

# Independent Contractor or Employee?



Presented by  
ODOT Procurement Office

# Topics

## Independent Contractor

Risk of misclassification

What is an Independent Contractor?

Assessing and mitigating risk

# Learning Objectives

By the end of the training, participants will be able to:

- ✓ Identify risks of treating contracted resources as employees
- ✓ Become familiar with tests and factors used to determine if a contracted resource is an Independent Contractor or an employee
- ✓ Strategize ways to avoid or mitigate risk of an employee misclassification

# Disclaimer

The information presented in this training and in the accompanying materials is provided as a summary and teaching guide.

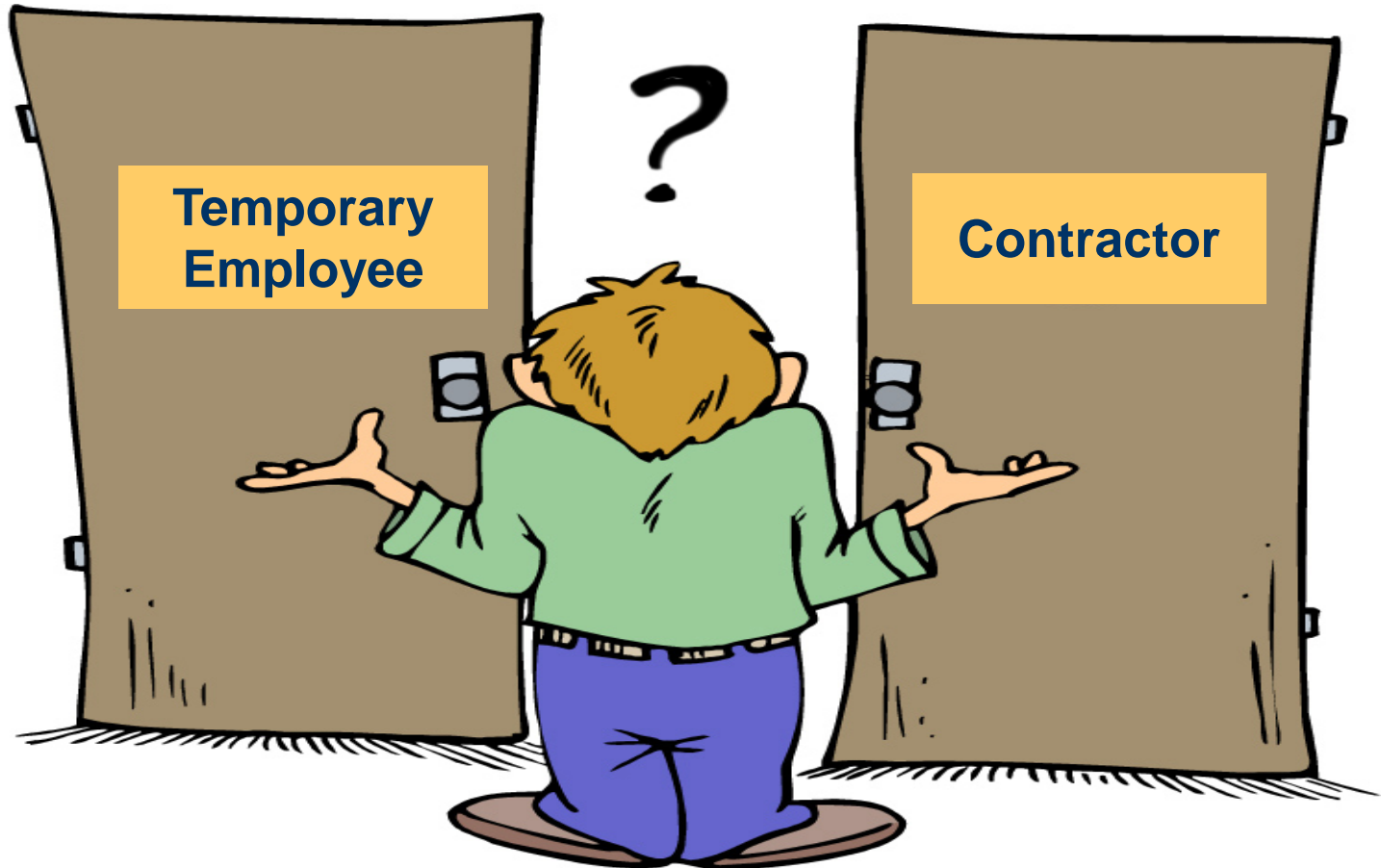
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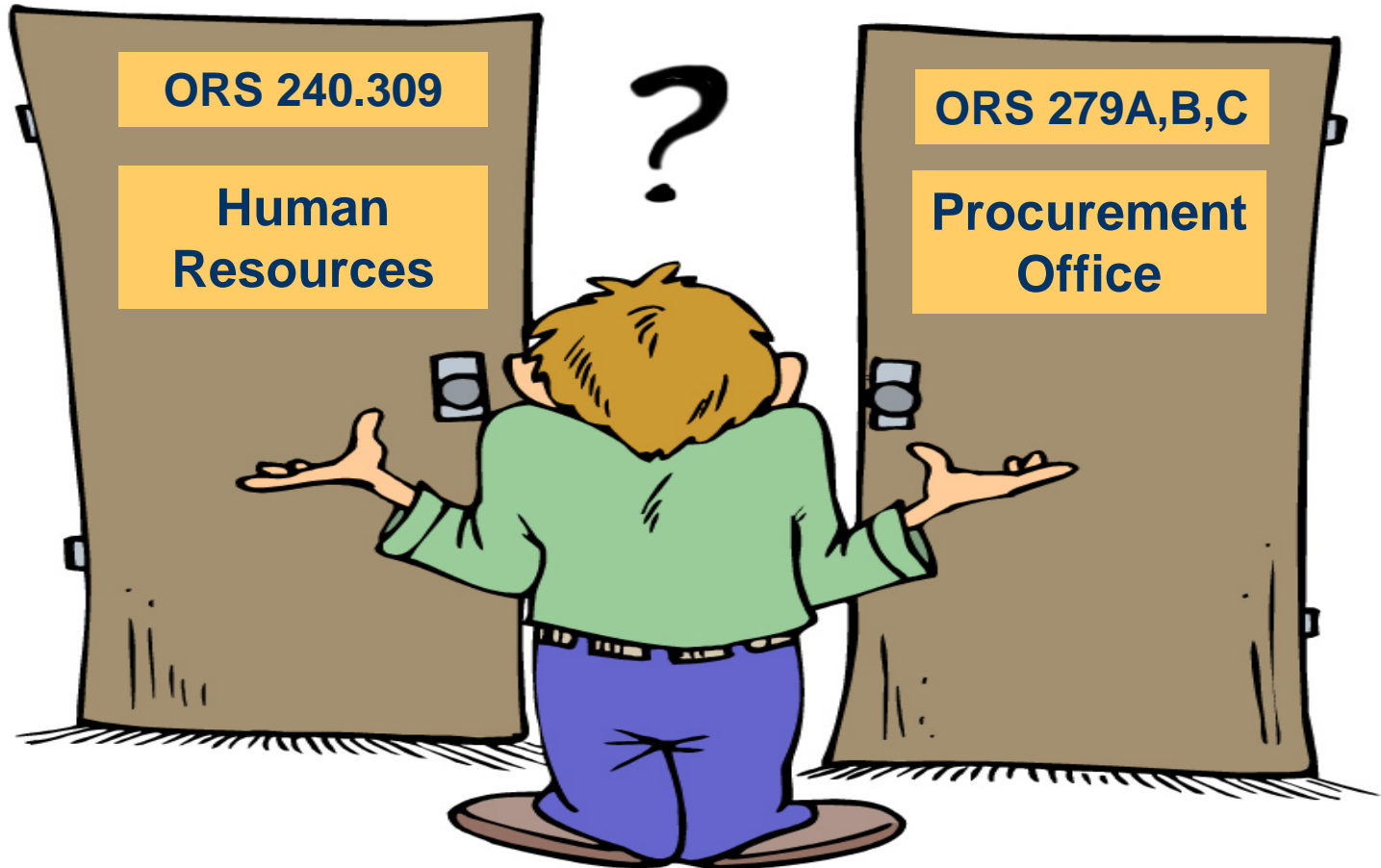
# Independent Contractors



# Employee or Contractor?



# Employee or Contractor?



# Outsourcing Work

Why should you care about Independent Contractor status?

