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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

BROADWAY CAB LLC, Petitioner Cross-Respondent, Petitioner on Review, v. EMPLOYMENT DEPARTMENT, Respondent Cross-Petitioner, Respondent on Review.	Office of Administrative Hearings No. T71262 CA A150627 SC S062715

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, EMPLOYMENT DEPARTMENT

Petition for Judicial Review of the Final Order of the Employment Department

Opinion Filed: September 4, 2014
Before: Sercombe, Presiding Judge, Hadlock, Judge, and Tookey, Judge
Author of Opinion: Hadlock, Judge

Continued...

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, EMPLOYMENT DEPARTMENT

STATEMENT OF THE CASE

Petitioner Broadway Cab LLC ("Broadway") is a taxicab company. At issue is whether the Employment Department (the department) may assess unemployment insurance tax on wages paid to Broadway's taxicab drivers.

Oregon's unemployment insurance statutes define "employment"—the presence of which results in an employer's liability for unemployment insurance tax—broadly. This court has therefore construed that definition broadly, such that the unemployment insurance statutes may achieve the legislature's goal of securing the economic condition of working people who become unemployed. Under that broad view, any services performed for any type of remuneration are typically subject to the tax. That view of employment encompasses taxicab drivers, who are precisely the type of working people intended to be protected by the unemployment insurance statutes.

And although that broad definition of employment is subject to an exception for independent contractors, that exception is quite narrow. Indeed, that exception is available only if a worker meets *each* of four conjunctively-stated requirements, all of which are directed at identifying those individuals who are truly independent in their work. Here, Broadway's policies do not leave its taxicab drivers with the sort of independence necessary to meet three

of those requirements, and the failure to satisfy any one of those three requirements is fatal to Broadway's appeal.

For those reasons, Broadway is in an employment relationship with its taxicab drivers, and it owes unemployment tax on their wages.

Questions Presented and Proposed Rules of Law

The ultimate question here is whether the relationship between Broadway and its taxicab drivers was an employment relationship for the purposes of ORS chapter 657. In answering that question, the court must answer the following predicate questions:

FIRST QUESTION PRESENTED

Broadway's taxicab drivers keep a portion of fares paid by passengers for their services. Does that form of compensation amount to remuneration for the purposes of establishing an employment relationship between Broadway and those drivers?

FIRST PROPOSED RULE OF LAW

Yes. One may be the employer of an individual for the purposes of ORS chapter 657 even though that individual is paid by someone else, either directly or indirectly. Neither the source of payment nor methods of accounting prevent a court from concluding that the putative employer is ultimately responsible for the remuneration.

SECOND QUESTION PRESENTED

To qualify as an independent contractor, an individual who provides services must be free from direction and control. Were Broadway's taxicab drivers free from direction and control here?

SECOND PROPOSED RULE OF LAW

No. Where a putative employer, like Broadway here, controls the primary resources necessary to perform the services, requires the individual to participate in training, and reinforces that training both by maintaining supervision over the performance of those services and by using financial incentives and fines, the individual performing the services retains no freedom to select either the manner or the means of performing the services.

THIRD QUESTION PRESENTED

To qualify as an independent contractor, an individual who provides services must also be customarily engaged in an independently established business. Relevant to that inquiry is whether the individual maintains a business "location" that is separate from the putative employer's "location." Is a vehicle such as taxicab a "location" for the purposes of that statutory criterion?

THIRD PROPOSED RULE OF LAW

No. A vehicle is not a "location" because the common meaning of that statutory term—as well as the statute's context and legislative history—establishes that a "location" must be a place that has the characteristics of real property and is suitable for occupancy.

FOURTH QUESTION PRESENTED

To qualify as an independent contractor, an individual who provides services must also obtain "licenses or certificates necessary to provide the services." Is that requirement met simply by obtaining *some* necessary licenses, as opposed to *all* necessary licenses?

FOURTH RULE OF LAW

No. An individual does not obtain "licenses or certificates necessary to provide the services" unless that individual obtains *all* licenses necessary to performing the services. A provider of services cannot be "independent" without all necessary licenses.

Summary of Argument

Whether Broadway owes unemployment insurance taxes on its taxicab drivers' earnings depends on whether an "employment" relationship exists between them. Under ORS 657.030, service performed for remuneration is employment. Under this court's caselaw, that test is applied broadly: service includes any act done for the benefit of another, and remuneration includes any compensation for that service. Here, Broadway's taxicab drivers performed services that benefitted Broadway because those services permitted Broadway to fulfill its obligations under its taxicab company permit and under contracts where it received payment from third parties in exchange for those services. Further, the taxicab drivers undisputedly received compensation from *someone*

for those services, and this court's caselaw establishes that one may be the employer of an individual for the purposes of ORS chapter 657 even though that individual is paid by someone else, either directly or indirectly. Thus, Broadway's taxicab drivers performed services for remuneration, and an employment relationship existed between Broadway and its drivers.

Notwithstanding that employment relationship, Broadway could still avoid paying unemployment insurance tax if it could qualify for a statutory exclusion from the definition of employment. Broadway argues that it is entitled to ORS 657.040's exclusion for independent contractors. That argument is unavailing because Broadway's taxicab drivers can satisfy none of the conjunctive requirements of the independent contractor test.

First, because Broadway directed both the means and manner by which its drivers performed services, the drivers were not free from Broadway's direction and control. Second, the taxicab drivers possessed none of the statutory characteristics of an independently established business: they did not maintain a separate business location, they did not make a significant investment in any independent business, and they did not have the authority to hire or fire other persons to participate in providing the services at issue. And finally, because the drivers could not operate as taxicab drivers without affiliating with a permitted taxicab company, the drivers did not obtain all the licenses necessary to provide their services.

Statement of Facts

The following facts are taken from the ALJ's factual findings[1] and from the decision on review, in which the Court of Appeals stated the facts "consistently with the ALJ's unchallenged factual findings and the uncontroverted evidence in the record." *Broadway Cab LLC v. Employment Dept.*, 265 Or App 254, 257, 336 P3d 12 (2014).

Broadway operated in Portland under a license from the city, which requires such a license in order to operate as a taxicab company. (Order at 4). To maintain that permit, Broadway was required to maintain taxicab service 24 hours per day, 7 days per week, including the ability to provide "reasonably prompt service" in response to telephone requests. (Order at 4 & n 10). At a minimum, Broadway was required to maintain a fleet of at least 15 taxicabs with at least two-thirds of its fleet in service at all times. (Pet Br 4). Failure to comply with the city's requirements would have exposed Broadway to civil penalties and potential revocation of its permit. (Order at 19).

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[1] Because Broadway has not—either before the Court of Appeals or before this court—contested any of the factual findings contained in the final order on review, the department relies, where possible, on those findings rather than the agency record. *See Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 134, 903 P2d 351 (1995) (holding that "unchallenged findings of fact are the facts for purposes of judicial review of an administrative agency's final order")

Broadway also entered into agreements with third-parties, obligating itself to provide taxicab services to various types of riders. (Order at 5–8). For example, Broadway received $13.86 million from Tri-Met in exchange for agreeing to provide comparable service to disabled individuals who could not use Tri-Met's fixed-route system. (Order at 6). In another contract, Broadway received $600,000 from Portland Public Schools (PPS) in exchange for agreeing to provide flat cab service. (Order at 6).

