

Stoel Rives World of Employment

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Court of Appeals Interprets Definition of "Independent Contractor" Under ORS 670.600

A new case from the Oregon Court of Appeals, [*Compressed Pattern LLC v. Employment Department*](#), provides some clarity about the “maintain a separate business location” prong of Oregon’s unique independent contractor statute, ORS 670.600.

First, the facts. In the summer of 2009, a design company retained a recently-laid-off architectural intern to provide drafting services on some of its projects. The design company’s owners agreed to pay him \$35.00 an hour for his services, and paid him periodically based on statements of his work he prepared and submitted. The design company provided the architect-intern with general specifications and timelines for the drafting projects, but didn’t otherwise instruct him on how to complete them. It also didn’t provide him with scheduled hours, a workspace, supplies and equipment, an email address or business cards. In fact, the architect-intern performed his drafting work free of charge at the offices of the architectural firm that had laid him off. The architectural firm was not affiliated in any way with the design company. The architect-intern performed drafting services for clients other than the design company, and even hired a friend to help him with an especially big drafting project. Meanwhile, the architect-intern spent his spare time preparing for the exams necessary to become a licensed architect. The licensing authority charged the architect-intern hundreds of dollars to take each exam.



The Oregon Employment Department sent the design company a letter notifying it that it was past due on its employment tax payments because it hadn’t been paying taxes on the amounts it paid the architect-intern. The design company argued that it didn’t owe employment taxes for the architect-intern because he was an independent contractor under ORS 670.600. (Employers must pay employment taxes on wages they pay their employees, but not for amounts they pay independent contractors.)

The Definition Of "Independent Contractor" Under Oregon Law

ORS 670.600 says that, for purposes of Oregon’s unemployment and workers’ compensation laws, an individual is only an independent contractor if a multi-part test is satisfied. The test has several different elements:

1. The individual must be free from the employer’s direction and control.
2. The individual must operate an “independently established business,” which requires that three of the following five statements be true:
 - a. The person maintains a business location separate from the employer
 - b. The person bears the risk of loss related to the business
 - c. The person provides services for two or more customers per year, or routinely engages in business advertising
 - d. The person makes a significant investment in the business
 - e. The person has the authority to hire and fire assistants.

At face value, the architect-intern appeared to satisfy the statute. The Employment Department agreed that he operated free from the design company’s direction and control and that he provided services to more than one customer per year. There was evidence in the record to show that the architect-intern indeed had the authority to hire and fire his assistants, and he completed his drafting work at a business location that didn’t belong to the design company.

Just the same, the Employment Department, an Administrative Law Judge (“ALJ”) and the Oregon Court of Appeals all agreed that the architect-intern was an employee rather than an independent contractor. So where did things go wrong?

First, the court concluded that the architect-intern didn’t “maintain” a business location as the law required because he used the offices of the architectural firm that had laid him off to complete his drafting work, not space that he paid for himself. The Court indicated that, to satisfy the “maintain” requirement, the individual must bear some responsibility to make the business location his own, although it offered few details about how that might be shown. Second, the Court concluded that the architect-intern didn’t make a significant investment in his business, even though he spent thousands of dollars on his architectural licensing courses, because the architect’s license wasn’t necessary to his performance of *drafting* services for the design company. Instead, the courses were necessary for his future career as an architect.

The Take Aways: How To Help Ensure Your Independent Contractors Are Really Independent Contractors

There are a few take-away points from the Court’s decision. First, if your business has retained independent contractors to perform certain tasks, it probably makes sense to ask some questions about where they perform their work. If they’ve set up shop for free at another business, without doing anything to suggest that the space is their own, the Court’s decision makes fairly clear that they won’t satisfy the separate-business-location element. Second, and more generally, if you’re unsure whether your relationship with an independent contractor will meet the statutory test, note how narrowly the Court parsed the requirements in this case. In a close case, the benefit of the doubt will almost certainly belong to the Employment Department.

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