

Independent Contractor Guide

*A Step-by-Step Guide to Hiring Independent Contractors
in Washington State*



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Important note about safety!

Even if you determine that you have “independent contractors,” as defined in this guide, they may still be considered your employees under the Washington Industrial Safety and Health Act, RCW 49.17. This guideline does not address your obligations as an employer under safety and health law. See Page 13 for more information.

Introduction

Do you use independent contractors?

In some cases, someone you consider an “independent contractor” is actually a worker who has legal protections that cannot be waived. If so, you may be an employer with “covered workers” under Washington workers’ compensation law and not realize it.

It is important that you understand your requirements. Otherwise, your business may be vulnerable to unexpected regulatory penalties and even lawsuits.

In Washington, every worker is presumed to be a “covered worker” for purposes of workers’ compensation coverage unless they fall into the few narrow exceptions provided by law.

If the person you hire or contract with is a “covered worker” under Washington State workers’ compensation law, then as an employer, you have certain legal responsibilities, such as to:

- Keep accurate records.
- Pay workers’ compensation premiums.
- Follow state employment laws.

Please be aware that:

- Simply calling a person an independent contractor does not automatically exempt you from your legal obligation to pay workers’ compensation premiums.
- In some cases, a person may be an independent contractor on one contract but not on another. Each contract must be evaluated separately.
- A person can be an independent contractor for federal tax purposes but still be a covered worker for Washington State workers’ compensation purposes.

Other government agencies, such as the Washington Employment Security Department and the Internal Revenue Service, have their own laws and regulations concerning independent contractors. Consult those agencies and your advisors for guidance in meeting their requirements. Additional resources for other agencies are included on the back cover of this publication.

This publication is a general guide to help you understand how and when the Department of Labor & Industries applies workers’ compensation laws to independent contractors.

Overview

Workers’ compensation law covers both employees and independent contractors who provide essentially personal labor.

Washington law provides the following tests that an independent contractor must pass in order to be exempt from workers’ compensation coverage. If your independent contractor does not meet one of these tests, you must provide workers’ compensation coverage.

Independent Contractor Tests

Test	Applicable Statute
<p>“Personal labor” test.</p> <p>Apply this test first regardless of type of business.*</p> <p>See Part A of this guide.</p>	<p>RCW 51.08.180 “Worker Exceptions.”</p>
<p>*If the above test is not met, then you would continue the independent contractor analysis with the tests below.</p>	
<p>“Independent contractor 6-part test” for all industries.</p> <p>For construction industries, add the 7th test.</p> <p>See Part B of this guide.</p>	<p>RCW 51.08.195 “Employer” and “Worker” – Additional Exception.</p> <p>RCW 51.08.181 “Worker” Registered contractor and electrician exclusions.</p>

See Page 14 for complete RCWs.



Note about court rulings

Significant court cases have excluded independent contractors from mandatory workers' compensation coverage if:

- The contractor must out of necessity own or provide machinery or equipment (distinguished from the usual hand tools) in order to perform the contract; or
- The contract could not be performed without assistance; or
- Out of necessity or choice, the contractor employs others to do all or part of the work under the contract.

Getting started

To avoid penalties, ask yourself the questions in this guide. If you're not sure about your status as a potential employer, please call for help. Or you can visit the many websites listed in this publication.

Part A

Ask yourself:

Does the independent contractor bring more than their personal labor?

A-1. Do they hire crew of their own or are they bringing other employees?

- If you contract with someone who brings their own employees to perform the work and **you are not directing or controlling this work**, then that person is not your employee. However, for contracts where you are supervising staff, they are your covered workers.
- Evidence they pass this part of the test:
 - The contractor brings employees and directs them.
- Evidence they don't pass this part of the test:
 - You direct or control the independent contractor.
 - You direct or control the independent contractor's employee(s).
- **Note:** Your subcontractors are responsible for their own employees. Make sure they are registered as employers with L&I and are current with workers' compensation premiums. If not, you will be held responsible for unpaid premiums. For more information, refer to *Avoid Liability for Your Subcontractor's Unpaid Workers' Comp Premiums* (Publication F262-262-000).

A-2. Or, are they bringing heavy or costly specialized equipment?