Broadway's taxicab drivers maintained city-issued driver permits, but they could not provide taxicab services to riders without associating with a permitted taxicab company. (Order at 8–9). During the relevant period, the city issued no new taxicab company permits, and none of the drivers operated a second business. (Order at 8–9).

All drivers paid Broadway a $160 weekly driver fee. That fee was intended to cover insurance for the drivers, as well as the cost of various services—such as payment processing, dispatching, accounting, and marketing—that Broadway provided. (Order at 9). Broadway provided the drivers with no accounting of how that $160 fee was applied to those various expenses. (Order at 9).

Broadway's drivers were required to provide their own vehicles, which they could either purchase for themselves or lease from Broadway. (Order at 9). Regardless of whether a vehicle was owned or leased, city regulations

required it to be painted in distinct company colors and to display markings identifying the taxicab company under which it was operating. (Order at 5). Also, regardless of whether a vehicle was owned or leased, Broadway maintained the right to dictate where the vehicle should be parked when not in use and to require compliance with vehicle check-in and checkout procedures. (Order at 10). Broadway charged driver-owners $420 weekly for their right to use their own vehicle, but reduced that fee to $320 weekly if the driver-owner associated with another one of Broadway's approved taxicab drivers who did not have a vehicle. (Order at 10). Broadway charged each driver-lessee a $290 weekly lease fee, but it leased each vehicle to two different drivers for alternating 12-hour periods. (Order at 10). Driver-owners were responsible for maintenance and repairs on their vehicles, but Broadway was responsible for maintenance and repairs on the leased vehicles. (Order at 14).

Broadway processed credit card payments for its drivers, though it did not require drivers to process payments through Broadway. (Order at 9, 12). Broadway also processed payment for riders who maintained accounts with Broadway and for riders who paid with vouchers under Broadway's agreements with third parties. (Order at 12, 19–20). Broadway maintained those funds in an account created for each driver, and Broadway deducted its fees from those accounts. (Order at 12, 19–20). Broadway permitted drivers to withdraw funds from those accounts only at the end of the week, and only if a balance remained

after Broadway deducted its fees. (Order at 12, 19–20). Broadway relied on the drivers' fees for 91.5% of its revenue. (Order at 12).

Based on those facts, the ALJ concluded that Broadway's taxicab drivers performed services for remuneration, that the drivers were not independent contractors, and that the amount of remuneration was "the difference between the fares collected and the fees paid to [Broadway]." (Order at 20, 27).

ARGUMENT

Every "employer" subject to ORS chapter 657 must pay unemployment insurance taxes "on all wages paid for services." ORS 657.505(1)–(2). The statutory framework defines the terms "wages" and "employer" to turn on the presence of "employment."[2] Thus, whether Broadway owes unemployment insurance taxes on account of its taxicab drivers depends on whether an "employment" relationship exists between them.

Under ORS 657.030, service performed for remuneration is employment:

> "employment" means *service* for an employer, including service in interstate commerce, within or outside the United States, *performed for remuneration* or under any contract of hire, written or oral, express or implied.

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[2] As relevant here, ORS 657.105(1) provides that "unless the context requires otherwise, * * * 'wages' means all remuneration for employment * * *."

ORS 657.025(1) provides that "unless the context requires otherwise, 'employer' means any employing unit which employs one or more individuals in an employment * * *."

(Emphases added). But an employer may—in certain circumstances—avoid having such service treated as employment if it can show that the individual performing the service is an "independent contractor, as that term is defined in ORS 670.600." ORS 657.040(1).

Here, Broadway's drivers performed service for remuneration, which gives rise to an employment relationship. And because those drivers do not meet the statutory definition of independent contractors, they do not qualify for the independent-contractor exclusion from the general definition of employment. Thus, the drivers' remuneration amounts to wages, and Broadway owes taxes on those wages as the drivers' employer.

A. Broadway's taxicab drivers performed service for remuneration.

Whether Broadway's taxicab drivers performed service for remuneration ultimately requires interpreting those terms—"service" and "remuneration"—as they appear in ORS 657.030. When interpreting statutory terms, this court must pursue the intention of the legislature. ORS 174.020(1). Text and context are primary to that analysis, but this court may also view legislative history with whatever weight this court determines that history deserves. *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009); *see also* ORS 174.020(3).

This court has observed in *Kirkpatrick v. Peet*, 247 Or 204, 212, 428 P2d 405 (1967) that the purpose of the Unemployment Insurance Act cannot be served unless ORS 657.030's definition of employment is construed broadly

enough to encompass persons who are "peculiarly subjected to the hazard of unemployment because of the nature of their occupation." Under that broad view of ORS 657.030, Broadway's taxicab drivers performed service for remuneration.

1. Broadway's taxicab drivers performed a service for Broadway.

Broadway does not dispute that its drivers performed services, but argues that those services were performed for the general public rather than for Broadway. (Pet Br 19). That argument lacks merit because it ignores both the broad sweep of the statutory term at issue and because Broadway in fact received substantial benefits from its drivers' services.

Put most simply, a "service" is "an act done for the benefit or at the command of another." *Webster's Third New Int'l Dictionary* 2075 (unabridged ed 2002); *see also Journal Pub. Co. v. State U.C. Com.*, 175 Or 627, 636, 155 P2d 570 (1945) (applying a similar definition). This court has held, in the context of an earlier but similarly-worded version of the unemployment compensation statutes, that "service" is "a broad term of description evidencing a legislative intent to give to the [Unemployment Compensation] Act a broad and liberal coverage to the end that the far-reaching effects of unemployment may be alleviated." *Journal Pub. Co.*, 175 Or at 636 (internal quotation marks omitted); *see also id.* at 634 (quoting unemployment compensation law providing that 'Employment' means service for an employer * * * performed

for remuneration or under any contract of hire, written or oral, express or implied" (omissions in *Journal Pub.*)).

Under any reading of that definition—and certainly under the broad view required to achieve the purposes of the Unemployment Insurance Act—Broadway's taxicab drivers performed service for Broadway because Broadway received substantial benefits from its drivers' acts of taxiing passengers. As noted above, Broadway operated under a permit from the city of Portland, and under that permit, Broadway was required to provide taxicab services throughout the city, at all times. (Order at 4 & n 10). Broadway drew business by marketing its large fleet of taxicab drivers. (Order at 4). Broadway also entered into contractual agreements with third-parties, obligating itself to provide taxicab services to various types of riders. (Order at 5–8). Because Broadway could fulfill none of those obligations without the services provided by its taxicab drivers, those services were to Broadway's benefit.[3] Moreover, Broadway received substantial benefits from the third-parties, who paid large sums directly to Broadway in exchange for the services of Broadway's taxicab drivers. (Order at 6 ($13.86 million paid by Tri-Met, $600,000 paid by PPS)).

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[3] Without doubt, those services also benefitted the riders, but no authority supports a rule that an act constitutes service to an employer only if the employer is the *only* entity that benefits from that service. Indeed, such a rule would defy reason: all sorts of employment—*e.g.*, nearly every type of customer-facing work—benefits parties other than the employer.

