

**OPINION NO. 2009-035****Syllabus:**

2009-035

An individual or business entity that is engaged to perform “licensed trade” construction work (as defined by R.C. 4740.01(C)) for a licensed contractor, and that has been designated by that contractor as an independent contractor (either by classification on a certified payroll or by issuance of an IRS Form 1099) is required to be separately licensed as a contractor under R.C. Chapter 4740 by the Ohio Construction Industry Licensing Board.

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**To: Kimberly Zurz, Director, Ohio Department of Commerce, Reynoldsburg, Ohio**

**By: Richard Cordray Ohio Attorney General, September 18, 2009**

We have received your request for an opinion concerning the licensing of

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contractors who work in a “licensed trade” under R.C. Chapter 4740. You have asked:

Is an individual or business entity that is engaged to perform “licensed trade” construction work (as defined by R.C. 4740.01(C)) for a licensed contractor, and that has been designated by that contractor as an independent contractor at the time the work was subcontracted (either by classifying the subcontracted individual or business entity as such on a certified payroll, or by issuing to it an IRS Form 1099), required to be separately licensed under R.C. 4740.06 by the Ohio Construction Industry Licensing Board?

The Ohio Construction Industry Licensing Board (OCILB), within the Ohio Department of Commerce, is responsible for licensing individuals as contractors in the licensed trades, defined as trades “performed by a heating, ventilating, and air conditioning contractor, a refrigeration contractor, an electrical contractor, a plumbing contractor, or a hydronics contractor.” R.C. 4740.01(C); *see* R.C. 4740.01(A), .02, .04. A license is issued in the name of the individual who meets the applicable requirements, and that individual may request that the license be assigned to a business entity with which the individual is associated as a full-time officer, proprietor, partner, or employee. R.C. 4740.06, .07. A licensee must maintain contractor’s liability insurance, satisfy continuing education requirements, and comply with other standards. R.C. 4740.05, .06(B)(4); 9B Ohio Admin. Code Chapters 4101:16-1 to 4101:16-4.

To be a “[c]ontractor” for purposes of R.C. Chapter 4740, an individual or business entity must satisfy both of the following:

(1) *Directs, supervises, or has responsibility for the means, method, and manner of construction, improvement, renovation, repair, or maintenance on a construction project<sup>1</sup> with respect to one or more trades and who offers, identifies, advertises, or otherwise holds out or represents that the individual or business entity is permitted or qualified to perform, direct, supervise, or have responsibility for the means, method, and manner of construction, improvement, renovation, repair, or maintenance with respect to one or more trades on a construction project;*

(2) *Performs or otherwise supervises or directs tradespersons who perform construction, improvement, renovation, repair, or maintenance on a construction project with respect to the contractor’s trades.*

R.C. 4740.01(B) (emphasis and footnote added). Thus, an individual or business entity that directs, supervises, or has responsibility for the means, method, and man-

<sup>1</sup> “Construction project” is defined as “a construction project involving a building or structure subject to [R.C. Chapter 3781] and the rules adopted under that chapter, but not an industrialized unit or a residential building as defined in [R.C. 3781.06].” R.C. 4740.01(E).

ner of the performance of a trade on a construction project, that holds itself out or represents itself as permitted or qualified to have responsibility for the performance of the trade on a construction project, and that performs (or supervises or directs tradespersons who perform) the trade on a construction project is considered a contractor and must be licensed under R.C. Chapter 4740. See R.C. 4740.13(A) (“[n]o person shall act as or claim to be a type of contractor that this chapter licenses unless that person holds or has been assigned a license issued pursuant to this chapter for the type of contractor that person is acting as or claiming to be”); R.C. 4740.99 (criminal penalties for violation of R.C. 4740.13(A)); 2005 Op. Att’y Gen. No. 2005-005.

In conducting operations on a construction project, the contractor has employees who are “[t]radesperson[s],” defined as “any individual who is supervised or directed by a contractor or who is otherwise employed by a contractor and who engages in construction, improvement, renovation, repair, or maintenance of buildings or structures without assuming responsibility for the means, method, or manner of that construction, improvement, renovation, repair, or maintenance.” R.C. 4740.01(D). Five years of experience as a tradesperson (or various other types of experience) are among the qualifications required to seek a license as a contractor. R.C. 4740.06(B).

