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CORRECTLY USING INDEPENDENT CONTRACTORS IN OREGON:

Understanding ORS 670.600, Oregon's Independent Contractor Statute

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Businesses commonly use contractors, in lieu of employees, to provide certain services to their customers. For example, a business may use contractors to help deliver the merchandise or install the products that it sells, provide transportation to and from its business location or special events that it sponsors, or provide troubleshooting or repair services. Using contractors to provide such services can be a very efficient and cost-effective business model *if they are truly independent contractors*. On the other hand, if a business's "contractors" are actually employees mislabeled as contractors, it may be setting itself up for a legal and financial disaster.

In recent years, Oregon's agencies (especially the Employment Department) have dedicated considerable attention and resources to cracking down on businesses that they believe misclassify their employees as independent contractors. Investigations by state agencies frequently result in the "reclassification" of a business's contractors as employees, with some harsh consequences, including assessments of years of back employment taxes, accompanied by accrued interest and stiff penalties. Worse, an adverse finding by a state agency can prompt a class-action lawsuit seeking back overtime wages and employee benefits on behalf of current and former "contractors," which can involve staggering legal costs and massive potential liabilities.

One of the most important contractor classification tests in Oregon is set out in a statute, ORS670.600, that defines who is an "independent contractor" (and, by implication, who is an employee) for purposes of state employment taxes. Any business that regularly uses contractors to provide services—and any accountant or attorney who advises businesses on the propriety of treating certain service providers as "contractors" for employment-tax purposes—should be well acquainted with this statute and how the Oregon courts have interpreted and applied it.

Under ORS 670.600, any individual or entity that provides services to a business for remuneration will be deemed its employee unless that individual or entity, in addition to possessing any license necessary to lawfully provide the services in question, is: (a)free from direction and control over the means and manner of providing the services; and (b) "customarily engaged in an independently established business." To pass the "independently established business" test, the hiring entity must prove that **three or more** of the following criteria are present: (1) the service provider maintains a separate business location; (2) the service provider bears the risk of loss related to the provision of the services; (3) the service provider provides similar contracted services for two or more persons within a 12-month period (or routinely engages in business advertising, solicitation, or other marketing efforts "reasonably calculated" to obtain new contracts to provide similar services); (4) the service provider has a significant investment in the business; (5) the service provider has the authority to hire other persons to provide or to assist in providing the services, and the authority to fire those persons. *See* ORS670.600(3).

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In the past few years, the Oregon Court of Appeals has issued a number of important decisions interpreting and applying ORS 670.600. This article examines what those decisions tell us about how to interpret the statute's "direction and control" test, and each criterion of its "independently established business" test.

What Is "Direction & Control," for Purposes of ORS 670.600(2)(a)?

Sections 471-031-0181 and 150-670.600 of the Oregon Administrative Rules (OAR), identical rules promulgated by the Employment Department and the Department of Revenue, respectively, interpret what it means to be "free from direction and control," for purposes of ORS670.600. As a preliminary matter, the rules state that being "free from direction and control" means that a contractor is "free from the *right* of another person to control the means or manner by which the independent contractor provides services." *See* OAR 471-031-0181(3)(a)(C) (emphasis added). Thus, "[i]f 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." *Id*. Rather, retention of the right to control the means or manner of performing the services—even unexercised—is fatal to independent contractor status.

Conversely, a hiring entity does have a prerogative to monitor and inspect the *quality* of the services provided by an independent contractor, as opposed to his means or manner of providing them. *See* OAR 471-031-0181(3)(b) ("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."). Thus, contract provisions that are confined to ensuring the quality of the final product or the services, without interfering with *how* they are generated or provided, do not create the type of "control" that creates an employment relationship.

With respect to the "means" of performing the contracted services, the administrative rules state that, to be free from direction and control over the means of providing services, the contractor must have the right to "determine which resources to use in order to perform the work, and how to use those resources." *See* OAR 471-031-0181(3)(a)(A). They identify "means" of performing services as including such things as "tools or equipment, labor, devices, plans, materials, licenses, property, work location, and assets, among other things." *Id*. With respect to the "manner" of providing services, the rules define that term as the "method by which services are performed," explaining that an independent contractor must have the right to "determine how to perform the work." *See* OAR471031-0181(3)(a)(B). The only specific examples of a "manners" of performing work that the rules give are "work schedules" and "work processes and procedures," but the rules note that these examples are not exhaustive. *Id*.

Thus, the administrative rules provide some helpful guidance. However, they also leave some important questions unanswered. These include:

1. Exactly how "free" must the contractor be? Does she need to have *complete freedom* with respect *every* means and manner of performing the services? Does the hiring entity's control over *one method or means* of performing the services compel a finding of employee status? Or, is it enough that the contractor is mostly free from control with respect to most of the means and manners of performing the services?
2. Should the factors generally viewed as indicators of economic dependence under the common-law "economic realities" test also be viewed as evidence of control for purposes of ORS 670.600? Or, should the statutory language be read literally—*i.e.*, as confining the inquiry to how the service provider actually "provid[es] the services" (*see* ORS 670.600(2)(a)), and whether the hiring entity controls *that* (*e.g*. closely supervises how the work is performed on an ongoing basis)?
3. Are constraints on the manner of performing services that emanate from third parties, other outside sources, or the very nature of the business itself properly weighed as evidence of "control"?

Fortunately, recent decisions from the Oregon Court of Appeals provide guidance on these issues. For example, in *Avanti Press, Inc. v. Employment Department*, 248 Or App 450 (2012), the court stated that the "direction and control" language in 670.600 was intended to codify the common-law "right to control" test, which has "never required that an 'independent contractor' be free from *all* direction and control." *Id*. at 461(emphasis in original).

There, the court applied the interpretation of "direction and control" contained in OAR4710310181. However, it also applied the "right to fire" factor from the traditional, commonlaw right-to-control test—even though it is not mentioned in the rule—because that factor has always been considered important under the common law. *Id*. at 471. Based on a provision in its contract with the service provider (Waiau) that allowed Avanti to terminate the contract without cause or liability on short notice (30 days), the court concluded that the "right to fire" was clearly present, definitively establishing at least one factor indicative of control. *Id*. at 472.

However, the court concluded that Waiau was an independent contractor nonetheless, because "the various facts bearing on the 'right of control,' with the notable exception of the right to fire, predominate[d] in favor of the conclusion that Waiau was an independent contractor." *Id*. at 473. Thus, *Avanti* indicates that freedom from direction and control should be found where factors indicating freedom "predominate" over facts suggesting control, even if some factors indicating control plainly exist.

Avanti also provides answers to the second question posed above. In determining whether the hiring entity

retained authority to control the service provider, the court explained, an agency should focus on "the nature of the services [the contractor] agreed to provide in the services agreement." *Id*. at 468. In other words, it is error to find "control" based on the hiring entity's retention of control over tasks or matters that it *did not hire the contractor to perform or oversee*. *See id*. ("Avanti did not control the manner in which Waiau set prices or accepted orders, because those were not part of her services in the first place."). Instead, *Avanti* instructs, the proper focus is on whether the hiring entity retained control over the contractor's means or manner of performing *those services that she actually agreed to provide*, and that the hiring entity paid her to provide. *Id*. at 468-69.

Thus, in *Avanti*, that Avanti assigned Waiau her customers, provided the product for which she solicited orders, provided the promotional materials that she used to sell that product, provided Waiau with business cards, and provided Waiau with her sole source of income during the time period in question might have suggested economic dependence, but those facts did not suggest control over *how Waiau performed the contracted services*. *See id*. at 455-56 (noting that Waiau received all of her income from Avanti, did not advertise or market her services as a product sales representative to others, and passed out Avanti business cards), 467 (noting that Waiau's agreement required her to visit specific Avanti customers a least once every 12 weeks), 470-71 (noting that Waiau's use of trademarks, trade names, and other promotional material pertained "more to *what* she solicits than to *how* she solicits") (emphasis in original). That distinction was important, because 670.600(2)(a) places the focus on how the service provider provides "the services," and the specific services that Avanti contracted with Waiau to provide were soliciting orders and promoting Avanti's products. *Id*. at 470-71. Therefore, the foregoing factors were not evidence of "direction and control" because they were not relevant to how Waiau actually performed her sales duties. *Id*. at 467 (observing that there was "no evidence that Waiau was required to use a specific sales technique when soliciting orders").

