



August 21, 2009

Representative Susan Westrom  
Chairman, Workers' Compensation Insurance Committee  
National Conference of Insurance Legislators (NCOIL)  
385 Jordan Road  
Troy, New York 12180

Dear Chairman Westrom:

On behalf of the National Federation of Independent Business (NFIB), the nation's largest small business advocacy organization, thank you for the opportunity to comment on the National Conference of Insurance Legislators (NCOIL) "Proposed Employee Misclassification Workers' Compensation Coverage Act."

One important issue for small businesses in the draft is the definition of independent contractor. The definition of independent contractor has been an on-going area of debate at both the state and federal level. Current laws are vague and confusing and offer little guidance to small employers. It is very difficult for a small employer to determine whether or not a contractor is misclassified since employers in many states must address the employment relationship under four separate tests: the Internal Revenue Service's test; the test of the state's unemployment compensation law; the test of the state's workers' compensation law; and the test for employer tort liability under the doctrine of respondeat superior. Small businesses are frequently penalized for making unintentional mistakes in interpreting these different and sometimes contradictory laws. As a result, small business owners are afraid to deal with independent contractors and many independent contractors, who are also small business owners, have limited opportunity to grow, expand and create jobs.

Because of the important role that independent contractors play in the small business economy, NFIB supports efforts to create a balanced and clear approach to classifying a worker as an independent contractor. Clarity would reduce unintended misclassifications by small business owners. In addition, a clear standard would reduce opportunities for potential bad actors to abuse the law.

#### NFIB Survey Results

A recent NFIB Small Business Poll surveyed three common areas (transportation/shipping, construction, IT services) for hiring independent contractors. The Poll found that 61 percent of the entire small business population contracted with at least one independent contractor from one of these professions in the last three years. As demonstrated by the survey, independent contractors are indispensable to the smooth operation of the small business economy, filling production and service needs when it is

inefficient for the firm to do so, providing otherwise unavailable or too costly expertise on a limited basis, and generally filling periodic gaps that arise from fluctuating demand.

#### NCOIL Model Legislation

NFIB believes that any model legislation on this issue must be carefully designed to optimize worker flexibility while minimizing uncertainties and unintended consequences.

Any test to determine the classification of a worker must provide business owners with the flexibility to make the decisions they need to make about operating their business, but also provide enough clarity so business owners can be confident about the decisions they make without the fear of lawsuits and penalties. NFIB supports NCOIL's efforts to clarify the definition of an independent contractor and bring some certainty to the law, but the definition included in the draft raises some questions and concerns.

The draft seems to require that all nine factors be met before an individual would be classified as an independent contractor. Such a specific standard is too rigid. This could not only be a problem for the business owner contracting with an independent contractor, but could also be a problem for the small business that is doing the contracting work. Failing to meet just one prong of the test should not be the grounds for penalties on the business owner.

A test requiring that a combination of certain factors be met before an individual is classified as an independent contractor provides more flexibility and clarity than an all-or-nothing test. The right mix of various factors can establish control or lack of control and can provide some flexibility to meet the needs of various industries.

In the most recent draft, a suggestion was made to add the word "control" to point 3. This seems redundant since the factors in the test are attempting to establish control. The idea of control or not having control underlies the factors set out in the test.

NFIB appreciates the opportunity to comment on this important issue. If you have any questions or comments about NFIB's position, please contact me at 202-554-9000 or [bill.rys@nfib.org](mailto:bill.rys@nfib.org).

Sincerely,



William A. Rys  
Tax Counsel  
NFIB