



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

January 5, 2004

Barry Jones, Manager of Enforcement
Oregon Occupational Safety and Health Division
350 Winter St, NE, Room 430
Salem OR 97301-3882

Re: Opinion Request OP-2004-1

Dear Mr. Jones:

David Sparks, Special Assistant to the Administrator, Oregon Occupational Safety and Health Division of the Department of Consumer and Business Services (OR-OSHA), asked three questions about OR-OSHA's jurisdiction over inmates participating in prison work programs.^{1/} We set out the questions asked and our short answers below, followed by our analysis.

1. In those situations where a city or county government in Oregon elects to provide workers' compensation coverage for inmates in accordance with ORS 656.041, do Oregon's occupational safety and health laws apply to those inmates by virtue of this election?

Yes.

2. In those situations where a city or county government has not elected to provide workers' compensation coverage for inmates, do Oregon's occupational safety and health laws apply to the inmates? Apart from occupational safety and health statutes, is there a separate legal obligation for an entity using and directing inmate labor to record injuries and illnesses of that labor in the OSHA 300 log?

No. Without election by a city or county government, the state's occupational safety and health laws do not apply to inmates. Our research has not identified any legal obligation to record injuries and illnesses for an entity using and directing inmate labor apart from occupational safety and health laws.

3. When youth offenders (under age 21) are temporarily employed per ORS 420.060 to 420.074, do Oregon's occupational safety and health laws apply to the youth offenders?

Oregon's occupational safety and health laws apply to youth offenders if the employer elects or is required to provide workers' compensation coverage for them under ORS chapter 656 or if the youth are subject to the direction and control of the employer.

Discussion

1. **Applicability of Oregon occupational safety and health laws if a city or county elects to provide workers' compensation coverage to inmates under ORS 656.041.**

Pursuant to a delegation of authority from the Director of the Oregon Department of Consumer and Business Services to the OR-OSHA Administrator, OR-OSHA has jurisdiction over all places of employment. ORS 654.025; OAR 437-001-0020. A place of employment is essentially anywhere employees actually or potentially work. ORS 654.005(8). "Employee" is defined to include "any individual who is provided with workers' compensation coverage as a subject worker pursuant to ORS chapter 656, whether by operation of law or by election." ORS 654.005(4).

ORS 656.041(2) provides that a city or county may elect to have inmates performing authorized employment considered as subject workers of the city or county for purposes of ORS chapter 656. If the city or county makes such an election, the city or county must provide workers' compensation coverage for those inmates that are considered subject workers for purposes of ORS chapter 656. ORS 656.017 to 656.174.

OR-OSHA, therefore, has jurisdiction over those inmates performing authorized employment for whom the city or county has elected to provide workers' compensation coverage, because those inmates are considered employees under ORS 654.005(4) and the area where the work is being performed is considered a place of employment under ORS 654.005(8).

In summary, the election by the city or county under ORS 656.041(2) makes the inmates subject workers when performing authorized employment and thereby compels workers' compensation coverage, which triggers OR-OSHA jurisdiction.

2. **Applicability of Oregon occupational safety and health laws if city or county does not provide workers' compensation coverage.**

The analysis for determining the applicability of Oregon occupational safety and health laws to city and county jail inmates begins with noting that both the definition of "employee" under ORS 654.005(4) and "worker" under 656.005(30) require the person to "engage to furnish services for a remuneration." The first step in analyzing any rule or statute is to examine the text and context using rules of statutory construction, and if the intent of the rule is clear from that analysis, then no further examination is undertaken. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993).

"Engage" in the work context means "to arrange to obtain the services of usu. for a wage or fee; * * * to enter (oneself) into an agreement to serve." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 751 (unabridged 1993). Thus, "engage to furnish services for a remuneration" requires an agreement or contract for hire between the worker and the employer. *See, e.g., Hopkins v. Kobos Co.*, 186 Or App 273, 276-277, 62 P3d 870 (2003) (phrase "engage to furnish services for a remuneration" in ORS 656.005(30) requires agreement between claimant and employer that employer will provide remuneration for claimant's services). The context of ORS chapter 656 also supports this conclusion since otherwise the election provisions

in ORS 656.041(2) would be meaningless. *See, e.g., Astleford v. SAIF*, 319 Or 225, 230, 874 P2d 1329 (1994) (in first level of analysis under *PGE* framework of statutory interpretation, court considers both statutory provision's text and context, with context including other provisions of same statute and other statutes relating to same subject); *ODOT v. City of Klamath Falls*, 177 Or App 1, 8, 34 P3d 667 (2001) (in interpreting meaning of administrative rule, court considered effect of interpretation on related rule).

Inmates of a city or county correctional facility who participate in work release programs are compelled by law to provide labor as a condition of incarceration and, therefore, do not "engage to furnish services for remuneration" regardless of whether the inmates receive any compensation. *See* ORS 169.170 to 169.320 (assignment of city and county prisoners to public works and sheriff's control over prisoners; work by prisoners); *see also* Or Const., Art I §41(6) (grants cities and counties authority to compel inmates to engage in work and on-the-job training programs). In *Westfall v. Multnomah County*, 57 Or App 459, 645 P2d 561 (1982), the court directly addressed this issue with regard to workers' compensation coverage for an inmate on a county work crew. The *Westfall* court held that an inmate who was injured while working on a county work crew was not a "subject worker" covered under the Workers' Compensation Act because the county did not file an election of coverage under ORS 656.041. The court concluded that inmates are required to work because of their status as prisoners, making them "conscripts," not employees. *Westfall*, 57 Or App at 462.

As already stated in our short answer to this question, we have not identified any legal obligation to record injuries and illnesses for an entity using and directing inmate labor apart from requirements found in the occupational safety and health laws. Therefore, OR-OSHA would not have jurisdiction where the city or county has not elected to provide workers' compensation coverage for inmates under ORS 656.041(2), because the inmates would not be considered employees under ORS 654.005(4).

3. Applicability of Oregon occupational safety and health laws to youth offenders engaged in temporary employment under ORS 420.060 to 420.074.

ORS 420.074 provides that:

"While temporarily employed under the provisions of ORS 420.060 to 420.074, youth offenders placed in a youth correction facility are entitled to the protection and benefits of ORS chapters 652, 654 and 656 to the same extent as other employees of their employer under 21, except that:

(1) Payment of wages by an employer of a youth offender directly to the superintendent as provided by ORS 420.065 (2) shall not be deemed in violation of ORS chapter 652; and

(2) Compensation paid under ORS chapter 656 that is not expended on medical services shall be treated in the same manner as the youth offender's earnings under ORS 420.065, so long as the youth offender remains in the legal custody of the youth correction facility."

ORS 420.060 to 420.074 authorize an employment program for youth offenders placed in a youth correctional facility. It is clear under ORS 420.074 that when youth offenders are permitted to work under that program, the protections of Oregon's Occupational Safety and Health Act, ORS chapter 654, apply to the same extent as for non-offender youth employees. Thus, the offender status of the youth worker and the lack of a true contract for employment do not prevent OR-OSHA from asserting jurisdiction, as would normally be the case for inmates. In order to establish jurisdiction, OR-OSHA must still prove, however, that the youth is otherwise an "employee" under ORS 654.005(4), *i.e.* that the employer has elected or is required to provide workers' compensation coverage under ORS chapter 656 or that the youth is subject to the direction and control of the employer.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

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^{1/} As used in this Letter of Advice, the term "inmate" encompasses and includes, without limitation, those persons identified in ORS 656.041(1)(b) and ORS 169.005(7).