Another recent decision from the Oregon Court of Appeals, *Ponderosa Properties, LLC v. Employment Department*,[1] 262 Or App 419 (2014), reinforces the approach adopted in *Avanti*. In *Ponderosa Properties*, the administrative law judge (ALJ) who heard Ponderosa's firstlevel appeal acknowledged that the cleaners who worked for Ponderosa enjoyed freedom from direction and control in the sense that they worked independently and without supervision on each assignment, could accept or reject any work opportunities offered, and generally provided their own tools and supplies that they could use in whatever manner they chose. *Id*. at 427. However, the ALJ nonetheless found that Ponderosa maintained "significant direction and control," based on the following facts: (a) Ponderosa set the rate of pay for each clean, and the rates were not negotiable; (b) Ponderosa assigned the work, deciding which jobs were offered to each cleaner; and (c) the cleaners were not authorized to negotiate directly with the property owners. *Id*. at 427-28.

On review, the court found that the ALJ had erred in concluding that these factors established "direction and control." It concluded that the foregoing facts were "indicative of the *results* Ponderosa seeks from hiring a cleaner – that the rental unit will be clean when the tenant arrives at a reasonable and predictable price." *Id*. at 428 (emphasis added); *see also* ORS 670.600(2)(a) (providing that the hiring entity can "specify the desired results" of an independent contractor's services). They did not, however, demonstrate any control by Ponderosa over *how* the cleaners performed the services for which Ponderosa had hired them—in other words, the methods that they used to clean and the supplies and equipment that they used to clean. *Id*.

Thus, taken together, *Avanti* and *Ponderosa Properties* establish in a fairly definitive manner that the economic dependence factors typically considered under the common-law "economic realities" test are not properly considered in determining the existence of "direction and control." This is significant, because it clarifies that an independent contractor relationship can exist under670.600 even if the hiring entity is solely responsible for obtaining all work performed by the service provider and for maintaining the relationships with the end customers receiving the benefits of the services. In the past, administrative law judges with Oregon's Office of Administrative Hearings (OAH) have frequently reached the contrary conclusion in cases before them. *See, e.g., Ponderosa Properties*, 262 Or App at 428 (quoting the ALJ's reasoning that the "most significant[]" fact demonstrating control was that the cleaners "were not authorized to negotiate directly with unit owners"); *In the Matter of the Final Premium Audit of Redding Transport* (Proposed Order of OAH, Case No. INS 03 09-006, March 15, 2005), p. 8 (finding "fundamental control" where the transport broker "procured the contract with the customer and selected the owner/operator to perform the work").[2] However, *Avanti* and *Ponderosa Properties* reject the reasoning in these cases from the OAH, and the ALJs with that office will be bound to follow *Avanti* and *Ponderosa Properties* going forward.

Finally, turning to the third question posed above, recent decisions from the Court of Appeals also indicate that demands emanating from third parties, business conditions, or other outside sources—but *not the hiring entity*—are not evidence of "direction and control" if they reflect "desired results" of the services or inherent demands of the work. For example, in *AGAT Transport,*

1 Not to be confused with *Ponderosa Inn, Inc. v. Employment Division, 63 Or App 183 (1983)*, another case from the Oregon Court of Appeals addressing independent contractor classification.

2 Available at: http://www.cbs.state.or.us/ins/admin_actions/actions_2006/wc_2006/billing_2006/03-09-006-p.pdf (PDF).

Inc. v. Employment Department, 256 Or App 294 (2013), the court ultimately upheld the ALJ's determination that the contract drivers in issue were employees because they were not free from AGAT's control over the means and manner of providing the services. However, in the process of reaching that conclusion, the court rejected certain findings of the ALJ, including, most notably, the ALJ's finding that requiring the drivers to comply with certain requirements imposed *by AGAT's customers* indicated "direction and control." As the court observed in rejecting that finding, "AGAT's requirement that its drivers meet the expectations of AGAT's customers regarding pickup and delivery relates primarily to the 'desired results'; it does not indicate control over the means or manner by which drivers could achieve that goal." *Id*. at 304.

Ponderosa Properties also addresses the issue of constraints that limit a service provider's freedom, but originate from sources other than the hiring party. There, the court rejected the Employment Department's assertion on appeal that there were sufficient facts to support a finding of direction and control over the cleaners' "work schedules," which the administrative rules specifically cite as one example of a "manner" of performing services. *See* OAR4710310181(3)(a)(B). The court noted that the deadlines Ponderosa gave the cleaners were dictated by when the occupancy of a unit required the work to be completed, and observed that these schedule constraints therefore "flow[ed] from the nature of the business, and not [Ponderosa's] desire to direct or control how the cleaners performed their services." 262 Or App at 428.

Thus, in summary, with respect to the "direction and control" element of 670.600(2)(a), opinions issued by the Oregon Court of Appeals within the last few years establish: (a) that freedom from direction and control exists even if a service provider is not *completely* free from control over the means and manner of providing the contracted services, as long as facts indicating freedom predominate; (b) that the "dependence" factors of the common-law "economic realities" test are not properly considered in assessing freedom from control; and (c) that requirements imposed by third-party service recipients are not properly weighed as evidence of control, insofar as they are best characterized as "desired results" of the contracted services (like having a rental unit ready on time for the service recipient's own customer, or complying with reasonable security protocols relating to the delivery of items that the end customers impose on the hiring entity).

What Does ORS 670.600(3)(a) Mean by "Maintains a Business Location"?

The first criterion of the independently established business test is satisfied only if the service provider "maintains" a business location that is: (a) "separate from the business or work location of the person for whom the services are provided"; or (b) "in a portion of the person's residence and that portion is used primarily for the business." ORS 670.600(3)(a).

In *Compressed Pattern, LLC v. Employment Department*, 252 Or App 254 (2012), the court confirmed what this statutory language suggests, holding that it is **not enough** to simply show that the service provider performs the services away from the hiring entity's premises. *Id*. at 260-61. Rather, the hiring entity must prove that the service provider has made an actual investment in a separate business location.

To conclude otherwise, the court reasoned, would render superfluous the word "maintains." The court could not ignore the presence of that word in subsection (3)(a), if it was possible to logically interpret the statute in a manner that gave the word meaning, because ORS 174.010 compels the Oregon courts to give meaning to each term contained in a statute, wherever possible.

In the case before the court, the service provider was providing drafting services for an architectural design company, and he performed this work entirely offsite. However, as it so happens, his offsite location was the premises of his former employer, which let him use an office and essential equipment for free. Consequently, the court concluded that there was no evidence that the service provider "maintained" a business location. After all, he was not required to pay any rent for the office space that he used, nor to pay for his use of other essential resources that he used to provide the services (*e.g*., drafting tables). *Id*. at 259-61.

Another recent case that has relevance to the "business location" factor is *Chelius v. Employment Department*, 258 Or App 72 (2013). There, the court's focus was actually on the "direction and control" element of ORS 670.600(2)(a). However, relevant to the court's determination that the taxpayer maintained "direction and control" was its observation that taxpayer contractually controlled the service provider's "work location" by telling her where to work (an office in her home) and limiting how she could use that work space (for work purposes only). *Id*. at 81-82. Thus, *Chelius* shows how important seemingly minor differences in contract drafting can be. Likely, the taxpayer imposed the work location controls specifically to establish the "maintains a business location" factor of ORS 670.600(3)(a). However, by being too controlling, it unwittingly doomed itself on the statute's "direction and control" element, and its service provider was therefore reclassified as an employee.

