

April 16, 2021

MEMORANDUM

To: Finance and Housing Committee
From: Karina Bull, Analyst
Subject: Draft legislation for independent contractor protections

On April 20, 2021, the Finance and Housing Committee will discuss draft legislation, sponsored by Councilmember Herbold, that would provide basic protections for workers hired as independent contractors. This memo provides an overview of the legislation and identifies policy issues for the Councilmembers' consideration.

Background

In February 2019, the City Council (Council) passed [Resolution 31863](#) to address the problem of employers improperly misclassifying employees as independent contractors. The resolution requested the Office of Labor Standards (OLS) and the Labor Standards Advisory Commission (LSAC) to work on policy, outreach and enforcement proposals to address this problem.

In May 2020, the LSAC issued policy recommendations that would require hiring entities to provide all independent contractors (not just those who are at risk of being misclassified) with the information necessary to understand (1) the terms of engagement between parties, and (2) what work is covered in each payment. The LSAC described these recommendations as the first steps toward creating more transparency and access to information for all workers hired as independent contractors and noted that there was support for the recommendations from business, community, and worker advocates on the Commission. On April 6, 2021, the LSAC presented these recommendations to the Finance and Housing Committee and provided several updates, such as recommendations for establishing an income cap for covered independent contractors and unique enforcement models.

Currently, Seattle has seven laws extending employee protections to workers hired as independent contractors.¹ While the Transportation Network Company (TNC) Minimum Compensation Ordinance, Paid Sick and Safe Time for Gig Workers Ordinance, and Premium Pay for Gig Workers Ordinance require some of the information recommended by the LSAC, there are no comprehensive transparency requirements for all independent contractors working in Seattle.

¹ Seattle ordinances covering independent contractors include: (1) Fair Employment Practices Ordinance, [SMC 14.04](#) (covering domestic workers); (2) Fair Contracting Ordinance, [SMC 14.08](#); (3) Domestic Workers Ordinance, [SMC 14.23](#); (4) TNC Driver Deactivation Rights Ordinance, [SMC 14.32](#); (5) TNC Driver Minimum Compensation Ordinance, [SMC 14.33](#); (6) Paid Sick and Safe Time for Gig Workers, [Ordinance 126091](#); and (7) Premium Pay for Gig Workers, [Ordinance 126094](#).

Summary

The legislation would incorporate the LSAC's recommendations as follows:

Coverage

Consistent with LSAC's recommendation, the legislation would cover independent contractors working for two types of hiring entities: (1) hiring entities that retain both employees and independent contractors, or (2) hiring entities that retain five or more independent contractors on a consistent basis, but do not retain any employees.

Labor standards requirements

The legislation would establish new labor standards requirements for independent contractors by requiring hiring entities to provide the following written notices:

- 1. Pre-contract disclosures** – Prior to an independent contractor beginning work, a hiring entity would provide information on the proposed terms and conditions of work. Consistent with Wage Theft Ordinance requirements for employers to provide employees with notice of employment information, hiring entities would be required to provide the pre-contract disclosure in English and the independent contractor's primary language. The legislation would also require OLS to create model notices of the pre-contract disclosure in English, Spanish and other languages.
- 2. Payment disclosures** – Each time a hiring entity compensates an independent contractor, the hiring entity would provide a payment disclosure with itemized pay information.

The legislation would also require hiring entities to provide independent contractors with a notice of rights in English and the independent contractor's primary language, retain records showing compliance for three years, and comply with anti-retaliation prohibitions.

Enforcement

The Office of Labor Standards (OLS) would implement this legislation. Upon a finding of violation, OLS could require hiring entities to (1) provide the pre-contract and payment disclosures and (2) pay a fine up to \$556.30. The OLS Director would have discretion to make this fine payable directly to the aggrieved party. Aggrieved parties would have a private right of action for violations and could go to court to obtain the pre-contract and payment disclosure notices.

Issue Identification

1. Coverage of independent contractors

The legislation would cover all independent contractors. Council may want to consider adjusting coverage requirements to (a) exclude workers who work in fields already covered by policies that govern their work and/or payment, or (b) exclude workers who are less likely to experience barriers to information about their work and pay.

