

OSBA Report: Multiple Definitions Cause Confusion for Oregon Small Businesses

NO COMMON DEFINITION OF SMALL BUSINESS

Small businesses, according to a common truism, are the backbone of our economy. A 2017 segment from the HBO program *Last Week Tonight with John Oliver* featured a [montage of politicians from across the political spectrum invoking the oft-repeated phrase](#). As the host aptly noted, the notion that “small businesses are the backbone of our economy” is that rare thing that every politician agrees on.¹ And while there may be near public unanimity about the economic benefits of small businesses, there is little agreement on what exactly constitutes a small business.

So, what makes a business a small business? What are the determining criteria? There are “many answers to the question of what exactly makes a small business,” one commentator noted.² Another—Benjamin C. Waterhouse, a historian of the American economy and business—has similarly observed that “small business is notoriously hard to define.”³

No standard definition exists. Rather, federal, state, and local governments use a variety of definitions and criteria. Even within Oregon, state and local government entities employ different definitions, making it impossible to arrive at a single common definition used statewide.

MULTIPLE DEFINITIONS IN STATUTE & RULE

A search of the [2019 Oregon Revised Statutes \(ORS\)](#) for “small business” or “small businesses” returned about 375 matches spanning 37 chapters. The ORS Index contains over 70 unique entries under small business. Likewise, a search of [Oregon Administrative Rules \(OAR\)](#) returned over 100 matches from 30 state agencies. The Office of Small Business Assistance reviewed all the entries to compile a list of Oregon’s various statutory and regulatory definitions of small business.

Unsurprisingly, the State of Oregon employs multiple definitions of small business. Its statutes and rules also contain references to other related terms, including *small business concern*, *emerging small business*, *Oregon growth business*, *emerging growth business*, *microenterprise*, *small business enterprise*, *small business corporation*, *small employer*, and even *small private railcar company*. Not all these terms are defined in statute or rule. Nor does every statutory or regulatory mention of small business refer to a corresponding definition.

¹ John Oliver, “Corporate Consolidation,” *Last Week Tonight with John Oliver* (LastWeekTonight), September 24, 2017, HBO program, 0:23 to 0:58, <https://youtu.be/00wQYmvfhn4>. The full segment contains strong language—viewer discretion advised.

² Jay Miller, “Definition of a Small Business Arbitrary; Wide Range of Standards Used for Classification,” *Crain’s Cleveland Business*, November 14, 2011, <https://www.craigslist.com/article/20111114/FREE/311149969/definition-of-a-small-business-arbitrary>.

³ Benjamin C. Waterhouse, “The Small Business Myth,” *Aeon*, November 8, 2017, <https://aeon.co/essays/what-does-small-business-really-contribute-to-economic-growth>.

The most common criterion used to define small business is number of employees. Oregon statutes and administrative rules set varying size standards.

100 OR FEWER EMPLOYEES

Secretary of State	Oregon License Directory (ORS 56.185) Office of Small Business Assistance (ORS 56.200)
Business Oregon	Oregon Small Business Development Act (ORS 285B.123)
Department of Consumer and Business Services	Oregon Consumer Information Protection Act (ORS 646A.622)

50 OR FEWER EMPLOYEES

Multiple agencies	Administrative Procedures Act (ORS 183.310)
Department of Revenue	Personal Income Tax—Severance Pay (ORS 316.856)
Business Oregon	Loans from Small Business Expansion Loan Fund (ORS 285B.130)
Department of Veterans' Affairs	Veterans' Small Business Repair Loan Program (OAR 274-013-0010)
Board of Pharmacy	Wholesale Drug Outlets—Registration Requirements (OAR 855-065-0006)
Columbia River Gorge Commission	Administrative Procedures—Definitions (OAR 350-016-0002)

EMPLOYEE THRESHOLD DEPENDS ON TYPE OF BUSINESS

Energy programs administered by the Construction Contractors Board and the Department of Energy set different criteria for the maximum number of employees, depending on the sector. To qualify as a small business under both programs, a retail or service business may have 50 or fewer employees. Conversely, an industrial or manufacturing business may employ 200 or fewer persons.