- If you are contracting with someone who brings more than ordinary hand tools to the job and **you are not directing or controlling the work**, then he/she is not your employee.
- Examples that meet this part of the test:
 - A contractor brings and operates earth-moving equipment to clear a house site.
 - A contractor brings an on-site rain gutter manufacturing machine and both fabricates and installs the gutters.
 - A medical technician brings an MRI-equipped truck and operates the MRI machine.
 - Fulfilling your job requires both the contractor's costly equipment (such as power lifts, scaffolding, CNC machine, ultrasound) and their expertise in operating it.
- Examples that don't meet this part of the test:
 - A landscape contractor brings a chain saw and a lawn mower to maintain a yard.
 - A painting contractor brings ladders and safety harnesses to paint a three-story home.
 - A framing contractor brings power tools, including a nail gun, circular saw, and power drill to construct a shed.
 - A flooring installer brings flooring materials in a van to the job site. (**Note:** This example comes from a significant Washington State Superior Court of Appeals case.)



Did you answer "yes" to ONE of the above questions?

- Then, in most cases, there are no workers' compensation premiums due.
- **Still, always keep your job site safe.**

Did you answer "no" to BOTH?

- Then, ask yourself the following questions in Part B.
- **Note:** If an independent contractor brings staff or equipment to fulfill some contracts but not others, you will need to evaluate each contract separately. When no staff or heavy equipment is used, the contractor must meet the requirements in Part B below in order to be exempt from workers' compensation.



Part B

Ask yourself:

Are they an established business, working without your direction or control?

An independent contractor must meet all provisions of the 6-part test (7-part test for construction contractors) described in B-1 through B-7.

B-1. Are they free from your supervision, direction or control?

RCW 51.08.181 and 195, Section 1: The individual has been, and will continue to be, free from control or direction over the performance of the service, both under the contract of service and in fact.

You cannot supervise how the work is done.

Here are some indications that the individual is not under your control:

- You're not concerned with the manner or technique in which the job is completed.
- You're not concerned with the specific individuals performing the work (but may need their names for safety and compliance requirement purposes).
- You don't tell the individual the sequence of steps to follow or the method of work to follow.
- You don't provide training or equipment.
- You don't contract with multiple individuals to perform the same work, which would then require coordination between them.

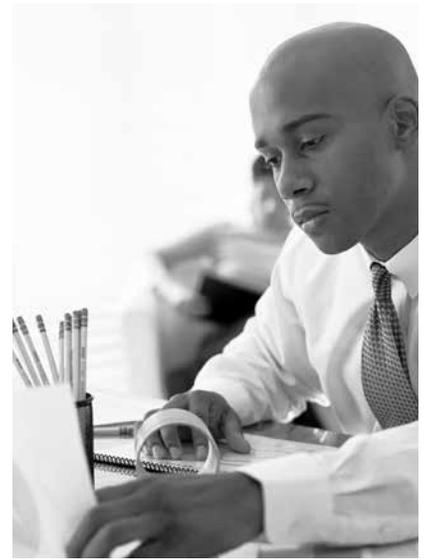
Note: Requiring that the individual adhere to all safety requirements or attend regular safety meetings will not be viewed as evidence of direction or control.

Here are some indications that the individual is under your control and would be considered a covered worker for workers' compensation purposes (and potentially other purposes as well):

- The individual works with you or your staff.
- You don't have a contract that establishes the independence, or the contract has provisions that represent control.
- You set hours or keep timesheets.
- You pay the individual on a more frequent cycle than you pay your other creditors.
- You retain the ability to hire and fire within the contract period for reasons other than breach of contract.

Examples of directing or controlling the work:

- A flooring retail store contracts with an owner-operated flooring installation business to install vinyl flooring and carpeting in its customer's house. The store's sales representative comes to the house during the installation and tells the installer to use the rep's tool and where to put the seams.
- A general contractor arranges for an owner-operated siding contractor to side a large commercial building. The siding contractor is up against a deadline, so hires another owner-operated siding contractor to help. They work together to get the job done, with the original siding contractor leading in order to meet the contract requirements with the general contractor.
- A general contractor mandates that its subcontractor attend the general's trainings.
- A business contracts with an independent computer programmer to augment its own programming staff in order to meet a deadline. The programmer works at the business's site along with the business's employees, coordinated by the business's project manager.
- An independent fitness trainer works within a fitness center. She's required to wear clothing with the fitness center's logo on it and to charge a standard rate.
- A company requires its computer networking installation contractor to adhere to its internal quality control procedure. (Note: It would be acceptable for the company to require that contractor's installation meet the manufacturer's requirements to retain equipment or product warranty rights.)