That beneficial relationship between Broadway and its taxicab drivers—in which Broadway contracted with its taxicab drivers to discharge Broadway's contractual obligations to third parties—is similar to relationships that this court has previously recognized as reflecting "service." For example, in *Kirkpatrick*, because a distributor of a certain brand of vacuum cleaners sold its merchandise "through the efforts of door-to-door salesmen," those salesmen were—for the purposes of ORS 657.030—"clearly" employed to perform services. 247 Or at 206, 213. And in *Journal Pub. Co.*, this court explained that a newspaper carrier's delivery of newspapers constituted a service to the publisher because that delivery served to fulfill the publisher's contractual obligations to its subscribers. 175 Or at 639, 653. So too here: Broadway relied on its taxicab drivers to fulfill Broadway's obligations under its taxicab company license and under its contracts with TriMet and PPP. Just as the publishing company in *Journal Pub.* would have been out of business without the services of its carriers, 175 Or at 639 ("circulation of a newspaper is its lifeblood"), Broadway would be out of business without the services of its taxicab drivers.

To contend with those facts, Broadway incorrectly characterizes itself as a "vendor of services" to its taxicab drivers. (*See* Administrative Exhibit A5 at 3). Broadway asserts that its "business model was simple": in exchange for a flat fee, it provided taxicab operators with "a bundle of services"—such as dispatch services, payment processing, marketing and advertising—to assist the

drivers in "providing taxicab services to the general public." (Pet Br 9, 20). By casting itself as a "vendor of services," Broadway suggests that its drivers are its clients rather than its employees, and that Broadway merely sells services to its drivers, who in turn provide services to their own clients, the general public.

But Broadway's relationship with its taxicab drivers is distinguishable from the relationship that a typical vendor of services maintains with its clients. First, the only benefit a vendor of services receives from its clients is payment, not the sort of non-monetary benefits discussed above. Second, a typical vendor of services is in the business of marketing its services to a field of client businesses, it is not in the business of marketing itself to the purchasing public in the way that Broadway does. Thus, a payment processor markets itself to retail chains, not to retail customers who typically neither know nor care who is processing payments for the retail chain. And although an advertising firm may market its *clients* to the purchasing public, it does not market its *own* services to that audience, who again neither know nor care who the advertising firm is. Here, by contrast, Broadway and its taxicab drivers are in precisely the same line of business—providing transportation to riders, marketed directly to those riders under Broadway's name. *Cf. Journal Pub. Co.*, 175 Or at 637 (summarizing two earlier Oregon Supreme Court cases where an individual was held to have provided services for an employer: one in which the employer was in the business of selling real estate and the employee "aided him in the

carrying on of that business by procuring sales of real estate"; another in which part of the business of the employer was selling sewing machines and "the services of the employee consisted in aiding the company to dispose its products to the purchasing public").

In sum, Broadway made business decisions—such as marketing itself as a taxicab company and entering into contracts with third parties—that allowed it to generate revenue by accepting certain obligations, and Broadway could not fulfill those obligations without the services of its drivers. Thus, Broadway directly benefitted from the services of its taxicab drivers and cannot claim to be merely a vendor of services.

2. Broadway's taxicab drivers were remunerated.

Broadway does not dispute that its drivers were compensated for their services, but again attributes that fact to the general riding public rather than to Broadway. (Pet Br 23). Again, Broadway ignores the broad sweep of the statutory term at issue, which does not require that compensation be received directly from the putative employer.

To "remunerate" is to "pay an equivalent to (a person) for a service, loss, or expense." *Webster's Third New Int'l Dictionary* 1921 (unabridged ed 2002). The legislature used the word remuneration "advisedly as one of broad meaning in order that the objects of the [Unemployment Compensation] Act might be achieved." *Journal Pub. Co.*, 175 Or at 657. This court long ago recognized

that one may be the employer of an individual for the purposes of ORS chapter 657 "even though the wages of such an individual are paid by someone else, either directly or indirectly." *Columbia Management Co. v. Morgan*, 270 Or 109, 119, 526 P2d 571 (1974).

For example, in *Journal Pub. Co.*, the newspaper carrier purchased newspapers from the publisher at wholesale price, delivered them to subscribers, collected from those subscribers the retail price and paid the publisher the difference between wholesale and retail price. 175 Or at 633, 635–36. That is, the remuneration that the newspaper carrier received—similar to the remuneration received from riders by Broadway's taxicab drivers here—flowed directly from the subscribers rather than from the newspaper publisher. But this court did not allow that fact to preclude holding that the publisher in *Journal Pub. Co.* had employed the newspaper carriers. To the contrary, this court rejected the proposition that "the method adopted for the payment of * * * compensation" should dictate whether the services so remunerated are subject to an unemployment compensation act. *Journal Pub. Co.*, 175 Or at 661 (rejecting any rule that would turn on whether the newspaper carriers were paid a commission or whether they retained the difference between the wholesale and retail price of the papers). Thus, it should not matter whether the

remuneration received for the drivers' services comes directly from Broadway or not.[4]

That conclusion is particularly compelling in the context of the financial relationship between Broadway and its drivers, which was in substance no different than if Broadway had collected the fares directly and then paid compensation to its drivers. As noted, Broadway charged its drivers weekly fees of at least $450 weekly, or $5,850 per financial quarter. (*See* Order at 9 (weekly driver fee of $160); *id.* at 10 (weekly vehicle-related fee ranging from $290 to $420, depending on whether vehicle was leased or owned)). That figure is substantial in comparison to the quarterly wages that a typical driver received. (*See* Administrative Exhibit A3 at 2–9 (summarizing the department's calculations for quarterly wages earned by each of Broadway's drivers)). That is, the record suggests that, for most drivers, the lion's share of their fares went to Broadway. In that circumstance, Broadway cannot fairly

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[4] Further support for that principle can be found in *Blacknall v. Westwood Corp., Developers and Contractors*, 307 Or 113, 764 P2d 544 (1988). In that case, the defendant had requested temporary workers from a staffing agency, and the staffing agency sent the plaintiff, whom the staffing agency paid for work he did at the defendant's location. *Id.* at 115, 118. On those facts, this court concluded that the defendant was an employer notwithstanding the source of the plaintiff's compensation. *Id.* at 118. In reaching that conclusion, this court explained that the staffing agency might also have been an employer and that "an employee can have more than one employer for workers' compensation purposes." *Id.*

characterize their "business model" as one in which drivers keep their fares and pay an administrative fee to Broadway. (*See* Pet Br 9). To the contrary, those facts suggest that the drivers were collecting fares on behalf of Broadway rather than themselves.[5]

Accounting vagaries aside, the relationship here was no different from one in which Broadway were to collect the fares and then pay compensation to the drivers for their services. Indeed, Broadway would occasionally suspend the fees associated with leasing or owning a vehicle, reinforcing the close relationship between the fees it charged drivers and the compensation that they received for their services. (*See* Order at 12). Moreover, when drivers were not performing taxi services because they were in training or waiting for a leased vehicle to be repaired, Broadway paid them $7 or $8 per hour—presumably as a substitute for the compensation that the drivers would have otherwise earned by providing taxi services. (*See* Order at 7, 14). Broadway's payment of a

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[5] Contrast the facts here with those of a more typical vendor of services, such as a credit card payment processor that takes a small portion of every payment for services. In that circumstance, the individual providing services keeps most of the payment, and that payment can fairly be said to have been collected on behalf of the individual. But when some third party is entitled to most of the payment, that payment is more fairly characterized as being collected on behalf of the third party, and any small portion retained by the individual should be treated no differently than if the third party collected the payment itself and then paid the individual.

substitute wage implies that the drivers' other compensation was functionally flowing from Broadway.

