# Invited Testimony Related to HB 2498
# Before the House Committee on Rules
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Chairman Holvey, members of the Committee, thank you for the opportunity to testify about House Bill 2498. My name is Elizabeth Inayoshi, I am an attorney from Hillsboro, Oregon. I represent employees in employment matters, and I assist small business owners set up their businesses, including advising them on how to set themselves up to be good employers. I urge you to support HB2498 as major step forward in clarifying which workers can be validly classified as independent contractors, which will help reverse an alarming trend of more and more employees being misclassified as independent contractors and wrongly deprived of the statutory protections afforded to employees.

**MULTIPLE STANDARDS ARE CONFUSING**

Different agencies use different tests to determine if a worker is an employee or an independent contractor for the purpose of receiving benefits.

- A Common Law test - used by the IRS, wending its way through 20+ factors to determine if a worker is an independent contractor
- The Economic Realities Test - used by the US Department of Labor, the Oregon Bureau of Labor and Industries Wage and Hour Division; an equally lengthy set of factors meant to determine whether in reality a worker is dependent on the employer for his/her livelihood and therefore should be considered an employee for the purpose of Oregon's wage and hour laws and the Federal Fair Labor Standards Act
- The Right-of-Control test - used by the Oregon Bureau of labor and Industries Civil Rights and Workers Compensation Divisions, which uses a swath of factors to determine whether the employer has the ultimate right to control the worker, in which case the worker would be an employee, not an independent contractor
- The Nature of the Work test - used by The Oregon Workers Compensation division, looks at a shorter set of factors to determine whether the worker is an employee because the work is a regular part of the employer's business, continuous, unskilled, and unaffected by the employer's profit or loss.
- The EEOC uses a 16-factor test to determine whether a worker is an employee and therefore protected under the Equal Employment Opportunity laws.
- The ABC test – a variation of which is used by about 2/3 of the states in different situations - uses 3 fairly simple factors to determine whether a worker is an independent contractor.

Even though so many of these tests have myriad factors, virtually none of them – except the ABC test -- require that all the factors be met, or that even a core set of the factors be met, or that a given number of factors be met. To a large extent, whether an agency classifies a worker as an independent contractor depends largely on the discretion of the agency or a judge who says that the factors the employer has met are sufficient to classify a worker as an independent contractor. Is it any wonder that even ethical employers who want to be compliant with the law may have a tough time figuring out if the person they expect to hire as an independent contractor is, under the law, an independent contractor? Is it any wonder that so many workers can find themselves illegally classified as independent contractors by unscrupulous employers?

Passage of HB2498 moves Oregon's standard to a close variation of the ABC standard. By itself, it will not cure the entire headache of multiple and conflicting standards, but it can move Oregon closer to a single, simple standard.

**THE ABC STANDARD IS SIMPLER, MORE STRAIGHT-FORWARD, AND MORE ENCOMPASSING THAN OTHER STANDARDS.**

The ABC standard is simple: A worker is an independent contractor if all three of the following factors are met:

A. The worker is free from control and direction over performance of the work, both under the contract and in *fact*;
B. The work provided is outside the usual course of business for which the work is performed; and
C. The worker is customarily engaged in an independently established trade, occupation, or business

The National Federation of Independent Businesses, an organization for the benefit of small businesses, in its NFIB Guide to Independent Contractors asserts that 2/3 of states use some variation of the A-B-C test to determine if a worker in an independent contractor (https://www.nfib.com/Portals/0/PDF/AllUsers/legal/guides/independent-contractors-guide-nfib.pdf ). Why have so many states embraced some version of this test? Because it provides clarity. Thrashing through 20 factors, trying to determine if the 5, 7, or 10 factors that have been met are sufficient to classify a worker in a foolproof -- and more importantly, legal - way as an independent contract is a guessing game. The three factors in the ABC test cut to the heart of the matter:

- does the worker actually control the manner and means of completing the work?
- does worker produce products or services that his or her clients don't provide to their own customers?
- does the worker actually have an independent business that serves multiple clients, not just a single employer?

If the answer is "yes" to all of these, then an employer can have some confidence that it has legally classified a worker as an independent contractor. That's not to say that employers and workers will never dispute whether the worker meets a given factor -- but fewer disputes should arise.

**THE CURRENT OREGON INDEPENDENT CONTRACTOR STATUTE IS SERIOUSLY WEAKENED BY THE LACK OF A FACTOR LOOKING AT THE COURSE OF THE EMPLOYER'S BUSINESS, LEAVING MANY WORKERS WITHOUT A SAFETY NET**

Oregon's existing independent contractor statute (ORS 670.600) includes 2 of the ABC factors, adds some licensing responsibility, and skips the factor dealing with the “usual course of the employer’s business”. The statute goes into deep detail -- 5 more subfactors -- to determine if a worker meets the factor of having an independent business.

Ignoring the “usual course of the employer’s business” factor gives rise to the following kinds of anomalies:

- Companies that develop custom software for other companies, but all of their programmers are "independent contractors"
- Transportation network companies who classify all their drivers as "independent contractors"
- Construction contractors who hire many seasonal workers as "independent contractors"

- Dance companies whose sole purpose is to provide dance performances, yet all of their dancers are "independent contractors"
- Musicians hired by orchestras for an entire season as "independent contractors"
- Farms that hire seasonal laborers as "independent contractors" to harvest their crops

Many employers routinely attempt to classify temporary, seasonal, and part-time employees as independent contractors simply because these workers do not work for them 40 hours a week, 52 weeks a year, even though their businesses would not exist without the work that these employees do. But clearly, many employers also attempt to evade the cost of having employees by misclassifying even full-time, permanent workers as independent contractors. Misclassification denies workers the guarantees of minimum wages, overtime, unemployment benefits, worker's compensation, as well as the protection of OSHA rules and discrimination laws. Underpaid workers have to pay both the employer and employee portions of employment taxes -- and the government often sees non-payment of those employment taxes. Compliant employers find themselves at a competitive disadvantage in costs. The only winners in this situation are non-compliant employers.

**ADDING THE "USUAL COURSE OF BUSINESS" FACTOR TO OREGON'S INDEPENDENT CONTRACTOR STATUTE MOVES OREGON CLOSER TO A SIMPLE AND COHERENT STANDARD FOR INDEPENDENT CONTRACTORS**

HB2498 adds Section 1 (e) to ORS 670.600: "Does not provide services that are within the usual course of the other person's business". This adds the critical third leg of the ABC test to the statute. The statute applies this definition to ORS chapters 656 (Workers Compensation), 657 (Unemployment Insurance), and 701 (Construction Contractors), amongst others. Adding that critical 3rd factor, that the work cannot be in the usual course of the employer's business, would immediately bring many misclassified workers under the protection of the employment statutes. For these reasons, I urge you to pass HB2498.