

Senate Bill 323

Sponsored by Senator WALKER, Representative BROWN (at the request of Independent Contractors Task Force)

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 **as introduced**.

Redefines "independent contractor" for laws relating to income tax, workers' compensation, unemployment insurance, architects, landscape contractors, construction contractors and others.

A BILL FOR AN ACT

1
2 Relating to independent contractors; creating new provisions; amending ORS 310.800, 316.162,
3 657.040, 670.600 and 670.605; and repealing ORS 314.013.

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

5 **SECTION 1.** ORS 670.600 is amended to read:

6 670.600. [*As used in various provisions of ORS chapters 316, 448, 656, 657, 671 and 701, an indi-*
7 *vidual or business entity that performs labor or services for remuneration shall be considered to per-*
8 *form 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 the*
11 *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 gov-*
14 *ernment ordinances 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 equipment*
16 *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 fire*
18 *employees 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 licensed under ORS chapter*
22 *701, if the individual or business entity provides labor or services for which licensure is required;]*

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

27 [(8) *The individual or business entity represents to the public that the labor or services are to be*
28 *provided by an independently established business. Except when an individual or business entity files*
29 *a Schedule F as part of the personal income tax returns and the individual or business entity performs*
30 *farm labor or services that are reportable on Schedule C, an individual or business entity is considered*
31 *to be engaged in an independently established business when four or more of the following circum-*

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

stances exist:]

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

[(b) Commercial advertising or business cards as is customary in operating similar businesses are purchased for the business, or the individual or business entity has a trade association membership;]

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

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

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

[(f) The individual or business entity assumes 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 relating to the labor or services to be provided.]

(1) As used in this section:

(a) "Individual" means a natural person.

(b) "Person" has the meaning given that term in ORS 174.100.

(c) "Services" means labor or services.

(2) As used in ORS chapters 316, 656, 657, 671 and 701, "independent contractor" means 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) Except as provided in subsection (4) of this section, is 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 obtaining other licenses or certificates necessary to provide the services.

(3) For purposes of subsection (2)(b) of this section, a person is considered to be customarily engaged in an independently established business if any three of the following requirements 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 as shown by factors such as:

(A) The person enters into fixed-price contracts;

(B) The person is required to correct defective work;

(C) The person warrants the services provided; or

(D) The person negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance.

(c) The person provides contracted services for two or more different persons within a

1 **12-month period, or the person routinely engages in business advertising, solicitation or**
 2 **other marketing efforts reasonably calculated to obtain new contracts to provide similar**
 3 **services.**

4 **(d) The person makes a significant investment in the business, through means such as:**

5 **(A) Purchasing tools or equipment necessary to provide the services;**

6 **(B) Paying for the premises or facilities where the services are provided; or**

7 **(C) Paying for licenses, certificates or specialized training required to provide the ser-**
 8 **vices.**

9 **(e) The person has the authority to hire other persons to provide or to assist in providing**
 10 **the services and has the authority to fire those persons.**

11 **(4) Subsection (2)(b) of this section does not apply if the person files a Schedule F as part**
 12 **of an income tax return and the person provides farm labor or farm services that are re-**
 13 **portable on Schedule C of an income tax return.**

14 **(5) For purposes of determining whether an individual provides services as an independ-**
 15 **ent contractor:**

16 **(a) The creation or use of a business entity, such as a corporation or a limited liability**
 17 **company, by an individual for the purpose of providing services does not, by itself, establish**
 18 **that the individual provides services as an independent contractor.**

19 **(b) When the individual provides services through a business entity, such as a corpo-**
 20 **ration or a limited liability company, the provisions in subsection (2), (3) or (4) of this section**
 21 **may be satisfied by the individual or the business entity.**

22 **SECTION 2.** ORS 670.600, as amended by section 5, chapter 704, Oregon Laws 2003, is amended
 23 to read:

24 670.600. *[As used in various provisions of ORS chapters 448, 656, 657, 671 and 701, an individual*
 25 *or business entity that performs labor or services for remuneration shall be considered to perform the*
 26 *labor or services as an “independent contractor” if the standards of this section are met.]*

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

30 *[(2) The individual or business entity providing labor or services is responsible for obtaining all*
 31 *assumed business registrations or professional occupation licenses required by state law or local gov-*
 32 *ernment ordinances for the individual or business entity to conduct the business;]*

33 *[(3) The individual or business entity providing labor or services furnishes the tools or equipment*
 34 *necessary for performance of the contracted labor or services;]*

35 *[(4) The individual or business entity providing labor or services has the authority to hire and fire*
 36 *employees to perform the labor or services;]*

37 *[(5) Payment for the labor or services is made upon completion of the performance of specific*
 38 *portions of the project or is made on the basis of an annual or periodic retainer;]*