Moreover, a substantial portion of the drivers' fares actually passed through Broadway's hands before being paid out—less deductions for Broadway's fees—to drivers. *See Broadway Cab*, 265 Or App 266 n 4; *id.* at 267 n 5. Broadway "processed all non-cash fares received in the form of credit/debit cards, charges to accounts maintained by [Broadway], and vouchers." (Order at 12). Although Broadway then credited the drivers' internal accounts with those amounts, it also deducted its fees from those accounts and allowed drivers to withdraw funds only if they had a balance at the end of the week. (Order at 12, 20).

At the very least, the record suggests that Broadway's drivers were relatively poorly remunerated for their services. (*See* Administrative Exhibit A3 at 2–9 (summarizing the department's calculations for quarterly wages earned by each of Broadway's drivers)). That fact suggests that those drivers are precisely the type of workers intended to be included within the ambit of an act intended "to deal with the social problem arising from the economic condition of a working [person] when he [or she] becomes unemployed." *See Columbia Management Co.*, 270 Or at 118.

In sum, the fares that riders paid for the drivers' services can fairly be characterized as remuneration paid by Broadway because much of those fares

passed through Broadway's hands and because Broadway controlled—through its assessment of weekly fees—how much of those fares was ultimately paid to its drivers.

3. Broadway's reliance on *Golden Shear* is misplaced.

Seeking to escape those conclusions, Broadway analogizes its arrangement to the one deemed not to be employment in *Golden Shear Barber Shop v. Morgan*, 258 Or 105, 481 P2d 624 (1971), but that case is distinguishable.

In *Golden Shear*, the putative employer was a master barber who supervised an apprentice barber operating in a shop owned jointly by the supervisor and two other barbers. 258 Or at 107 & n 1, 108. This court held that the apprentice performed no services for the supervisor because the services performed by the apprentice were not beneficial to the supervisor:

> the amount of business done by [the apprentice] made no difference to [the supervisor's] income or the volume of his business. [The apprentice] did not bring [the supervisor] new customers and did not serve [the supervisor's] own customers. None of the barbers, including [the supervisor], could profit from the contributions [the apprentice] made to the common fund; [another of the barbers] accounted to all the others, including [the apprentice], for any excess in the fund over operating expenses. These facts do not disclose an employment relationship, but a bona fide space-sharing arrangement * * *.

Id. at 112–13; *see also id.* at 107 n 1 (explaining that each of the barbers paid $35 weekly into a common fund, but otherwise retained autonomy to set his

own prices, serve his own clientele, keep his own accounts, and come and go as he pleased).

Here, by contrast, Broadway received far more tangible and direct benefits because it "could not fulfill its contractual and legal duties without the services provided by the taxicab drivers," and because, "if Broadway did not meet those requirements, it faced the possibility of civil penalties imposed by the city and the loss of its contracts with the public agencies." *Broadway Cab*, 265 Or App at 264; *see also id.* at 265 n 3 ("The type and extent of benefits that Broadway receives from the drivers' services—particularly the drivers' importance in allowing Broadway to fulfill its *legal and contractual obligations* and to maintain its industry position—distinguish this case from [*Golden Shear*]." (emphasis added)).

Golden Shear is also distinguishable because the master barber in that case was operating a business that was truly independent of the apprentice barber, whereas, here, Broadway's drivers were an integral part of its business. The master barber in *Golden Shear* earned money from servicing his own clients. Any fees paid by the apprentice were used only to defray operating expenses and could not be retained by the supervisor because the apprentice was owed an accounting of those fees. Here, by contrast, Broadway owed no accounting to its drivers, (Order at 9), and in fact relied on the drivers' fees for 91.5% of its revenue, (Order at 12). Put simply, the supervisor in *Golden Shear*

had a fully functional business independent of the apprentice barber's services, whereas Broadway has no fully functional business independent of its taxicab drivers.[6]

B. Broadway's taxicab drivers were not independent contractors.

Because Broadway's taxicab drivers performed remunerated services for Broadway, this court must conclude that an employment relationship existed for the purposes of ORS chapter 657 unless some exclusion applies. Broadway argues that it is entitled to an exclusion because its drivers were independent contractors under ORS 670.600's statutory test. ORS 657.040.[7] Broadway is mistaken.

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[6] That is, Broadway is wrong to assert that "[i]f the apprentice barber did not have customers, the barbershop owner would eventually go out of business * * *." (Pet Br 25). Indeed, it appears that the master barber in *Golden Shear* had been in business for years before the apprentice joined him and his partners. *See* 258 Or at 107 n 1 (explaining that the three master barbers had opened their shop in 1963 without contribution from the apprentice, whose 1968 earnings were at issue).

[7] In full, ORS 657.040(1) provides:

> Services performed by an individual for remuneration are deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Director of the Employment Department that the individual is an independent contractor, as that term is defined in ORS 670.600.

Notwithstanding the "shown to the satisfaction" phrase, this court has viewed "the question of whether one is an 'employee' or the contractor of another" as "a question of law." *McPherson v. Employment Division*, 285 Or

Footnote continued...

As relevant here, ORS 670.600 provides that

> "independent contractor" means a person who provides services for remuneration and who, in the provision of the services:
>
> (a) Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;
>
> (b) Except as provided in subsection (4) of this section, [8] is customarily engaged in an independently established business;
>
> (c) Is licensed under ORS chapter 671 or 701 if the person provides services for which a license is required under ORS chapter 671 or 701; *and*
>
> (d) Is responsible for obtaining other licenses or certificates necessary to provide the services.

ORS 670.600(2) (emphasis added). Because the quoted requirements are stated in the conjunctive, Broadway cannot prevail unless it can satisfy each of them. The requirement in subsection (c) is inapplicable here. (Order at 26 ("Because the department agrees that drivers did not require any licenses under ORS 671

(...continued)
541, 548, 591 P2d 1381 (1979) (explaining *Baker v. Cameron*, 240 Or 354, 360, 401 P2d 691(1965)).

[8] The exception in subsection (4) pertains to farm labor and is not applicable here.

or 701, [subsection (c)] does not apply."). But the remaining requirements are applicable, and Broadway can satisfy none of them.[9]

1. Broadway's taxicab drivers were not free from Broadway's direction and control over the means and manner of providing services.

