

Independent Contractors

What is an Independent Contractor?

An independent contractor (IC) is a worker who provides services to an organization but is not considered an employee and therefore, not on payroll.

A worker who provides services for remuneration generally will be considered an employee, unless that worker meets the criteria required of an “independent contractor.”

How Do You Determine if a Worker is an Independent Contractor?

In Oregon, there are various tests for determining whether a worker is an IC or not:

- ❖ **Bureau of Labor and Industries (BOLI):** Minimum wage and overtime regulations
- ❖ **BOLI Civil Rights Division:** Employment discrimination
- ❖ **Employment Department:** Unemployment insurance and payroll taxes
- ❖ **Department of Revenue:** Income tax withholding and reporting
- ❖ **Workers' Compensation Division:** Workers' compensation
- ❖ **Construction Contractors Board:** IC license eligibility for construction contractors
- ❖ **Landscape Contractors Board:** IC license eligible for landscape contractors

Federally, there are two main tests:

- ❖ **US Department of Labor (DOL) Test:** FLSA Compliance
- ❖ **IRS Test:** Income taxes, Social Security and Medicare taxes, and Unemployment tax on wages paid. Note: This guide does not focus on the IRS Test. However, you can access it [here](#).

Oregon's Bureau of Labor and Industries Economic Reality

For wage and hour determinations, BOLI uses DOL's “economic reality” test¹. The Economic Reality test uses a six-factor, totality-of-the-circumstances analysis to determine whether a worker is an independent contractor or employee. The six-factors are as follows:

1. The extent to which work performed by the worker is an integral part of the employer's business.

- ❖ BOLI states “whereas the work of an independent contractor is unlikely to be integral to an employer's business, an employee performs services which are integral to the operation of an employer's business.”

¹ [BOLI Economic Reality IC Test](#)
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- ❖ BOLI gives the following example:

“For a construction company that frames residential homes, carpenters are integral to the employer’s business because the company is in business to frame homes, and carpentry is an integral part of providing that service.

In contrast, the same construction company may contract with a software developer to create software that, among other things, assists the company in tracking its bids, scheduling projects and crews, and tracking material orders. The software developer is performing work that is not integral to the construction company’s business, which is indicative of an independent contractor.”

2. The degree of control exercised by the alleged employer.

- ❖ BOLI states that “the nature and degree of an employer’s control is analyzed to determine whether the worker is economically dependent on the employer or, conversely, operates his or her own independent business. In order to be seen as a person operating [their] own business, a worker must have control over meaningful aspects of the work.
- ❖ BOLI gives the following example:

“A registered nurse who provides skilled nursing care in nursing homes is listed with Beta Nurse Registry in order to be matched with clients. The registry interviewed the nurse prior to [them] joining the registry, and also required the nurse to undergo a multi-day training presented by Beta. Beta sends the nurse a listing each week with potential clients and requires the nurse to fill out a form with Beta prior to contacting any clients. Beta also requires that the nurse adhere to a certain wage range and the nurse cannot provide care during any weekend hours. The nurse must inform Beta if [they are] hired by a client and must contact Beta if [they] will miss scheduled work with any client. In this scenario, the degree of control exercised by the registry is indicative of an employment relationship.

Another registered nurse who provides skilled nursing care in nursing homes is listed with Jones Nurse Registry in order to be matched with clients. The registry sends the nurse a listing each week with potential clients. The nurse is free to call as many or as few potential clients as [they] wish and to work for as many or as few as [they] wish; the nurse also negotiates [their] own wage rate and schedule with the client. In this scenario, the degree of control exercised by the registry is not indicative of an employment relationship.”

3. The permanency of the relationship.

- ❖ BOLI states that “an independent contractor generally provides services for a specific, defined period of time, whereas an employee is generally hired on a permanent or indefinite basis.”

- ❖ BOLI gives the following example:

“An editor has worked for an established publishing house for several years. [Their] edits are completed in accordance with the publishing house’s specifications, using its software. [They] only edit books provided by the publishing house. This scenario indicates a permanence to the relationship between the editor and the publishing house that is indicative of an employment relationship.

