



National Association of Professional Insurance Agents

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August 21, 2009

TO: Susan Nolan

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The NCOIL Subcommittee on Employee Misclassification Model Legislation

NCOIL National Office

FR: PIA National Business Issues Committee, Technical working Group

RE: PIA National Comments

08-12-09 DRAFT Model –

**NCOIL TO ADVANCE WORKERS' COMP REFORM, TARGETS
EMPLOYEE MISCLASSIFICATION**

PIA Members Marketplace Perspective:

PIA National appreciates this opportunity to provide our comments on this model and our perspective on the subject. We agree with the concern of NCOIL and state WC officials concerning what state authorities and NCOIL have documented as the serious and growing noncompliance of employers in classifying and reporting employee vs. ICs.

All employers and workers need to remember and appreciate the value of the states' public policy quid-pro-quo bargain in creating the WC system. Employers received an Administrative WC mandatory system instead of being subject to direct state common court process for every worker injury issue. And the state's social benefit in trade is that the workers in their state receive the protection of state law defined WC benefit system without having to go to state common court to prove the injury was caused by employer's negligence (both of which also act to relieve a significant burden off of state common courts' systems). This continues to be a major benefit for both sides, and manipulation of classifications and WC obligations by employers and/or workers undermines these benefits.

In PIA members' view and professional experience, it is less a matter of confused state WC law in worker classes and applied definitions. Rather, the largest portion of the concern is being unclear that compliance is required and enforcement for noncompliance can carry a very heavy stick/penalty.

PIA Suggested Approach for Better Compliance:

However, we believe that NCOIL (and state officials both WC and Insurance) will be more successful in compliance adherence among employers, contractors, and workers by narrowing the focus of your efforts to the core issue, and developing a model Compliance Bulletin that directly states the current law, requirements of compliance, and that enforcement is real.

We've attached an example of NJ's recent bulletin actions that demonstrate the value and benefit such a laser approach can deliver. We believe this approach creates far less confusion, and contradictions than a model bill that attempts to address far too many things.

Despite best efforts, PIA National still finds the NCOIL draft's definitions unclear, too often in direct conflict with a large number of state WC current requirements in this area, and applied inconsistently through the functional portion of the model. In contrast the bulletin approach is much more streamlined and specific to the heart/center of the challenge.

Please see our following suggestions. If you have any questions of PIA, please advise.

Respectfully Submitted by:

Susan Sallada, (PA) Chair PIA National Business Issues Committee (BIC)

Andy Harris (NJ), Chair, PIA National BIC Technical Working Group

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– Your message will be forwarded to our WG members.

PIA National Suggestions for NCOIL's consideration and purpose, your model compliance bulletin and discussion would include:

The State WC Authority Compliance Bulletin would act as both a reminder and warning to all employers with regard to their current legal obligations and expected/required compliance.

Restate that employers (as well as individual workers) have a current and standing obligation in every state to fully comply with WC laws, regulations, board decisions and practices as they apply to their specific business, workers and workplace/site circumstances.

This includes the standing obligation that "employers" at all times properly report their number of employee-workers, and have in place continuing valid WC insurance (or other legal options) covering the WC benefit obligations of the employer for these employees.

Failing to do so for any reason is a violation of states' WC laws, causes the employer to be noncompliant with state WC requirements, and subjects

employers to serious penalties (even when no workplace injury has not occurred).

State WC officials and legislatures have documented the rising tide of WC misclassification and misreporting by employers of individual workers as independent contractors (ICs) (instead of as employees) and, as such, pay these people on a 1099 as "proof" of IC status.

Every U.S. WC jurisdiction, as well as where applicable federal WC regulations, make clear what characteristics, practices and job assignments qualify an individual worker to declare themselves as an IC, and what WC system benefit options and/or obligations they may have.

Employers and workers are reminder that in each of these circumstances state WC laws, regulations and systems require the individual to properly document and demonstrate their standing and legal basis for electing worker status as IC; provide authentic insurance evidence of proper WC insurance in place, and/or if they are permitted and are exercising lawful election to opt-out of the WC benefit system. In tandem, the employer when hiring the IC and/or lawfully opt-out active business owner, officers, and/or principal is required to secure the ICs/opt-out person's documentation, check its authenticity, and retain and require update of this documentation in their files to substantiate that the employer's has properly classified, reported and complaint. State WC authorities expect these proper documentations to be included in the backup materials for and to WC files and available upon request for audit. This same process also applies with an employer is securing the contracting/subcontracting services of a business entity IC that is directly responsible for the WC obligations of the IC entity's employees completing the contracted services.

Further, employers and workers are reminded that they are also legally required to use and/or accept and document with authentic insurance forms (certificates of insurance, and/or insurance policy endorsement of interests, etc.) as proof of insurance compliance with insurance requirements. Employers and workers are to refer to the states' Department of Insurance regulations/guidance as to what constitutes authentic insurance forms and compliant practices in this area and which are prohibited by state insurance law. (NCOIL, as an FYI, please see also attached example of PIA Member bulletin on the challenges with certificates of insurance forms).

WC officials pursue their public safety and enforcement responsibilities seriously and actively. Failure to comply can result in serious fines, penalties, civil liabilities as well as a possible State issued Immediate Stop-Work Order.

NJ 08-20-09 WC Compliance - Prohibit Miscalssification - IC

New Jersey has recently increased its penalties for employers found to have violated state workers' compensation requirements.

Who is affected? All employers operating in the state of New Jersey

What does the law cover? The law imposes harsher penalties for employers who have knowingly failed to provide workers' compensation coverage, misrepresented employees as independent contractors, or provided false or misleading information concerning the number of employees they have for purposes of paying lower workers' compensation premiums.

Penalties: A stop-work order will be issued within 72-hours of a recognized violation. The stop-work order will remain in effect until the employer has come into compliance with New Jersey's workers' compensation requirements and has paid all monetary penalties levied against them. Violations of the stop-work order will result in a \$5,000 penalty, with an additional \$5,000 penalty for every 10-day period the employer is not in compliance with the order.

Compliance requirements: Employers must be careful to always ensure that they are providing accurate information to the state's workers' compensation agency with regards to the size of their workforce. Keep in mind what designates an employee as an employee and what designates an individual as an independent contractor. This distinction is important for determining whether or not you need to cover the individual under your workers' compensation plan.