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- If you are directing or controlling the work, then yes, the individual is a covered worker and workers' compensation coverage is required.*
 - If not, go to B-2.*



B-2. Is the individual's business different and separate from your own?

RCW 51.08.181 and 195, Section 2: (a) The service is either outside the usual course of business for which the service is performed, or (b) the service is performed outside all of the places of business of the enterprise for which the service is performed, or (c) the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed.

They must pass one of the following three subtests.

B-2(a). Is the individual's service "outside the usual course of business," or in other words, does the contractor do something different from what you do?

Examples that meet this part of the test:

- A general contractor whose primary business is to build new construction contracts with:
 - A licensed architect to design the homes.
 - An electrician to install all the electrical work (the general does not have licensed electrical contractor on staff).
 - A plumber to install the plumbing (the general does not have a licensed plumber on staff).
 - A masonry contractor to build the fireplace and chimney (the general has no experience with this type of work).
- A restaurant contracts with a janitorial company to clean the restaurant after hours.
- An auto body shop sends a vehicle to an auto mechanic for engine repairs.

If the individual is performing a service outside of your usual course of business, go to B-3.

If not, go to B-2(b).

B-2(b). Is the individual's service being performed "outside of all of the places of business," or in other words, does the contractor perform the service away from where you perform your services?

Examples that meet this part of the test:

- An antique furniture boutique sends a piece of furniture out to be refinished by a furniture refinisher at their business location.
- An auto repair company sends a car's transmission to a transmission shop.
- A siding contractor has a contract with a general contractor that's building homes in three different subdivisions. The siding contractor subcontracts with another siding contractor to side the homes in one of the subdivisions. (Note: If the two siding contractors are siding a single home or sharing labor and/or equipment, the assumption is that the firm wouldn't pass this part of the test.)

If the individual is performing a service outside of all the contractor's places of business or job sites, go to B-3.

If not, go to B-2(c).

B-2(c). Is the individual contractually obligated to pay costs affiliated with the location from where the work is controlled (usually its headquarters)?

- Does your contract specify that obligation, as required to meet this test?
- Can the individual provide receipts or contracts showing proof of the financial obligation for their location?

Examples that meet this part of the test:

- A painting contractor has a mobile headquarters in its van with client records and items such as computer, printer, equipment, tools and inventory, and has records proving it is paying the costs for the van and its contents.
- A lawn care service regularly performs administrative, marketing and sales work from its home office, and has records proving it is paying costs for the home office.
- A roofing contractor has a separate business office location from the general contractor and is responsible for paying mortgage or rent, electricity, phone, Internet, etc., for the separate business office location.

If the individual is obligated to pay costs affiliated with its headquarters, go to B-3.

If not, the individual is a covered worker and workers' compensation coverage is required.

If you don't meet B-2(a) or B-2(b) or B-2(c), then the individual is a covered worker and worker' compensation coverage is required.

B-3. Does the individual have an established independent business that existed before you brought them on – OR – does the individual have a principal place of business that qualifies for an IRS business deduction?

RCW 51.08.181 and 195, Section 3: (a) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or (b) the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes.

They must pass one of the next two subtests.

B-3(a). Do you have evidence to demonstrate that the individual has an established business?

Examples of evidence for this part of the test:

- Advertising, marketing materials.
- Customer lists.
- Membership in business or professional associations.

Conditions that would NOT meet this part of the test:

- A contract that eliminates the possibility that the individual could suffer a loss.
- An individual whose business will terminate at the completion of your engagement.

If the individual has an established business, go to B-4.

If not, go to B-3(b).

B-3(b). Does the individual have a principal place of business that qualifies for an IRS business deduction? Do you have evidence to demonstrate it?

Examples of evidence to meet this part of the test:

- A copy of the individual's federal business tax return showing the deduction. (Note: confidential information can be blacked out.)
- Your contract states the individual has a deductible location and he/she signs it.