For example, the legislation could exclude sales representatives, attorneys, and licensed medical professionals because these professions are covered by state law, rules of professional conduct, or ethics policies that govern their work and/or payment.² New York City and Minneapolis have laws requiring written contracts and timely payment for independent contractors (referred to as “freelancers”) that exempt these workers from coverage.³

During the Finance and Housing Committee meeting on April 6, 2021, the LSAC recommended narrowing coverage to exclude workers who are highly compensated (e.g., lawyers, accountants, freelance designers) and suggested an income cap of \$75,000 per year. It is not clear how hiring entities would discern the overall annual income of independent contractors since some independent contractors may work for more than one hiring entity and/or perform work on an irregular basis for a hiring entity. Analysis of this recommendation would benefit from more information on reasons for excluding high income earners and the basis for establishing an income cap. If there are concerns about OLS’s enforcement capacity, capping worker income might not be necessary if OLS can use existing procedures for prioritizing investigations and workers have a private right of action as an alternative enforcement method. Currently, about half of Seattle’s labor standards restrict coverage to employees covered by minimum wage requirements; no labor standards have an income cap for coverage.

Options

- A. Exclude sales representatives, attorneys, and licensed medical professionals from coverage.
- B. Exclude other types of licensed professionals from coverage.
- C. Exclude certain independent contractors from coverage by imposing an income cap, such as \$75,000 per year.
- D. Make no changes to the legislation.

² Sales representative contract and payment requirements are covered by state law, [RCW 49.48.160](#). Attorneys and licensed medical professions have specific codes of ethics/rules of professional conduct that govern their practice, [Washington Courts Rules of Professional Conduct \(RPC\) 1.8](#) and [Washington Medical Commission Policies and Rules](#).

³ See the New York City Freelance Isn’t Free Act ([Local Law 140](#)) and the Minneapolis Freelance Workers Protections Ordinance ([Title 2, Chapter 40, Article VI](#)).

2. Coverage of hiring entities

The legislation would cover two types of hiring entities: (1) hiring entities that retain both employees and independent contractors and (2) hiring entities that hire five or more independent contractors on a consistent basis, but do not retain any employees.

Council may want to consider alternatives for defining hiring entity coverage. Independent contractors with limited information about a hiring entity's business structure and hiring practices could have difficulty applying these definitions. For example, an independent contractor might not know whether a small business has any employees, especially if communications are conducted online or by phone, or if the business does not have a public-facing establishment. Likewise, an independent contractor might not know whether a non-commercial entity (e.g., private party or household) retains an employee, such as a nanny, or consistently hires five or more independent contractors. Due to fears of retaliation, independent contractors could be reluctant to ask potential hiring entities the questions necessary to determine coverage. If workers are unsure about coverage, they may not assert their rights or report violations.

Also, if OLS investigates an alleged violation and cannot easily access evidence to determine the number of independent contractors consistently hired by a hiring entity, the office might need to conduct extensive research and fact gathering.

Options

- A. Cover hiring entities subject to restrictions on value of services (see below).
- B. Cover commercial hiring entities. Coverage could be determined by searching business license databases or other publicly available records.
- C. Increase the threshold number of independent contractors hired on a consistent basis. Coverage could include larger, recognizable businesses and align with threshold employee requirements in other labor standards (e.g., 20, 50, 250 or 500 independent contractors worldwide).
- D. Make no changes to the legislation.

3. Coverage of domestic workers

The two types of hiring entities covered by this legislation would likely exclude many private parties who hire domestic workers due to requirements to also hire an employee or multiple independent contractors on a consistent basis. However, many domestic workers are independent contractors and experience barriers to information about their work and pay. Council may want to consider adding a third type of hiring entity that includes those hiring a domestic worker regardless of whether they retain employees or other independent contractors.

Currently, the right to a notice of employment information and itemized pay statement only extends to domestic workers hired as employees. The Domestic Workers Ordinance requires OLS to create a model notice of rights and pay information in English, Spanish, and

other languages, but it does not require hiring entities to provide workers with this information.

On April 8, 2021, the Domestic Workers Standards Board (DWSB) issued recommendations to the Council and Mayor to amend the Domestic Workers Ordinance to require that hiring entities provide domestic workers with information about their rights and the conditions of their work. The DWSB recommended that this policy be considered in conjunction with Council's consideration of pay transparency for independent contractors.

Options

- A. Add a third category of hiring entity that includes entities hiring a domestic worker.
- B. Make no changes to the legislation.