Construction Contractors Board	Energy Efficiency and Sustainable Technology Loan Program (EEAST) (OAR 812-025-0005) ⁴
Department of Energy	Small Scale Local Energy Projects (ORS 470.050, OAR 330-110-0010)

EMPLOYEE & GROSS RECEIPTS THRESHOLDS

Programs administered by the Oregon Department of Transportation and the Port of Hood River use two criteria to define small business: number of employees and average annual gross receipts.

⁴It bears mentioning that CCB's Energy Efficiency and Sustainable Technology Loan Program (EEAST) established separate definitions for both *small business* and *small business concern*. The definition for small business concern uses the U.S. Small Business Administration definition. See [OAR 812-025-0005](#).

Under both programs, small business “means an independent business with fewer than 20 employees and with average annual gross receipts during the last three years of not more than \$1 million for construction firms and not more than \$300,000 for businesses that are not construction firms.”⁵

Department of Transportation	Awarding of Contracts for Tollway Projects (ORS 383.017)
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Port of Hood River	Bridge Projects (ORS 381.310)
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FEDERAL DEFINITIONS

Several state agencies, as well as the Port of Portland and the tribal government of the Confederated Tribes of Siletz Indians, employ federal definitions of small business. The U.S. Small Business Administration (SBA) defines small business using size standards that vary by industry. It bases those standards on the average number of employees a business has over 12 months or the average annual receipts over three years.⁶ Additional information is available from the [SBA Office of Size Standards](#), including the [table of size standards by industry](#). Title 13, Chapter 1, Part 121 of the *Code of Federal Regulations* (abbreviated 13 CFR, Part 121) spells out the size standards in detail.

The following Oregon agencies use the SBA definition:

Construction Contractors Board	Energy Efficiency and Sustainable Technology Loan Program (EEAST) (OAR 812-025-0005) ⁷
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Business Oregon	Certification Office for Business Inclusion and Diversity — Certification Procedures (OAR 123-200-1100)
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The Air Quality Small Business Assistance Program in the Department of Environmental Quality uses a different federal definition. The Clean Air Act of 1990 required that each state institute a small business technical assistance program. The Environmental Protection Agency (EPA), the federal agency overseeing the enforcement of the Clean Air Act, established the criteria for how state programs could define a small business. In addition to requiring that a business have 100 or fewer employees, the EPA also set specific emissions standards.⁸

UNIQUE & NO DEFINITIONS

The Department of Environmental Quality uses a unique definition specific to its loan program that assists small businesses to repair failing septic systems. According to ORS 454.779, small business

⁵[ORS 381.310](#). See also [ORS 383.017](#).

⁶U.S. Small Business Administration, “Size Standards,” <https://www.sba.gov/federal-contracting/contracting-guide/size-standards>.

⁷As noted above, CCB’s Energy Efficiency and Sustainable Technology Loan Program (EEAST) established separate definitions for both *small business* and *small business concern*. The definition for small business concern uses the U.S. Small Business Administration definition. See [OAR 812-025-0005](#).

⁸Department of Environmental Quality, “Small Business Assistance Program,” <https://www.oregon.gov/deq/aq/aqPermits/Pages/BAP.aspx>. See also Title 42, Chapter 85, Subchapter V, Section 7661f of the United States Code (abbreviated 42 U.S. Code § 7661f).

“means a corporation, partnership, sole proprietorship or other legal entity formed for the purpose of making a profit and that generates less than 3,500 gallons of wastewater per day.”

Some statutes neither define small business nor reference a statutory definition. For example, according to ORS 458.685, one of the approved purposes for individual development accounts is capitalization of a small business. ORS 708A.150 authorizes community development corporations to invest in and support projects that benefit small businesses.

Among the various state programs that serve small businesses, the Workers’ Compensation Ombudsman for Small Business (housed in the Department of Consumer and Business Services) is unique in that it operates without any definition of its customer or restrictions regarding the size of businesses it serves.⁹ In other words, it has no statutory, regulatory, or working definition of small business.