If the individual has a deductible principal place of business, go to B-4.

If not, the individual is a covered worker and workers' compensation coverage is required.

B-4. Is the individual responsible for filing a schedule of expenses with the IRS, such as would be part of a business tax return?

RCW 51.08.181 and 195, Section 4: On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting.

For example, does the individual file business tax returns with the IRS, and are they for the same business activity you are engaging them for?

Examples of evidence for this part of the test:

- The individual gives you a copy of his/her IRS business tax return.
(**Note:** confidential information can be blacked out.)
- Your contract states the individual will file a return and he/she signs it.

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- If the individual will file a business tax return with the IRS, go to B-5.*
 - If not, the individual is a covered worker and workers' compensation coverage is required.*

B-5. Does the individual have all required registrations and licenses for their business?

RCW 51.08.181 and 195, Section 5: On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington.

- Is the business fully licensed? An open Department of Revenue (DOR) account is mandatory to pass this part of the test, even though DOR may not require it.

Examples of evidence for this part of the test:

- Proof of an open DOR account (screen print from DOR website). To look it up, go to **www.DOR.wa.gov** and click on "Look up a business."
- Copies of specialty licenses.

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- If the individual has an open DOR account, and has all required registrations and licenses, go to B-6.*
 - If not, the individual is a covered worker and workers' compensation coverage is required.*

B-6. Does the individual maintain his/her own set of books and records that reflect all income and expenses of the business?

RCW 51.08.181 and 195, Section 6: On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

Examples of evidence for this part of the test:

- Invoices from the individual.
- A copy of the IRS business tax return. (**Note:** confidential information can be blacked out.)
- The estimate for the work.
- Profit and loss statement.

-
- If the individual maintains a separate set of business financial records and **is a construction-related business**, go to B-7.*
 - If the individual maintains a separate set of business financial records and **is not a construction-related business**, then the individual is probably an independent contractor, exempt from workers' compensation.*
 - If the individual does not maintain a separate set of business records, then the individual is a covered worker and workers' compensation coverage is required.*

B-7. This question is for construction contractors only: Is the individual a properly registered contractor?

RCW 51.08.181, Section 7: On the effective date of the contract of service, the individual has a valid contractor registration pursuant to chapter 18.27 or an electrical contractor license pursuant to chapter 19.28 RCW.

Evidence for this part of the test is:

- Proof of contractor registration (screen print from L&I's webpage, ideally prior to each contract or quarterly).

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- If the individual is properly registered as a contractor, then the individual is probably an independent contractor, exempt from workers' compensation.*
 - If not properly registered as a contractor, the individual is a covered worker and workers' compensation is required.*

Your job site must be safe

You are required to keep your job site safe for all personnel performing work – employees or covered workers – whether they work for you, your contractor, a subcontractor or someone else.

The definition of “employee” differs among Washington’s safety and health, workers’ compensation and wage and hour laws. Your “independent contractor” under Washington’s workers’ compensation law could be an employee for the purposes of safety and health laws. For this reason, Washington safety and health rules **MAY** apply at your work site even when you are not required to pay workers’ compensation premiums.

Note: You may not be technically liable for the safety of some people on your job site because they are not considered *employees* under safety and health regulations. These people include those who are:

- On your job site as the supervisor of their own employees who are doing the work.
- Doing work that requires a license or certificate giving them legal permission to do the job, such as an electrician or plumber. (A contractor registration is not enough.)
- Doing work that requires the use of heavy equipment (not vehicles used for transportation) they have provided (not just rented) to the job site.
- On the job site, but who are not making the bulk of their profit from their own personal labor. (They may be delivering materials, for example.)

Still, the best practice is to make sure your job site is safe for everyone.

What does it mean to keep your job site safe?

Among the requirements is to develop, maintain and implement a written safety program that addresses the hazards specific to your business. For examples and other information on safety requirements, visit www.Lni.wa.gov/safety-health.

Have safety questions?

L&I provides consultations, training and technical assistance at no cost to employers. Call today to schedule a free confidential consultation or go to www.Lni.wa.gov/SafetyConsultants for more information. You may also call 1-800-423-7233 or visit a local L&I office and ask to meet with a safety consultant.



