



MEMORANDUM

February 25, 2021

To: Management-Labor Advisory Committee

From: Sally Coen, Administrator, Workers' Compensation Division

Subject: LC 3492/HB 3188 – definition of “worker” and “employer”

During the committee’s Feb. 19, 2021 meeting, members asked about the kinds of people who would be newly entitled to workers’ compensation coverage under LC 3492 (now HB 3188.)

The division does not believe the impact of HB 3188 would fall in particular professions or occupations. Instead, a limited number of individuals working in a variety of fields would become newly entitled to coverage. In most cases, whether a person would be affected would be based on their degree of independence from their clients or employers. As under current law, this analysis is done on a case-by-case basis.

Oregon’s workers’ compensation law provides that all ‘workers’ are entitled to workers’ compensation coverage, unless they fall under a specific exemption. Under current law, a person who performs services for remuneration qualifies as a worker if they are subject to the direction and control of an employer.

Under HB 3188, a person who performs services for remuneration would qualify as a worker unless they instead met the definition of an independent contractor. To qualify as an independent contractor, a person must meet three requirements:

- The person must be free from direction and control over the means and manner of providing the services.
- The person must satisfy any three of five criteria in the ‘independently established business’ test (discussed in more detail below.)
- If the work being performed requires a license, the person must have that license or be responsible for obtaining it.

February 25, 2021

Page 2

The courts have found that ‘direction and control’ has the same meaning in both the definition of ‘worker’ under ORS chapter 656 and the definition of ‘independent contractor’ under ORS 670.600¹. As a result, a person who works for pay and is subject to direction and control would be a worker under both current law and HB 3188. A person would newly qualify as a worker under HB 3188 if they were free from direction and control, but did not qualify as an independent contractor.

If a person is free from direction and control, the most likely reason why they would not qualify as an independent contractor is that they do not satisfy at least three of the criteria in the ‘independently established business’ subtest. These criteria are:

- (a) Having a business location, which can include a home office,
- (b) Bearing a risk of loss,
- (c) Having or soliciting multiple clients,
- (d) Making a significant investment in the business, and
- (e) Having the authority to hire and fire helpers.

Whether a person satisfies a majority of the criteria will not necessarily depend on the kind of work they do. For example, within the same field, some individuals may have multiple clients while others work for a single client on a long-term basis. Contract terms on issues such as work defects and subcontracting, which affect criteria (b) and (e), may also vary from one situation to the next.

Members should also be aware that even if a person newly qualifies as a worker, they may not be entitled to workers’ compensation coverage because of exemptions under current law. For example, taxi drivers, truck drivers, and sole proprietors with construction contracting licenses are all exempt under certain circumstances.

For these reasons, the division does not believe the impact of HB 3188 would be limited to certain occupations or industries. Instead, the division believes the bill would have a more limited impact across a variety of fields.

¹ In both definitions, the determination of whether a person is subject to direction and control is based according to whether the alleged employer has a ‘right to control’ their services, which is determined by consideration of the following factors:

- (1) whether the employer retains the right to control the details of the method of performance
- (2) the extent of the employer’s control over work schedules
- (3) whether the employer has power to discharge the person without liability for breach of contract
- (4) whether the employer furnishes equipment, and
- (5) payment of wages.