THE CONSEQUENCES OF MULTIPLE DEFINITIONS

Government, across its various layers, is complex and multifaceted. Consequently, it stands to reason that over the decades, as different agencies developed programs intended to serve small businesses, multiple definitions emerged. Many federal, state, and local agencies established size criteria specific to the programs they administer. While these various criteria may serve the unique needs of the programs that use them, their use, in aggregate, adversely affects both the public and private sectors. This proliferation of definitions presents three significant problems.

1. DIFFICULTY IN COUNTING OREGON’S NUMBER OF SMALL BUSINESSES AND OBTAINING RELIABLE DATA

How many small businesses does Oregon have? Elected officials, policymakers, researchers, and the media often pose that question to this office. We inevitably respond that the answer depends entirely on how the individual or entity asking the question defines small business. Which statutory or regulatory definition of small business is the questioner using? Without a standard definition of what constitutes a small business, it’s impossible to provide a precise number. Furthermore, depending on which definition is used, the Office of Small Business Assistance may not have access to such information.

The U.S. Small Business Administration provides one possible answer. The agency produces an annual small business profile of each state. According to the most recent profile of Oregon, its 396,925 small businesses constitute 99.4% of the state’s total number of businesses. The profile notes that “small businesses are defined here as firms with fewer than 500 employees,” a maximum threshold considerably higher than any established in Oregon statute.¹⁰

During legislative hearings, legislators often ask representatives of state agencies, boards, and commissions how a proposed statute or rule change could affect small businesses, whether a new program might benefit small businesses, or how many small businesses a program serves. Again, the answer depends on what the questioner means by small business. Agencies that administer programs aimed at serving small businesses might be able to use statutory or federal definitions specific to those programs. However, the multiple statutory, regulatory, and federal definitions prevent any direct comparisons across programs.

⁹David Waki (Department of Consumer and Business Services), email message to author, June 16, 2021.

¹⁰U.S. Small Business Administration, Office of Advocacy, “2021 Small Business Profile: Oregon,” <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30143123/Small-Business-Economic-Profile-OR.pdf>.

Although this report largely emphasizes the differing size criteria, it bears noting too that the various statutory definitions also differ on whether small business includes nonprofits. For example, the criteria set forth by the U.S. Small Business Administration (13 CFR, Part 121), the Veterans' Small Business Repair Loan Program (OAR 274-013-0010), the Columbia River Gorge Commission (OAR 350-016-0002), the Administrative Procedures Act (ORS 183.310), and the Department of Environmental Quality's septic system low interest loan program (ORS 454.779) all specify that a small business must be a for-profit enterprise. Conversely, other definitions used by the Secretary of State (ORS 56.185 & 56.200; OAR 160-010-0701) and Business Oregon (ORS 285B.123) are broad enough to include nonprofits.

Finally, no single state agency collects all the information needed to count Oregon's small businesses using the various size criteria. Rather, three agencies capture some of the required information:

- The Secretary of State collects data on business registrations, although not every small business is required to register. Sole proprietorships and partnerships that use the real and true names of their owners need not register.
- Although the Employment Department collects data on the number of employees businesses have, the data do not include most nonemployers—small businesses with no paid employees.¹¹ According to the U.S. Small Business Administration, “four in five businesses are nonemployers.”¹² The Employment Department data also exclude certain agricultural and natural resources businesses that are not subject to unemployment insurance taxes.
- The annual revenue and receipts data collected by the Department of Revenue are not readily available from a single source.¹³ Gathering the information, not to mention sorting it accurately by sector, may not even be possible.

At present, collating and aggregating these disparate strands of captured data into a single report simply isn't feasible. Three agencies hold different pieces of the data puzzle, but there's no way to assemble those pieces into a precise, coherent whole.¹⁴

2. CONFUSION FOR BUSINESSES THAT QUALIFY FOR SOME PROGRAMS BUT NOT OTHERS

In Oregon, the definition of small business tends to vary by agency and depends largely on the programs under which a business falls. A business might meet the criteria for a small business established by some programs but not others. The use of multiple definitions means that businesses must remain attentive to when they do and do not meet the specified requirements. This can cause confusion and frustration for those businesses that qualify for small business assistance under certain programs yet are ineligible under others.