Broadway cannot show that its taxicab drivers were free from direction and control over the means and manner of providing services. That test essentially codified the common-law "right-to-control" test created by Oregon courts in various employment contexts. *See S-W Floor Cover Shop v. National Council on Compensation Ins.*, 318 Or 614, 625–631, 872 P2d 1 (1994). As this court has recognized, ORS 670.600 was enacted in 1989 to "achieve uniformity in who qualifies as an independent contractor" for the purposes of workers' compensation law, unemployment compensation law, tax law, and construction contractor law. *S-W Floor Cover Shop*, 318 Or at 618, 625, 628. The legislative history of that enactment reveals that legislators intended to

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[9] Broadway is mistaken that this court must—because the Court of Appeals resolved the appeal solely on the basis of the "independently established business" prong of ORS 670.600(2)—confine its review to that issue. (*See* Pet Br 19 n 5). The department's final order addressed both the direction-and-control prong of ORS 670.600(2), as well as the license-related prong of that statute. (Order at 27 ("[Broadway] did not show that drivers were responsible for obtaining all the license and certificates necessary to provide their services as drivers in the city, were free from its direction and control, and were customarily engaged in an independently established business.")). And the parties briefed all three prongs at the Court of Appeals. Thus, this court can review those issues just as well as the Court of Appeals can, and if reaching those issues is necessary, a remand would serve no purpose.

incorporate, via the "direction and control" phrase, "'an old * * * common law test,'" specifically the "right-to-control" test created by Oregon courts and specific to Oregon law.[10] *Id.* at 628 (quoting statements of Representative Shiprack); *id.* at 630–31.

Accordingly, Oregon courts have continued to apply a common-law "right-to-control" test "under a variety of statutes that define the employment relationship in terms of direction and control or a contractual relationship." *Cejas Commercial Interiors, Inc. v. Torres-Lizama*, 260 Or App 87, 96, 316 P3d 389 (2013) (citing, for example, workers' compensation statutes and unemployment insurance statutes).

Direction and control means not just *actual* control over an individual's work, but also the *right* to control an individual's work. OAR 471-031-0181(3)(a)(C) ("If the person for whom services are provided has the right to control the means or manner of providing the services, it does not matter

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[10] Importantly, by the time ORS 670.600 was enacted in 1989, Oregon courts had repeatedly explained that the judicially created test—though rooted in common law and agency principles—is "'broader than the scope of the employer-employee relation or that of master and servant as those terms are known to the common law.'" *Journal Pub. Co.*, 175 Or at 635 (citing *Rahoutis v. Unemployment Compensation Commission*, 171 Or 93, 113, 136 P2d 426 (1943); *Singer Sewing Machine Company v. State Unemployment Compensation Commission*, 167 Or 142, 149, 164, 176, 103 P2d 708 (1941)); *see also Kirkpatrick*, 247 Or at 212 (similar, citing *Rahoutis* and *Singer Sewing Machine Company*); *Columbia Management Co.*, 270 Or at 118 (similar).

whether that person actually exercises the right of control.");[11] *accord S-W Floor Cover Shop*, 318 Or at 631. The "means" of providing services are the "resources used or needed in performing services," including "such things as tools or equipment, labor, devices, plans, materials, *licenses*, property, work location, and assets, among other things." OAR 471-031-0181(3)(a)(A) (emphasis added). The "manner" of providing services is "the method by which services are performed," including "such things as work schedules, and work processes and procedures, among other things." OAR 471-031-0181(3)(a)(B). Finally, under the common-law right-to-control test applied by Oregon courts before the 1989 enactment of ORS 670.600, one of the "principal factors showing right of control" was "the right to fire." *Henn v. SAIF*, 60 Or App 587, 591, 654 P2d 1129 (1982), *rev den*, 294 Or 536 (1983); *see also S–W Floor Cover Shop*, 318 Or at 622 ("Factors considered by the courts in determining whether a 'right to control' establishes an employment relationship have included * * * whether the employer has power to discharge the person without liability for breach of contract.").

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[11] OAR 471-031-0181 is provided in full in an appendix to this brief.

a. Broadway exercised control over its taxicab drivers in ways unrelated to its obligations under its permit and contracts with third-parties.

Here, Broadway maintained substantial control over two resources highly necessary to a taxicab drivers' ability to provide services: insurance and a vehicle. First, drivers were "not free to purchase their own insurance." (Order at 13). Second, Broadway exercised control over the taxicabs themselves, many of which were owned by Broadway and leased to drivers. (Order at 9). Drivers were not free to control leased taxicabs because Broadway would lease "each vehicle to two different drivers for alternating 12-hour periods" and would not permit lease drivers to choose whom to share a vehicle with because Broadway "controlled the lease." (Order at 10). Broadway permitted drivers to lease vehicles only from Broadway. (Order at 13). And although Broadway permitted drivers to provide their own vehicle for use as a taxicab, Broadway maintained the right to dictate where any vehicle—whether owned or leased—should be parked when not in use. (Order at 9–10). Similarly, regardless of whether a vehicle was owned or leased, Broadway "did not allow third parties to drive any vehicle on its approved list of vehicles without first receiving permission from [Broadway]." (Order at 9; *see also* Order at 4 (stating that Broadway "included all vehicles on its approved lists, regardless of who owned the vehicle").

Broadway also maintained and exercised a right to control other equipment used in its taxicab drivers' service. For example, Broadway required drivers to keep certain equipment—such as flashlights, maps, and tire chains—in their vehicles. (Order at 9).

In addition to controlling the *means* of service, Broadway maintained and exercised a right to control the *manner* of its taxicab drivers' service. Broadway "required all new drivers to attend Cabbie College" at Broadway's location, where it instructed drivers on such work processes as defensive driving, customer service, passenger assistance, vehicle operation, and accident procedures.[12] (Order at 7–8). Broadway also "considered drivers' first week as 'on the job training' during which time they were monitored by [Broadway's] other drivers, street supervisors, dispatchers, and [Broadway's] management." (Order at 7). Broadway also employed a "street supervisor who emphasized driver performance." (Order at 8). Finally, Broadway maintained tight control over drivers' manner of accounting for fares and expenses: it collected all non-cash fares and permitted drivers to access those funds only once a week and only after deducting all fees from those funds. (Order at 12).

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[12] In a typical independent contractor relationship, one would not expect the party hiring the contractor to provide training to the contractor. To the contrary, the party would typically find a contractor already qualified to do the work and would likely need to provide greater remuneration for more qualified contractors.

And to enforce its control over its drivers, Broadway used both a carrot and some sticks. Broadway handled complaints about drivers, imposed fines, and provided an incentive whereby Broadway would occasionally suspend the fees associated with leasing or owning a vehicle. (Order at 12). Moreover, Broadway maintained and exercised the right to suspend drivers. (Order at 11–12). In addition to the right to suspend drivers, Broadway maintained the right to unilaterally terminate the agreement under which a driver provided services, essentially allowing Broadway the right to fire its drivers. (Agency Exhibit A6 at 5). Those practices establish that Broadway was interested in controlling not just the desired results of having riders ferried from one location to another. Rather, Broadway was interested in controlling how its drivers achieved those results.

Given the control and direction set forth above, Broadway could not show that its drivers were "free from direction and control over the means *and* manner of providing the services * * * subject only to [Broadway's right] to specify the desired results." *See* ORS 670.600(2)(a) (emphasis added). Even if Broadway exercised control over only the manner or only the means of performance, it would fail to satisfy ORS 670.600(2)(a) and its drivers would not be independent contractors.

b. This court may also consider direction and control related to Broadway's obligations under its permit and contracts with third-parties.