Thus, to summarize, if a business plans to rely on the "maintains a business location" criterion to support its classification of a service provider as an independent contractor, it must ensure that: (a) the service provider invests (or has invested) significant resources in a specific business location; and (b) that this location is dedicated to his business, specifically (*i.e*., that the service provider does not use it primarily for personal, non-business purposes). Moreover, if the contract is for ongoing services for an indefinite period, the hiring entity may wish to include provisions in its written contract with the contractor that are aimed at ensuring that this state of affairs continues for the duration of the parties' working relationship. For example,

the parties' contract could require the contractor to submit proof, every six months, that the contractor is still paying rent for office space. It might also contain a provision requiring the contractor to immediately notify the hiring entity if he gives up his separate business location (*e.g.*, elects to start working from home, in lieu of continuing to rent office space).

Such provisions are well within the rights of a hiring business, without disturbing the essential character of the independent contractor relationship. On the other hand, as the *Chelius* case demonstrates, a business should avoid contract provisions that *direct* the contractor where to work, which could possibly convert an otherwise valid independent contractor arrangement into an employment relationship.

What Does ORS 670.600(3)(b) Mean by "Bears the Risk of Loss"?

Subsection (3)(b) of the statute provides that the "risk of loss" criterion can be established by showing the presence of 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."

A recent decision from the Oregon Court of Appeals, *Portland Columbia Symphony v. Employment Department* ("PCS"), 258 Or App 411 (2013), provides important guidance regarding how to apply these factors. In *PCS*, the court found that the symphony had properly classified the contract musicians in issue as independent contractors. *Id*. at 413. Among the court's more important findings, it found that the ALJ who handled the symphony's first-level appeal had erred when assessing the risk of loss criterion by "applying factors that have little relationship to the type of work that the musicians were performing." *Id*. at 427. The court explained that it is not always necessary to apply each example of "bearing the risk of loss" referenced in the statute. Rather, the agency or ALJ assessing the criterion must determine which factors are actually relevant by "account[ing] for the nature of the work." *Id*. at 426. Of the examples listed in the statute, the court concluded that the most relevant factor in the case before it was "one that the ALJ did not even mention: the fixed price contracts." *Id*. (This fact presumably showed risk because the job might end up requiring more rehearsal time than the contracted musician had contemplated, which equates to a risk of earning relatively little for a significant investment of time that the musician could have been spent on more profitable work.)

PCS is helpful for businesses using contractors because it suggests that showing just one of the statutory examples of risk can be sufficient to establish the "risk of loss" criterion, at least if the example in question is plainly the "most relevant" given the "nature of the work." Moreover, *Ponderosa Properties, supra*, reinforces and extends *PCS*'s reasoning.There, the court reaffirmed that the subsection (3)(b) examples are "disjunctive," meaning that "[a]n individual is not required to satisfy all of them as if they were four elements." 262 Or App at 431. Moreover, as in *PCS*, the court found that, in the circumstances presented, the parties' fixed-price contracts were alone adequate to demonstrate that the service providers in question bore the risk of loss, stating:

> "The fixed-price assignments demonstrate that the cleaners bore significant risk. Regardless of the condition of the unit or the time necessary to complete the task they would be paid only a fixed rate." Id. at 431-32.

That the cleaners also were required to "fix defective work" before being paid only "underscored" that they bore a genuine risk of loss, in the court's view. *Id*. at 433. Thus, although the court recognized that these two factors were only "two among a nonexclusive list of factors" set forth in the statute, it found them sufficient to establish the risk of loss criterion "as a matter of law" on the record before it. *Id*. at 433 n 7.

Undoubtedly, *PCS* and *Ponderosa Properties* are both quite helpful to businesses that use contractors to assist in providing services to their customers. However, it is important to recognize that the opinions in each case leave room for the Court of Appeals to reach a different result in the future if a case comes before it in which: (a) the one example of risk of loss that is present is not the "most relevant" (as it was in *PCS*); or (b) there are other examples or risk that you would normally expect to see for the type of work in issue that are not present in the case at hand.

Moreover, not all of the recent case law on the risk of loss criterion has been favorable to businesses. For example, in *Compressed Pattern, supra*, the hiring entity attempted to show "risk of loss" by showing that the service provider was "required to correct defective work" without additional compensation. *See* ORS 670.600(3)(b)(B). In support of this argument, the service provider (an architectural drafter) testified that he was "willing" to correct defective work, and would have done so for no additional charge. *Compressed Pattern*, 252 Or App at 262. However, this was not enough. The court found that the ALJ was justified in "discounting" the drafter's willingness to correct his own mistakes, given "the nature of the parties' arrangement—*i.e.*, no written contract; no evidence that Singer would have been required to correct defective work; payment based on hourly fee; and no liability insurance or performance bond carried by Singer." *Id*. (Emphasis in original.)

An important take-away from *Compressed Pattern* is this: although courts commonly look through contract language if it does not reflect realities on the ground, having a good written contract in place, to memorialize the essential elements of the independent contractor relationship, is nonetheless of critical importance. Practically, this should be viewed as a necessary (but not sufficient) condition to having independent contractor classification withstand

scrutiny by state agencies, ALJs, and the courts. For example, if the parties intend that the contractor will fix defective work for no additional charge, they should not rely on an informal understanding; they should spell this out explicitly in their contract.

At the same time, in detailing the presence of the risk of loss criterion—or, indeed, any other criterion of the statute's "independently established business" test—the hiring entity should take care to avoid mandates and directives wherever possible, instead using recitals of true facts and provisions requiring periodic proof of the continued existence of those facts. For example, a contract should not state that the contractor "shall maintain liability insurance," which an agency could view evidence of "direction and control." Instead, the better approach is to recite that the contractor has such insurance, and include contract provisions requiring the contractor to produce proof of continued coverage periodically (perhaps every six months).

What Does ORS 670.600(3)(c) Mean by "Provide[s] Contracted Services for Two or More Different Persons"?

To satisfy the third criterion of the independently established business test, the service provider must "provide contracted services for two or more different persons within a 12 month period, or … routinely engage in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services." ORS 670.600(3)(c).

That the statute refers to "contracted" services could be read to suggest that the taxpayer has the burden of proving that the service provider's working relationship with a third party satisfies each element of ORS 670.600. However, in *Ponderosa Properties, supra, the court* reached the contrary conclusion. There, on the initial administrative appeal before the case reached the Court of Appeals, the ALJ determined that Ponderosa had failed to meet its burden of proof on the "two or more different persons" criterion. In so ruling, the ALJ disregarded testimony from two cleaners that they provided cleaning services to other businesses, reasoning that the testimony was insufficient because there was "no evidence that the services were performed as independent contractors." *Id*. at 434 (quoting from the ALJ's opinion; emphasis omitted).

The court, however, concluded that the ALJ had misapplied subsection (3)(c) by "interposing unnecessary requirements in its analysis." *Id*. Contrary to the ALJ's conclusion, Ponderosa was *not* required to affirmatively "prove the elements and criteria required to establish that each individual was an independent contractor" in relation to other entities for which she performed services. *Id*. Moreover, the court clarified that no proof of a "formal or written contract" between the service provider and third parties is required to prove the "two or more different persons" criterion, either. Rather, qualifying proof can consist of evidence of contracts that are "oral or written, one-time arrangements or long-time commitments." *Id*. at 435. Still, the court suggested that its conclusions regarding whether subsection (3)(c) was satisfied might have been different had there been evidence in the record that the service provider's services for a third party had been performed "as a typical employee"—for example, as a "salaried custodian for a nearby school district." *Id*. at 434.

Thus, *Ponderosa Properties* tells us that: (a) the taxpayer has the burden of proving that its service provider provided similar services to others, but does *not* have the burden of proving that she satisfied each element of ORS 670.600 when providing those services; and (b) evidence that the service provider performed one paying job providing similar services for another person or entity within the relevant 12-month period will normally be sufficient to meet the taxpayer's burden, even if the arrangement was informal and the engagement brief; but (c) if the government presents evidence that the service provider provided services to the third party (or parties) as an employee, this might serve to rebut the hiring entity's evidence and disprove the existence of the "two or more different persons" criterion. (At least, this remains a possibility unless and until the Court of Appeals addresses this issue squarely and reaches the contrary conclusion.)

