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National Conference of Insurance Legislators
c/o Jordan Estey, Director of Legislative Affairs & Education
385 Jordan Road
Troy, NY 12180

Re: Proposed Trucking and Messenger Courier Industries Workers'
Compensation Model Act

Dear Mr. Estey:

The American Trucking Associations, Inc. ("ATA"), respectfully submits additional comments regarding the proposed use of the "ABC" test for the Workers' Compensation Committee's Proposed Trucking and Messenger Courier Industries Workers' Compensation Model Act.

ATA is a nonprofit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Arlington, Virginia. ATA is the national trade association of the trucking industry. It has approximately 2,000 direct motor carrier members and, in cooperation with the state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others.

Members of the Committee considering the proposed Model Act have requested information on the ABC test. The proponents of the ABC test before that Committee were not clear whether they were suggesting use of the ABC test in all areas of workers' compensation, or only within the trucking industry. As discussed below, its use in either is inappropriate. As a general matter, the

ABC test is rarely, if ever, used by states to classify owner-operators as either independent contractors or employees for purposes of workers' compensation. In fact, a comprehensive review of state workers' compensation schemes indicates no state has explicitly adopted the ABC test for purposes of workers' compensation. Rather, the ABC test has only been used to determine an individual's employment status for purposes of unemployment tax, and only by less than a majority of the states. Candidly, the ABC test is deficient even as applied in the unemployment tax context due to its subjective nature and its susceptibility to judicial and regulatory misapplication.

This difference in approach between unemployment tax and workers' compensation reflects the different purposes of each system. Unemployment tax is just that – a tax structure implemented with the purpose of protecting against interruptions in income due to workflow variations. The tests some states use to collect this tax err substantially toward generation of tax revenue through an overly-broad and far too subjective approach.

This may be due to the fact that use of the ABC test does not provide the clarity suggested by its proponents. For example, Massachusetts has an independent contractor law applicable to labor laws and unemployment tax that uses the ABC test. This law does not by its terms apply to workers' compensation, but has been interpreted by the Massachusetts Attorney General and at least one court to apply to workers' compensation, due to provisions within the law that refer to violations of the workers' compensation code. The law has been the subject of attempts at legislative revision and multiple advisory opinions issued by the Attorney General on the proper application of the supposedly "straightforward" ABC test. As the report submitted by one commenter on the Massachusetts experience with the ABC test acknowledges, the use of the ABC test has not provided this alleged clarity. In other words, the report demonstrates that the ABC test does not provide sufficient guidance to business and industry in order to avoid misclassification.

By contrast, the model legislation currently being considered by this Committee, and as further refined by ATA's April 22, 2010, comments, provides a much superior methodology than the ABC test for making classification determinations in the trucking industry. That conclusion is supported by a positive experience in Minnesota which has a trucking-specific independent contractor definition nearly identical to the current proposed model language. According to a study performed on the incidence of misclassification in Minnesota, hiring entities misclassified employees as independent contractors in the transportation industry only three percent of the time. This was the lowest rate of incidence of any industry, thirty percentage points below the

industry with the highest rate of misclassification (real estate), and eleven percentage points below the average rate of misclassification in all industries.

The manner in which the majority of states address workers' compensation provides further support for the model legislation vis-à-vis an ABC test. Workers' compensation is intended to protect workers from unexpected injury in the workplace. The party responsible for insuring against such an injury is not best determined by an economic analysis, but by which party has control over the work conditions and work activity. Therefore, consistent with that circumstance, virtually every state utilizes some form of control test to determine which party is more appropriately responsible for insuring against such potential injury. States then codified this control test as developed in the courts. Accordingly, approximately 34 states use some form of control test, while several others use multi-factor tests (which include a control element) for workers' compensation classification purposes. In addition, 22 states have enacted trucking-specific workers compensation status tests, which generally include a control analysis. Consequently, contrary to what has been suggested, there is significant uniformity among the various states regarding the proper test to be applied within workers' compensation, and that test is the control test.

Use of the ABC test within the trucking industry is even less appropriate than it is for other industries. The ABC test is particularly subject to misapplication within the trucking industry. The uninitiated often do not understand that an owner-operator plays a different role in the freight-hauling process than the motor carrier. While the two businesses are interrelated, it is the owner-operator/independent contractor that actually moves the freight, while the motor carrier for that particular freight movement can be more accurately described as providing logistic management to the shipper.

ATA appreciates the opportunity to provide this viewpoint, and looks forward to providing any additional information the Committee may seek.

Very truly yours,

/s/ Gregory M. Feary