In addition to the controls set forth above, Broadway also imposed a number of other—far more stringent—requirements to comply with city regulations and the terms of its contracts with third parties. For example, to facilitate compliance with the city's requirement that Broadway record hours of service for each driver, Broadway's drivers were required to "sign in" on an electronic system "whenever they were in their taxicabs including but not limited to when they attended normal maintenance * * * and when they took breaks or rest periods of less than two hours." (Order at 11). The city's requirements mandated that drivers use vehicles that were painted in company colors and that were equipped with certain equipment—such as a "top light," taximeter, first-aid kit, fire extinguisher, and camera. (Order at 4–5 & n 12; *id.* at 13). Under both city regulations and the terms of third-party contracts, drivers were limited in the fares they could charge and were required to meet certain standards of customer service. (Order at 5 & nn 12, 14; *id.* at 6 n 18; *id.* at 12). Moreover, their vehicles were required to meet certain mechanical standards. (Order at 5 n 12). And under the terms of the contract with TriMet, Broadway required its drivers to submit to random drug tests and had its supervisors accompany drivers to the drug-testing facility. (Order at 7). Under

the TriMet contract, Broadway also maintained the right to "direct" drivers to take a rider when no driver would voluntarily do so. (Order at 8).

Finally—and perhaps most importantly—Broadway maintained and exercised a right to control an indispensable means of its taxicab drivers' service: the taxicab company license. As Broadway admits, its taxicab drivers cannot operate in Portland without affiliating with a licensed taxicab company. (Pet Br 4 ("Taxicab operators, too, are required to abide by City Code regulations, which include affiliation with a permitted taxicab company, such as Broadway."); *see also* Opinion at 8–9 ("[A]ny driver wishing to operate a taxicab also needed a taxicab company permit. * * * [D]uring the period in issue, the city did not issue new taxicab permits to anyone. Without a taxicab company permit, drivers had to associate with a taxicab company to provide taxicab services.")). Because its taxicab drivers could not operate except under Broadway's license and with Broadway's approval, Broadway exercised substantial control over them.

Tacitly recognizing the significance of those facts, Broadway urges this court to adopt a rule precluding consideration of any direction or control that is attributable only to the putative employer's compliance with (or "pass-through"

of) government regulations. (*See* Pet Br 30–31).[13] Broadway suggests that any facts relating to regulatory compliance show direction and control only by the *government*, not by *Broadway*. But that argument is unavailing for at least four reasons. First, the record contains evidence of substantial direction and control that cannot be attributed to any government regulations, as discussed above. Thus, the outcome of the direction-and-control test does not depend on consideration of the additional controls attributable to government regulations.

Second, Broadway's "pass-through" argument ignores the text of the statutory test, which asks whether the *worker* providing the services is "free from direction and control over the means and manner of providing the services," without regard to *who* exercises that direction and control. *See* ORS 670.600(2)(a). That is, Broadway asks this court to essentially rewrite the statute, reading it as if it asked whether the individual providing the services is "free from the putative employer's direction and control." Broadway asks for too much. *See* ORS 174.010 ("In the construction of a statute, the office of the

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[13] As Broadway recognizes, its "pass-through" argument is relevant to the direction-and-control test. (Pet Br 31 n 8). But because its brief does not address that prong of the independent-contractor definition, Broadway attempts to apply that "pass through" rule to other portions of the statutory definition of independent contractor. As discussed below, however, Broadway's "pass-through" argument is applicable only to establish control under common-law agency principles. Thus, the "pass-through" doctrine is relevant—if at all—only to the direction-and-control inquiry under ORS 670.600(2)(a), which is the only common-law aspect of the applicable statutory test.

judge is simply to ascertain and declare what is, in terms or in substance, contained therein, *not to insert what has been omitted*, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." (emphasis added)).

Third, many of the additional controls outlined above were attributable not only to city regulations, but to Broadway's contracts with third-parties. Even if Broadway is not responsible for controls that it implemented only to comply with city regulations over which it has no control, Broadway cannot disclaim responsibility for the terms of contracts that it negotiated and accepted. In light of the additional controls attributable to Broadway's contracts with third parties, Broadway's taxicab drivers were not free from direction and control.

And fourth, Broadway's argument is based on principles inapplicable to the present case. Broadway relies on a "long line of authority (including authority specific to the taxi industry) hold[ing] that 'the fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship.'" (Pet Br 30–31 (quoting *SIDA of Hawaii, Inc. v. NLRB*, 512 F2d 354, 359 (9th Cir 1975))). But *SIDA* relied on common-law agency principles. 512 F2d at 357 ("It is well-established doctrine that determinations of whether an individual is an employee or an independent contractor are to be made by the application of common law agency principles to the total factual context of each case.").

Although ORS 670.600's right-to-control test is rooted in common law and agency principles, this court has repeatedly explained that the unemployment statutes are "'broader than the scope of the employer-employee relation or that of master and servant as those terms are known to the common law.'" *Journal Pub. Co.*, 175 Or at 635 (citing *Rahoutis v. Unemployment Compensation Commission*, 171 Or 93, 113, 136 P2d 426 (1943); *Singer Sewing Machine Company v. State Unemployment Compensation Commission*, 167 Or 142, 149, 164, 176, 103 P2d 708 (1941)); *see also Kirkpatrick*, 247 Or at 212 (similar, citing *Rahoutis* and *Singer Sewing Machine Company*); *Columbia Management Co.*, 270 Or at 118 (similar). Thus *SIDA*'s common-law rule is inapplicable here.[14]

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[14] *SIDA* is inapplicable here for yet another reason. That case involved a different species of employment law, and it is therefore not particularly helpful to the purpose-driven analysis that this court has historically applied to unemployment statutes. *See, e.g.*, *Columbia Management Co.*, 270 Or at 118 (explaining that the Oregon "should be liberally construed so as to deal effectively" with "the social problem arising from the economic condition of a working [person] when he [or she] becomes unemployed").

SIDA analyzed the independent-contractor issue for the purposes of the collective-bargaining requirements of the federal National Labor Relations Act. 512 F2d at 356. The purpose of collective-bargaining is to protect workers from their *employers*. *See generally United States v. Silk*, 331 US 704, 713, 67 S Ct 1463 (1947), *superseded by statute as explained in Donovan v. Agnew*, 712 F2d 1509, 1513–14 (1st Cir 1983). Unemployment insurance, by contrast, protects workers from *economic conditions*. *See Byrne Trucking, Inc. v. Employment Division*, 284 Or 443, 475, 587 P2d 473 (1978) ("Unemployment compensation is designed to provide protection during those

Footnote continued...

For those reasons, this court should consider all of Broadway's controls on its drivers, even those attributable solely to regulatory requirements.

2. Broadway's taxicab drivers were not customarily engaged in an independently established business.

Although this court may reject Broadway's independent-contractor argument solely on the basis of its failure to show that its drivers are free from direction and control, Broadway also failed to show another requirement of the independent contractor definition: that its drivers were customarily engaged in an independently established business.