Another editor has worked intermittently with fifteen different publishing houses over the past several years. [They] market [their] services to numerous publishing houses. [They] negotiate rates for each editing job and turns down work for any reason, including because [they are] too busy with other editing jobs. This lack of permanence with one publishing house is indicative of an independent contractor relationship.”

4. The skill and initiative required to perform the work.

- ❖ BOLI states “a worker’s business skills, judgment and initiative, rather than [their] technical skills, indicate whether a worker is economically independent from the business. If the work requires technical skills but is not reliant on such business skills to perform the work, then the worker is likely an employee.”

- ❖ BOLI gives the following example:

“A highly skilled carpenter provides carpentry services for a construction firm; however, such skills are not exercised in an independent manner. For example, the carpenter does not make any independent judgments at the job site beyond the work that [they are] doing for that job; [they] do not determine the sequence of work, order additional materials, or think about bidding the next job, but rather is told what work to perform where. In this scenario, the carpenter, although highly-skilled technically, is not demonstrating the skill and initiative of an independent contractor (such as managerial and business skills). [They are] simply providing [their] skilled labor.

In contrast, a highly skilled carpenter who provides a specialized service for a variety of area construction companies, for example, custom, handcrafted cabinets that are made-to-order, may be demonstrating the skill and initiative of an independent contractor if the carpenter markets [their] services, determines when to order materials and the quantity of materials to order, and determines which orders to fill.”

5. The degree to which the workers’ opportunity for profit or loss is determined by the alleged employer.

- ❖ BOLI states “a worker with [their] own business may experience either a profit or loss, often dependent upon his or her managerial skills to administer the business. An employee’s ability to earn more is dependent upon [their] ability to work and the employer making work hours available, not the managerial skills of the worker.”

- ❖ BOLI gives the following example:

“A worker provides cleaning services for corporate clients. The worker performs assignments only as determined by a cleaning company; [they] do not independently schedule assignments, solicit additional work from other clients, advertise [their] services, or endeavor to reduce costs. The worker regularly agrees to work additional hours at any time in order to earn more. In this scenario, the worker does not exercise managerial skill that affects [their] profit or loss. Rather, [their] earnings may fluctuate based on the work available and [their] willingness to work more. This lack of managerial skill is indicative of an employment relationship between the worker and the cleaning company.

A worker provides cleaning services for corporate clients, produces advertising, negotiates contracts, decides which jobs to perform and when to perform them, decides to hire helpers to assist with the work, and recruits new clients. This worker exercises managerial skill that affects [their] opportunity for profit and loss, which is indicative of an independent contractor.”

6. The extent of the relative investments of the worker and the alleged employer.

- ❖ BOLI states “The nature and extent of the relative investments from the employer and the worker help determine whether the worker has an independent business. An independent contractor usually makes investments that support the business beyond any one particular job. Investments may enable the business to expand, change its costs or otherwise change the manner and extent of how it provides goods or services. If the worker’s investment is relatively minor compared to the employers, then the worker may be economically dependent on the employer.”
- ❖ BOLI gives the following example:

“A worker providing cleaning services for a cleaning company is issued a Form 1099-MISC each year and signs a contract stating that [they are] an independent contractor. The company provides insurance, a vehicle to use, and all equipment and supplies for the worker. The company invests in advertising and finding clients. The worker occasionally brings [their] own preferred cleaning supplies to certain jobs. In this scenario, the relative investment of the worker as compared to the employer’s investment is indicative of an employment relationship between the worker and the cleaning company. The worker’s investment in cleaning supplies does little to further a business beyond that particular job.

In contrast, a worker providing cleaning services receives referrals and sometimes works for a local cleaning company. The worker invests in a vehicle that is not suitable for personal use and uses it to travel to various worksites. The worker rent [their] own space to store the vehicle and materials. The worker also advertises and markets [their] services and hires a helper for larger jobs. [They] regularly (as opposed to on a job-by-job basis) purchases material and equipment to provide cleaning services and brings [their] own equipment (vacuum, mop, broom, etc.) and cleaning supplies to each worksite. [Their] level of investments is similar to the

investments of the local cleaning company for whom [they] sometimes works. These types of investments may be indicative of an independent contractor.”

