

April 23, 2010

Jordan Estey
Director of Legislative Affairs and Education
National Conference of Insurance Legislators
NCOIL Workers' Compensation Insurance Committee

Re: March 5 "Proposed Trucking and Messenger Courier Industries Workers' Compensation Model Act"

Dear Mr. Estey:

Our NAIC/IAIABC Joint Working Group subgroup has reviewed the above captioned draft model law carefully and has engaged in several conference calls and numerous exchanges of e-mails.

The primary and overarching concern of the group is that the model offers insufficient detailed guidance on criteria for identifying and classifying true independent truckers from relationships that are best described as employment. The law seems to offer excessive latitude for employers to attempt mass conversions of their workforces to independent contractor status.

Our 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.

The attached document contains several specific changes to the draft model that we offer for your consideration.

Please contact Bob Card of the National Association of Insurance Commissioners—NAIC if you have any questions (bcard@naic.org, telephone 816-783-8263).

Thank you for the opportunity to provide comments. We stand willing to share our thoughts and assist NCOIL in whatever manner it desires as it considers these matters further.

Sincerely,



Merle Scheiber
Director, South Dakota Division of Insurance
Chair, NAIC Workers' Compensation (C) Task Force



Greg Krohm, Ph.D.
Executive Director
International Association of Industrial Accident Boards and Commissions

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PROPOSED MARKUP REVISIONS BY THE NAIC/IAIABC JOINT WORKING GROUP

**NATIONAL CONFERENCE OF INSURANCE LEGISLATORS (NCOIL)
Proposed Trucking and Messenger Courier Industries Workers' Compensation Model Act**

To be considered by the NCOIL Workers' Compensation Insurance Committee on Friday, March 5, 2010.

Sponsored for discussion by Rep. George Keiser (ND)

Section 1. Purpose

The purpose of this Act is to establish clear criteria to determine employee and independent contractor status for workers' compensation coverage purposes.

Section 2. Definitions

Definitions for this Section will track definitions in *[Insert Workers' Compensation Statute]*.

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

In the trucking and messenger courier industries, an operator of a car, van, truck, tractor, or truck-tractor **is an employee and subject to state workers' compensation laws that is licensed and registered by a governmental motor vehicle agency is an employee and subject to state workers' compensation laws and regulations,** unless each of the following factors are present, and if each factor is present the operator is an independent contractor:

1. the ~~individual operator individual~~ owns the equipment or holds it under a bona fide lease arrangement. **Any lease arrangement, loan or loan guarantee cannot be with the hiring entity or any affiliate of the hiring entity;**
2. the ~~individual operator individual~~ is responsible for the maintenance of the equipment;
3. the ~~individual operator individual~~ is responsible for the operating costs of the vehicle, including fuel, repairs, supplies, vehicle insurance, and personal expenses. The ~~individual operator 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 operator individual~~ is responsible for supplying the necessary **personnel** ~~personal services~~ to operate the equipment;
5. ~~the individual operator'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;~~
5. the individual must be free to contract for work with any other entities using the same equipment and the compensation is based on such factors relating to the work performed as
 - (i) **a percentage of any schedule of rates;**
 - (ii) **a percentage of any quote which may have been used by the courier in determining the price for a transit service; or**

(iii) any bid which may have been submitted by the individual to the courier for a specific transit service. The individual is not compensated for time in service, without supporting documentation to tie the payment to a bid and/or bill which itemizes expenses including but not limited to operator-borne expenses, such as rental fees for extra equipment, storage, and job specific vehicle alteration;

6. the ~~individualoperatorindividual~~ substantially controls the means and manner of performing services, in conformance with regulatory requirements, ~~and s~~Specifications of a shipper, **if any, are limited to those directly related to the safe and timely delivery of a load or equipment, and may not extend to whether the driver has a passenger; and the specific manner in which the work is done, such as whether the driver has a passenger, the specific delivery route, or the specific hours of operation; and**
7. **there must be a certification statement affirming that the individualindividual whose services are being acquired meets each of the factors in Section 3 (1 – 6) and that the relationship is understood to be that of an independent contractor and not that of an employee. The statement must be signed and dated by the individualindividual supplying the service and the hiring entity. The statement must be supplied on demand to an insurance premium auditor or state authority (specify agency). the individual enters into a written contract that specifies the relationship to be that of an independent contractor and not that of an employee.**

Section 4. Penalties

Penalties for non-compliance will be levied in accordance with *[Insert Workers' Compensation Statute]*.

Section 5. Enforcement

The *[Insert Applicable State Agency]* shall have enforcement authority as provided under *[Insert Workers' Compensation Statute]*.

Section 6. Effective Date

This Act shall take effect immediately.

April 23, 2010

Jordan Estey
Director of Legislative Affairs and Education
National Conference of Insurance Legislators
NCOIL Workers' Compensation Insurance Committee

Re: March 5 "Proposed Trucking and Messenger Courier Industries Workers'
Compensation Model Act"

Dear Jordan,

I am writing at the request of interested parties within the NAIC and IAIABC to provide background and rationale for our detailed comments on the above captioned draft model law addressing independent contractors.

The word individual is appropriately used in the bill itself, but in the background material the word operator is used simultaneously with individual. We think it is preferable to use the term individual throughout.

Sec 3 -- we don't think that a license should be used to limit the application of these principles defined in this law.

Sec. 3 sub (4) -- we felt the wording was unclear; our best reading was that "personnel" better described the intent.

Sec.3 sub(5) -- we felt strongly that the basis of compensation should be broadened substantially to include the additional forms of compensation enumerated here.

In addition, we felt that the common law and statutory test found in most states should be recognized: that a true independent contractor should be independent of any one hiring entity for their survival as a business. Thus exclusive contracting relationships inherently violate true independence of the operator with hiring entity.

Sec.3 sub(6) -- Specifications of the hiring entity (called here "shipper") should not drift into the specific manner in which the work gets done. This honors a fundamental common law principle that an employer is one that exercises control over the work being done. Thus, outlawing passengers or other aspects of vehicle operation unrelated to safety or timely delivery should be banned. As a non-employee, the operator should be free to choose their hours and routes provided.

Sec.3 sub(7) -- we rejected the general test of a contract because without more structure the contract would end up being a very hollow test. Operators could be misled into signing a document that did not truly and clearly lay out the relationship into which they and the hiring entity believed they are entering. It would be a better test if it was called a certification in which both parties understood that the conditions of independence in this law were in fact met. Finally, this certification should be readily producible to the state if it wanted to audit or enforce this law.

Thank you for the opportunity to comment. Please contact me if you have questions.

A handwritten signature in black ink, appearing to read "Gregory Krohm". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gregory Krohm
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