On the whole, then, Ponderosa Properties is a very positive decision for Oregon businesses that use contractors. If the court had sided with the Employment Department, this would have created an excessive and unrealistic burden on any business hoping to rely on the "contracted services for two or more different persons" criterion to establish that its contractor is engaged in an independently established business. Essentially, the Employment Department advocated a "case within a case" method of proving this criterion, whereby a business would have to prove every element of its contractor's relationship with a *third party* to the same degree that it is obligated to prove the elements of ORS 670.600 with respect to its own contractual relationship. Businesses that use contractors can breathe a sigh of relief that the court rejected this onerous burden of proof, especially since third parties will not always be cooperative or responsive to a business's request for assistance in its dispute with the state.

However, not all of the recent case law on subsection (3)(c) has delivered good news for businesses. For example, in *Broadway Cab LLC v. Employment Dept.*, 265 Or App 254 (2014), the court rejected the taxpayer's argument that the taxi drivers in question routinely engaged in marketing efforts reasonably calculated to obtain new contracts for similar services (the alternative way to prove that subsection (3)(c) is satisfied, in lieu of showing actual performance of services for "two or more different persons"). Of note, the court reasoned that "a person's 'routine' marketing efforts must be undertaken to help that person 'obtain new contracts to provide similar services,' not to promote the services of another organization." *Id*. at 272. The court found that the marketing efforts in question failed that test because the drivers "could not legally

provide transportation services except under Broadway's auspices," and, therefore, "any advertising efforts that the drivers undertook would, in the end, promote Broadway itself, given that the drivers drove solely in taxicabs marked with the company's name and colors." *Id*. In short, that the drivers' self-promotion could lead to more calls and more money in their own pockets was insufficient; rather, they had to routinely solicit work that they could and would perform *separate from their work for Broadway* to establish that they "routinely engage[d] in … marketing efforts," for purposes of subsection (3)(c).

In conclusion, a taxpayer that plans to rely on the "two or more different persons" criterion to pass the "independently established business" test needs to exercise care to document the contractor's provision of services to third persons, and should be vigilant that the contractor at no point becomes reliant on the taxpayer as her sole source of income. Among other things, the taxpayer should consider including a provision in the service contract requiring that the contractor submit appropriate documentary proof every six months that she has provided similar contracted services to another entity within the past six months. That proof should also indicate that the services were rendered as an independent contractor, and not as an employee. (For example, a W-2 or paystub would not be especially helpful to proving the "contracted services to two or more different persons" criterion.)

At the same time, the taxpayer should take care to avoid mandates and directives wherever possible, instead using recitals of true facts and provisions requiring periodic proof of the continued existence of those facts. For example, a contract should *not* state that the contractor "shall perform services for other parties," as an agency would likely view this as evidence of "direction and control." Finally, as *Broadway Cab* teaches, the service provider's services for third parties should be unconnected to the contractor's agreement with, or services for, the business seeking to establish her bona fides as an independent contractor.

What Does ORS 670.600(3)(d) Mean by a "Significant Investment in the Business"?

To satisfy the fourth criterion of the independently established business test, the service provider must make a "significant investment in the business." ORS 670.600(3)(d). The statute provides three non-exclusive examples of what a "significant investment" might look like: (a) purchasing the tools or equipment necessary to provide the services; (b) paying for the premises or facilities where the services are provided; and (c) paying for licenses, certificates, or specialized training required to perform the services. *Id*.

In *Compressed Pattern, supra*, the court addressed what is required to establish this criterion. There, the taxpayer (Compressed Pattern), an architectural design firm, challenged the Employment Department's reclassification of an individual (Singer) who provided it with architectural drafting services. Compressed Pattern asserted that evidence of Singer's efforts to obtain an architectural license—including paying more than $1,500 to take seven licensing exams—was sufficient to prove the "significant investment" criterion.

The court rejected this argument, stating in relevant part:

> "Singer's services for petitioner and others involved only drafting, and an architectural license was not required for those services. Singer apparently had been pursuing an architectural license since 2002, including while he was an employee for GBD Architects. Singer also told an Employment Department investigator in February 2010 that he did not have a business. Thus, there was evidence in the record to support the ALJ's factual finding that, although Singer had invested in an architectural license, he had not made that investment for the purpose of investing in any existing business." 252 Or App at 263.

Thus, *Compressed Pattern* indicates that it is not always sufficient to show that the service provider has made significant investments that substantially enhance the quality of his services. Rather, the court's opinion suggests that at least two additional requirements must be satisfied if the hiring entity is to be certain that the subsection (3)(d) "significant investment" criterion is satisfied: (1) if the investment relates to a license or certificate, obtaining that license or certificate must be *required* to provide the services, not just enhance the service provider's skills or marketability; and (2) the service provider must have an actual "business" in place when he makes the investment.

To the extent *Compressed Pattern* stands for the second proposition, the court's reasoning seems misguided. True, subsection (3)(d) states that the service provider must make a significant investment in "the business," rather than "the services." However, *Compressed Pattern* fails to account for the broader context. Specifically, the court's opinion fails to consider the relationship between subsections (3)(d) and (2)(b) of the statute, the latter of which requires that the service provider have an "independently established business" to qualify as an independent contractor. Subsection (3)(d) provides that proof of a "significant investment" is *one criterion* that a taxpayer can use to show the existence of an independent business. Therefore, it makes little sense to require the taxpayer to show that the service provider has an "existing business" *before it can establish that criterion*.

Interpreting the statute in that manner, as *Compressed Pattern* seems to, puts the cart before the horse. A taxpayer trying to prove that its service provider has an "independently established business" should not be required to prove that she has an existing, stand-alone business to prove one of the very criteria that the statute makes available to establish that she has an existing, stand-alone business. Evidently, this argument was not raised by the petitioner in *Compressed Pattern* (at least, the opinion makes no reference to any such argument). However, in future cases, taxpayers challenging reclassification who can show that their

service providers made significant investments related to *the services at hand* should argue—based on the need to harmonize subsections (2)(b) and (3)(d) of the statute—that this is enough to prove the existence of the "significant investment" criterion, without the need for additional proof that their contractors specifically made such investments in an established business. The most logical interpretation of the statute is that the term "business," as used in subsection (3)(d), should be read expansively, as encompassing any services performed for remuneration. Simply put, *Compressed Pattern* interprets the term "business" too narrowly.

Similarly, since the examples of "significant investments" set out in the statute are plainly intended to be non-exhaustive, it seems inappropriate to conclude, as *Compressed Pattern* seems to, that investments in licenses or certificates must necessarily be disregarded as irrelevant if the license or certificate in question is not strictly required to be able to lawfully perform the services in question. Since a license "required to provide the services" is merely cited in the statute as *one example* of a "significant investment," taxpayers challenging reclassifications in the future, who can show that their service providers made significant investments in licenses, training, or certificates that substantially enhanced the quality of their services or their marketability, might want to argue that this is sufficient to establish the "significant investment" criterion, even if there was no legal requirement that the service providers undertake the training or obtain the licenses or certificates to be able to lawfully provide the services. The petitioner in *Compressed Pattern* did not appear to raise this argument (no such argument is referenced in the opinion, in any event), which in itself should be a valid ground for distinguishing *Compressed Pattern* in future cases involving significant investments in education or training.

In conclusion, Compressed Pattern is a tough decision for Oregon businesses that use contractors. However, as noted above, there are some good arguments available to distinguish the case. In the meantime, businesses that use independent contractors to assist in providing services to customers should take care to memorialize in their agreements with those contractors the significant investments they have made, and continue to make, to be able to effectively provide the services. In so doing, they should take care to avoid mandates and directives wherever possible, instead using recitals of true facts in their place. For example, a contract should *not* state that the contractor "shall" pay rent for a separate office, as an agency would likely view this as evidence of "direction and control." Instead, the better approach is to recite that the contractor pays rent for an office space, shop, or storefront, and include contract provisions requiring that he periodically produce proof that he is continuing to lease that space.