BOLI notes that:

- ❖ “No single factor in the economic realities test is determinative for establishing that a worker is an independent contractor or an employee. Rather, the factors are considered in their totality and in relation to one another with the objective of determining, on the whole, whether a worker is economically dependent on a business to which services are rendered.
- ❖ The economic realities of a worker’s relationship with an employer or business and not a label given to that relationship determine whether the worker is providing services as an employee or an independent contractor.
- ❖ An agreement between a worker and an employer that labels the worker as an independent contractor is not determinative when evaluating the worker’s status.”

Oregon’s Bureau of Labor and Industries

To determine whether an employer is liable for discrimination against a worker under employment law, the “right-to-control test” is applied. Four factors are weighed to determine whether an employer has the “right to control” the work of an individual:

1. Direct evidence of the right to, or the exercise of, control.

- a. BOLI notes that the following may help illustrate this factor:
 - i. Who is responsible for quality control?
 - ii. Does the worker have other customers?
 - iii. Who determined the rate of pay? Was it negotiated?
 - iv. Who determines how the work gets performed?

2. The method of payment.

- a. BOLI notes that the following may help illustrate this factor:
 - i. Do clients pay the individual worker directly or do they pay the business employing that worker?
 - ii. Does the worker set the rate of payment or does the business employing that worker set the rate?

3. The furnishing of equipment.

- a. BOLI notes that the following may help illustrate this factor:
 - i. Does the worker supply their own tools?
 - ii. Does the worker purchase materials necessary to do the job?
 - iii. Has the worker invested in bonds/insurance/advertising?



4. The right to fire.

- a. BOLI notes that the following may help illustrate the right to control:
 - i. How long has the job lasted? Is an ending date contemplated (upon completion of the project)?
 - ii. Is the contract (if any) subject to periodic review or automatic renewal?
 - iii. Does the contract (if any) address termination of employment or provide consequences for either party terminating the relationship?

Oregon's Employment Department and Department of Revenue Independent Contractor Test

ORS 670.600² defines independent contractor for agencies including Oregon's Employment Department regarding unemployment insurance and payroll taxes and Oregon's Department of Revenue regarding income tax withholding and reporting. This test is also used by Oregon's Workers' Compensation Division in order to determine whether an individual is subject to workers' compensation insurance. Moreover, Oregon's Construction Contractors Board and Oregon's Landscape Contractors Board use this test to determine if an individual qualifies for a contractor's license under the applicable board.

ORS 670.600 generally establishes three requirements for determining independent contractors. An independent contractor must:

1. Be customarily engaged in an independently established business.

A person is considered to be customarily engaged in an independently established business if any three of the five following requirements are met:

1. *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.
2. *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.
3. *The person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.*

² [ORS 670.600](#)
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4. *The person makes a significant investment in the business, through means such as:*
 - a. Purchasing tools or equipment necessary to provide the services;
 - b. Paying for the premises or facilities where the services are provided; **or**
 - c. Paying for licenses, certificates or specialized training required to provide the services.
5. *The person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.*

2. Be free from direction and control over the means and manner of providing services to others.

For purposes of determining whether an individual provides services as an independent contractor, consider the following:

1. The creation or use of a business entity, such as a corporation or a limited liability company, by an individual for the purpose of providing services does not, by itself, establish that the individual provides services as an independent contractor.
2. When the individual provides services through a business entity, such as a corporation or a limited liability company, the above factors may be satisfied by the individual or the business entity.

3. If required, is responsible for obtaining other licenses or certificates necessary to provide the services.

For example, the person must satisfy certain licensing requirements³, including having a construction or landscape contractor's license if they are doing work that requires that license.

DOL Independent Contractor Test

The DOL IC Test⁴ uses a six-factor, totality-of-the-circumstances analysis to determine whether a worker is an independent contractor or employee. The six-factors are as follows:

1. Opportunity for profit or loss depending on managerial skill;
2. Investments by the worker and the potential employer;
3. Degree of permanence of the work relationship;
4. Nature and degree of control;
5. Extent to which the work performed is an integral part of the potential employer's business; and,
6. Skill and initiative.

³ [OAR 436-170-0300](#)

⁴ [DOL IC Test](#)



1. Opportunity for Profit or Loss Depending on Managerial Skill

This factor considers whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work. The DOL states that the following factors, non-exclusive, can be relevant:

- a. Whether the worker determines or can meaningfully negotiate the charge or pay for the work provided;
- b. Whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed;
- c. Whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and
- d. Whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.

