

May 3, 2021

MEMORANDUM

To: Finance and Housing Committee
From: Karina Bull, Analyst
Subject: Draft Legislation for Independent Contractor Protections

On May 4, 2021, the Finance and Housing Committee (Committee) will discuss draft legislation, sponsored by Councilmember Herbold that would include new requirements for hiring 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 recommended that the City require hiring entities to provide all independent contractors (not just those who are at risk of being misclassified) with the following written information:

1. proposed terms of engagement between parties, and
2. itemized pay information.

The LSAC described these recommendations as the first steps toward creating more transparency and access to information for 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.

On April 20, 2021, the Committee was scheduled to discuss draft legislation that incorporated LSAC's recommendations and an accompanying Central Staff memo, but the discussion was postponed due to time constraints. On May 4, 2021, the Committee will discuss revised draft legislation that includes substantive policy developments in the areas of:

1. hiring entity coverage;
2. labor standards requirements; and
3. enforcement mechanisms.

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 establish some permanent and temporary protections for ride share drivers and gig workers, there are no comprehensive labor standards for all independent contractors working in Seattle.

Summary

The legislation would incorporate and expand LSAC's recommendations to establish new labor standards for many (although not all) independent contractors working in Seattle. The labor standards would be effective on March 1, 2022.

Coverage

The legislation would cover independent contractors working for two types of hiring entities:

1. a commercial hiring entity that hires an independent contractor to provide services for the commercial hiring entity's business or commercial activity; or
2. any hiring entity that hires an independent contractor to provide domestic worker services.

The Legislation would exclude all independent contractors hired by non-commercial entities (e.g., a plumber, carpenter, or pet sitter hired by a private party). The legislation would also explicitly exclude coverage of attorneys and licensed medical professionals working within the scope of their profession and, pursuant to future Director rules, other independent contractors working in a profession governed by a comparable code of ethics.

Labor standards requirements

The legislation would require hiring entities to provide independent contractors with pre-contract disclosures, timely payment, and payment disclosures.

- 1. Pre-contract disclosures** – Prior to beginning work, a hiring entity would provide a written disclosure with the terms and conditions of the job. Consistent with Wage Theft Ordinance requirements for employees, the legislation would require hiring entities to provide the information in English and the independent contractor's primary language. The legislation would also direct OLS to create model notices (e.g., template documents with fillable blanks) of the pre-contract disclosure in English, Spanish and other languages.

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](#).

2. **Timely payment** – A hiring entity would pay an independent contractor pursuant to the terms and conditions of the pre-contract disclosure (or related contract). The payment would be due on or before the date specified in the pre-contract disclosure (or related contract). If the pre-contract disclosure (or related contract) does not specify a due date, then payment would be due no later than 30 days after the completion of the services.
3. **Payment disclosures** – With each payment, the hiring entity would provide a written disclosure with itemized pay information including total payment and a breakdown of the rate of pay, pay basis, tip compensation (if included) and other items.

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 the legislation as follows:

1. **Rules** – OLS would have authority to issue administrative rules. There are numerous provisions stating OLS’s authority to issues rules. In addition, OLS would have discretion to clarify other provisions to help parties understand their rights and responsibilities.
2. **Outreach** – OLS would develop model notices and templates for the pre-contract disclosure, payment disclosure, and notice of rights in English and other languages. OLS would also establish a court navigation program to provide intake and information on court procedures for civil actions; obtaining translation, interpretation and other courtroom services; contacting organizations for legal assistance, and other information on resolving workplace issues.
3. **Enforcement**
 - a. **OLS enforcement** – OLS would conduct investigations or engage in a “complaint procedure.” For the complaint procedure, OLS would provide the hiring entity with notice of an alleged violation and an opportunity to respond. OLS would provide the hiring entity’s response to the independent contractor. OLS would not determine whether a violation has occurred. After the conclusion of the complaint procedure, the independent contractor could pursue further enforcement of the claim in court.
 - b. **Private right of action** – Aggrieved parties would have a right to file a civil action for violations and could be awarded attorney fees plus costs.
4. **Remedies** – Remedies for violations would include (1) provision of the pre-contract and payment disclosures, and (2) payment of up to three times the unpaid compensation plus interest.
 - a. **Rebuttable presumption for payment** – If a hiring entity fails to provide a pre-contract disclosure or fails to provide the payment specified in a pre-contract disclosure, the legislation would establish a legal presumption, rebuttable by clear

and convincing evidence² (such as a written contract), that the independent contractor's claims for payment are true. Both OLS and a court could use the rebuttable presumption to establish the payment due to an independent contractor.