What Does ORS 670.600(3)(e) Mean by "Authority to Hire"?

To satisfy the fifth criterion of the independently established business test, the service provider must have "the authority to hire other persons to provide or to assist in providing the services," and, also, "the authority to fire those persons." ORS 670.600(3)(e).

In *PCS*, *supra*, the court provided some useful guidance on this criterion. There, the Employment Department conducted an audit and concluded that the symphony's contract musicians were actually its employees, resulting in an assessment of back unemployment insurance taxes. On the symphony's administrative appeal to the OAH, the ALJ upheld the Employment Department's determination, concluding that the symphony had failed to establish the necessary three criteria of the independently established business test. Among other things, the ALJ accepted the Employment Department's assertion that the contract musicians lacked the "authority to hire" other musicians to substitute for them when they were unable to perform, since: (a) some musicians never actually hired substitute performers; (b) the symphony reserved the right to approve any substitute that one of its contract musicians proposed; and (c) the symphony paid any substitutes directly (rather than paying the musician with whom it contracted and leaving it to her to pay her substitute).

However, on review, the court concluded that the ALJ erred by relying on irrelevant factors to conclude that the "right to hire" was absent. Specifically, it observed that: (a) the statute requires only *authority* to hire others to assist in performing the service, not proof that the contractor actually exercised that authority; (b) the statute does not require that the right to hire be "unfettered," as it is common practice, where personal services contracts are concerned, for the hiring entity to reserve "veto power" over proposed substitutes; and (c)there is no requirement in the statute that the contractor actually remit the payments to his assistants or substitutes (*i.e*., that the hiring entity pays the substitute directly does not disprove that the contractor had authority to hire). 258OrApp at 427-28.

These conclusions will be welcomed by businesses that use independent contractors to assist them in providing services to their customers. Still, *PCS*'s statement about the propriety of reserving "veto power" should be taken with a grain of salt. The court made this statement in the specific context of analyzing the requisite proof for establishing the right to hire criterion of subsection (3)(e). However, in certain circumstances, reserving *too much* "veto power" might be viewed as direct evidence of the hiring entity's retention of control, possibly dooming it on the statute's direction and control element before the decisionmaker ever reaches the right to hire criterion of subsection ORS 670.600(3)(e).

Indeed, the *AGAT case*, *supra*, illustrates this very danger. There, the court rejected AGAT's "implicit contention" that it merely required its contractors' substitute drivers to meet legal requirements for providing the services. (If true, this

presumably would not have equated to "direction and control.") In reality, the court found, AGAT went beyond a mere contract provision requiring its contractors to hire only qualified drivers. Instead, AGAT required that *it* confirm the substitute drivers' qualifications, including requiring them to pass a drug screen "*as specified by AGAT*." 256 Or App at 305 n 8 (emphasis in original). This equated to control over the drivers' use of "labor," one of the "means" of performing services specifically identified in OAR 471-031-0181, the administrative rule through which the Employment Department has interpreted the statutory term "direction and control."

In addition to the *AGAT* case, businesses and their advisors should be aware of the court's recent decision in *Broadway Cab, supra*. There, Broadway Cab argued that its contract drivers had "authority to hire" because they hired mechanics to maintain their taxicabs. 265 Or App at 275. The court rejected this argument, observing that hiring mechanics to perform maintenance did not demonstrate that the drivers had the authority to hire people to assist them in performing "the services" that Broadway Cab had contracted the drivers to perform. *Id*.; *see also* ORS670.600(3)(e) (examining whether the service provider has the authority to hire other persons to provide or to assist in providing "the services").

Thus, to summarize, PCS is a positive decision for Oregon businesses that use contractors to help service their customers. If a hiring entity is willing to give its contractor authority to hire others to assist in providing the contracted services, it makes sense to formally confer that authority via the parties' contract, even if both parties view it as unlikely that the contractor will actually exercise it. Under *PCS*, *authority* to hire and fire is enough, even if unexercised. On the other hand, having conferred hiring authority, a business must be careful not to retain too much control over its contractor's hiring decisions. The *AGAT* decision illustrates the practical limitations on a hiring entity's right to exercise the "veto power" that *PCS* concluded hiring entities can retain under the "authority to hire" criterion. According to *AGAT*, by effectively taking control of the screening process, AGAT exercised direction and control over its contract drivers' use of labor, dooming it on the first element of the independent contractor test. Had AGAT instead left it to its contractors to vet their substitute drivers' qualifications—including leaving it to them to arrange drug screens and imposing contractual liability on them if they failed to properly perform this duty—it might have stood a better chance of avoiding a finding of control. Thus, regardless what *PCS* says about "veto power," a hiring entity's safest move is always to stay out of its contractor's hiring decisions to the full extent possible.

Conclusion

Complying with ORS 670.600 can be tricky, but recent decisions from the Oregon Court of Appeals at least provide businesses and their advisors with more guidance than they had a few years ago. They also emphasize that organizations using contractors to help serve their customers should do three things. *First*, they should have well-drafted contracts in place that fully spell out the nature of their business relationship with the contractor, and recite in some detail the ways in which the contractor satisfies the necessary three criteria of the statute's "independently established business" test. *Second*, in seeking to affirm the presence of the necessary three criteria, the contract should avoid any suggestion that the hiring entity is imposing "direction and control," for example, by *requiring* that the contractor maintain a separate business location, perform similar services for others, or hire assistants. Instead, the hiring entity should make use of contract recitals to affirm the presence of such factors. *Third*, to ensure that the contractor maintains a qualifying independent business over the course of the parties' relationship, the hiring entity should include contract provisions that obligate the service provider to provide periodic proof that he still satisfies the criteria upon which the hiring entity will rely to show the propriety of its classification if it comes under scrutiny by an agency. For example, the contract might require the contractor to submit, every six months, documents showing that he has received payment from another person for providing similar services, or proof that he is continuing to rent office space.

Taxation in Popular Culture: *Breaking Bad*[1]

By Dan Eller[2]

"I've got three little letters for you: I. R. S. If they can get Capone, they can get you." – Saul Goodman[3]

The challenge in reviewing *Breaking Bad* is to make the hard call as to how much to cover. *Breaking Bad* is rich with tax content; to properly cover all of the tax references would require an article of great length or a series of shorter articles. In the end, I decided to reserve much of the Saul character for a future article all to his own (in part out of the hope his spin-off will provide additional material) and, instead, to

1 Breaking Bad is a production of AMC.

2 Dan Eller is a shareholder in the Portland, OR office of Schwabe, Williamson & Wyatt, who focuses his practice in the areas of tax and business law, advising clients with both transactional and controversy matters. Dan is the Past Chair of the Oregon State Bar Taxation Section. I thank Caitlin Wong and Marc Sellers for their assistance in reviewing early versions of this article. Special thanks go to Jennifer Woodhouse for pointing me to the IRS scene discussed herein. This article is an outgrowth of a keynote address I made to a joint meeting of the IRS and TEI in May 2015.

3 "Kafkaesque." *Breaking Bad*. AMC. May 16, 2010. We better call Mr. Goodman "Saul" in this article.

focus here on how the show portrays the Internal Revenue Service[4] and taxpayers' views of and interactions with it.

Without spoiling the plot of *Breaking Bad*, you should at least understand the show centers upon how, with the help of former student Jesse Pinkman ("Jesse"), Walter White ("Walter") started a drug business in order to pay for his cancer treatments. Ultimately, the White-Pinkman drug business throws off a literal pile of cash,[5] all of which is from an unlawful source and is not, at least initially, taxed. With that in mind, you can begin to understand why the topic of tax enforcement pops up here and there.