¹¹Gail Krumenauer (Oregon Employment Department), email message to author, November 2, 2021.

¹²U.S. Small Business Administration, Office of Advocacy, “A Look at Nonemployer Businesses,” August 2018, <https://www.sba.gov/sites/default/files/advocacy/Nonemployer-Fact-Sheet.pdf>.

¹³Marjorie Taylor (Oregon Department of Revenue), email message to author, October 26, 2021.

¹⁴Statistics available from the U.S. Census Bureau's Annual Business Survey Program can potentially fill some data gaps and provide approximate counts of Oregon's small businesses using some of the various size criteria. See <https://www.census.gov/programs-surveys/abs/data.html>.

Many state programs intended to benefit small businesses provide informational assistance. The aim of these programs is to help entrepreneurs navigate complex licensing and regulatory requirements. Initiatives that provide informational assistance include:

- Office of Small Business Assistance (Oregon Secretary of State)
- Oregon License Directory (Oregon Secretary of State)
- Oregon Small Business Development Center Network
- Air Quality Small Business Assistance Program (Department of Environmental Quality)
- Small Business Ombudsman for Workers' Compensation (Department of Consumer and Business Services)

The above programs—except for the Small Business Ombudsman for Workers' Compensation, which operates without any sort of definition of small business—all define small business as having 100 or fewer employees.

Oregon law also requires agencies to provide information about what it will cost small businesses to comply with proposed administrative rules. The Administrative Procedures Act (ORS 183) instructs agencies to submit information about the number and types of small businesses adversely affected by a proposed rule. Agencies must also describe the projected compliance costs, including the required equipment, supplies, or labor costs. Unlike the other informational programs that define small business as having 100 or fewer employees, the Administrative Procedures Act defines small business as a for-profit entity with 50 or fewer employees. Businesses with 51 or more employees, while considered small businesses under other programs, are not treated as such when rulemaking agencies estimate the cost of compliance on small business.

One peculiar quirk in the Administrative Procedures Act is that it does not allow rulemaking agencies to use an alternative definition when determining a rule's effect on small business—even when the proposed administrative rule under consideration itself contains a definition different from the one provided in the Act. A proposed rule might similarly reference an alternative statutory definition or originate from a program required to use a federal definition. Regardless of other definitions embedded or referenced in the rule under consideration, the Act provides simply that small business means a for-profit entity with 50 or fewer employees.

3. CONFUSION FOR BUSINESSES OPERATING IN MULTIPLE JURISDICTIONS

At each level of government—federal, state, and local—agencies establish their own definitions of small business. Some agencies borrow others' definitions, especially if they administer programs that mandate the use of federal definitions. A few agencies even operate with multiple definitions that vary depending on the program. This can cause confusion as businesses struggle to determine which definitions apply in which circumstances. The lack of a consistent definition of small business can make things even more confusing for businesses that operate in multiple jurisdictions.

Oregon small businesses that operate in other states must navigate the myriad laws and regulations imposed by those states. The same holds true for small businesses that operate in regions governed by sovereign tribal governments. Having to navigate the multiple definitions of small business used

by Oregon agencies—let alone the other definitions employed by other tribal, federal, state, and local governments—imposes an additional burden on small businesses, especially those trying to determine whether they meet the requisite criteria to receive assistance. The various definitions and size criteria can frustrate businesses that qualify for assistance in some jurisdictions but not others.

Except for Idaho, Oregon's neighboring states also employ multiple definitions of small business. The State of Idaho uses a single definition that applies to all state agencies or programs except when a program administers federal funds and must use a specific federal definition.¹⁵ The City of Boise, however, has its own definition that it uses to administer grant funds.

CALIFORNIA

Procurement—Certification as a Small Business or Microbusiness

An independently owned and operated business with 100 or fewer employees and average annual gross receipts of \$15 million dollars or less over the previous three years—or is a manufacturer with 100 or fewer employees.