- b. Penalties and fines** – Consistent with existing labor standards, OLS could also impose penalties/fines in varying amounts, including up to \$556.30 per type of violation. OLS could issue lower penalties/fines depending on the circumstances of the violation (e.g., nature and persistence of the violations; substantive or technical nature of the violations; size, revenue, and human resources capacity of the hiring entity).

Labor Standards for platform gig workers

The proposed legislation includes a non-codified section on labor standards for platform gig workers (i.e., workers hired as independent contractors by companies providing work through an online-enabled application or platform). The non-codified section states Council's intent to develop legislation that would require minimum compensation, flexibility protections, and transparency requirements and to consider such legislation for a full Council vote before the start of the 2021 budget deliberations.

Issue Identification

1. Written contract

The legislation would rehire hiring entities to provide independent contractors with a pre-contract disclosure before the independent contractor begins work.

Council may want to consider requiring a written contract instead of a pre-contract disclosure. Requiring a written contract could simplify the hiring process and enforcement. A contract could result in a more participatory "meeting of the minds" than a pre-contract disclosure prepared by one party; result in greater clarity of terms (including terms not required by the pre-contract disclosure); and reduce the risk of a dispute. A written contract is already a legally binding document that would not require a rebuttable presumption to establish an enforceable agreement. A downside of a written contract is that parties could no longer enter into oral contracts – although the ability to purely engage in an oral agreement is already somewhat diminished by the written pre-contract disclosure requirement.

Options:

- A. Require a written contract instead of a pre-contract disclosure.
- B. Make no changes to the legislation.

² "Clear and convincing evidence" means that the evidence must be highly and substantially more likely to be true than untrue. This is a medium level burden of proof that is a more rigorous standard than "preponderance of the evidence" but a less rigorous standard than "beyond a reasonable doubt."

2. Enforcement – remedies, civil penalties, and fines

Certain hiring entities, such as small businesses and hiring entities hiring domestic workers, might be unaccustomed to providing written disclosures for contract work or keeping records of hiring independent contractors. Such hiring entities also might experience significant hardship if required to pay to three times the amount due to the independent contractor and penalties/fines for violations of these requirements.

The legislation would have several provisions to mitigate the impact of OLS's enforcement, such as Director discretion to:

- a. use a complaint procedure that centers on providing notice to the parties rather than an investigation;
- b. determine whether to impose penalties/fines based on the circumstances of each situation; and
- c. waive or reduce penalties/fines if the hiring entity pays the remedy due in a timely manner following service of the Director's Order.

Council may want to consider additional measures to mitigate the impact of enforcement. For example, the legislation could prevent OLS from imposing penalties/fines for first violations (except for egregious violations) by small businesses or hiring entities hiring domestic workers. Or the legislation could entirely remove penalties/fines for violations by such hiring entities, thereby restricting such enforcement measures to larger commercial hiring entities.

Options:

- A. Specify that OLS could not impose penalties/fines for first violations by a small business (except for egregious violations). Small businesses could be defined as those hiring less than a certain number of employees (e.g., less than 5, 10, 20 employees), those exempt from City business license tax, or as defined by Director rules.
- B. Specify that OLS could not impose penalties/fines for first violations by any hiring entity hiring a domestic worker (except for egregious violations).
- C. Remove OLS's authority to impose penalties/fines on small businesses.
- D. Remove OLS's authority to impose penalties/fines on hiring entities hiring domestic workers.
- E. Specify some combination of A, B, C, or D.
- F. Make no changes to the legislation.

3. Effective Date

The labor standards requirements would become effective on March 1, 2022. Council may want to consider providing OLS with more time to prepare for implementation. 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 time needed for OLS to create a variety of informational materials (e.g., model notices in English and other languages, court navigation documents) and engage in a potentially lengthy rulemaking process. OLS recommends an effective date of one year from passage.

Options

- A. Change the effective date of the labor standards requirements to provide OLS with at least one year to prepare for implementation (e.g., June 1, 2022 or July 1, 2022).
- B. Make no changes to the legislation.

Next steps

The Finance and Housing Committee is scheduled to discuss the draft legislation at its meeting on May 4, 2021. Please contact me if you have questions.

cc: Dan Eder, Interim Director
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