4. Value of services

The legislation would include all work performed by independent contractors for covered hiring entities. An alternative approach could limit coverage to independent contractors providing services for a specific value, or reasonably expected to be a specific value over a certain period (e.g., calendar year). Examples of this approach could limit coverage to services where the proposed compensation is \$600 or more to align with IRS requirements for businesses to report payments to non-employees of \$600 or more; or proposed compensation of \$400 or more to align with IRS requirements for independent contractors to file an income tax return if net earnings were \$400 or more.

Imposing a threshold value of services would prevent coverage of smaller service agreements and could support OLS's enforcement because hiring entities or independent contractors would be required to keep records independent of this legislation. If imposing this restriction would prevent coverage of many domestic workers, there could be an exception covering all contracts for domestic services regardless of value.

Options

- A. Limit coverage to services where the proposed compensation is \$600 or is reasonably expected to be \$600 over a certain period (e.g., calendar year).
- B. Limit coverage to services where the proposed compensation is \$400 or is reasonably expected to be \$400 over a certain period (e.g., calendar year).
- C. Make no changes to the legislation.

5. Additional protections for gig workers

During the Finance and Housing Committee meeting on April 6, 2021, there was public comment and discussion of a labor standards campaign among gig workers hired by platform companies (i.e., workers hired as independent contractors by companies providing work through online-enabled application or platforms) to secure rights to minimum compensation, flexible work, and transparent job and pay information; and to establish a

gig workers standards board. Council may want to consider whether policies from this campaign could be included in this legislation.

Options

- A. Include expanded protections for gig workers in this legislation.
- B. Include a non-codified section that outlines a timeline for addressing minimum compensation.
- C. Make no changes to the legislation.

6. Enforcement

The legislation would include enforcement procedures and remedies typical of other labor standards. OLS would be authorized to issue administrative rules, conduct complaint-based and directed investigations of individual and company-wide claims, and impose remedies (e.g., fines payable to the City or the aggrieved party).

During the Finance and Housing Committee on April 6, 2021, the LSAC recommended consideration of unique enforcement models, such as the use of citations (akin to a speeding ticket) to permit limited investigations. The LSAC also recommended creating evidentiary presumptions for court claims, such as a rebuttable presumption in favor of the independent contractor's claim for payment if the hiring entity fails to provide a pre-contract disclosure or a rebuttable presumption of employment if a hiring entity fails to provide a pre-contract disclosure.

The legislation would likely permit OLS to develop policies and procedures for streamlining investigations without additional language. For example, OLS has used advisory letters and pre-investigation settlements as ways to quickly resolve complaints for existing labor standards. However, the legislation could establish specific methods for enforcement, such as citation process and/or court referral programs.

For the evidentiary presumptions, more research is needed to address the interplay of existing laws and court precedent with these types of remedies.

Options

- A. Specify enforcement methods, such as a citation process and/or court referral program.
- B. Specify evidentiary presumptions as remedies for court claims, pending additional research.
- C. Make no changes to the legislation; OLS could develop internal policies and procedures for enforcement.

7. Effective Date

The legislation has a blank placeholder for the effective date of the new Chapter 14.34. There is no typical amount of time between Council's passage of labor standards and implementation. Previous labor standards (except for emergency ordinances) have had lead times from three months to one year or longer. When establishing the effective date, Council may want to consider the legislation's requirements for OLS to create model notices and translations. OLS would need time to prepare for implementation and conduct outreach to workers and hiring entities.

Options

- A. Specify an effective date for Chapter 14.34 (e.g., September 1, January 1, March 1, July 1).
- B. Do not specify an effective date. Chapter 14.34 would go into effect 30 days after the Mayor signs the legislation.

Next steps

The Finance and Housing Committee is scheduled to discuss the draft legislation at its meeting on April 20, 2021. Please contact me if you have questions.