Applicable laws

RCW 51.08.070: “Employer” – Exception.

“Employer” means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers. Or as an exception to the definition of employer, persons or entities are not employers when they contract or agree to remunerate the services performed by an individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW.

RCW 51.08.180: “Worker” – Exceptions.

“Worker” means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

RCW 51.08.195: “Employer” and “worker” – Additional exception.

As an exception to the definition of “employer” under RCW 51.08.070 and the definition of “worker” under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

(1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and

(2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

(4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

(5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

RCW 51.08.181 – “Worker” – Registered contractor and electrician exclusions.

For the purposes of this title, any individual performing services that require registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW for remuneration under an independent contract is not a worker when:

(1) The individual has been, and will continue to be, free from control or direction over the performance of the service, both under the contract of service and in fact;

(2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed;

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes other than that furnished by the employer for which the business has contracted to furnish services;

(4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting;

(5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has an active and valid certificate of registration with the department of revenue, and an active and valid account with any other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington;

(6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting; and

(7) On the effective date of the contract of service, the individual has a valid contractor registration pursuant to chapter 18.27 RCW or an electrical contractor license pursuant to chapter 19.28 RCW.





Questions we are often asked

But he had a contractor's license!

I subcontracted some work to a guy who has a contractor's registration with L&I. Doesn't that mean he's not my employee?

Not necessarily. L&I auditors look at "direction or control" and other factors described on the previous pages. Because he is a construction contractor, all seven parts of RCW 51.08.181 must be met.

Can I be sued?

Someone working on my job site claims he hurt himself because of an unsafe condition. Can he sue me?

Your employees and covered workers cannot sue you for their work-related injuries. Their only legal remedy is the workers' compensation benefit to which they are entitled. However, independent contractors and their employees can sue you if they are hurt as a result of your negligence, or the negligence of one of your employees.

What are wage and hour requirements?

I'm paying workers' comp premiums for my five landscape workers. Do I have to meet wage and hour requirements? What are they?

In general, if you are required to pay workers' compensation premiums, you must also meet state wage and hour requirements, which require employers to:

- Pay minimum wage for all hours worked and overtime for hours over 40 in a work week.
- Keep accurate payroll records for all hours worked.
- Provide pay statements.
- Give rest breaks and meal periods.
- Obtain a minor work permit endorsement and follow minor work regulations for employees under 18.

Note: There are a few exceptions to the above wage and hour requirements. Learn more at www.Lni.wa.gov/workers-rights, or call 360-902-5316 or email ESgeneral@Lni.wa.gov.

Unemployment tax — Washington Employment Security Department

When do I pay unemployment tax for my workers?

Washington Employment Security Department is a separate state agency from the Department of Labor & Industries. In general, unemployment taxes must be paid when you are required to pay workers' compensation premiums for the worker.

Related RCWs: see www.ESD.wa.gov or call the Employment Security Department's Employer Status Unit at 360-902-9360.

Federal employment taxes — Social Security, Medicare, income tax and federal unemployment

Visit www.Business.wa.gov for information and resources.



Still have questions?

- For determination of coverage for independent contractors, call Workers' Comp Coverage Determinations at 360-902-6868 or send email to Determinations@Lni.wa.gov. The determination will not result in an assessment or audit referral.
- Check out our websites:
 - L&I home page: www.Lni.wa.gov
 - Report fraud: www.Lni.wa.gov/Fraud (or call 1-888-811-5974)
 - Register or renew registration/license online: www.Lni.wa.gov/licensing-permits
 - Verify a contractor: www.Lni.wa.gov/Verify
 - Pay quarterly premiums online: www.Lni.wa.gov/QuarterlyReports
 - Check status of a workers' compensation account for a business: www.Lni.wa.gov/Verify
 - Check workplace safety rules and issues: www.Lni.wa.gov/safety-health
- For business resources and information: www.Business.wa.gov
- To check the status of a Washington business Department of Revenue account: www.DOR.wa.gov
- Call or visit your local L&I office. For locations, visit: www.Lni.wa.gov/Offices
- Get this document online: www.Lni.wa.gov/go/F101-063-000

Employer Services Outreach: 360-902-4599