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To: NCOIL Insurance Compensation Committee
cc: Jordan Estey, NCOIL Director of Legislative Affairs
From: Victoria King, UPS Public Affairs
Re: Proposed Trucking and Messenger Courier Industries Workers Compensation Model Act
Date: September 20, 2010

UPS wishes to follow up on the comments it submitted in April and on the discussion that occurred at the Workers' Compensation Insurance Committee meeting on July 8, 2010, regarding the Proposed Trucking and Messenger Courier Industries Workers Compensation Model Act ("Model Act").

UPS believes that the proposed Model Act should not be adopted in its present form because it would have the effect of perpetuating practices that UPS believes have resulted in significant worker misclassification in the small package delivery sector of the trucking industry.

It is important to keep in mind that the purpose of workers' compensation laws is to protect workers that have been injured on the job. In that context, proposed changes must be disfavored if they would have the result of denying workers' compensation coverage and benefits to workers for job-related injuries.

As numerous state workers' compensation agencies have discovered, through ongoing audits and through participation in statewide task forces on the issue of worker misclassification, there is a serious problem caused by employers that attempt to avoid or minimize workers' compensation premiums (and avoid paying unemployment taxes) by treating workers as independent contractors rather than employees.

UPS has recommended specific modifications to the proposed Model Act that would make its provisions more consistent with typical standards for distinguishing between employees and independent contractors, including that a worker be free from the hiring entity's control in order to be classified as an independent contractor.

Contrary to the impression that may have been conveyed during the July meeting, the recognition of special workers' compensation rules applicable to truck owner-operators is far from universal, and even in the 20-plus States that apply separate workers' compensation rules to owner-operators, the treatment is far from uniform. Few States have rules that are as heavily slanted as the proposed Model Act in finding independent contractor status (and thereby denying workers' compensation coverage and benefits). In some States, the owner-operator tests may actually be more likely to result in a finding of employee status than the general workers' compensation worker status rules.

We note comments made by other organizations critical of the proposed Model Act:

- The International Brotherhood of Teamsters says that the seven-factor test in the proposed Model Act would “ensure that misclassification would remain rampant in the States which adopt this act.”
- The National Employment Law Project says that in the proposed Model Act, “the seven factors do not truly get at whether the worker is running an independent business, and are relatively easily manipulated by any employer seeking to create an independent contractor arrangement with the worker.”
- The Property Casualty Insurers Association of America urges NCOIL to undertake further study before adopting a Model Act in this area. In particular, the organization recommends that a review of state workers’ compensation laws on the independent contractor in the trucking industry be completed due to state variations.
- In joint comments, the National Association of Insurance Commissioners and the International Association of Industrial Accident Boards and Commissions, expressed concern that the proposed “law seems to offer excessive latitude for employers to attempt mass conversions of their workforces to independent contractors status.” They said their “objection to radically expanding the scope for reclassifying workers to independent contractors rests on several principles: 1) the traditional basis for determining employment status; 2) distortions to the exposure basis for workers compensation insurance; and 3) arbitrary treatment of workers access to social insurance based on business advantages pursued by some employers.”

UPS believes that the Workers’ Compensation Insurance Committee should take to heart these concerns and should give serious consideration to whether it makes sense to move forward with the proposed Model Act. UPS believes that it would be preferable to adopt no model law in this area rather than adopting the proposed Model Act.

It should be noted that proponents of changing the workers’ compensation laws to give more certainty that owner-operators will be classified as independent contractors (and thereby denied workers’ compensation coverage and benefits) have been candid in indicating that the workers’ compensation changes are only part of their longer-term game plan. They would like to be able to point to the proposed Model Act (if adopted) as a rationale for also changing the worker classification rules under State unemployment laws and under State tax laws.

In addition to denying truckers various benefits they would otherwise be entitled to as employees, such changes would almost certainly cost the States significant tax revenues and workers’ compensation and unemployment insurance contributions. By way of emphasizing this point, I am attaching a July 15, 2010, press release from the Attorney General of Massachusetts regarding a \$3 million payment to settle claims by the Commonwealth that FedEx Ground had misclassified its drivers.