



TO: NATIONAL CONFERENCE OF INSURANCE
LEGISLATORS

FROM: DAN REILLY
STATE LEGISLATIVE & POLITICAL DIRECTOR
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

DATE: APRIL 23, 2010

RE: COMMENTS ON PROPOSED NCOIL MODEL
LEGISLATION

The International Brotherhood of Teamsters commends the National Conference of Insurance Legislators for its recent efforts to address concerns surrounding worker misclassification in the Conference's proposed trucking and messenger courier industry model act. Despite these efforts, the Teamsters Union and its 1.4 million members have serious concerns surrounding the proposal.

In the last twenty-five years, this egregious practice has exploded throughout the country. Between 2004 and 2008, federal estimates suggest that the misclassification of workers has increased at nearly five percent annually, compromising workers' rights and state tax codes. Some estimates suggest that five million independent contractors are considered to be misclassified employees – 48% of all independent contractors nationwide. More disconcerting, all published reports suggest the extent of worker misclassification is not yet known, and almost all estimates on financial costs to states are considered conservative.

Both federal and state estimates suggest governments lose billions of dollars annually due to worker misclassification. The federal government currently loses at least \$4.7 billion annually due to this egregious practice. Equally notable, fifteen states have associated cost estimates with this practice, totaling well over \$3.2 *billion* annually. Most recently, Nebraska estimated worker misclassification costs the state nearly \$20 million. During the current economic crisis, bad-acting employers are illegally saving billions of dollars at the expense of workers and federal and state governments.

To address this egregious practice, federal and state governments have initiated unprecedented efforts to protect workers. At the federal level, President Obama recently announced efforts to address worker misclassification and recoup more than \$10 billion over the next decade. Additionally, pending federal legislation to address both the "safe harbor" tax loophole and the Fair Labor Standards Act are currently being considered in Congress. At the state level, more than forty states have investigated this practice through executive orders, state agency investigations, legislation, commissions, and ongoing task forces.

As NCOIL's model act suggests, worker misclassification is not simply prevalent in the construction industry. States have seen this practice increase in the film, real estate, port trucking, and – most notably – the package delivery industries, just to name a few. In particular, FedEx Ground's misclassification of more than 13,000 drivers throughout the country has revealed the company as the corporate poster child for worker misclassification.

Currently, more than thirty-five state agencies have investigated the company's independent contractor business model since 2004. Last year, the Montana and New York Attorneys General called the company's business model a "serious injustice," claiming the company violated state labor laws. This letter followed an earlier communication from eight state Attorneys General to the company expressing concerns regarding the company's business model.

Additionally, state Departments of Labor have also actively investigated the company. In 2009, the Maryland Department of Labor, Licensing, and Regulation identified nearly 340 misclassified FedEx Ground drivers, easily the most by any one employer in that state. Earlier this year, the Tennessee Department of Labor fined the company \$1.6 million for misclassifying drivers between 2004 and 2008.

While FedEx Ground and others continue to deliberately violate state laws, policymakers in those states must actively identify measures to properly address the misclassification of drivers. Unfortunately, the current NCOIL proposal does not adequately advance states' efforts to ensure bad-acting employers are properly classifying their workers.

While the Teamsters Union supports employee presumption under Section Three, the application of the seven-factor plan will ensure that misclassification would remain rampant in states which adopt this act. The seven-factor proposal does not adequately address the issue of control surrounding the day-to-day activities of workers by employers. In fact, the Teamsters Union believes the adoption of this proposal would allow for the continuation of misclassification.

In many instances, misclassified workers are required to purchase vehicles under company independent contractor models, maintain that vehicle, be responsible for operating costs, provide the necessary personnel services, and receive compensation based on work performance. Therefore, misclassified workers satisfy the first five factors under the NCOIL model act.

Additionally, factor seven should also be removed. In many instances, an employer requires workers to sign these agreements despite the fact that state labor and tax laws would suggest these workers to be employees, not independent contractors. To allow bad-acting employers to hide behind these agreements while violating state laws would be irresponsible.

In the case of FedEx Ground, misclassified workers would technically meet six of the seven factors under the NCOIL proposal. The final factor is vaguely worded and certainly

could be interpreted either in favor of employee status or independent contractor status. Yet, as mentioned earlier, more than thirty-five states believe FedEx Ground's independent contractor business model is, at best, questionable, and, at worst, a serious injustice. To adopt the NCOIL proposal would be to go against most state interpretations of what standards must be met for a worker to be considered a legitimate independent contractor.

As states attempt to properly address the question of misclassified employee versus legitimate independent contractor, the Teamsters Union strongly encourages NCOIL to consider adopting a model that incorporates the "ABC" standard. The ABC test is currently in use by nearly thirty states – including for workers' compensation – and is the most effective standard in use to properly address the egregious practice of worker misclassification.

For your review, please note the following language for the ideal ABC standard:

- (1) The individual has been and will continue to be free from direction and control of the employer, both under his contract of service and in fact;
- (2) The service is outside the usual course of the business of the employer; and
- (3) The individual is customarily engaged in an independently established trade, occupation, profession or business, both under his contract of service and in fact.

As states have continued to investigate instances of worker misclassification, they have particularly looked into the day-to-day control issue, as noted in state efforts against FedEx Ground. Under the ABC test, it is clear that the misclassified worker could not be considered a legitimate independent contractor. NCOIL should actively pursue the most effective tools to uproot this egregious practice. The Teamsters Union strongly encourages NCOIL to reconsider its model act and to follow the actions of states throughout the country in the use of the ABC standard.