Employee

Independent Contractor





# Oregon Personnel Relations Statutes

Any person who **willfully** violates ORS 240.309 State Personnel provisions commits a Class A misdemeanor:

## Penalties

- Fine up to \$6,250 or up to one year incarceration, or both
- Ineligible for employment in state services for 5 years (any person)
- Deemed guilty of malfeasance and lose state service position (employee or officer of the state)

**This would impact you personally!**

# Impact to Agency

Agency may be liable for:

- Employment taxes, plus late fees & penalties
- Compensation for accrued overtime
- Non-compliance with the Affordable Care Act
- Retirement benefits
- FMLA
- Vacation and sick leave benefits
- Harm or damage caused by contracted resource
- Violation of bargaining agreement

# Example #1 – Freelancers

1. A company contracts with “freelancers”
2. Each freelancer signs an agreement that they are an “independent contractors” responsible for their own:
  - federal and state taxes withholding
  - social security withholding
  - insurance and other benefits
3. Each freelancer signs a separate acknowledgement that they are responsible for their own insurance and other benefits
4. Freelances are paid through Accounts Payable; not Payroll

# Example #1, Part 2 - Freelancers

1. Contracted for specific projects
2. Often are continued on successive projects for years
3. Fully integrated into the company's workforce
4. Work onsite and on work teams with company's regular employees
5. Share same supervisors, perform identical functions and work same core hours as regular employees
6. Are provide admittance card keys, office equipment and supplies by the company

# Vizcaino vs. Microsoft

Class action suit involving 10,000 misclassified workers ruled in favor of workers

The Independent Contractor Agreements were legally voided

Court ruled eligible workers entitled to Employee Stock Purchase Program benefits - \$97 million settlement

Microsoft hired 3,000 of the freelancers as regular employees with full benefits – estimated at \$101 million

# Red Flags for IRS

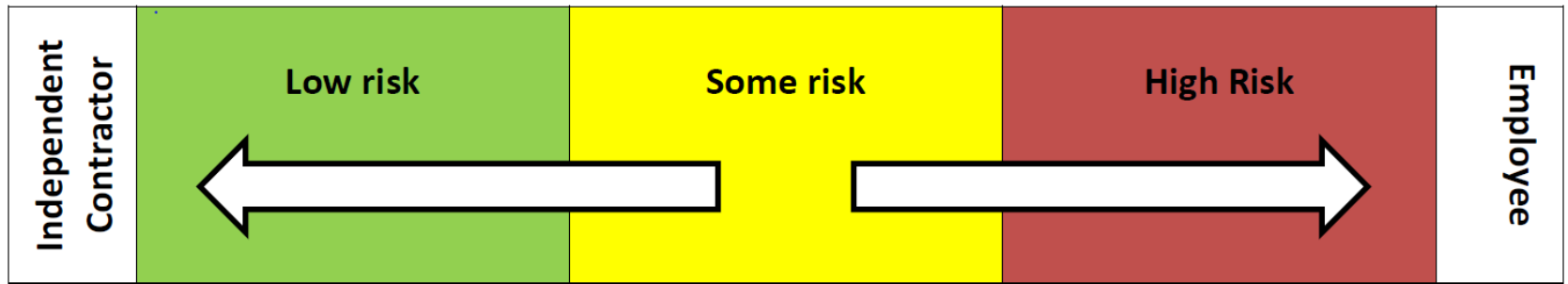
- Worker previously provided the same services as an employee (retired, then returned as independent contractor)
- An exclusive independent contractor relationship lasting for years
- Independent contractor is:
  - Under contract for past several years
  - Provides increased “bench” depth to the entity for completion of key programming
  - Attends bimonthly staff meetings
  - Required to follow the policies and procedures of the entity

# What is an Independent Contractor?



# Determination

More a continuum of risk than an exact definition





# Common Considerations

1. Nature and degree of control by agency
2. Extent to which the services are integral part of agency's business
3. Duration of the relationship
4. Independent enterprise
  - Extent of worker's investment in facilities and equipment
  - Ability of worker to hire others to help with the work
  - Extent worker is able to perform similar services for others while working for agency
  - Degree of control worker has to set own schedule, hours and working conditions

# IRS 11 Factor Test

1. Behavioral Control
2. Financial Control
3. Type of Relationship

# Behavioral Control

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include:

- Instructions the business gives the worker.
- Training the business gives the worker.

# Example #2 - Behavioral Control

Robert...

1. Reports to work daily at CWEB to receive inspection assignments.
2. Returns to CWEB after scheduled inspections to complete required paperwork.
3. Must satisfactorily complete CWEB's training courses for residential inspection.
4. Uses CWEB-created protocols to conduct inspections.

