

LICENSURE NO SUREFIRE INDICATOR OF AN INDEPENDENT CONTRACTOR

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The first in a series, this piece examines the application of Oregon law to the proper classification of workers as either employees or independent contractors.

Q: With winter formal just around the bend I reminded my nail technicians and stylists to be ready for some extra hours. Jana, one of my newest techs, said she was looking forward to earning overtime pay. The problem is that I hired her as an independent contractor - her license even says she's an independent contractor! Am I obligated to pay overtime?

A: Oregon's wage and hour laws do not require the payment of overtime to independent contractors. That said, you need to be careful here and ensure that Jana (or any other similarly situated worker) really is an independent contractor and not your employee. Agencies that enforce employment laws do not rely on the label "independent contractor" in contracts or even on a business license. In the event of a wage claim, the Bureau of Labor and Industries would take a close look at the circumstances of your relationship to determine whether Jana, as a matter of economic reality, is "economically dependent" upon your business.

The Bureau's test applies five factors to gauge the degree of a worker's economic dependency, with no single factor being determinative:

1. The degree of control exercised by the alleged employer;
2. The extent of the relative investments of the worker and alleged employer;
3. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;
4. The skill and initiative required in performing the job;
5. The permanency of the relationship.

Ask yourself who has the right to direct and control how Jana performs her work. (Does she set her own schedule and appointments? Decide what equipment to use? Can she accept or reject the clients she sees? What duties does she have beyond servicing her own clients?) The more you reserve the right to direct Jana's work, the more likely she would be considered an employee.

Take a look at her investments in the business. (Does Jana purchase her own equipment and products? Does she have to do so through the salon? Does she "rent" a chair? For a flat fee or based on usage? Are these charges deducted from wages paid?) The more significant her investments in the business relative to your own, the more this factor would indicate Jana is an independent contractor.

It sounds as if Jana is paid hourly; are there ways that she could increase her earnings for the time she works or sustain a loss? Does she have to guarantee her work at her cost?

Does Jana independently advertise her services? To what extent? Does Jana pay to maintain her business license? Does she provide her own insurance or work under a house policy?

Is your relationship with Jana indeterminate as with an employee or contracted to run for a fixed term?

It is also important to remember that other state agencies (like the Department of Revenue, Employment Department and DCBS, Workers Compensation Division) will make their own determination on whether a worker is an independent contractor or an employee, and there are significant costs and potential penalties for businesses which incorrectly classify an employee as an independent contractor. You can visit www.oregonindependentcontractors.com for more information about these agencies' classification criteria.

For additional information on this and other topics of interest to Oregon employers, you can also visit our website at www.oregon.gov/boli/ta or attend our free seminar on this topic on November 8 in Portland. See our website for details. You may also call us at 971-673-0824.