Under ORS 670.600(3), a multi-factor test controls whether a person is considered to be "customarily engaged in an independently established business":

> For purposes of subsection (2)(b) of this section, a person is considered to be customarily engaged in an independently established business if any three of the following requirements are met:
>
> (a) The person maintains a business location:
>
> (A) That is separate from the business or work location of the person for whom the services are provided; or

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(...continued)
times when an arrangement cannot be made with another firm providing similar services *because there is insufficient demand for similar services*." (emphasis added)).

(B) That is in a portion of the person's residence and that portion is used primarily for the business.

(b) The person bears the risk of loss related to the business or the provision of services as shown by factors such as:

(A) The person enters into fixed-price contracts;

(B) The person is required to correct defective work;

(C) The person warrants the services provided; or

(D) The person negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance.

(c) The person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.

(d) The person makes a significant investment in the business, through means such as:

(A) Purchasing tools or equipment necessary to provide the services;

(B) Paying for the premises or facilities where the services are provided; or

(C) Paying for licenses, certificates or specialized training required to provide the services.

(e) The person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.

ORS 670.600(3) (indenting altered).

In sum, Broadway cannot prevail unless its drivers satisfied at least three of the five criteria listed above. Put differently, Broadway loses if at least three criteria are unsatisfied, as is true here. Broadway does not dispute that its drivers failed to satisfy the criterion in ORS 670.600(3)(c)—routinely engaging in business advertising and marketing. (*See* Order at 25).[15] Thus, two more unsatisfied criteria defeat Broadway's appeal. Those two additional unsatisfied criteria are the ones in ORS 670.600(3)(a) and (3)(e)—maintaining a separate business location and retaining authority to hire or fire other persons to assist in the services. Moreover, at least some of Broadway's drivers also fail to satisfy the criterion in ORS 670.300(3)(d)—making a significant investment in the independent business.

a. Broadway's drivers did not maintain a separate business location.

The first criterion at issue is whether Broadway's taxicab drivers "maintain[ed] a business location * * * [t]hat [was] separate from the business or work location of the person for whom the services are provided." ORS 670.600(3)(a). The plain text of that criterion requires Broadway to show that its drivers performed their services at *locations* that were both separate

[15] For its part, the department has not challenged the ALJ's conclusion that Broadway had established the criterion in ORS 670.600(3)(b)—risk of loss. (*See* Order at 25).

from Broadway's location *and* maintained by the drivers.[16] Broadway argues that its taxicab drivers' vehicles were such locations, (Pet Br 29), but those vehicles do not satisfy the foregoing test.

First, vehicles are not "locations." In ordinary usage, a "location" is typically a "position or site occupied or available for occupancy (as a *building*)," or a "an area or tract of *land*." *Webster's Third New Int'l Dictionary* 1327 (unabridged ed 2002) (emphases added). *Contrast with id.* at 1567 (defining "office" to mean "a place where a particular kind of business is transacted or a service is supplied: as * * * c: the place where a professional man (as a physician or lawyer) conducts his professional business"); *id.* at 1727 (defining "place" more broadly, to mean "physical environment : SPACE" and "an indefinite region or expanse : AREA"). That is, a location is a physical area typically recognizable as real property and fit for occupancy. That term does not typically include personal property such as vehicles. Thus, Broadway is

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[16] Broadway does not appear to dispute that, to satisfy this criterion, a business location must be both "maintained" by the person and "separate from the business or work location of the person for whom services are provided." For reasons well-articulated by the Oregon Court of Appeals, those two phrases impose distinct requirements. *See Compressed Pattern, LLC v. Employment Dept. Tax Section*, 253 Or App 254, 260–61, 293 P3d 1053 (2012) ("If all that were necessary for a person to 'maintain a business location' was performance of the work somewhere other than the client's business or work site, then it would not matter if that location were in a residence or what portion of a residence were used to perform the work, effectively writing subparagraph (B) out of the statute.").

mistaken that its taxicab drivers' vehicles could qualify as a "business location" for the purposes of ORS 670.600(3)(a).

Both context and legislative history support that conclusion. As for context, ORS 670.600(3)(a)(B) permits a business location to satisfy that subsection's criterion if the location "is in a portion of the person's residence." By recognizing that a room in a residence qualifies as a business location, the legislature has evinced an intent that a business location must be in the nature of real property or premises.

As for legislative history, the current text of ORS 670.600 is a variation on an independent-contractor definition that was enacted in 2003 as applicable only for revenue purposes, with an effective date of January 1, 2006. *See* ORS 314.013 (2003); 2003 Or Laws ch 704 §§ 4, 7. In that same act, the legislature authorized the creation of a Task Force on Independent Contractors, to study issues related to that new definition of independent contractor. 2003 Or Laws ch 704 § 7a. That task force submitted a report to the 2005 legislature, which considered it when deciding to repeal ORS 314.013 and to codify a new independent-contractor definition at ORS 670.600 such that it would apply more broadly than just for revenue purposes. *See* 2005 Or Laws ch 533; *see also* Final Report of the Independent Contractors Tax Force, submitted as Exhibit C to the February 24, 2005 meeting of the Senate Committee on Business and Economic Development (included as Appendix B to this brief).

In that Final Report, the task force offered an explanation of the separate-business-location criterion, and suggested that services performed "in the field" did not occur at any particular business location:

> A business usually has some business location of its own. However, it is not necessary that all of the services be performed from that business location; for example, a business may perform all services in the field and use its business location only for administrative functions.

Final Report of the Independent Contractors Tax Force at 9. Thus, an independently established business may have a separate business location even if the business is conducted primarily "in the field," so long as that separate location is where the business performs its administrative tasks.

Under the framework contemplated by the task force, Broadway's taxicab drivers performed their services in the field rather than at a separate business location, and their business location is wherever they performed most of their administrative functions. Those administrative functions—the dispatching, payment processing, advertising, and other services that Broadway discusses in its brief—occurred at Broadway's location, rather than at some separate location.

Even if the term "location" is ambiguous enough that it might encompass vehicles, the vehicles were not *separate* from Broadway because Broadway maintained possession of the vehicles whenever they were not in use. Broadway "required lease drivers to park the leased vehicles at [Broadway's]

location when not in use, and to follow [Broadway's] check-in and checkout procedures." (Order at 10). Significantly, Broadway "controlled the lease[s]" and did not allow lease drivers to choose second drivers assigned to those vehicles. (Order at 10). As to the owner-operated vehicles, Broadway also maintained the right to dictate where the vehicles should be parked when not in use and to require the owners to follow Broadway's check-in and check-out procedures. (Order at 10). Thus, the vehicles were always either physically in Broadway's possession or in use in furtherance of Broadway's business. For that reason, even if the vehicles were locations, they were an extension of Broadway's business location instead of separate from it.

b. Broadway's drivers did not have the authority to hire and fire persons to assist in providing the services.