39 *[(6) The individual or business entity providing labor or services is licensed under ORS chapter*
 40 *701, if the individual or business entity provides labor or services for which licensure is required;]*

41 *[(7) Federal and state income tax returns in the name of the business or a business Schedule C or*
 42 *farm Schedule F as part of the personal income tax return were filed for the previous year if the in-*
 43 *dividual or business entity performed labor or services as an independent contractor in the previous*
 44 *year; and]*

45 *[(8) The individual or business entity represents to the public that the labor or services are to be*

1 provided by an independently established business. Except when an individual or business entity files
 2 a Schedule F as part of the personal income tax returns and the individual or business entity performs
 3 farm labor or services that are reportable on Schedule C, an individual or business entity is considered
 4 to be engaged in an independently established business when four or more of the following circum-
 5 stances exist:]

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

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

11 [(c) Telephone listing and service are used for the business that is separate from the personal res-
 12 idence 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 year;
 15 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 and
 18 omission insurance or liability insurance relating to the labor or services to be provided.]

19 **(1) As used in this section:**

20 **(a) "Individual" means a natural person.**

21 **(b) "Person" has the meaning given that term in ORS 174.100.**

22 **(c) "Services" means labor or services.**

23 **(2) As used in ORS chapters 316, 656, 657, 671 and 701, "independent contractor" means**
 24 **a person who provides services for remuneration and who, in the provision of the services:**

25 **(a) Is free from direction and control over the means and manner of providing the ser-**
 26 **vices, subject only to the right of the person for whom the services are provided to specify**
 27 **the desired results;**

28 **(b) Except as provided in subsection (4) of this section, is customarily engaged in an in-**
 29 **dependently established business;**

30 **(c) Is licensed under ORS chapter 671 or 701 if the person provides services for which a**
 31 **license is required under ORS chapter 671 or 701; and**

32 **(d) Is responsible for obtaining other licenses or certificates necessary to provide the**
 33 **services.**

34 **(3) For purposes of subsection (2)(b) of this section, a person is considered to be cus-**
 35 **tomarily engaged in an independently established business if any three of the following re-**
 36 **quirements are met:**

37 **(a) The person maintains a business location:**

38 **(A) That is separate from the business or work location of the person for whom the**
 39 **services are provided; or**

40 **(B) That is in a portion of the person's residence and that portion is used primarily for**
 41 **the business.**

42 **(b) The person bears the risk of loss related to the business or the provision of services**
 43 **as shown by factors such as:**

44 **(A) The person enters into fixed-price contracts;**

45 **(B) The person is required to correct defective work;**

1 (C) The person warrants the services provided; or

2 (D) The person negotiates indemnification agreements or purchases liability insurance,
3 performance bonds or errors and omissions insurance.

4 (c) The person provides contracted services for two or more different persons within a
5 12-month period, or the person routinely engages in business advertising, solicitation or
6 other marketing efforts reasonably calculated to obtain new contracts to provide similar
7 services.

8 (d) The person makes a significant investment in the business, through means such as:

9 (A) Purchasing tools or equipment necessary to provide the services;

10 (B) Paying for the premises or facilities where the services are provided; or

11 (C) Paying for licenses, certificates or specialized training required to provide the ser-
12 vices.

13 (e) The person has the authority to hire other persons to provide or to assist in providing
14 the services and has the authority to fire those persons.

15 (4) Subsection (2)(b) of this section does not apply if the person files a Schedule F as part
16 of an income tax return and the person provides farm labor or farm services that are re-
17 portable on Schedule C of an income tax return.

18 (5) For purposes of determining whether an individual provides services as an independ-
19 ent contractor:

20 (a) The creation or use of a business entity, such as a corporation or a limited liability
21 company, by an individual for the purpose of providing services does not, by itself, establish
22 that the individual provides services as an independent contractor.

23 (b) When the individual provides services through a business entity, such as a corpo-
24 ration or a limited liability company, the provisions in subsection (2), (3) or (4) of this section
25 may be satisfied by the individual or the business entity.

26 **SECTION 3.** ORS 670.605 is amended to read:

27 670.605. (1) In accordance with ORS chapter 183, those agencies responsible for the adminis-
28 tration of ORS 671.510 to 671.710 and ORS chapters 316, 656, 657 and 701 jointly shall adopt rules
29 to carry out the provisions of ORS 670.600.

