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INDEPENDENT CONTRACTORS?

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Background — Over the last decade, businesses have shifted to treating new workers as Independent Contractors. The motivation for doing so has generally been driven by economic considerations. In general, a business will pay an Independent Contractor a slightly higher fee for services in exchange for relief from Workers Compensation Tax, Social Security Tax, Medicare Tax, and the requirement of paying Medical, Dental and/or Retirement benefits. However, state and federal government agencies have actively investigated, regulated, and litigated this issue.

Determining Independent Contractor Status

I. Oregon Law

A. Requirements of Oregon Law in order to achieve Independent Contractor status.

1. Oregon Revised Statute Section 670.600 defines the term “independent contractor” for the purposes of ORS Chapter:

- 1.1. 316 (income withholding)
- 1.2. 656 (worker’s compensation)
- 1.3. 657 (unemployment compensation)
- 1.4. 671 (architect; landscape architect, contractor businesses)
- 1.5. 701 (construction contractors).

B. Eight (8) specific conditions must be met in order for a party to be considered an independent contractor under Oregon law.

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

2. The individual or business entity providing labor or services is responsible for obtaining all assumed business registrations or professional occupation licenses required by state law or local government ordinances for the individual or business entity to conduct the business;

3. The individual or business entity providing labor or services furnishes the tools or equipment necessary for performance of the contracted labor or services;
4. The individual or business entity providing labor or services has the authority to hire and fire employees to perform the labor or services;
5. Payment for the labor or services is made upon completion of the performance of specific portions of the project or is made on the basis of an annual or periodic retainer.
6. The individual or business entity providing labor or services is licensed under ORS chapter 701, if the individual or business entity provides labor or services for which licensure is required;
7. Federal and state income tax returns in the name of the business or a business Schedule C or farm Schedule F as part of the personal income tax return were filed for the previous year if the individual or business entity performed labor or services as an independent contractor in the previous year; and
8. The individual or business entity represents to the public that the labor or services are to be provided by an independently established business. Except when an individual or business entity files a Schedule F as part of the personal income tax returns and the individual or business entity performs farm labor or services that are reportable on Schedule C, an individual or business entity is considered to be engaged in an independently established business when four or more of the following circumstances exist:
 - 8.1. 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;
 - 8.2. 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;
 - 8.3. 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;
 - 8.4. Labor or services are performed only pursuant to written contracts;
 - 8.4.1. Labor or services are performed for two or more different persons within a period of one year; or
 - 8.4.2. 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.

C. Activity in the Courts

1. Centers around worker's compensation insurance.
 - 1.1. Worker's compensation insurer audits employment records of a policy holder.
 - 1.2. Insurer may take the position that persons employed as "independent contractors" are actually employees; therefore, the employer owes SAIF additional premiums.
 - 1.3. The courts have clearly set forth the rule that all eight (8) parts of the test must be met in order for the party to be an independent contractor. Any contract with an independent contractor must address these eight specific conditions.

II. Federal Taxation

A. The IRS employs a twenty (20) factor test, which is substantially similar to the eight (8) part test that is set out in the Oregon statute. Revenue Ruling 87-41 sets out these 20 factors as follows:

1. The right of one person to tell a worker when, where, and how he or she is to work;
2. One person training the worker;
3. Integration of the worker's services into the business' general operations;
4. The requirement that services be rendered personally;
5. Direction over hiring, supervising, and paying assistants;
6. A worker's continuing relationship with one business;
7. Set hours which the worker must work;
8. The requirement that the worker devote full-time attention to one business;
9. Performing work on a business' premises;
10. Control over the order or sequence of work performed;
11. The requirement that the worker submit reports to the person for whom work is performed;
12. Payment by hour, week, or month;
13. Compensation for business and/or traveling expenses;
14. Provision of tools and materials;
15. The worker's investment in the facilities in which he works;
16. A worker's direct interest in the profitability of the work accomplished;
17. Working for more than one firm at the same time;
18. Making services available to the general public;
19. A person's right to discharge the worker; and,
20. A person's right to terminate the work relationship.

III. Other Laws.

The following laws also deal with "Independent Contractor" matters:

- A. The Fair Labor Standards Act;
- B. The National Labor Relations act (Labor Unions);
- C. ERISA (retirement plans, etc).

IV. Planning.

Although, there are numerous systems regulating Independent Contractors, in Oregon, there really is very little leeway -- a business MUST comply with the eight part test set forth in the statute. This requires a well drafted contract that addresses all of the points set forth in the statute. In addition, the lawyer drafting the contract can help the business avoid pitfalls that may arise during the operations of the Independent Contractor relationship.