# Behavioral Control- Summary

- *The less control agency has over the worker's behavior, the more likely the worker is an Independent Contractor*
- *The more control agency has over the worker's behavior, the more likely the worker is an employee*

# Financial Control

Facts that show whether the business has a right to control the business aspects of the worker's job include:

- Extent of worker's unreimbursed business expenses.
- Extent of worker's investment.
- Extent workers makes services available to relevant market.
- How business pays the worker.
- Extent worker can realize a profit or loss.

# Example #3 - Financial Control

1. Robert works 40 hours per week for CWEB.
2. Robert's hourly rate is set by CWEB.

CWEB provides Robert...

3. Materials needed to do inspections.
4. A desk and workspace at CWEB.
5. A badge and business cards.
6. An agency vehicle to travel to and from residences he is assigned to inspect.

# Financial Control - Summary

- *If the worker provides the facilities and equipment necessary for the services, the worker is more likely an Independent Contractor.*
- *If agency provides the facilities and equipment, the worker is more likely an employee.*
- *If a profit may be made or a loss incurred, the worker is more likely an Independent Contractor.*
- *If not, the worker is more likely an employee.*



# Relationship

Facts that show the parties' type of relationship include:

- Written contracts describing the relationship the parties intended to create.
- Whether company provides worker with employee-type benefits; insurance, pension plan, vacation or sick pay.
- Permanency of the relationship.
- Extent services performed by worker are a key aspect of company's regular business.

## Example #4 - Relationship

Robert:

1. Is paid an hourly pay approximately the same as regular full-time CWEB residential inspectors.
2. Does not receive CWEB employee benefits, such as health or life insurance.
3. Performs the same job duties as regular full-time residential inspectors employed by CWEB.
4. Receives assigned inspections from CWEB on an ongoing as-needed basis.

# Relationship - Summary

- *If the work is expected to be completed at the conclusion of the project or specific period of time, it is more likely the worker is an Independent Contractor.*
- *If there is an expectation that the work will exist on an ongoing basis, it is more likely the worker is an employee.*

# Assessing Independent Contractor

Visible to procurement staff

Visible to field staff



# Assessing Risk

- Assess each situation on a case-by-case basis
- Look at the entire relationship and weigh all factors
- Consider degree or extent that agency has a right to direct or control the worker.
- For factors that indicate employee:
  - If not a defensible business necessity, make changes to those factors and others to strengthen Independent Contractor status
  - If a defensible business necessity, document reason and make compensating adjustments to strengthen Independent Contractor status for those and other factors

# #1 - Independent Contractor or Employee?

1. Henry Anderson owns ABC Landscape & Maintenance (“ABC”).
2. ABC provides landscape maintenance to several businesses.
3. ODOT contracts with ABC to cut weeds growing on a steep embankment in ODOT right of way.
4. The project must be completed within two days.
5. ODOT agrees to pay ABC a flat rate for the services.
6. ABC provides all equipment and labor to complete the services.
7. To meet the deadline, ABC hires a couple temporary laborers.
8. ABC’s trailer is temporarily out of commission, so ABC rents a trailer to haul the cut debris from the site, as required by the contract.
9. Upon completion of the services, ABC invoices ODOT the flat rate agreed to in the contract.