30 (2) **The agencies responsible for the administration of ORS 671.510 to 671.710 and ORS**
31 **chapters 316, 656, 657 and 701 shall cooperate as necessary in their compliance and enforce-**
32 **ment activities to ensure among the agencies the consistent interpretation and application**
33 **of ORS 670.600.**

34 **SECTION 4.** ORS 657.040 is amended to read:

35 657.040. (1) Services performed by an individual for remuneration are deemed to be employment
36 subject to this chapter unless and until it is shown to the satisfaction of the Director of the Em-
37 ployment Department that[:]

38 [(a) *Such*] **the** individual is an independent contractor, as that term is defined in ORS
39 670.600.[: or]

40 [(b) *Such individual has been and will continue to be free from control or direction over the per-*
41 *formance of such services, both under a contract of service and in fact; and]*

42 [(c) *Such individual customarily is engaged in an independently established business of the same*
43 *nature as that involved in the contract of service.*]

44 (2) A finding that an individual performed services for an employing unit and earned less than
45 the minimum amount necessary to qualify for benefits under ORS 657.150 based on earnings from

1 that employing unit [shall] **may** not be considered in determining whether [such] **the** service is em-
2 ployment under subsection (1) of this section.

3 **SECTION 5. ORS 314.013 is repealed.**

4 **SECTION 6.** ORS 310.800 is amended to read:

5 310.800. (1) As used in this section:

6 (a) "Authorized representative" means a senior citizen who is authorized by a tax-exempt entity
7 to perform charitable or public service on behalf of a senior citizen who has entered into a contract
8 under subsection (2) of this section.

9 (b) "Homestead" means an owner-occupied principal residence.

10 (c) "Senior citizen" means a person who is 60 years of age or older.

11 (d) "Tax-exempt entity" means an entity that is exempt from federal income taxes under section
12 501 (c) of the Internal Revenue Code, as amended and in effect on December 31, 2002.

13 (e) "Taxing unit" means any county, city or common or union high school district, community
14 college service district or community college district within this state with authority to impose ad
15 valorem property taxes.

16 (2) A tax-exempt entity may establish a property tax work-off program pursuant to which a
17 senior citizen may contract to perform charitable or public service in consideration of payment of
18 property taxes extended against the homestead of the senior citizen and billed to the senior citizen.
19 For purposes of ORS chapters 316 and 656, and notwithstanding ORS [314.013 or] 670.600 or other
20 law, a senior citizen who enters into a contract under this subsection shall be considered an inde-
21 pendent contractor and not a worker or employee with respect to the services performed pursuant
22 to the contract. Nothing in this section precludes a taxing unit from being considered an employer,
23 for purposes of unemployment compensation under ORS chapter 657, of a senior citizen who enters
24 into a contract under this section.

25 (3) A taxing unit may enter into an agreement with a tax-exempt entity that has established a
26 property tax work-off program. Pursuant to the agreement the taxing unit may accept, as volunteer
27 and public service, the services of a senior citizen who has entered into a contract described in
28 subsection (2) of this section or an authorized representative.

29 (4) A taxing unit may provide funds or make grants to any tax-exempt entity that has established
30 a property tax work-off program for use to carry out the program.

31 **SECTION 7.** ORS 316.162, as amended by section 6, chapter 704, Oregon Laws 2003, is amended
32 to read:

33 316.162. As used in ORS 316.162 to 316.219:

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

37 (2) "Wages" means remuneration for services performed by an employee for an employer, in-
38 cluding the cash value of all remuneration paid in any medium other than cash, except that
39 "wages" does not include remuneration paid:

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

42 (b) To an employee of a common carrier to the extent that 49 U.S.C. 14503 and 40116 prohibit
43 the remuneration from withholding for state income taxes.

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

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

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

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

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

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

9 (i) For services performed by a duly ordained, commissioned or licensed minister of a church in
10 the exercise of the minister's ministry or by a member of a religious order in the exercise of reli-
11 gious duties required by such order, which duties are not commercial in nature.

12 (j) For services [*performed*] **provided** by an independent contractor, **as defined in ORS**
13 **670.600.**

14 (k) To or on behalf of an employee, a beneficiary of an employee or an alternate payee under
15 or to an eligible deferred compensation plan that, at the time of the payment, is a plan described in
16 section 457(b) of the Internal Revenue Code and that is maintained by an eligible employer described
17 in section 457(e)(1)(A) of the Internal Revenue Code.

18 (L) When the remuneration is exempt from taxation under this chapter.

19 (3) "Employer" means:

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

22 (b) An officer or employee of a corporation, or a member or employee of a partnership, who as
23 such officer, employee or member is under a duty to perform the acts required of employers by ORS
24 316.167, 316.182, 316.197, 316.202 and 316.207.

25 **SECTION 8. (1) The amendments to ORS 670.600 by sections 1 and 2 of this 2005 Act and**
26 **the repeal of ORS 314.013 by section 5 of this 2005 Act apply to income tax years and with-**
27 **holding tax reporting periods beginning on or after January 1, 2006.**

28 **(2) The amendments to ORS 657.040 and 670.600 by sections 1, 2 and 4 of this 2005 Act**
29 **apply only to services provided on or after the effective date of this 2005 Act.**

30