❖ The DOL gives the following examples:

“A worker for a landscaping company performs assignments only as decided by the company for its corporate clients. The worker does not independently choose assignments, ask for additional work from other clients, advertise the landscaping services, or try to reduce costs. The worker regularly agrees to work additional hours to earn more money. In this example, the worker does not exercise managerial skill that affects their profit or loss. Rather, their earnings may change based on the work available and their willingness to work more. Because of this lack of managerial skill affecting their opportunity for profit or loss, these facts indicate employee status under the opportunity for profit or loss factor.

In contrast, a worker provides landscaping services directly to corporate clients. The worker produces their own advertising, negotiates contracts, decides which jobs to perform and when to perform them, and decides when and whether to hire helpers to assist with the work. This worker exercises managerial skill that affects their opportunity for profit or loss. These facts indicate independent contractor status under the opportunity for profit or loss factor.”

2. Investments by the Worker and the Potential Employer

This factor considers whether any investments by a worker are capital or entrepreneurial in nature.

- ❖ The DOL states investments that are capital or entrepreneurial in nature and thus indicative of independent contractor status are those that “generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.”
- ❖ The DOL states that the following are not considered investments that are capital or entrepreneurial in nature: costs for tools and equipment necessary for the job, labor and costs unilaterally imposed by an employer on a worker.

- ❖ The DOL gives the following examples:

“A graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred drafting tools for certain jobs. In this scenario, the worker's relatively minor investment in supplies is not capital in nature and does little to further a business beyond completing specific jobs. These facts indicate employee status under the investment factor.

A graphic designer occasionally completes specialty design projects for the same commercial design firm. The graphic designer purchases their own design software, computer, drafting tools, and rents their own space. The graphic designer also spends money to market their services. These types of investments support an independent business and are capital in nature (e.g., they allow the worker to do more work and find new clients). These facts indicate independent contractor status under the investment factor.”

3. Degree of Permanence of the Work Relationship

This factor considers the degree of permanence of the work relationship.

- ❖ The DOL states that “when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers,” the worker would weigh in favor of being an employee.
- ❖ When the work relationship is “definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities,” independent contractor status is suggested.
- ❖ The DOL gives the following examples:

“A cook has prepared meals for an entertainment venue continuously for several years. The cook prepares meals as decided by the venue, depending on the size and specifics of the event. The cook only prepares food for the entertainment venue, which has regularly scheduled events each week. The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity as the cook does not cook for other venues. These facts indicate employee status under the permanence factor.

A cook has prepared specialty meals occasionally for an entertainment venue over the past three years for certain events. The cook markets their meal preparation services to multiple venues and private individuals and turns down work from the entertainment venue for any reason, including because the cook is too busy with other meal preparation jobs. The cook has a sporadic or project-based nonexclusive relationship with the entertainment venue. These facts indicate independent contractor status under the permanence factor.”

4. Nature and degree of control

This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Factors the DOL considers are whether the potential employer:

- a. Sets the worker's schedule;
 - b. Supervises performance;
 - c. Uses technological means to supervise work performance (via a device or electronically);
 - d. Reserves the right to supervise/discipline workers; or
 - e. Limits the workers ability to work for others.
- ❖ The DOL also considers whether the potential employer controls economic aspects of the working relationship, including controlling prices or rates for services and the marketing of the services or products provided by the worker. The DOL recognized that certain actions taken by a potential employer to ensure compliance with specific laws and regulations do not indicate employer control.
- ❖ The DOL gives the following examples:

"A registered nurse provides nursing care for Alpha House, a nursing home. The nursing home sets the work schedule with input from staff regarding their preferences and determines the staff assignments. Alpha House's policies prohibit nurses from working for other nursing homes while employed with Alpha House to protect its residents. In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision. While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a nurse can work and whether a nurse can work for another nursing home. These facts indicate employee status under the control factor.