You have explained your concerns as follows:

[Under R.C. 4740.01(B)], a licensed contractor must either personally perform the regulated work or supervise or direct tradespersons who perform the work. OCILB has interpreted this provision to mean that if the licensed contractor is not personally performing the regulated work, then the tradespersons who are must be employees of the contractor, i.e., receive an IRS W-2 Form from the contractor for the work. However, contractors are increasingly engaging “independent contractors” to perform the regulated work. These independent contractors do not receive IRS W-2 Forms; instead, they are classified as independent contractors on the contractor’s certified payroll and/or receive an IRS Form 1099 from the contractor for the regulated work.

The language of R.C. 4740.01(B) describing a contractor as an individual or business entity that directs, supervises, or has responsibility for *the means, method, and manner* of construction, improvement, renovation, repair, or maintenance on a construction project expresses the common law distinction between an independent contractor and an employee. See *Gillum v. Indus. Comm’n of Ohio*, 141 Ohio St. 373, 48 N.E.2d 234 (1943) (syllabus, paragraph 2) (“if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant, while if the manner or means of doing the work or job is left to one who is responsible to the employer only for the result, an independent contractor relationship is thereby created”); accord *Bostic v. Connor*, 37 Ohio St. 3d 144, 524 N.E.2d 881 (1988) (syllabus, paragraph 1) (in deciding whether someone is an employee or an independent contractor, “[t]he key factual determination

is who had the right to control the manner or means of doing the work’’); *Councell v. Douglas*, 163 Ohio St. 292, 126 N.E.2d 597 (1955); *Billman v. Massillon Dev. Group, L.L.C.*, 2008-Ohio-287, 2008 Ohio App. LEXIS 246 (Stark County).

It has long been established that an employee is subject to the direction and supervision of the employer with regard to the means, method, and manner of performing a function, and that the employer is responsible for the actions of the employee. In contrast, an independent contractor is given the responsibility of performing a function and is entrusted with the responsibility of determining the means, method, and manner of performance. *See Councell v. Douglas* (syllabus, paragraph 1); *Miller v. Metro. Life Ins. Co.*, 134 Ohio St. 289, 291, 16 N.E.2d 447 (1938); *Indus. Comm’n of Ohio v. Laird*, 126 Ohio St. 617, 186 N.E. 718 (1933); 2007 Op. Att’y Gen. No. 2007-046 (citing numerous cases and other authorities); *see also, e.g.*, R.C. 2744.01(B) (for purposes of determining tort liability of a political subdivision, the term “employee” does not include an independent contractor).

The definitions set forth in R.C. 4740.01(B) and (D) thus distinguish between licensed individuals (contractors)—who have established the skills and experience necessary to assume responsibility for the means, method, and manner of performing a construction project—and tradespersons, who are supervised, directed, or otherwise employed by a contractor but do not assume responsibility for determining the means, method, or manner of performance. *Cf.* 2003 Op. Att’y Gen. No. 2003-001 (licensing exemption for certificated school psychologists practicing school psychology within the scope of employment by certain schools or in certain programs applies to both employees and independent contractors).<sup>2</sup>

If a licensed contractor engages an individual or business entity to work on a project as an independent contractor, that independent contractor is not a tradesperson or an employee of the contractor and, under the established meaning of the term “independent contractor,” is not subject to direction or supervision with regard to the means, method, and manner of performance. Rather, an independent contractor holds out or represents the capacity to assume responsibility for the means, method, and manner of construction. *See Marshall v. Aaron*, 15 Ohio St. 3d 48, 49-50, 472 N.E.2d 335 (1984). Because a person engaged as an independent contractor is not subject to control as to the means, method, and manner of performance, that independent contractor must be licensed as a contractor under R.C. Chapter 4740 in order to work on a construction project under that chapter.

The question whether a person is an employee or an independent contractor depends upon the facts of each case. *See, e.g., Bostic v. Connor*, 37 Ohio St. 3d at 146 (factors include who controls the details and quality of the work, the hours worked, and the materials, tools, and personnel; the length of employment; the method of payment; and any pertinent agreements); *Gillum v. Indus. Comm’n of*

<sup>2</sup> A licensed contractor may also be an employee. *See, e.g.*, R.C. 4740.07(B) (an individual who is licensed as a contractor under R.C. Chapter 4740 may request that the license be assigned to a business entity with which the individual is associated as an employee).

