

MEMORANDUM

To: Office of Labor Standards
From: Labor Standards Advisory Commission (LSAC)
Date: May 6, 2020
Subject: Recommendations on Independent Contractor Transparency

I. Background

On February 19, 2019, Council passed Resolution 31863 calling on the Labor Standards Advisory Commission (LSAC) to develop a work program to assist the Office of Labor Standards (OLS) on the issue of independent contractor misclassification.¹

In response, LSAC formed a Misclassification Subcommittee comprised of four LSAC members: Elizabeth Ford, Seattle University School of Law professor and former Legal Director of the Fair Work Center; Mona Smith, business attorney; Anthony Burnett, President of MBD Staffing; and Artie Nosrati, Field Director at Working Washington. Rather than attempting to redefine the test for independent contractors, the subcommittee has concentrated on information barriers that those who are currently designated as independent contractors face.

In its May 6, 2020 meeting, LSAC voted to endorse the subcommittee's recommendations and presents those recommendations to OLS here. LSAC determined that such action was necessary and routine pursuant to the Governor's [Proclamation 20-28](#).

II. Introduction

Part of the charge given to LSAC was to base our recommendations on the report created by the Washington State Department of Commerce pursuant to Substitute Senate Bill 6032, §127 (2018). When it is published, that report will include information regarding the following:

- Needs of workers earning income as independent contractors including sources of income;

¹ The specific charge for LSAC was as follows:

Develop a work program identifying how they will work with OLS on the issue of misclassification, particularly how they can assist OLS by providing input on effective strategies based on their experience and existing worker and business associations. LSAC should consider how they can assist OLS in engaging parties affected by the issue of misclassification through stakeholder groups and public hearings.

This recommendation represents a first step on which there is support from business and worker advocates on the Commission. Should OLS choose to move this recommendation forward, the Commission will develop a work plan related to community engagement.

- Amount of their income derived from independent work; and
- Discussion of the benefits provided to such workers.²

However, the Department's report has not yet been issued in part because of challenges in data collection. Specifically, since so much of its data collection will be based on self-reporting, the interim report identifies a series of gaps in the information available to the workers themselves.

The interim study also points to a few dynamics that help to inform this set of initial recommendations. First, there seems to be clear underreporting of independent contractor status among workers. That is, workers do not accurately report themselves to be independent contractors. Second, there is a connection between independent contractor misclassification and the underground economy. Often vulnerable workers will be told that they are independent contractors and therefore not entitled to any information about their employment. Finally, in the gig economy, the diversity of platforms – and therefore the diversity of payment methodology - has increased dramatically over the past five years.

Thus, LSAC recommends this first, modest step toward creating more transparency and access to information among those currently classified as independent contractors.

III. Recommendation

LSAC recommends a policy requiring hiring entities to provide independent contractor workers with the information necessary to understand (1) the terms of the relationship between an independent contractor and a hiring entity and (2) what work is covered in each payment received. More simply, independent contractors should be able to understand the terms of their engagement and determine whether those terms have been satisfied.

a. Pre-contract Disclosures

Prior to beginning work, a hiring entity should be required to provide independent contractor workers with enough information to understand who they are working for, how to contact the hiring entity, and the pay they can expect to receive for the work. The following is a list of the types of disclosures we recommend be required. These are intended as examples and not prescriptions.³

- i. Name of hiring entity;
- ii. Physical address of the hiring entity;
- iii. Telephone number and, if applicable, email address of the hiring entity;
- iv. Rate or rates of pay for the contractor;
- v. Typical expenses incurred in the course of the work, if any, and which expenses will be paid or reimbursed by the hiring entity ;

² <https://www.commerce.wa.gov/about-us/research-services/independent-contractor-employment-in-washington-state/> (last visited 1/1/20).

³ It is sensible to us that those disclosure would track, where practicable, the disclosures required by Seattle's Wage Theft Ordinance, SMC 14.20, in the employer/employee context.

- vi. Pay basis, and where payment is made on other than an hourly basis, it is sensible to require disclosure of the method for determining pay so that the contractor can determine if payment comports with the agreement;
- vii. Tip and/or service charge policy.
- viii. Payment Schedule

Further, when providing outreach and education on any eventual transparency requirement, OLS should consider providing a model notice for independent contractors informing them of business licensing requirements.

b. Disclosure at time of Payment

At the time of payment, a hiring entity should be required to provide independent contractor workers with information detailing the work the payment covers. The following is a list of the types of disclosures we recommend be required.

- i. A description of the work for which payment is being made, whether by description of the project; tasks completed, or hours worked;
- ii. All rate or rates of pay whether paid on hourly, salary, commission, piece rate, project, or combination thereof, or other basis;
- iii. Tip or service charge compensation;
- iv. Pay basis (e.g. hour, shift, day, week, commission) and what hours or work is compensated by which pay basis;⁴
- v. Gross earnings; and
- vi. All deductions, fees, or other charges for that pay period.

c. Hiring Entity Coverage

LSAC recommends that these policies apply to hiring entities who (1) retain both employees and independent contractors or (2) retain five or more independent contractors on a consistent basis, but do not retain any employees. The first coverage requirement will ensure that a private party hiring an individual contractor on an isolated basis is not required to provide the disclosures described above (e.g. an individual hiring a plumber or an independent contractor hair stylist). The second coverage requirement ensures that hiring entities that have an exclusively independent contractor workforce must still provide transparency disclosures. Policymakers should consider how to define “consistent basis” and look to the treatment of coverage thresholds in existing labor standards such as the Minimum Wage Ordinance, Commuter Benefits Ordinance, and Paid Sick and Safe Time ordinance.

d. Other Considerations

⁴ The policy should consider how to describe work that is compensated on a non-hourly basis such that workers understand what they are being paid for

Finally, we note that in most cases where there is a written contract for services, that contract should provide the necessary pre-contract disclosures. For others, we recommend OLS develop model notices or other tools to assist hiring entities in complying.