For the purposes of public works contracts, small business means an independently owned and operated business with 200 or fewer employees and average annual gross receipts of \$36 million dollars or less over the previous three years.

A microbusiness is a small business which, together with affiliates, has average annual gross receipts of \$5 million or less over the previous three years—or is a manufacturer with 25 or fewer employees.¹⁶

Local Definitions

Counties and municipalities can establish their own parameters, for procurement purposes, of what constitutes a small business or microbusiness.

California Office of the Small Business Advocate (CalOSBA)

The definition for small business varies somewhat by agency. The Office of the Small Business Advocate uses the following definition:

Small business means a business with 500 employees or fewer for most manufacturing and mining industries and \$7.5 million or less in average annual receipts for nonmanufacturing industries. Small business includes for-profit and nonprofit entities.¹⁷

¹⁵Cody Allred (Idaho Commerce), email message to author, June 8, 2021.

¹⁶Small Business Procurement and Contract Act, California Code of Regulations (C.C.R.) § 14837, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=14837.&lawCode=GOV.

¹⁷Jean Coleman (California Office of the Small Business Advocate), email message to author, June 16, 2021.

IDAHO

Idaho Small Business Federal Funding Assistance Act	Small business means an Idaho for-profit company with 500 or fewer employees. ¹⁸
City of Boise—Municipal Small Business Grant Program	The eligibility criteria include the requirement that businesses have 100 or fewer employees. ¹⁹

NEVADA

Nevada Administrative Procedure Act	Small business means a business conducted for profit which employs fewer than 150 full-time or part-time employees. ²⁰
Community Redevelopment Law—Loans to Small Business	Small business means a business that employs not more than 25 persons. ²¹
Unemployment Compensation Law	Small business means a business conducted for profit that employs 50 or fewer full-time employees and has gross annual sales of less than \$5 million. ²²
Program for Certification of Local Emerging Small Businesses	Only for-profit businesses that maintain their principal place of business in the state are eligible for certification as a local emerging small business.

TIER 1 FIRM DESIGNATION REQUIREMENTS:

- No more than 20 full-time or full-time equivalent employees
- For construction services: average annual gross receipts of no more than \$1.7 million for the preceding 3 years
- Other types of business: average annual gross receipts of no more than \$700,000 for the preceding 3 years

TIER 2 FIRM DESIGNATION REQUIREMENTS:

- No more than 30 full-time or full-time equivalent employees
- For construction services: average annual gross receipts of no more than \$3.5 million for the preceding 3 years
- Other types of business: average annual gross receipts of no more than \$1.3 million for the preceding 3 years²³

¹⁸Idaho Small Business Federal Funding Assistance Act, Idaho Statutes § 67-4723A, <https://legislature.idaho.gov/statutesrules/idstat/title67/t67ch47/sect67-4723a/>.

¹⁹City of Boise, "Municipal Small Business Grant Program," <https://www.cityofboise.org/smallbusinessgrant>.

²⁰Nevada Administrative Procedure Act, Nevada Revised Statutes (NRS) § 233B.0382, <https://www.leg.state.nv.us/nrs/nrs-233b.html#NRS233BSec0382>.

²¹Community Redevelopment Law, Nevada Revised Statutes (NRS) § 279.700, <https://www.leg.state.nv.us/nrs/nrs-279.html#NRS279Sec700>.

²²Unemployment Compensation Law, Nevada Revised Statutes (NRS) § 612.607, <https://www.leg.state.nv.us/nrs/nrs-612.html#NRS612Sec607>.

²³Program for Certification of Local Emerging Small Businesses, Nevada Revised Statutes (NRS) § 231.1405, <https://www.leg.state.nv.us/nrs/NRS-231.html#NRS231Sec1405>.