Broadway also failed to show the final statutory criterion at issue: whether the taxicab drivers had "the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons." ORS 670.600(3)(e). The ALJ found that Broadway's drivers "had the authority to hire other persons, such as mechanics, accountant and other professionals to assist them" and that "owner operators had the authority to choose a second driver." (Order at 26). However, neither of those facts established that the drivers had the authority to hire and fire persons to assist in providing the services because none of those other persons assisted the hiring driver in

performing his or her own services. That reading is the only one consistent with the purpose to be served by the criterion here. Any employee is free to employ the assistance of others in *preparing* to perform services for his or her employer, but only an independent businessperson has the authority to hire others to *perform* the services of that business.

Here, because none of those individuals could be hired to provide services in lieu of the driver, none of that authority pertained to hiring "other persons to provide or to assist in providing the *services*." ORS 670.600(3)(e) (emphasis added). Mechanics, accountants, and other professionals did not participate in performing the *driving services* that taxicab drivers provided to Broadway. "Second drivers," by contrast, performed driving services, but only in addition to a given driver's own services rather than as a substitute for or by participating in those services. Moreover, a driver's authority to hire a second driver was not plenary; instead, it was limited to those drivers already affiliated with Broadway. (Opinion at 10).

c. Of Broadway's drivers, those who leased their vehicles did not make a significant investment in their businesses.

Broadway asserts that its drivers incurred expenses related to their vehicles and equipment and that those expenses amount to "significant investments." (Pet Br 27–28). The department agrees that drivers who purchased their own vehicles satisfied this criterion: they made a significant

investment because the vehicles they purchased retained some residual value that the drivers could take with them if they left Broadway. By contrast, however, drivers who leased their vehicles do not satisfy this criterion: the only significant expenses that they incurred were the fees that Broadway charged them, but none of those fees created any continuing value that the drivers could take with them if they left Broadway. And any other expenses incurred by those drivers were not significant enough to satisfy this criterion.

An investment is typically "an expenditure of money for income or profit or to purchase something of *intrinsic value*." *Webster's Third New Int'l Dictionary* 1190 (unabridged ed 2002) (emphasis added). ORS 670.600(3)(d) enumerates examples of investments that seem consistent with the notion of continued value. That statute enumerates items like tools, equipment, licenses, certificates, training, or the right to use premises—all of which have continuing, intrinsic value that an individual can take with him or her. *See* ORS 670.600(3)(d)(A)–(C).

Here, the fees paid to Broadway did not secure anything of intrinsic or continuing value that a driver could retain upon leaving Broadway. Instead, those fees were exchanged for nothing more than the right to continue performing services under Broadway's name for a week at a time. If Broadway could call such expenditures an investment, then any employer could satisfy this criterion simply by charging its employees a substantial fee for the right to

keep working for the employer. Perhaps a clever employer might simply increase employees' salary by some substantial amount and then deduct the same amount from each paycheck, labeling the deduction in a way that suggests an "investment." That result would improperly elevate form over substance, in a manner inconsistent with this criterion's ultimate purpose: determining whether an individual is engaged in an independently established business.

And although at least some of Broadway's drivers purchased tools, those expenditures were not "significant" because they were similar in nature to the sort of job-related expenses than any employee might incur, such as a lawyer might spend on court attire, a service member might spend on uniforms, or a doctor might spend on a personal stethoscope. Those minimal and ancillary expenses are different in nature from the substantial investments that a tradesperson such as a mechanic or plumber might spend on tools necessary to that person's trade. The same is true for any expenses incurred for licenses—an annual driver's permit costs $100 per year. (*See* Administrative Exhibit A56 at 30 (fee table for taxicab permitting); *Id.* at 10 (regulation specifying that driver permits are good for 12 months)). Given the relatively small amount of that expense, it is no more an investment than any costs incurred to maintain certifications necessary for some forms of employment. For example, lawyers cannot be said to have made a significant investment in a law practice simply by paying their bar dues.

That reasoning is consistent with the ALJ's conclusion that the drivers' expenses amounted to investments in *Broadway*'s business, not in any *independent* taxicab business. When ORS 670.600(3)(d) discusses "a significant investment in *the* business," (emphasis added), the use of a definite article suggests a reference to the phrase "independently established business" in the prefatory portion of ORS 670.600(3). Unless a taxicab driver's expenses resulted in the driver obtaining something with intrinsic residual value, those expenses reflected, at most, an investment in Broadway's business.

In sum, because Broadway's drivers failed to satisfy each of three statutory criteria, they were not customarily engaged in an independently established business. Broadway does not dispute that its drivers failed to satisfy the criterion requiring them to routinely engage in business advertising and marketing. And, as argued above, all of its drivers—both those that lease their vehicles and those that own their vehicles—failed to satisfy another two criteria because they neither maintained a separate business location nor retained authority to hire and fire individuals to assist in performing the services. And even if Broadway's drivers had established one of those two challenged criteria, at least some of the drivers were not customarily engaged in an independently established business: those who drove leased vehicles failed to establish the criterion requiring a significant investment in their independent business.

3. Broadway's taxicab drivers were not responsible for obtaining all licenses or certificates necessary to providing their services.

Although this court may reject Broadway's independent-contractor argument solely on the basis of its failure to satisfy either the direction-and-control test or the independently-established-business test, Broadway failed to show yet another requirement of the independent contractor definition: that its drivers were responsible for obtaining the licenses *necessary* to their services.

Again, ORS 670.600(2)(d) provides that an individual cannot be an independent contractor unless that individual "[i]s responsible for obtaining other licenses or certificates *necessary* to provide the services." (Emphasis added). The reference to "other licenses" serves only to distinguish the general class of licenses at issue in this subsection from the specific types of licenses discussed in ORS 670.600(2)(c),[17] which are not at issue here.

Although the text of ORS 670.600(2)(d) is unclear as to whether it can be satisfied by an individual who obtains merely *some* as opposed to *all* of the "necessary" licenses, context resolves that ambiguity in favor of the latter reading. Again, the purpose of this inquiry is to identify *independent* contractors. But an independent contractor cannot be truly independent unless he or she possesses *all* the licenses or certificates necessary to provide the

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[17] Again, that subsection asks whether the individual providing the services is "licensed under ORS chapter 671 or 701 if the person provides services for which a license is required under ORS chapter 671 or 701[.]"

services at issue. If some other person obtains and holds some of the necessary licenses, then the individual at issue is dependent on that other person's license.

Here, even Broadway admits that taxicab drivers cannot operate in Portland without affiliating with a licensed taxicab company. (Pet Br 4 ("Taxicab operators, too, are required to abide by City Code regulations, which include affiliation with a permitted taxicab company, such as Broadway."); *see also* Opinion at 8–9 ("[A]ny driver wishing to operate a taxicab also needed a taxicab company permit. * * * [D]uring the period in issue, the city did not issue new taxicab permits to anyone. Without a taxicab company permit, drivers had to associate with a taxicab company to provide taxicab services.")). That is, a taxicab company permit was necessary to the taxicab drivers' services, and Broadway was responsible for obtaining that permit. For that reason as well, Broadway's taxicab drivers were not independent contractors.

CONCLUSION

For the foregoing reasons, this court should conclude that Broadway's taxicab drivers performed services for remuneration and were not independent contractors. The order on review and the judgment of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 13, 2015, I directed the original Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Paula A. Barran, Thomas M. Christ, and Edwin A. Harnden, attorneys for petitioner, by using the electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 11,047 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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