

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



**Independent Contractors
Oregon Administrative Rules
Chapter 436, Division 170**

Effective February 1, 2007

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**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION**

In the Matter of the Adoption of Oregon Administrative)	
Rules (OAR):)	ORDER OF
	Order No.	ADOPTION
436-170, Independent Contractors	07-050)

The Director of the Department of Consumer and Business Services, under the general rulemaking authority in ORS 656.726(4), and in accordance with the procedure provided by ORS 183.335, adopts OAR chapter 436, division 170.

On July 14, 2006 and again on October 13, 2006, the Workers' Compensation Division filed with the Secretary of State a *Notice of Proposed Rulemaking/Hearing* and *Statement of Need and Fiscal Impact*. The division mailed copies of the *Notice* and *Statement* to interested persons and legislators in accordance with ORS 183.335 and OAR 436-001-0009, and posted copies to its Web site. The Secretary of State included notice of the public hearings in its August 2006 and November 2006 *Oregon Bulletins*.

On September 15, 2006, September 22, 2006, and November 15, 2006, public hearings were held as announced. In addition, the record was held open for written testimony through November 1, 2006 (for the July-filed rules) and through November 15, 2006 (for the October-filed rules). A summary of the public testimony is on file and available for public inspection upon request during regular business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, in the Administrator's Office, Workers' Compensation Division, Labor & Industries Building, 350 Winter Street NE, PO Box 14480, Salem, Oregon 97309-0405, (503) 947-7717.

RULE SUMMARY

These rules have been adopted to:

- Provide guidance to agencies referenced in ORS 670.600 as to how the statute will be implemented;
- Clarify the meaning of terms used in ORS 670.600; and
- Provide guidance to interested persons as to how the agencies referenced in ORS 670.600 will apply the provisions of that statute.

FINDINGS

Having reviewed and considered the record and being fully informed, I make the following findings:

- a) The applicable rulemaking procedures have been followed.
- b) These rules are within the director's authority.
- c) The rules being adopted are a reasonable administrative interpretation of the statutes and are required to carry out statutory responsibilities.

**Order of Adoption
OAR chapter 436, division 170**

IT IS THEREFORE ORDERED THAT

- 1) OAR chapter 436, division 170, as set forth in Exhibit "A", is attached, incorporated by reference, and **adopted on this 30th day of January 2007, to be effective February 1, 2007.**
- 2) A certified copy of the adopted rules will be filed with the Secretary of State.
- 3) A copy of the adopted rules with revision marks will be filed with the Legislative Counsel under ORS 183.715 within ten days after filing with the Secretary of State.

DATED this 30th day of January 2007.

DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES

/s/ John L. Shilts

John L. Shilts, Administrator
Workers' Compensation Division

Under the Americans with Disabilities Act guidelines, alternative format copies of these rules will be provided to qualified individuals upon request.

If you have questions about these rules or need them in an alternate format, contact the Workers' Compensation Division at (503) 947-7810.

Distribution: WCD-ID, NM, S0, S2, S3, S6

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
INDEPENDENT CONTRACTORS**

**EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 170**

436-170-0002 Purpose of Rule

The Landscape Contractors Board, Department of Revenue, Department of Consumer and Business Services, Employment Department, and Construction Contractors Board must adopt rules together to carry out ORS 670.600. ORS 670.600 defines "independent contractor" for purposes of the programs administered by these agencies. This rule is intended to ensure that all five agencies apply and interpret ORS 670.600 in a consistent manner; to clarify the meaning of terms used in ORS 670.600; and, to the extent possible, to enable interested persons to understand how all five agencies will apply ORS 670.600.

Stat. Auth: ORS 656.726(4); 670.605; Stats. Implemented: ORS 316.162; 670.600
Adopted 1/30/07 as WCD Admin. Order 07-050, eff. 2/1/07

436-170-0100 Statutory Context

(1) ORS 670.600 generally establishes three requirements for "independent contractors." One requirement is that an "independent contractor" must be engaged in an "independently established business." Another requirement is related to licenses and certificates that are required for an "independent contractor" to provide services. A third requirement is that an "independent contractor" must be "free from direction and control over the means and manner" of providing services to others.

(2) The specific focus of this rule is the "direction and control" requirement. See ORS 670.600 for the requirements of the "independently established business" test and for licensing and certification requirements.

Stat. Auth: ORS 656.726(4); 670.605; Stats. Implemented: ORS 316.162; 670.600
Adopted 1/30/07 as WCD Admin. Order 07-050, eff. 2/1/07

436-170-0200 Direction and Control Test

(1) ORS 670.600 states that an "independent contractor" must be "free from direction and control over the means and manner" of providing services to others. The agencies that have adopted this rule will use the following definitions in their interpretation and application of the "direction and control" test:

(a) "Means" are resources used or needed in performing services. To be free from direction and control over the means of providing services an independent contractor must determine which resources to use in order to perform the work, and how to use those resources. Depending upon the nature of the business, examples of the "means" used in performing services include such things as tools or equipment, labor, devices, plans, materials, licenses, property, work location, and assets, among other things.

