

316 Pennsylvania Ave., S.E.  
Suite 300  
Washington, DC 20003  
202.675.4220 Tel



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: April 20, 2010

UPS appreciates the opportunity to comment on the discussion document (“Discussion Draft”) for the Proposed Trucking and Messenger Courier Industries Workers Compensation Model Act. UPS believes that worker misclassification is a serious and growing concern that adversely impacts the small package delivery sector of the transportation industry.

UPS applauds NCOIL’s efforts to study the workers’ compensation coverage rules for truckers and messenger couriers in various states relating to misclassification of employees as independent contractors. 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.

However UPS’ concern is that the NCOIL’s Discussion Draft, if adopted, would have the effect of perpetuating practices that UPS believes have resulted in significant misclassification in these industries.

**Recommendations for Modification to Discussion Draft**

With the above concerns in mind, UPS believes that the “independent contractor” definition in the Discussion Draft should not be adopted unless it is modified:

- (1) to indicate that the burden of proof is on the hiring entity regarding independent contractor status,
- (2) to modify the “control” factor to keep it consistent with the “control” test now applied in many states,
- (3) to require that an independent contractor have an opportunity for profit or loss, and

(4) to require that an independent contractor must customarily be engaged in an independently established trade or business (as opposed to providing substantially all of his or her services to a single employer).

### Proposed Revisions

To reflect the above comments, UPS recommends the following changes be made to Section 3 of the Discussion Draft. Insertions are noted in CAPS and deletions are noted as strike through.

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

A. In the trucking and messenger courier industries, an operator of a car, van, truck, tractor, or truck tractor that is licensed and registered by a governmental motor vehicle agency is an employee and subject to state workers' compensation laws and regulations, unless **THE HIRING ENTITY DEMONSTRATES WITH RESPECT TO THE OPERATOR THAT** 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;
2. the individual is responsible for the maintenance of the equipment;
3. the individual is responsible for the 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 hiring entity, including, but not limited to, tolls, permits, and lumper fees;
4. the individual is responsible for supplying the necessary personal 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;
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 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**
9. the individual enters into a written contract that specifies the relationship to be that of an independent contractor and not that of an employee.