

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS (NCOIL)
Proposed Trucking and Messenger Courier Industries Workers' Compensation Model Act

*To be considered by the NCOIL Workers' Compensation Insurance Committee on November 18, 2010.
Sponsored for discussion by Rep. George Keiser (ND)*

This draft incorporates Committee changes approved on July 8 and interested-party markups submitted in accordance with an April 23, 2010, comment deadline.

Interested-party markups are signified throughout the text by the following:

ATA: American Trucking Associations

MCAA: Messenger Courier Association of the Americas

NAIC/IAIABC: Joint Working Group of the National Association of Insurance Commissioners and International Association of Industrial Accident Boards and Commissions

UPS: United Parcel Service

Section 1. Purpose

The purpose of this Act is to establish clear criteria to determine employee and independent contractor status for workers' compensation coverage purposes.

Section 2. Definitions

Definitions for this Section will track definitions in *[Insert Workers' Compensation Statute]*.

Section 3. Independent Contractors in the Trucking and Messenger Courier Industries

In the trucking and messenger courier industries, an operator of a car, van, truck, tractor, or truck-tractor is an employee and subject to state workers' compensation laws unless each of the following factors is present, and if each factor is present the operator is an independent contractor:

1. the individual owns the equipment or holds it under a bona fide lease arrangement;

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1. the individual owns the equipment or holds it under a bona fide **long-term** lease arrangement;

NAIC/IAIABC

1. the individual owns the equipment or holds it under a bona fide lease arrangement; **Any lease arrangement, loan or loan guarantee cannot be with the hiring entity or any affiliate of the hiring entity.**

2. the individual bears the practical responsibility for the maintenance of the equipment;
3. the individual is responsible for substantially all of the principal operating costs of the vehicle, including fuel, repairs, supplies, vehicle insurance, and personal expenses. The individual may be paid the carrier's fuel surcharge and incidental costs by the contracting entity, including, but not limited to, tolls, permits, and lumper fees;
4. the individual is responsible for supplying the necessary services to operate the equipment;
5. the individual's compensation is based on factors related to the work performed, such as a percentage of any schedule of rates, and not on the basis of the hours or time expended;

ATA

5. the individual's compensation is based on factors related to the work performed, such as mileage-based rates or a percentage of any schedule of rates, and not solely on the basis of the hours or time expended;

MCAA

5. the individual's compensation is based on factors related to the work performed, such as percentages of revenue, type of equipment required, class or type of freight transported, degree of difficulty or ease in effecting deliveries and/or pick-ups at specific locations, and not strictly on the basis of the hours or time expended;

NAIC/IAIABC

- ~~5. the individual's compensation is based on factors related to the work performed, such as a percentage of any schedule of rates, and not on the basis of the hours or time expended;~~

5. the individual must be free to contract for work with any other entities using the same equipment and the compensation is based on such factors relating to the work performed as:

- a. a percentage of any schedule of rates;
- b. a percentage of any quote which may have been used by the courier in determining the price for a transit service; or
- c. any bid which may have been submitted by the individual to the courier for a specific transit service. The individual is not compensated for time in service, without supporting documentation to tie the payment to a bid and/or bill which itemizes expenses including but not limited to operator-borne expenses, such as rental fees for extra equipment, storage, and job specific vehicle alteration.

6. the individual substantially controls the means and manner of performing services, in conformance with regulatory requirements and specifications of a shipper; and

ATA

6. the individual substantially controls the means and manner of performing services, in conformance with statutory and regulatory requirements and specifications of a shipper; and

MCAA

6. the individual ~~substantially~~ controls the ~~means and~~ manner in which of performing services, are performed, subject to shipper specifications establishing the parameters of the contracted service in conformance with regulatory requirements and specifications of a shipper; and

NAIC/IAIABC

6. the individual substantially controls the means and manner of performing services, in

conformance with regulatory requirements, ~~and s~~ Specifications of a shipper; if any, are limited to those directly related to the safe and timely delivery of a load or equipment, and may not extend to the specific manner in which the work is done, such as whether the driver has a passenger, the specific delivery route, or the specific hours of operation; and

UPS
6. the individual has been and will continue to be free from the hiring entity’s control or direction in performing services, both under contract and in fact, provided that the obligation to conform substantially controls the means and manner of performing services, in conformance with regulatory requirements shall not be considered control by the hiring entity and specifications of a shipper; and

7. the individual enters into a written contract that specifies the relationship to be that of an independent contractor and not that of an employee.

NAIC/IAIABC
7. ~~the individual enters into a written contract that specifies the relationship to be that of an independent contractor and not that of an employee. there must be a certification statement affirming that the individual whose services are being acquired meets each of the factors in Section 3(1) through (6) and that the relationship is understood to be that of an independent contractor and not that of an employee. The statement must be signed and dated by the individual supplying the service and the hiring entity. The statement must be supplied on demand to an insurance premium auditor or [Insert Applicable State Agency].~~

UPS
7. the individual is customarily engaged in an independently established business providing trucking or courier services and regularly provides such services beyond just to the hiring entity;
8. the individual may realize a profit or suffer a loss in performing services for the hiring entity; and
79. the individual enters into a written contract that specifies the relationship to be that of an independent contractor and not that of an employee.

-OR-

STAFF NOTE: *At the July 10 meeting, Committee members asked that we also look at the “ABC” test used for many state unemployment and workers’ compensation laws. Below is an example of from Louisiana Rev. Stat., § 23-1472 (12)(E).*

E. Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, shall be deemed to be employment subject to this Chapter unless and until it is shown to the satisfaction of the administrator that;

I. such individual has been and will continue to be free from any control or direction over the performance of such services both under his contract and in fact; and

- II. such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- III. such individual is customarily engaged in an independently established trade, occupation, profession or business;

Section 4. Penalties

Penalties for non-compliance will be levied in accordance with *[Insert Workers' Compensation Statute]*.

Section 5. Enforcement

The *[Insert Applicable State Agency]* shall have enforcement authority as provided under *[Insert Workers' Compensation Statute]*.

Section 6. Effective Date

This Act shall take effect immediately.

Proposed additions to the draft model are indicated in **bold underline**.
Proposed deletions to the draft model are indicated by ~~strikethrough~~.