As the scene from which the Saul's above quotation is derived develops, we learn the bias of *Breaking Bad*: when the IRS sees criminal behavior that involves the underreporting of income, the IRS will view those involved in the enterprise as "tax cheats"[6] over any other type of criminal, whether it be a drug dealer or other crime lord. As to this view of the IRS, *Breaking Bad* does a fair job of characterizing the IRS's primary job: the IRS is here to enforce the tax laws.[7] It is true the IRS may work with other agencies to enforce other laws, but, as to the IRS's focus, tax compliance come first. At a minimum, *Breaking Bad* presents an accurate picture of how the public views the IRS.

Breaking Bad shows us at least two ways in which tax controversies may arise. The primary type of tax controversy forms the basis of the show: how to deal with millions of dollars of untaxed unlawful drug-sale proceeds. We see that Saul advises his clients to launder the money as a way to "clean" the source of the money.[8] Why? As Jesse points out, these guys are already criminals so why should they give a significant portion of their drug proceeds to the government? The reason, Saul explains, is that it is often easier to prove someone is a tax cheat than a drug lord. If we look at unlawful drug enterprises through a narrow tax lens, this makes sense.

On this point an important aside is warranted. In one episode, Saul notes that Walter needs a "Danny" to accomplish his tax scheme.[9] When I heard this, I sat up and closely listened. What was this Danny? My name is Danny – was anything to made of this? Well, as it turns out, a "Danny" was a euphemism for someone who could help Walt accomplish the unlawful tax scheme. Just so we are on the same page, my name may be Danny, but I am no accomplice.

The other way *Breaking Bad* portrays tax controversies is in its handling of the Ted Beneke ("Ted") character. Early in the show's run, Ted is primarily included as a way to set up tension between Walter and his spouse, Skyler White ("Skyler"). Soon, though, we learn that Ted has been committing some form of accounting irregularities at his business, Beneke Fabricators, to the tune of at least one million dollars.[10] By the fourth season of *Breaking Bad*, Ted returns in a desperate situation: he is going to meet with IRS Criminal Investigation ("IRS CI") and he is worried about his liberty, not just the approximately $617K he or Beneke Fabricators is said to owe to the IRS.[11]

Here is where *Breaking Bad* goes off-track, at least in part. On the day of the IRS CI interview, we see Ted in a conference at the IRS with Special Agent James Picarus (the "Special Agent"). Ted is struggling to explain to the Special Agent the reasons for the unreported or underreported income issues the Special Agent is finding in the books of Beneke Fabricators. At this moment, Skyler enters the conference room unannounced and sits between Ted and the Special Agent. In a few minutes of dialogue, she explains away the accounting problems by acting clueless about even the most basic accounting concepts. Next, we see Skyler and Ted walk out of the IRS, Skyler demanding Ted pay the debt to make the problem go away – implying that paying the tax debt will cause the IRS to stop threatening criminal action.[12]

Frankly, so much is wrong with this scene that it portrays the IRS, not to mention tax procedure, in an inaccurate light. For example, having been to the IRS offices in Portland many times over the years, it is my experience that you cannot enter its conference rooms unannounced, especially in the middle of a criminal investigation. That Skyler was able to do so boggles the mind. Similarly, it is unclear that Skyler has any authorization to participate in this investigation. Given the nature of the Section 6103 information shared in this scene,[13] Skyler should have been required to provide a Form 2848 Power of Attorney or otherwise establish how authorized to participate in this interview. How she was able to speak to the Special Agent is unclear.

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4 For simplicity, I will refer to the Internal Revenue Service as the "IRS" in this article instead of "the Service" or, in the words, again, of Saul, "The Tax Man." *Id*.

5 "Gliding Over All." *Breaking Bad*. AMC. September 2, 2012.

6 "Kafkaesque." *Breaking Bad*. AMC. May 16, 2010.

7 It is true that the IRS does not necessarily act alone in the enforcement of tax laws. For purposes of this article, we assume that the "IRS" will be all government officials, regardless their agency affiliation, associated with a criminal tax audit will act as a team, and that team will be labeled "IRS."

8 *Id*. As noted, I intend to return to the Saul character in the future, focusing in particular on his "tax advice."

9 "Abiqui." Breaking Bad. AMC. May 30, 2010.

10 "Mandala." *Breaking Bad*. AMC. May 17, 2009. The amount and source(s) of the tax fraud are never clear. Neither is the identity of the taxpayer. Skyler notes the accounting irregularities involved "almost one million dollars" in this episode, but we do not know if that is income or something else. Later we learn the obligation totals approximately $617K. Assuming Beneke Fabricators was the taxpayer and it was a C corporation, it is hard to come up with an obligation of $617K on one million dollars of unreported income, especially given how little time appears to pass between the months?/years? at issue and the IRS Criminal Investigation scene described below. The same can be said if the obligation was personal to Ted.

11 "Bug." *Breaking Bad*. AMC. September 11, 2011.

12 *Id*.

13 Kudos to the writers for mixing in a reference to "Section 61 of the I.R.C." as a reference for what defines the income of Beneke Fabricators.

Additionally, the implication that a Special Agent could be fooled by some hair flipping and uninformed comments seems laughable. Special Agents are trained to interrogate suspects. They are on the lookout for all kinds of fraud and deceit. Although someone will likely send me an article of a rogue IRS employee who fell for a similar deceit, I find this to be the sort of one-in-a-million occurrence as to be hyperbole in the context of this show.

That being said, Skyler's insistence that she is not good with "the Quicken"[14] has some merit because, in the right context, it could be successful. Recall, this was a criminal investigation. Tax crimes under the Internal Revenue Code are crimes of specific intent that require someone to act willfully in order to be guilty of a crime. The IRS would be looking for evidence of the taxpayer's willful conduct upon which to rest any criminal charging decision. If Skyler was truly misinformed and that led to the accounting irregularities, that type of conduct could be used to show the tax noncompliance was not criminal.[15] If the Special Agent believed Skyler was responsible for the unreported income and that her conduct was not willful, that could cause the IRS to conclude the neither Ted nor Beneke Fabricators had engaged in any criminal behavior. Given these schemes are often coordinated by a business owner and a bookkeeper – especially where a person relationship exists, as Skyler implies in the scene – it is difficult to believe the Special Agent would conclude no criminal tax fraud exists after a few minutes of scattered discussion and terminate an investigation at this point.[16]

Finally, when Skyler insists that Ted pay the tax liability in order to cut off the investigation, the show's writers imply that the IRS would terminate an active criminal investigation if Ted were to simply pay the tax on the income he or the company omitted from his or its tax return(s). That is a serious miss, which is unfortunate because Skyler had acted brilliantly up until that point in the scene, apparently getting Ted out of serious trouble by turning the focus to herself in a way that did not put herself in jeopardy. Taxpayers cannot disregard tax laws until such time as they are caught, then pay the tax (and, presumably penalties and interest) in the middle of a criminal investigation as a way to make it all go away. That is not how it works.

Perhaps the explanation for Skyler's demand that Ted pay the IRS obligation is that it sets up Skyler's use of Saul's services to orchestrate a plan by which Ted would receive a fake inheritance from a distant relative in the exact amount of Ted's tax debt as a way of helping Ted pay that debt. Using an inheritance as the method for the payment was ingenious because Ted's receipt of the inheritance would not have been a separate taxable event to him. Thus, he would been able to directly pay that money to the IRS, reducing his outstanding liability to zero without creating a new liability for the current tax year. So smart!

In the end, the tax brains behind *Breaking Bad* were less fried than the eggs of the 1980's era PSAs concerning the dangers of drugs.[17] The show's awareness of the tax issues surrounding unreported and underreported income was generally on-point, save some missteps. To the extent some of the misses are made in the nature of hyperbole and to drive other plot lines, those misses do not outweigh that which the show gets right. On a scale of zero to 100, therefore, I rate Breaking Bad a score of 280E. Any questions?

14 *Id.*

15 Other subtle factual issues lurk in this scene – who is the taxpayer? Ted? Beneke Fabricators? Was this solely an income tax issue, or could it have involved payroll tax noncompliance?

