Administration.

Fortunately, in the last year several states have passed legislation allowing contractors to sue competitors who win bids by misclassifying employees as independent subcontractors. Congress has also held hearings on employee misclassification that are likely to generate legislative proposals.

If the practice of misclassifying employees as independent subcontractors continues to grow, more employees will lose their benefits and be exempted from Federal and state labor law protection; more employers who properly classify their employees will lose work to competitors who do not, and the taxpayers' burden will grow.

JOHN CUNNINGHAM
 MICHAEL D. HOBBS
 Norwalk, Conn., Aug. 1, 1991

The writers are, respectively, labor and management co-chairmen, Carpentry Industry Partnership.