Attachment

1. Independent Contractor Protections – Policy Options

cc: Dan Eder, Interim Central Staff Director
Aly Pennucci, Supervising Analyst

Attachment 1. Independent Contractor Protections – Policy Options

Topic	Issue Identification	Options
<p>1. Coverage of independent contractors</p>	<p>The legislation would cover all independent contractors. The City Council (Council) may want to consider adjusting coverage requirements to (a) exclude workers who work in fields already covered by policies that govern their work and/or payment, or (b) exclude workers who are less likely to experience barriers to information about their work and pay.</p> <p>For example, the legislation could exclude sales representatives, attorneys, and licensed medical professionals because these professions are covered by state law, rules of professional conduct, or ethics policies that govern their work and/or payment.¹ New York City and Minneapolis have laws requiring written contracts and timely payment for independent contractors (referred to as “freelancers”) that exempt these workers from coverage.²</p> <p>During the Finance and Housing Committee meeting on April 6, 2021, the Labor Standards Advisory Commission (LSAC) recommended narrowing coverage to exclude workers who are highly compensated (<u>e.g.</u>, lawyers, accountants, freelance designers) and suggested an income cap of \$75,000 per year. It is not clear how hiring entities would discern the overall annual income of independent contractors since some independent contractors may work for more than one hiring entity and/or perform work on an irregular basis for a hiring entity. Analysis of this recommendation would benefit from more information on reasons for excluding high income earners and the basis for establishing an income cap. If there are concerns about the Office of Labor Standard’s (OLS’s) enforcement capacity, capping worker income might not be necessary if OLS can use existing procedures for prioritizing investigations and workers have a private right of action as an alternative enforcement method. Currently, about half of Seattle’s labor standards restrict coverage to employees covered by minimum wage requirements; no labor standards have an income cap for coverage.</p>	<p>A. Exclude sales representatives, attorneys, and licensed medical professionals from coverage.</p> <p>B. Exclude other types of licensed professionals from coverage.</p> <p>C. Exclude independent contractors from coverage by imposing an income cap, such as \$75,000 per year.</p> <p>D. Make no changes to the legislation.</p>

¹ Sales representative contract and payment requirements are covered by state law, [RCW 49.48.160](#). Attorneys and licensed medical professions have specific codes of ethics/rules of professional conduct that govern their practice, [Washington Courts Rules of Professional Conduct \(RPC\) 1.8](#) and [Washington Medical Commission Policies and Rules](#).

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<p>2. Coverage of hiring entities</p>	<p>The legislation would cover two types of hiring entities: (1) hiring entities that retain both employees and independent contractors and (2) hiring entities that hire five or more independent contractors on a consistent basis, but do not retain any employees.</p> <p>Council may want to consider alternatives for defining hiring entity coverage. Independent contractors with limited information about a hiring entity’s business structure and hiring practices could have difficulty applying these definitions. For example, an independent contractor might not know whether a small business has any employees, especially if communications are conducted online or by phone, or if the business does not have a public-facing establishment. Likewise, an independent contractor might not know whether a non-commercial entity (<u>e.g.</u>, private party or household) retains an employee, such as a nanny, or consistently hires five or more independent contractors. Due to fears of retaliation, independent contractors could be reluctant to ask potential hiring entities the questions necessary to determine coverage. If workers are unsure about coverage, they may not assert their rights or report violations.</p> <p>Also, if OLS investigates an alleged violation and cannot easily access evidence to determine the number of independent contractors consistently hired by a hiring entity, the office might need to conduct extensive research and fact gathering.</p>	<p>A. Cover hiring entities subject to restrictions on value of services (see below).</p> <p>B. Cover commercial hiring entities. Coverage could be determined by searching business license databases or other publicly available records.</p> <p>C. Increase the threshold number of independent contractors hired on a consistent basis. Coverage could include larger, recognizable businesses and align with threshold employee requirements in other labor standards (<u>e.g.</u>, 20, 50, 250 or 500 independent contractors worldwide).</p> <p>D. Make no changes to the legislation.</p>
<p>3. Coverage of domestic workers</p>	<p>The two types of hiring entities covered by this legislation would likely exclude many private parties who hire domestic workers due to requirements to also hire an employee or multiple independent contractors on a consistent basis. However, many domestic workers are independent contractors and experience barriers to information about their work and pay. Council may want to consider adding a third type of hiring entity that includes those hiring a domestic worker regardless of whether they retain employees or other independent contractors.</p> <p>Currently, the right to a notice of employment information and itemized pay statement only extends to domestic workers hired as employees. The Domestic Workers Ordinance requires OLS to create a model notice of rights and pay information in English, Spanish, and other languages, but it does not require hiring entities to provide workers with this information.</p>	<p>A. Add a third category of hiring entity that includes entities hiring one or more domestic workers.</p> <p>B. Make no changes to the legislation.</p>