*Ohio*, 141 Ohio St. at 374-75 (there is no absolute rule for determining whether a person is an independent contractor or an employee; each case must be determined on its own facts); *Billman v. Massillon Dev. Group, L.L.C.*; 2007 Op. Att’y Gen. No. 2007-046, at 2-455 n.5. An employer has various obligations on behalf of employees, which may include paying prevailing wages and making contributions for payroll taxes, Social Security, workers’ compensation, and unemployment benefits. In contrast, an independent contractor is a self-employed business person who is responsible for compliance with requirements of law, such as paying taxes on self-employment income. *See, e.g., Ren-Lyn Corp. v. United States*, 968 F. Supp. 363, 366 (N.D. Ohio 1997); *Rogan v. Brown*, 2006-Ohio-5508, 2006 Ohio App. LEXIS 5486, at ¶20-22 (Clinton County).

You have indicated that OCILB has established the practice of distinguishing between employees and independent contractors on the basis of the manner in which they are listed on a payroll or are treated for tax purposes, with an employee receiving an IRS Form W-2 and an independent contractor being classified as an independent contractor on the contractor’s certified payroll and/or receiving an IRS Form 1099. Under federal income tax law, IRS Form W-2 indicates an employer-employee relationship and provides for the withholding of income taxes and other employer obligations, whereas IRS Form 1099 is an informational form used for persons who are self-employed (including independent contractors) that generally does not involve withholding income taxes (except backup withholding in some instances). *See* 26 U.S.C.A. § 3402 (West Supp. 2009); 26 C.F.R. § 31.3401(c)-1(c) (2009) (“[g]enerally, . . . contractors, subcontractors, . . . and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees”); 26 C.F.R. § 31.6051-1 (2009) (employer furnishes each employee a statement of withholding on Form W-2); I.R.S. General Instructions for Forms 1099, 1098, 3921, 3922, 5498, and W-2G (2009); *State ex rel. Schaengold v. Ohio Pub. Emps. Retirement Sys.*, 114 Ohio St. 3d 147, 2007-Ohio-3760, at ¶3 (appellant “was paid pursuant to an Internal Revenue Service form 1099 for independent contractors instead of a W-2 form for employees”); *Vajda v. St. Paul Mercury Ins. Co.*, 2003-Ohio-160, 2003 Ohio App. LEXIS 110, at ¶17 (Cuyahoga County) (“[t]he use of 1099 forms typically suggests that the parties were not acting in an employer/employee relationship, but rather in that of an independent contractor relationship”).

Thus, the factor of receiving a Form W-2 or a Form 1099 is indicative of a person’s status as an employee or an independent contractor. *See Bostic v. Connor*, 37 Ohio St. 3d at 147 (argument that individual was an employee, rather than an independent contractor, for purposes of workers’ compensation law, was supported, *inter alia*, by evidence that the individual was paid with an employee payroll check, rather than the kind of check used to pay independent contractors, and that taxes were withheld from the pay); *see also Billman v. Massillon Dev. Group, L.L.C.; Crossley v. Esler*, No. 94APE04-497, 1994 Ohio App. LEXIS 5185, at \*7-8, 13 (Franklin County Nov. 17, 1994) (factors considered in determining status as employee or independent contractor for purposes of indemnification included the withholding of taxes and contractual use of the term “wages and compensation”).

Therefore, OCILB may reasonably use the fact that an individual or business entity engaged by a licensed contractor to perform a licensed trade under R.C. Chapter 4740 has been designated as an independent contractor (either by classification on a certified payroll of the licensed contractor, or by issuance of an IRS Form 1099 by the licensed contractor) as a basis for determining that the individual or business entity is an independent contractor that must be separately licensed under R.C. Chapter 4740.

#### **Conclusions**

For the reasons discussed above, it is my opinion and you are advised, that an individual or business entity that is engaged to perform "licensed trade" construction work (as defined by R.C. 4740.01(C)) for a licensed contractor, and that has been designated by that contractor as an independent contractor (either by classification on a certified payroll or by issuance of an IRS Form 1099) is required to be separately licensed as a contractor under R.C. Chapter 4740 by the Ohio Construction Industry Licensing Board.