

**WAC 326-20-080 Factors considered in determining control. (1)**

In determining whether disadvantaged owner(s) control a business, the office must consider all of the facts in the record, viewed as a whole.

(2) The disadvantaged owner(s) must demonstrate the ability to make independent and unilateral business decisions needed to guide the future and direction of the business.

(3) The certifiable business must not be subject to any formal or informal restrictions limiting the customary discretion of the disadvantaged owner(s). Restrictions through corporate charter provisions, bylaw requirements, contracts or any other formal or informal devices, such as cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by nondisadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, limitations on or assignments of voting rights, preventing the disadvantaged owner(s), without the co-operation or vote of any nondisadvantaged individual, from making any business decision are prohibited. This subsection does not preclude a spouse or registered domestic partner cosignature on the office's spouse or domestic partner nonparticipation statement.

(4) Disadvantaged owner(s) must possess the power to direct or cause the direction of the management and policies of the business and make daily and long-term decisions on matters of management, policy, and operations.

(a) Disadvantaged owner(s) must hold the highest officer position in the company, such as chief executive officer or president.

(b) In a corporation, disadvantaged owners must control the board of directors.

(c) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions. In order for a partnership to be controlled by disadvantaged individuals, any nondisadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(d) Nondisadvantaged or immediate family members may be involved in a certified business as owners, managers, employees, stockholders, officers, or directors. They must not possess or exercise the power to control the business or be disproportionately responsible for the operation of the business.

(e) Disadvantaged owner(s) of the business may delegate various areas of the management, policymaking, or daily operations of the business to other participants in the business, regardless of whether these participants are disadvantaged individuals. Such delegations of authority must be revocable, and the disadvantaged owner(s) must retain the power to hire and fire any person to whom such authority is delegated. The disadvantaged owner(s) managerial role in the business's overall affairs must be such that the recipient can reasonably conclude the disadvantaged owners actually exercise control over the business's operations, management, and policy.

(f) Disadvantaged owner(s) must demonstrate the ability to make basic decisions pertaining to the daily operations of the business independently and have an overall understanding of, managerial and technical competence and experience directly related to, the type of business in which the business is engaged and operating. The owner(s) are not required to have experience or expertise in every critical area of operations or given field than managers or key employees. They must

have the ability to intelligently and critically evaluate information presented by other participants in the business's activities and to use this information to make independent decisions concerning the business's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principle business activities of the business is insufficient to demonstrate control.

(g) If state or local law requires the persons to have a particular license or other credential in order to own or control a certain type of business, then the disadvantaged person(s) who own and control a potential certifiable business of that type must possess the required license or credential. If state or local law does not require the applicant to possess such a license or credential to own or control a business, the office must not deny certification solely on the ground the person lacks the license or credential. However, the office may take into account the absence of the license or credential as one factor in determining whether the disadvantaged owner(s) actually control the business.

(h) The office may consider differences in remuneration between the disadvantaged owner(s) and other business participants in determining whether to certify a business. Such consideration must be in the context of the duties of the persons involved, normal industry practices, the business's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the business. The office may determine a disadvantaged owner controls a business although that owner's remuneration is lower than that of some other participants in the business. In a case where a nondisadvantaged individual formerly controlled the business, and a disadvantaged individual now controls it, the office may consider a difference between the remuneration of the former and current controller of the business as a factor in determining who controls the business, particularly when the nondisadvantaged individual remains involved with the business and continues to receive greater compensation than the disadvantaged individual.

(i) In order to be viewed as controlling a business, a disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the business or prevent the individual from devoting sufficient time and attention to the affairs of the business to control its activities. For example, absentee ownership of a business and part-time work in a full-time business are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings or weekends, if the individual controls it all the time it is operating.

(j) A disadvantaged individual may control a business even though one or more of the individual's nondisadvantaged immediate family members, participate in the business as a manager, employee, owner, or in another capacity. Except as otherwise provided in this subsection, the office must make a judgment about the control the disadvantaged owner exercises vis-a-vis other persons involved in the business as the office does in other situations, without regard to whether or not the other persons are immediate family members. If the office cannot determine the disadvantaged owners, as distinct from the family as a whole, control the business, then the disadvantaged owners failed to carry their burden of proof concerning control, even though they may participate significantly in the business's activities.

(k) When a business was formerly owned or controlled by a nondisadvantaged individual, whether or not an immediate family member, and ownership or control was transferred to a disadvantaged individual, and the nondisadvantaged individual remains involved with the business in any capacity, there is a rebuttable presumption of control by the nondisadvantaged individual unless the disadvantaged individual now owning the business demonstrates to the office, by clear and convincing evidence, that:

(i) The transfer of ownership or control to the disadvantaged individual was made for reasons other than obtaining certification; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the business, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned or controlled the business.

(l) In determining whether its disadvantaged owner controls a business, the office may consider whether the business owns equipment necessary to perform its work. However, the office must not determine a business is not controlled by disadvantaged individuals solely because the business leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the business.

(m) A business operating under a franchise or license agreement may be certified if it meets the standards in this paragraph and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the office should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(n) The disadvantaged individual(s) controlling a business may use an employee leasing company. The use of such a company does not preclude the individual(s) from controlling their business if they continue to maintain an employer-employee relationship with the leased employees. This includes responsibility for hiring, firing, training, assigning, and otherwise controlling on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-080, filed 6/7/19, effective 7/8/19; WSR 04-08-093, § 326-20-080, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-080, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-12-060 (Order 88-5), § 326-20-080, filed 5/31/88; WSR 87-18-030 (Order 87-6), § 326-20-080, filed 8/27/87. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-080, filed 10/28/83.]