16 That Ted and Skyler left the IRS believing they were off-the-hook after what appeared to be a short exchange with the Special Agent is also unbelievable. In my experience, the IRS rarely makes decisions of this importance in a few minutes.

17 *See, e.g.*, https://www.youtube.com/watch?v=ub_a2t0ZfTs.

Legislative Highlights from the 2015 Oregon Legislative Session

By Elizabeth Jessop[1]

This article summarizes key pieces of tax legislation from the 2015 session. The author has attempted to choose legislation that might be of the most interest to the Tax Section. Unless stated otherwise, the laws below take effect January 1, 2016.

Tax Reporting of Multinational Corporations (Tax Havens)

In 2013, the legislature passed a law that required the filer of an Oregon consolidated corporation excise tax return to add to its taxable income the income (or loss) of a unitary foreign corporation in certain jurisdictions. This new bill, SB 61, modifies the list of jurisdictions (currently found at ORS 317.715) by adding Trinidad and Tobago and Guatemala, and removing Monaco. The bill also replaced the reference to the former Netherlands Antilles with the names of its former constituent islands (Bonaire, Curacao, Saba, Sint Eustatius, and Sint Maarten).

The bill also removes a requirement to take the apportionment factors of the tax haven company into account.

Annual Corporate Minimum Tax: No Credits

Sections 43-45 of Omnibus Bill HB 2171 amend ORS 317.090, the corporate minimum tax. Effective for tax years beginning on or after January 1, 2015 through 2020, the corporate minimum tax cannot be reduced by any tax credit.

1 Elizabeth Jessop is an attorney at Immix Law Group in Portland, Oregon. She thanks Robert T. Manicke for his summaries of 2015 tax legislation, which she used as a starting point as she prepared this article.

This amendment essentially repeals the *Con-way v. Department of Revenue* decision from 2013 (353 Or 616). In *Con-way*, the Oregon Supreme Court affirmed an Oregon Tax Court decision that Con-way could offset its $75,000 corporate minimum tax liability with a $75,000 Business Energy Tax Credit.

Collection of Property Tax Upon Conveyance to Government Body

HB 2127 provides that a county clerk may not record an instrument conveying or contracting to convey fee title to real property to a tax exempt public body unless the assessor of the county in which the real property is located attests in a certificate that all charges against the real property, including tax and interest, have been paid. This law applies as of October 5, 2015.

Liens for Personal Property Tax

Under this new law, SB 161, a seller of "business personal property" (tangible personal property, and machinery and equipment that a tax collector treats as personal property pursuant to ORS 311.549) must provide a purchaser of such property a disclosure notice that contains the following information:

(1) Whether any property taxes assessed on the property are outstanding;

(2) Whether there are any liens against the property;

(3) The name of any county in which the property has ever been assessed for property tax purposes other than the county in which the property is located at the time of the proposed purchase transaction;

(4) The name and address of any other person that has owned or had possession or control of the property; and

(5) The fact that the bona fide purchaser provisions of the new law may apply to the purchase transaction.

A bona fide purchaser, purchasing in good faith, for value, at an arm's length, and "without notice" of delinquent taxes, will not be liable for property taxes that were delinquent on the date of the transaction, or for interest or fees related to the delinquent property taxes. In order to meet the "without notice" standard, the purchaser must take several prescribed due diligence steps, including review of a new state registry of delinquent tax liens.

Industrial Property Classification and Appeals

HB 2482 amends the statutes that govern the appraisal of industrial property. The terminology used to classify industrial property has been changed from "principal industrial property" and "secondary industrial property" (these classifications were dependent on the real market value of the property) to "state-appraised industrial property" and "county-appraised industrial property."

Generally, state-appraised industrial property is property with improvements valued at over $1 million on the previous year's tax roll, unless the state has delegated the responsibility for the appraisal to the county (in which case, it is classified as county-appraised industrial property). Property valued at $1 million or less is county-appraised industrial property.

Appeals of the assessed value for state-appraised industrial property must be brought in the Oregon Tax Court, while appeals of county-appraised industrial property must be brought in the county board of property tax appeals. The deadline for appeals remains December 31. The changes to the law apply to the property tax year beginning July 1, 2015.

Elimination of Extensions for Personal Property Tax Returns

In accordance with HB 2484, personal property tax returns will be due annually on March 15 instead of March 1, and extensions of time to file will no longer be granted. The new law applies to property tax years beginning on or after July 1, 2016.

Central Assessment

The Oregon Supreme Court held in *Comcast v. Department of Revenue*, 356 Or 252 (2014), that Comcast's cable television service qualified as "data transmission services, " and therefore as "communication" under ORS 308.505 – meaning that Comcast's cable television service business was subject to central assessment. Oregon's central assessment is unusual in that intangible property, such as the value of the brand, is subject to the tax.

SB 611 makes changes to Oregon's central assessment. It imposes a cap on the value of the intangible property that is assessable by Oregon. The cap is 130 percent of the company's historical or original cost of its real property and tangible personal property. Note that if this exemption applies, other exemptions in the law do not.

The law also allows exemptions from property tax for certain communication satellites, communication franchises, and certain residential high-speed communication services. The provisions regarding these exemptions are found in HB 2485, which amends section 5 of SB 611.

The new law will generally apply to tax years beginning July 1, 2016.

Homestead Deferral

The legislature further amended the senior and disabled person property tax deferral program during this session. HB 2083 amends ORS 311.670 to allow for an exception to the five-year home ownership requirement. The exception will apply if the individual moved to the new homestead from a home that had been granted a deferral, the previous home had a greater real market value than the new homestead, the previous home was sold within a year of the purchase of the new homestead, the deferral liens were satisfied on the previous home, and the individual owed no more than 80 percent of the purchase price of the new homestead.

The law also includes new casualty insurance requirements and increases the real market value qualification limits for individuals who have continuously owned and lived in a property for at least 21 years.

The changes apply on or after July 1, 2016.

Reconnection to Federal Tax Law and Same-Sex Marriage

SB 63 is the reconnection bill for this session. As usual, this bill updates the references in Oregon law to the Internal Revenue Code that are not related to the definition of "taxable income." HB 2478 changes numerous references from "husband and wife" to "spouses in a marriage."

Suspension of Collections from Low-Income Individuals

HB 2089 requires that the Department of Revenue offer to suspend collection from a taxpayer if his or her income does not exceed 200 percent of the federal poverty guidelines based on the individual's household size and household members, if the taxpayer has less than $5,000 in assets, and if the income is solely from a source that is exempt from garnishment. Even though collection is suspended, interest continues to apply and the Department of Revenue can file a lien against the taxpayer's property.

Natural Resource Credit for the Oregon Estate Tax

The definition of "natural resource property," for the purposes of the natural resource credit on the Oregon Estate Tax Return, is changed by SB 864 to include only property located in the State of Oregon.

Heather Kmetz
2015 Mentor of the Year Award

The New Tax Lawyer Committee honored Heather Kmetz by awarding her the 2015 Mentor of the Year Award. The award, which is given to practitioners who are outstanding mentors to new tax lawyers, recognizes Heather's commitment to integrating new tax lawyers into the legal community.

Heather, a partner at Sussman Shank LLP, believes that encouraging new attorneys is a professional duty. As a member of the Tax Section's Executive Committee, Heather tries to foster ties between rising attorneys and established tax attorneys. Heather is also generous with her own time. She maintains an informal network of mentees who are at different stages of their legal careers. When these mentees have questions about professional development or substantive tax issues, Heather is quick to offer them support and advice.

Heather enjoys building positive relationships with new and established tax attorneys alike. A longtime resident of Portland, Heather especially enjoys working with attorneys who share her love for Oregon and the Pacific Northwest.

Congratulations, Heather, on receiving the 2015 Mentor of the Year Award!