Another registered nurse provides specialty movement therapy to residents at Beta House. The nurse maintains a website and was contacted by Beta House to assist its residents. The nurse provides the movement therapy for residents on a schedule agreed upon between the nurse and the resident, without direction or supervision from Beta House, and sets the price for services on the website. In addition, the nurse provides therapy sessions to residents at Beta House as well as other nursing homes in the community at the same time. These facts—that the nurse markets their specialized services to obtain work for multiple clients, is not supervised by Beta House, sets their own prices, and has the flexibility to select a work schedule—indicate independent contractor status under the control factor."

5. Extent to Which the Work Performed is an Integral Part of the Potential Employer's Business

This factor measures whether the work performed is an integral part of the employer's business.

- ❖ The DOL states that most courts adopt a common-sense approach to determining whether the work or service performed by a worker is an integral part of a potential employer's business. For example,

if the potential employer could not function without the service performed by the workers, then the service they provide is integral.

- ❖ The DOL gives the following example:

“A large farm grows tomatoes that it sells to distributors. The farm pays workers to pick the tomatoes during the harvest season. Because a necessary part of a tomato farm is picking the tomatoes, the tomato pickers are integral to the company's business. These facts indicate employee status under the integral factor.

Alternatively, the same farm pays an accountant to provide non-payroll accounting support, including filing its annual tax return. This accounting support is not critical, necessary, or central to the principal business of the farm (farming tomatoes), thus the accountant's work is not integral to the business. Therefore, these facts indicate independent contractor status under the integral factor.”

6. Skill and Initiative

This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to entrepreneurial initiative.

- ❖ The DOL states that if a worker uses specialized skills, this weighs toward independent contractor status.
- ❖ If a worker depends on potential employer training or does not use specialized skills, this weighs toward employee status.
- ❖ Where the worker brings specialized skills to the work relationship, this itself does not indicate independent contractor status because both employees and independent contractors may be skilled workers.
- ❖ The DOL gives the following examples:

“A highly skilled welder provides welding services for a construction firm. The welder does not make any independent decisions at the job site beyond what it takes to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding for the next job, or use their welding skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. These facts indicate employee status under the skill and initiative factor.

A highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies. The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies. The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative. These facts indicate independent contractor status under the skill and initiative factor.”

- ❖ **DOL further states that additional factors aside from 1- 6 may be considered if they assist in assessing whether the worker is in business for themselves or is economically dependent on the employer for work.**

What is the Difference Between DOL's Rules and Oregon's Rules on Independent Contractors?

While courts will likely look at DOL's final rule for guidance to determine independent contractors under FLSA, this rule does not have any impact on state laws.

The DOL stated that the final rule only revises the Department's interpretation under the FLSA and that it has no effect on other laws.

Specifically, "FLSA does not preempt any other laws that protect workers, so businesses must comply with all federal, state, and local laws that apply and ensure that they are meeting whichever standard provides workers with the greatest protection."

Why is Classification of IC's Important?

Independent contractors are not considered employees and are therefore, not subject to employment laws, rules or protections provided to actual employees.

If an employee is wrongfully classified as an independent contractor, that individual loses their employment benefits and protections including:

- ❖ Minimum wage and overtime protections
- ❖ Unemployment insurance benefits
- ❖ Income tax withholdings
- ❖ Workers' compensation coverage
- ❖ Protected Leave
- ❖ Benefits offered to properly classified employees such as vacation leave and retirement

What are the Risks of Misclassification?

Often in cases of misclassification, state agencies will assess back taxes, penalties, and interest in cases where employers have misclassified an employee as an IC.

Additionally, employees who were not properly paid minimum wage and overtime may also seek back wages, civil penalty wages and interest through the court system and/or BOLI.

If the IRS finds out that an employer willfully misclassified to avoid taxes, it is considered a felony.

What Should I do if I Misclassify an Employee as an Independent Contractor?

If you misclassified an independent contractor, it is recommended that you move the individual to employee classification immediately and contact an employment law attorney as soon as possible.

Various Oregon agencies will likely need to be contacted, as each agency handles misclassification differently. The following agencies are generally:

- ❖ **The IRS** – in some circumstances, employers who misclassified may qualify for relief from employment tax liability.
- ❖ **The Oregon Department of Revenue** – regarding personal income taxes, transit taxes, and withholdings.
- ❖ **The Oregon Employment Department** – regarding employment taxes.
- ❖ **Oregon's Workers' Compensation Division** – regarding workers' compensation coverage.