(b) "Manner" is the method by which services are performed. To be free from direction and control over the manner of providing services an independent contractor must determine how to perform the work. Depending upon the nature of the business, examples of the "manner" by which services are performed include such things as work schedules, and work processes and

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procedures, among other things.

(c) "Free from direction and control" means that the independent contractor is free from the right of another person to control the means or manner by which the independent contractor provides services. If the person for whom services are provided has the right to control the means or manner of providing the services, it does not matter whether that person actually exercises the right of control.

(2) Right to specify results to be achieved. Specifying the final desired results of the contractor's services does not constitute direction and control over the means or manner of providing those services.

Stat. Auth: ORS 656.726(4); 670.605; Stats. Implemented: ORS 316.162; 670.600
Adopted 1/30/07 as WCD Admin. Order 07-050, eff. 2/1/07

436-170-0300 Application of "direction and control" test in construction and landscape industries

(1) The provisions of this section apply to:

- (a) Architects licensed under ORS 671.010 to 671.220;
- (b) Landscape architects licensed under ORS 671.310 to 671.479;
- (c) Landscaping businesses licensed under ORS 671.510 to 671.710;
- (d) Engineers licensed under ORS 672.002 to 672.325; and
- (e) Construction contractors licensed under ORS chapter 701.

(2) A licensee described in section (1) that is paying for the services of a subcontractor in connection with a construction or landscape project, will not be considered to be exercising direction or control over the means or manner by which the subcontractor is performing work when the following circumstances apply:

(a) The licensee specifies the desired results of the subcontractor's services by providing plans, drawings, or specifications that are necessary for the project to be completed.

(b) The licensee specifies the desired results of the subcontractor's services by specifying the materials, appliances or plants by type, size, color, quality, manufacturer, grower, or price, which materials, appliances or plants are necessary for the project to be completed.

(c) When specified by the licensee's customer or in a general contract, plans, or drawings and in order to specify the desired results of the subcontractor's services, the licensee provides materials, appliances, or plants, including, but not limited to, roofing materials, framing materials, finishing materials, stoves, ovens, refrigerators, dishwashers, air conditioning units, heating units, sod and seed for lawns, shrubs, vines, trees, or nursery stock, which are to be installed by subcontractors in the performance of their work, and which are necessary for the project to be completed.

(d) The licensee provides, but does not require the use of, equipment (such as scaffolding or fork lifts) at the job site, which equipment is available for use on that job site only, by all or a significant number of subcontractors requiring such equipment.

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(e) The licensee has the right to determine, or does determine, in what sequence subcontractors will work on a project, the total amount of time available for performing the work, or the start or end dates for subcontractors working on a project.

(f) The licensee reserves the right to change, or does change, in what sequence subcontractors will work on a project, the total amount of time available for performing the work, or the start or end dates for subcontractors working on a project.

Stat. Auth: ORS 656.726(4); 670.605; Stats. Implemented: ORS 316.162; 670.600
Adopted 1/30/07 as WCD Admin. Order 07-050, eff. 2/1/07

Secretary of State
Certificate and Order for Filing
PERMANENT ADMINISTRATIVE RULES

I certify that the attached copies* are true, full and correct copies of the
PERMANENT Rule(s) adopted on

January 30,2007 by the
Date prior to or same as filing date

Department of Consumer and Business Services
Workers' Compensation Division
Agency and Division

OAR chapter 436
Administrative Rules Chapter No.

Fred Bruyns (503) 947-7717
Rules Coordinator Telephone

350 Winter Street NE, PO Box 14480, Salem OR 97309-0405
Address

to become effective February 1, 2007 was published in the August 2006 & November 2006 Oregon Bulletin.**
Date upon filing or later Month and Year

Implementation of ORS 670.600 related to independent contractors.

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

List each rule number separately, 000-000-0000.

ADOPT: OAR 436-170-0002, 436-170-0100, 436-170-0200, 436-170-0300

ORS 656.726; ORS 670.605 Oregon Laws 2005, Chapter 533 (Enrolled Senate Bill 323)
Statutory Authority Other Authority

ORS 316.162; ORS 670.600
Statutes being Implemented

RULE SUMMARY

These rules are adopted to:

- Provide guidance to agencies referenced in ORS 670.600 as to how the statute will be implemented;
- Clarify the meaning of terms used in ORS 670.600; and
- Provide guidance to interested persons as to how the agencies referenced in ORS 670.600 will apply the provisions of that statute.

Direct questions to: Fred Bruyns, Rules Coordinator; phone 503-947-7717; fax 503-947-7581; or e-mail fred.h.bruyns@state.or.us. Rules are available on the internet: <http://www.wcd.oregon.gov/policy/rules/rules.html>

For a copy of the rules, contact Publications at 503-947-7627, Fax 503-947-7630.

/s/John L. Shilts
Authorized Signer

1/30/07
Date

John L. Shilts, Administrator, Workers' Compensation Division
Printed name

*With this original, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules.

**The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday. ARC 930-2005