



## Independent Contractors versus Employees: The Latest from the Oregon Supreme Court

***By Nicole Elgin***

The question of whether a person qualifies as an independent contractor versus an employee is an increasingly important one in the rise of the “gig economy.” For business owners, it can also be an expensive question to get wrong, considering the various taxes, insurance, and benefits – not to mention the penalties – that a business owner might owe if the state determines that what the business called “contractors” are actually “employees.”

As recently as May 2018, the Oregon Supreme Court weighed in on the test for determining whether an individual qualifies as an independent contractor for purposes of unemployment insurance tax in *ACN Opportunity, LLC v. Employment Department*, 362 Or 824 (2018). ACN Opportunity sold satellite-television, telephone, Internet, and home-security services, as well as other items related to those services. The company used a network of direct-to-consumer sellers that it called “independent business owners.”

In auditing the company, Oregon’s Employment Department found that the company was an employer, and therefore required to pay unemployment-insurance tax on the earnings the company paid to the independent business owners for their sales. On appeal, the Oregon Supreme Court addressed the statutory interpretation questions and affirmed that the independent business owners were not independent contractors.

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To understand the court’s legal analysis, it is important to know the facts surrounding the nature of the relationship between ACN and the independent business owners, which was governed by a written contract. The contract between ACN and the sellers stated that each seller agreed to pay ACN an initial fee for a one-year license to sell ACN products and could pay a renewal fee each year. The contract also specifically stated that the sellers would sell ACN’s products as “an independent contractor,” not as an employee, and that sellers received commissions and bonuses from ACN from selling the product and getting new customers’ subscriptions. The contract also restricted the sellers’ marketing, prohibiting “cold marketing” techniques like trade shows, door-to-door sales, and pamphlet distribution.

After paying the initial fee, the sellers received a “Team Trainer Kit” and access to ACN’s customer tracking services, ACN’s website to submit customer orders, and ACN’s back office and call center services. ACN did not provide computers, telephones, training, or marketing materials, but those items could be purchased from ACN. The contracts allowed the sellers to choose where and how many hours to work, as ACN did not offer office space to the sellers and ACN did not even have an office in Oregon. The Oregon sellers worked out of various locations, including coffee shops, hotel conference rooms, and the homes and offices of their customers.

The court’s analysis first reminded business owners that, “for purposes of unemployment insurance tax liability, Oregon law begins with the presumption that a person who performs services for remuneration is an employee, and the employer must pay unemployment-insurance taxes on that person’s wages.” *Id.* at 826-27. In explaining the presumption, the court cited ORS 657.505(2), which reads that “an employer shall be liable for taxes on all wages paid for services performed on or after the first day of a calendar quarter.” Thus, to avoid unemployment insurance tax liability, a business owner must prove that the worker is an independent contractor under ORS 670.600 or qualifies for one of the exemptions from “employment” under ORS 657.087.

First, the court analyzed ORS 670.600, which provides: “independent contractor means a person

who provides services for remuneration and who, in the provision of the services:

Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;

...is customarily engaged in an independently established business;

Is licensed under ORS chapter 671 or 701 if the person provides services for which a license is required under ORS chapter 671 or 701; and

Is responsible for obtaining other licenses or certificates necessary to provide the services.”

The court found that the company’s independent business owners failed the “customarily engaged in an independently established business” factor of the test because the sellers did not “maintain a business location.” 362 Or at 838; ORS 670.600(3)(a). Specifically, the court reasoned that to maintain a business location, the contractor “must take some affirmative action – more than, for example, temporarily occupying a table at a coffee shop.” 362 Or at 836. Additionally, the court highlighted that the independent business owners did not have sufficient authority to hire others to provide the services, which is another important factor to the independent contractor test. *Id.* at 842; ORS 670.600(3)(e).

The court then looked to the “in-home sales” exemption in ORS 657.087(2): “Employment does not include service performed: ...By individuals to the extent that the compensation consists of commissions, overrides or a share of the profit realized on orders solicited or sales resulting from the in-person solicitation of orders for and making sales of consumer goods in the home.” This exemption was found only to apply to those sales made “in the home,” basing its reading and legislative history analysis on the Tupperware business model. 362 Or at 843-46. Following this application, the exemption could not apply to all of the sellers’ work because they sometimes worked in other locations, such as coffee shops or customers’ offices. *Id.* at 846. Because the company did not meet its burden to prove that the sellers

were independent contractors or that they qualified for the employment exemption for in-home sales, the court upheld the Employment Department's assessment against the company for unemployment insurance taxes.

Those surprised by some of the court's application of the statutory language to the realities of the modern-day workforce are not alone. In his concurring opinion, Judge Thomas Balmer agreed with the majority's holding, but urged the Oregon Legislature "to consider revising some of the many statutes that regulate the relationships between those who perform work and those individuals or businesses who pay them, in light of the far-reaching changes that have occurred in the workplace and in the economy over the last two decades." *Id.* at 847. Reflecting on the increasingly mobile and flexible nature of the growing "gig economy," Judge Balmer concluded that "it is apparent that existing statutes and regulations do not address the realities of important parts of today's work environment." *Id.* at 850.

This case has several good takeaways for lawyers who advise Oregon business owners on independent-contractor tests:

There are many state and federal "independent contractor" tests, including ones for unemployment insurance, workers compensation, and wage-and-hour laws;

It is almost always the company's burden to show that the worker is not an employee and does qualify as an independent contractor; and

Each case is highly fact-specific, requiring an attorney to know many details of its client's operations in order to give the best advice on whether a worker qualifies as an independent contractor.

*This article, authored by Barran Liebman attorney Nicole Elgin, was originally published in the September 2018 issue of Oregon Business Lawyer, the newsletter of the Oregon State Bar Business Law Section. Reprinted with permission.*