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	<p>On April 8, 2021, the Domestic Workers Standards Board (DWSB) issued recommendations to the Council and Mayor to amend the Domestic Workers Ordinance to require that hiring entities provide domestic workers with information about their rights and the conditions of their work. The DWSB recommended that this policy be considered in conjunction with Council’s consideration of pay transparency for independent contractors.</p>	
<p>4. Value of Services</p>	<p>The legislation would include all work performed by independent contractors for covered hiring entities. An alternative approach could limit coverage to independent contractors providing services for a specific value, or reasonably expected to be a specific value over a certain period (e.g., calendar year). Examples of this approach could limit coverage to services where the proposed compensation is \$600 or more to align with IRS requirements for businesses to report payments to non-employees of \$600 or more; or proposed compensation of \$400 or more to align with IRS requirements for independent contractors to file an income tax return if net earnings were \$400 or more.</p> <p>Imposing a threshold value of services would prevent coverage of smaller service agreements and could support OLS’s enforcement because hiring entities or independent contractors would be required to keep records independent of this legislation. If imposing this restriction would prevent coverage of many domestic workers, there could be an exception covering all contracts for domestic services regardless of value.</p>	<ul style="list-style-type: none"> A. Limit coverage to services where the proposed compensation is \$600 or is reasonably expected to be \$600 over a certain period (e.g., calendar year). B. Limit coverage to services where the proposed compensation is \$400 or is reasonably expected to be \$400 over a certain period (e.g., calendar year). C. Make no changes to the legislation.
<p>5. Additional protections for gig workers</p>	<p>During the Finance and Housing Committee meeting on April 6, 2021, there was public comment and discussion of a labor standards campaign among gig workers hired by platform companies (i.e., workers hired as independent contractors by companies providing work through online-enabled application or platforms) to secure rights to minimum compensation, flexible work, and transparent job and pay information; and to establish a gig workers standards board. Council may want to consider whether policies from this campaign could be included in this legislation.</p>	<ul style="list-style-type: none"> A. Include expanded protections for gig workers in this legislation. B. Include a non-codified section that outlines a timeline for addressing minimum compensation C. Make no changes to the legislation.

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<p>6. Enforcement</p>	<p>The legislation would include enforcement procedures and remedies typical of other labor standards. OLS would be authorized to issue administrative rules, conduct complaint-based and directed investigations of individual and company-wide claims, and impose remedies (e.g., fines payable to the City or the aggrieved party).</p> <p>During the Finance and Housing Committee on April 6, 2021, the LSAC recommended consideration of unique enforcement models, such as the use of citations (akin to a speeding ticket) to permit limited investigations. The LSAC also recommended creating evidentiary presumptions for court claims, such as a rebuttable presumption in favor of the independent contractor’s claim for payment if the hiring entity fails to provide a pre-contract disclosure or a rebuttable presumption of employment if a hiring entity fails to provide a pre-contract disclosure.</p> <p>The legislation would likely permit OLS to develop policies and procedures for streamlining investigations without additional language. For example, OLS has used advisory letters and pre-investigation settlements as ways to quickly resolve complaints for existing labor standards. However, the legislation could establish specific methods for enforcement, such as citation process and/or court referral programs.</p> <p>For the evidentiary presumptions, more research is needed to address the interplay of existing laws and court precedent with these types of remedies.</p>	<p>A. Specify enforcement methods, such as a citation process and/or court referral program.</p> <p>B. Specify evidentiary presumptions as remedies for court claims, pending additional research.</p> <p>C. Make no changes to the legislation; OLS could develop internal policies and procedures for enforcement.</p>
<p>7. Effective date</p>	<p>The legislation has a blank placeholder for the effective date of the new Chapter 14.34. There is no typical amount of time between Council’s passage of labor standards and implementation. Previous labor standards (except for emergency ordinances) have had lead times from three months to one year or longer. When establishing the effective date, Council may want to consider the legislation’s requirements for OLS to create model notices and translations. OLS would need time to prepare for implementation and conduct outreach to workers and hiring entities.</p>	<p>A. Specify an effective date for Chapter 14.34 (e.g., September 1, January 1, March 1, July 1).</p> <p>B. Do not specify an effective date. Chapter 14.34 would go into effect 30 days after the Mayor signs the legislation.</p>