WASHINGTON

Regulatory Fairness Act	Small business means any independently owned and operated businesses entity with 50 or fewer employees. ²⁴
Public Contracts & Indebtedness— Procurement of Goods and Services	Small business means an independently owned and operated in-state business that has either 50 or fewer employees or gross revenues of less than \$7 million annually over the previous three consecutive years. Minibusiness means an independently owned and operated business with gross revenues of between \$1 million and \$3 million dollars annually. Microbusiness means an independently owned and operated business with gross revenues of less than \$1 million dollars annually.²⁵
Governor’s Office for Regulatory Innovation and Assistance (ORIA)	There is no general definition of small business used statewide. Rather, state agencies reported using various definitions: <i>Department of Revenue:</i> A business that grosses up to \$100,000 annually is eligible to receive the small business credit for the business and occupation gross receipts tax. <i>Secretary of State:</i> The agency has no small business definition since they do not collect data on the size of businesses. <i>Department of Labor and Industries:</i> The definition of small business depends on the specific program under which a business falls. <i>Department of Employment Security:</i> The agency uses no one specific definition of small business except in cases involving public contracts. <i>Department of Enterprise Services:</i> For procurement purposes, a small business is defined as having 50 or fewer employees or gross revenues of less than \$7 million annually.²⁶

²⁴Regulatory Fairness Act, Revised Code of Washington (RCW) § 19.85.020, <https://app.leg.wa.gov/RCW/default.aspx?cite=19.85.020>.

²⁵Procurement of Goods and Services, Revised Code of Washington (RCW) § 39.26.010, <http://app.leg.wa.gov/RCW/default.aspx?cite=39.26.010>.

²⁶Rachael Lindstedt (Washington Governor’s Office for Regulatory Innovation and Assistance), email message to author, June 14, 2021.

City of Seattle—Office of Economic Development

The city has no one-size-fits-all definition of small businesses. The specific definition employed depends on the particular service or program under which a business falls. When businesses apply for or receive federally funded services, the city uses the appropriate federal parameters.²⁷

CONCLUSION

Federal, state, and local governments have established multiple statutory and regulatory definitions of small business. The size criteria set forth in the many definitions vary widely. Consequently, as one commentator observed, there is “no shortage of confusion” in determining when a business is a small business.²⁸

The proliferation of inconsistent definitions and size criteria hinders small business owners, researchers, and policymakers alike. According to Jerome S. Osteryoung and Derek Newman, scholars who have studied the problem, “if researchers and government officials are to find ways to study small business and to target policy instruments effectively, they must know the specifications of the entity they are to measure.” Unfortunately, the authors noted, many definitions have fluctuated over time and have been “arbitrary” in specifying “the parameters that identified small businesses.”²⁹ This lack of consistency impedes researchers’ efforts to study small businesses, as well as policymakers’ efforts to develop comprehensive policies that benefit them.

Any definition of small business that relies on specific size criteria is inherently arbitrary. Former Secretary of State Kate Brown indicated as much when testifying before a legislative committee in favor of the bill that created the Office of Small Business Assistance. That legislation, which became ORS 56.200-209, defined small business as any business with 100 or fewer employees. However, as Secretary Brown acknowledged in her testimony, “you could use any particular number” to define small business.³⁰

The issue, then, is not the arbitrary nature of the size criteria that constitute Oregon’s many small business definitions. Rather, the issue is whether Oregon needs so many definitions enshrined in statute and rule. Can state government get by with fewer definitions? Will a general definition suffice for most state programs and for counting Oregon’s number of small businesses? Ultimately, that’s a question for policymakers to decide.

²⁷Pedro Gómez (Office of Economic Development, City of Seattle), email message to author, June 15, 2021.

²⁸Jay Miller, “Definition of a Small Business Arbitrary; Wide Range of Standards Used for Classification,” *Crain’s Cleveland Business*, November 14, 2011, <https://www.craigslist.com/article/20111114/FREE/311149969/definition-of-a-small-business-arbitrary>.

²⁹Jerome S. Osteryoung and Derek Newman, “What Is a Small Business?,” *Journal of Small Business Finance* 2, no. 3 (Summer 1993): 226, 229, <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1137&context=jef>.

³⁰Kate Brown (Oregon Secretary of State), Oral Testimony Delivered at the Public Hearing on SB 143, March 6, 2013, 6:16 to 9:14, Senate Committee on General Government, Consumer and Small Business Protection. Oregon Legislative Assembly, 2013 Regular Session. <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2013031296>.