

## National Employment Law Project

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Submitted via email to [jestey@ncoil.org](mailto:jestey@ncoil.org)

Susan Nolan, Executive Director, and  
NCOIL Workers Compensation Insurance Committee  
NCOIL

Re: Trucking and Messenger Courier NCOIL Proposed Model

Dear Ms. Nolan and Members of the Workers Compensation Committee:

The National Employment Law Project (NELP) writes to submit comments on the NCOIL proposed workers compensation model legislation for trucking and messenger couriers. NELP advocates with and on behalf of low-wage workers in a range of jobs to ensure that work creates opportunity and economic security. An important piece of our work is reining in independent contractor misclassification in all of its guises. For more background on NELP and our work in this area, see [http://www.nelp.org/site/issues/category/independent\\_contractor\\_misclassification\\_and\\_subcontracting](http://www.nelp.org/site/issues/category/independent_contractor_misclassification_and_subcontracting).

Our comments consist of two primary concerns. First, it is not good policy to create piecemeal, industry-by-industry rules in labor and employment statutes, because it tends to confuse workers and employers, splinter the labor market into smaller and smaller job categories seeking their own special rules, and make it difficult to ensure broad-reaching progress on labor standards compliance. Workers compensation agencies and other public insurance enforcement agencies are in a good position to issue illustrative regulations and administrative guidance that apply statutory provisions to specific industries, such as trucking and messenger couriers, for example. We therefore urge NCOIL to promote across-the-board statutory rules for workers compensation (and other insurance-related laws).

Second, while the proposed language creates a presumption of employee status for trucking and messenger couriers, only to be overcome by proving each of the seven listed factors, the seven factors do not truly get at whether the worker is running an independent business, and are relatively easily manipulated by any employer seeking to create an independent contractor arrangement with the worker. Things like requiring a signed written contract (factor #7), requiring that the basis for compensation is by the job (#5), requiring the worker and not the employer to lease, maintain and pay for the costs of the equipment (#1-3) and requiring the worker to hire anyone needed to operate the equipment, are all easily imposed by employers who can require these things as a condition of getting a job. When a worker wants a job, he would agree to almost anything required by the employer, including the terms listed in factors 1-7 in your model legislation.

A better approach is to have objective factors that truly get at whether a worker is an independent business person. The majority of state unemployment insurance laws have for decades used the more objective and difficult to manipulate “ABC test,” which presumes the worker is an employee unless the employer can show each of the three prongs: (a) the individual is free from control or direction over performance of the work, both under any contract and in fact; (b) the service is outside the usual course of business for which the service is performed, or performed outside all of the places of business of the employer, and (c) the individual is customarily engaged in an independently established trade, occupation or business. Because these laws have been tried and tested in the states, they are easy to apply. Agencies and most employers and workers who have encountered the unemployment insurance system know and understand them.

We would also suggest that your model legislation permits third parties to make complaints under the law, and protect against retaliation by employers.

Please feel free to reach out to either of us if you have any questions.

Very truly yours,

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