Hon. Jill A. Tanner to be awarded 2016 Roberts Award

The Honorable Jill A. Tanner, Presiding Magistrate, Oregon Tax Court - Magistrate Division, is the 2016 Oregon Women Lawyers Justice Betty Roberts Award winner. The Roberts Award will be given at the **24th OWLS Roberts and Deiz Awards Dinner** on *Friday, March 11, 2016 at the Portland Art Museum.*

Please join the OSB Taxation Section for this special event honoring Judge Tanner and Kellie Johnson at the Portland Art Museum on the 2nd Friday in March.

If you are interested in joining a Tax Section table, then please do both of the following:

(1) Purchase your ticket(s) by following the "Click here to register" link at http://www.oregonwomenlawyers.org/roberts-deiz-awards-dinner/Please be sure to indicate in the notes that you want to sit at an "OSB Taxation Section" table; then

(2) Email ErinNDawson@gmail.com with the names of registered attendees and menu selection to confirm your spot at a Tax Section table.

Cost: Each person is responsible for his or her own ticket, and the Tax Section is only coordinating seating at the Tax Section table (or tables). Tickets are $90 per person ($65 for incomes under $50,000).

Tickets are transferrable, but not refundable. If you need to transfer your ticket, then email Erin Dawson with any name and menu changes before March 2.

You do not need to be an OWLS member to attend and this event will sell out, so please do not delay.

Questions? Please email Erin Dawson at ErinNDawson@gmail.com

Award of Merit

The Executive Committee of the OSB Taxation Section would like to recognize and honor those among us who exemplify professionalism in the practice of tax law in the State of Oregon. In 2009, we presented the Taxation Section's first Award of Merit to David Culpepper. Subsequently, the award has been presented to Robert Manicke (2010), John Draneas (2012), the Honorable Henry C. Breithaupt (2013), Mark Golding (2014), and Larry Brant (2015). We are now accepting nominations for the Taxation Section's fifth Award of Merit. Nominations must be received by April 15, 2016. There is no guarantee that an Award will be presented during 2016, the Executive Committee is striving to ensure that the Award is only given to candidates who truly deserve it. The Award will be granted to the candidate the Committee believes to best personify the Oregon State Bar's Statement of Professionalism, and best serves as a role model for other lawyers. Factors considered include competence, ethics, conduct with others and the courts, and pro bono contributions to the Bar and tax system. The candidate's accomplishments must fall within the tax field. If a recipient is selected, the Award will be presented at the 16th Annual Oregon Tax Institute on June 2, 2016.

More information about the criteria for the award and the nomination form is available online at www.osbartax.com/Award-of-Merit.

Future Events

Feb 16, 2016
Mid-Valley Tax Forum
Affordable Care Act Update
Christine Moehl, Saalfeld Griggs, PC
12:00 – 1:15 p.m.

Feb 18, 2016
Portland Luncheon Series: International Tax Planning
Portland
12:00-1:30 p.m.
Presenter: David Cordova, *Deloitte Tax LLP*

Mar 07, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland
12:00-1:00 p.m., Thede, Culpepper, Moore, Munro & Silliman LLP
(111 SW Fifth Ave., Ste. 3675)

Mar 16, 2016
New Tax Lawyer Committee: Social Hour
Portland
5:30-7:00 p.m., The Original (300 SW Sixth Avenue)

Mar 17, 2016
Portland Luncheon Series: Tax Issues for the Tax Exempt
Portland
12:00-1:30 p.m.
Presenter: William Manne, Miller Nash Graham & Dunn LLP

Mar 23, 2016
New Tax Lawyer Committee: Speaker Series: Tax Consequences of Buying, Holding, Modifying, and Disposing of Debt Instruments Acquired on the Secondary Market
Portland
Speaker: Paul Paschelke
Time & Location: Noon-1:15, Miller Nash Graham & Dunn LLP
(111 SW Fifth Ave., Suite 3400)

Apr 04, 2016
New Tax Lawyer Committee:
Monthly Meeting
Portland
12:00-1:00 p.m., Location TBA

Apr 20, 2016
New Tax Lawyer Committee: Pub Talk
Portland
5:30-7:00 p.m., The Original
(300 SW Sixth Avenue)

Apr 20, 2016
Portland Luncheon Series: Oregon Legislative Update
Portland
12:00-1:30 p.m.
Presenter: Robert Manicke, Stoel Rives

May 02, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland
12:00-1:00 p.m., Location TBA

May 18, 2016
New Tax Lawyer Committee: Social Hour Portland
5:30-7:00 p.m., The Original
(300 SW Sixth Avenue)

May 18, 2016
Portland Luncheon Series: Structuring Issues in NMTC Transactions
Portland
12:00-1:30 p.m.
Presenter: Alan Pasternack, Kantor Taylor Nelson Evatt & Decina PC

May 25, 2016
New Tax Lawyer Committee: Speaker Series: Tax-Exempt Organizations 101
Portland
Speaker: June Wiyrick-Flores
Noon-1:15 p.m., Miller Nash Graham & Dunn LLP (111 SW Fifth Ave., Suite 3400)

Jun 02-03, 2016
Oregon Tax Institute
Presenters: Various
Time: TBA
The Multnomah Athletic Club

Jun 06, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland
12:00-1:00 p.m., Location TBA

Jun 15, 2016
New Tax Lawyer Committee: Pub Talk
Portland
5:30-7:00 p.m., The Original
(300 SW Sixth Ave)

Jun 23, 2016
Portland Luncheon Series: The Complete Anatomy of a QSub Election--Not Just the Nuts and Bolts
Portland
12:00-1:30 p.m.
Presenter: Larry Brant, *Garvey Schubert Barer*

Jul 11, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland
12:00-1:00 p.m., Location TBA

Jul 20, 2016
New Tax Lawyer Committee: Speaker Series: International Taxation 101
Portland
Speaker: Justin Hobson
Noon-1:15 p.m., Miller Nash Graham & Dunn LLP (111 SW Fifth Ave., Suite 3400)

Jul 20, 2016
New Tax Lawyer Committee: Social Hour
Portland
5:30-7:00 p.m., The Original
(300 SW Sixth Avenue)

Aug 01, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland
12:00-1:00 p.m., Location TBA

Aug 17, 2016
New Tax Lawyer Committee: Social Hour
Portland
5:30-7:00 p.m., The Original
(300 SW Sixth Avenue)

Sep 05, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland
12:00-1:00 p.m., Location TBA

Sep 15, 2016
Portland Luncheon Series: What's New at DOR
Portland
12:00-1:30 p.m.
Presenter: Oregon Department of Revenue

Sep 21, 2016
New Tax Lawyer Committee: Pub Talk
Portland
5:30-7:00 p.m., The Original
(300 SW Sixth Avenue)

Oct 03, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland
12:00-1:00 p.m., Location TBA

Oct 19, 2016
New Tax Lawyer Committee: Speaker Series: Corporate Tax Issues: Formation and Capitalization
Portland
Speaker: David Brandon
Noon-1:15 p.m., Miller Nash Graham & Dunn LLP (111 SW Fifth Ave., Suite 3400)

Oct 19, 2016
New Tax Lawyer Committee: Social Hour
Portland
5:30-7:00 p.m., The Original
(300 SW Sixth Avenue)

Oct 20, 2016
Portland Luncheon Series: Nonqualified Deferred Compensation
Portland
12:00-1:30 p.m.
Presenter: Lorne Dauenhauer, Ogletree Deakins

Nov 07, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland
12:00-1:00 p.m., Location TBA

Nov 16, 2016
New Tax Lawyer Committee: Social Hour
Portland
5:30-7:00 p.m., The Original
(300 SW Sixth Avenue)

Nov 17, 2016
Portland Luncheon Series: Perspectives and Updates from the Bench
Portland
12:00-1:30 p.m.
Presenter: Judge Henry Breithaupt, Oregon Tax Court

Dec 05, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland
12:00-1:00 p.m., Location TBA

Dec 28, 2016
Portland Luncheon Series: Federal Legislative Update
Portland
12:00-1:30 p.m.
Presenter: Mark Prater, *Senate Finance Committee*