## #2 - Independent Contractor or Employee?

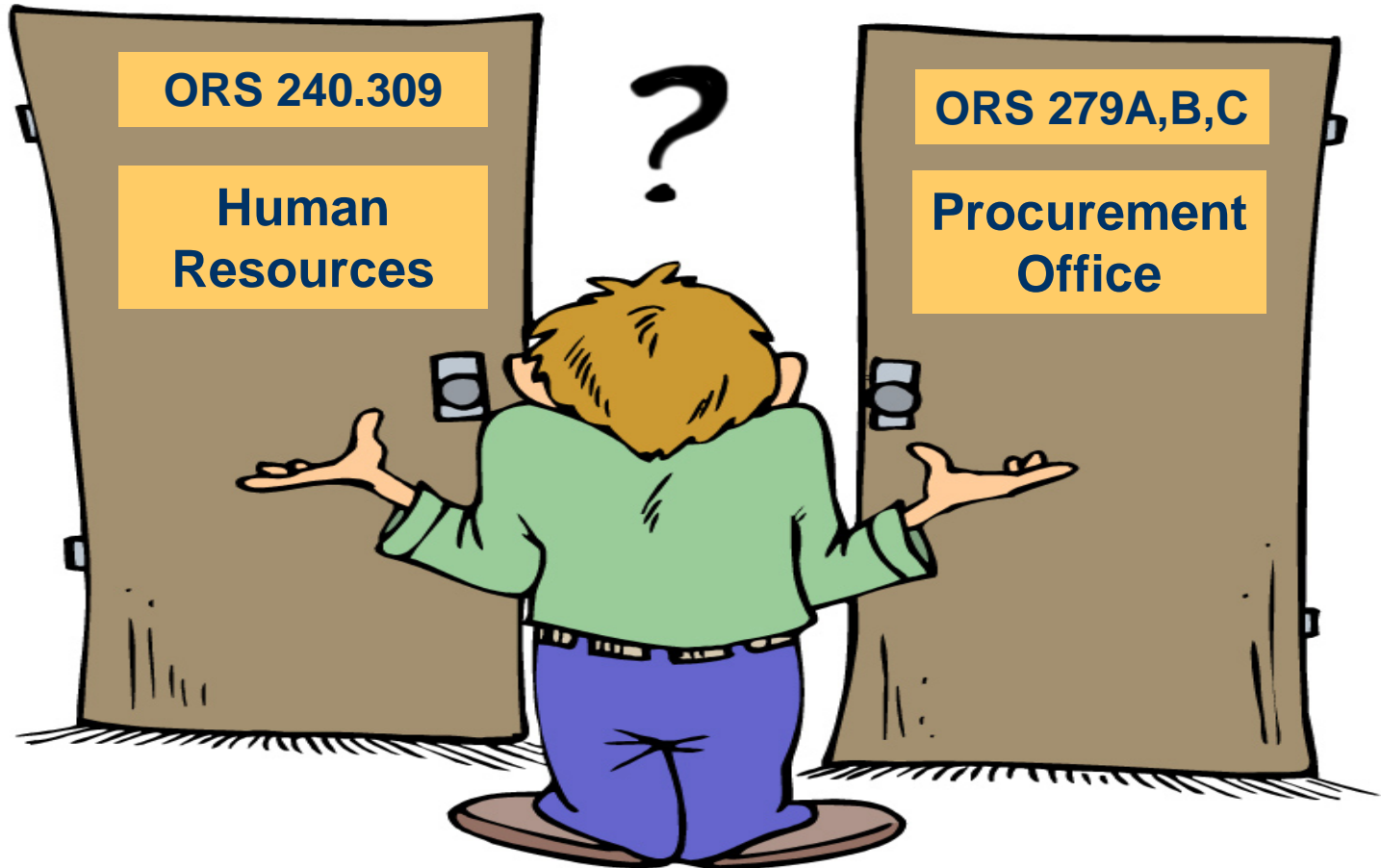
1. ODOT has selected Ray Miller for a contract to provide process improvement training and facilitation services.
2. During negotiations of the contract, ODOT agrees to provide Ray a cubicle with computer and telephone.
3. ODOT agrees to give Ray access to ODOT's Outlook system so Ray can check employee calendars and schedule meetings for various process improvement projects.
4. ODOT agrees to time & materials (T&M) compensation and reimbursement of travel and all other direct expenses associated with the services.
5. The contract is for two years with option to extend an additional two years.

# Best Practices

- Centralized worker classification decisions
- Be consistent
- Classify workers performing same/similar work the same
- Independent contractor should not perform same work as regular employees
- Ensure written independent contractor agreement is in place
- Independent contractors should be paid via invoice
- Review all relationships with independent contractors and their duties
- Monitor compliance and performance of terms, amending the contract as necessary



# Summary



# Resources

Oregon.gov – Oregon Independent Contractors

<http://www.oregon.gov/IC/pages/index.aspx>

OPO Independent Contractor webpage

<http://transnet.odot.state.or.us/cs/opo/Pages/IndependentContractor.aspx>

ODOT Procurement Office staff

# Wrap Up

This training was provided to help you identify potential risks of when engaging with contractors.

Knowledge of factors used to make independent contractor determinations will help you make conscious and intentional decisions, and develop solutions to mitigate potential risks.

If needed, seek additional assistance from your manager, the ODOT Procurement Office and other resources.

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*Thank you  
for your participation!*