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To: NCOIL Workers' Compensation Insurance Committee

cc: Jordan Estey, NCOIL Director of Legislative Affairs

From: Victoria King and Nicole Pierre, UPS Public Affairs

Re: Proposed Trucking and Messenger Courier Industries Workers Compensation Model Act

Date: February 28, 2011

UPS appreciates NCOIL's request for supplemental comments to those recently submitted by proponents of the Proposed Trucking and Messenger Couriers Workers Compensation Model Act. UPS stands by the comments it submitted on April 20, 2010, and September 20, 2010. Specifically, UPS continues to believe that the Proposed Model Act should not be adopted in its present form because it would have the effect of perpetuating practices that UPS believes have resulted in significant misclassification in the small package delivery sector of the trucking industry.

Response to MCAA Comments

In its February 24, 2011, letter, the Messenger Courier Association of America (MCAA), of which FedEx is also a member, comments on some of the proposed language modifications UPS submitted last April:

- MCAA's first comment on UPS language is that there is no "hiring" entity in a carrier/independent contractor relationship. This comment is without merit. As MCAA must understand, the "hiring entity" is the entity with which the putative "independent contractor" has a relationship. The MCAA is attempting to play semantic games but fails to note that the term "hiring entity" is used elsewhere in the proposed Model Act (see Section 3.1).

- With respect to MCAA's second comment on UPS language, MCAA states that "requiring the individual to be free from all direction or control can directly ignore statutory, regulatory, and shipper specifications." Again MCAA appears not to have read the UPS comment carefully; the UPS proposed modification specifically provides that "the obligation to conform with regulatory requirements shall not be considered control by the hiring entity." By contrast, if the hiring entity requires its drivers to comply with shipper specifications, we believe that does evidence control by the hiring entity. Any shipper specifications are part of

the contract between the hiring entity and the shipper, and the driver is not a party to that contract. If the hiring entity can or does require the driver to follow the shipper specifications, the hiring entity is imposing its control on the driver.

The Model Act's proposed requirement that the driver "*substantially* controls the means and manner of performing services" is an attempt to weaken the standard control test governing employee classification; the control test simply asks whether the worker is free from control or not. The word "substantially" appears intended to allow the hiring entity to reserve or exercise significant control.

- MCAA's third comment states that one of the proposed UPS amendments "which essentially requires an independent contractor to regularly provide services to multiple entities is an unfair restriction on the individual's business practice." With this comment, MCAA tries to mislead the Committee. The Committee's inquiry is whether the driver is independent of the hiring entity. A driver who has agreed to provide substantially all of his services to one hiring entity for an indefinite period, who has purchased or rented an expensive truck meeting the specifications of the hiring entity, and where the driver's services are integral to the hiring entity's business (i.e., a driver working for a trucking company) can hardly be viewed as independent of the hiring entity. Nothing in the UPS proposed amendment would put a restriction on any individual's business practice – individuals are free to work for as many or as few hiring entities as they wish, but if they agree effectively to work for just one hiring entity for the indefinite future it is not appropriate for that entity to get a free pass to avoid its employer responsibilities to provide workers' compensation protection.

Control is Essential to the Operation of a Nationwide Small Package Delivery Company

While there are those in our industry sector, including FedEx Ground, who may claim that they are operating with true independent contractors, the facts speak otherwise. Small package delivery networks are complex operations that require stringent control over every aspect, including pickup of packages, sorting, loading, routing, and delivery, in order to function. Control is a fundamental requirement and it is also the clear dividing line for determining when workers are employees. There is a role for the independent contractor truck driver, but not as part of an integrated, nationwide small package delivery company.

For example, in order for the UPS network of time-sensitive service to work, there must be painstaking control and coordination. We are in constant communication with our drivers about their locations, package loads, traffic conditions, etc. which all affect our ability to provide the time definite service our customers require. We readjust drivers' routes and loads daily based upon these factors in order to provide the promised service commitment to our customers. We set the time-in-transit service offerings, not the worker performing the job. This type of control and coordination is absolutely essential in the highly competitive small package delivery business.

We would note that the general trucking industry includes those who operate as true independent contractors. In sharp contrast to the nationwide small package delivery business where UPS and FedEx Ground, among others, compete, small business entrepreneurs in general trucking may own their own trucks and function as independent contractors. They are able to set their own schedules, accept work or decline it, and determine the manner in which they provide their services. Those individuals understand the "risk and reward" that comes with owning and operating a business. These are true "owner-operators" who are properly classified as "independent contractors".

While independent contractor status is appropriate in some instances, there are some in our industry sector that are exploiting it in their classification of drivers, abusing long-recognized work rules rather than following them. They want the financial advantages of treating drivers as independent contractors but nonetheless exercise control in a manner reserved only for employees. These workers would be classified as employees under even the most basic definition of employee.

In order to work for such a package delivery employer, drivers are often required to sign contracts that provide them little-to-no opportunity to negotiate rates, work rules, or profit. A driver is subject to control of virtually every aspect of his or her working day. The contracts may declare drivers to be independent contractors, but the label does not reflect reality.

These misclassified drivers have little say about how their vehicle is used due to the requirements under their contract. Reimbursements received for vehicle expenses cover the basic cost of the equipment with little room for negotiation or profit. Drivers have little say about their daily route, which is subject to change by the company at any time.

Furthermore, these drivers face financial penalties if they fail to meet service deadlines. Drivers have strict rules about what they must wear and how they must look. They are subject to the daily and often hourly control of their workday, just like those correctly treated as employees. Yet these drivers receive none of the benefits of being employees. This blatant abuse of independent contractor classification hurts those drivers as well as the taxpayers of this state. Moreover, the knowing and intentional worker misclassification by these employers may jeopardize the legitimate use of independent contractors by small businesses and others.

FedEx Ground Worker Classification Practices Should Give the Committee Pause

In our September 20, 2010, comment, we noted that FedEx Ground had recently paid $3 million to the Commonwealth of Massachusetts to settle claims by the Commonwealth that FedEx Ground had misclassified its drivers. The Massachusetts Attorney General specifically alleged that FedEx Ground's failure to properly classify drivers had led the company to underpay the Commonwealth for workers' compensation.

Massachusetts is not alone in recent actions against FedEx Ground. In September 2010, the Attorney General of Kentucky sued the company alleging that it had intentionally misclassified its employees as independent contractors and is seeking a reported $10 million, including for violation of laws

requiring FedEx Ground to protect its employees by obtaining workers' compensation coverage. Also, in October 2010, the New York Attorney General filed suit against FedEx Ground for misclassifying drivers as independent contractors and requiring them to pay costs that should be borne by the employer. And, also in October, FedEx Ground agreed to pay $2.3 million to settle claims by the State of Montana that FedEx Ground had misclassified its drivers as independent contractors. We believe the Committee should bear these State challenges to FedEx Ground in mind in considering a proposed Model Act that would facilitate classifying drivers as independent contractors.

Proposed Model Act Does Not Protect the Interests of Workers

Frankly, we are surprised that the Committee continues to move forward with the Proposed Model Act. The Model Act is far from a consensus document. Those who have submitted supportive comments are trucking and messenger courier companies and associations that would like to have certainty in their ability to avoid responsibility for providing workers' compensation coverage and benefits for the workers who serve them.

By contrast, those organizations that prioritize the interests of workers have been uniform in their criticism of the Proposed Model Act. The National Association of Insurance Commissioners, the International Association of Industrial Accident Boards and Commissions, the Property Casualty Insurers Association of America, the National Employment Law Project, the International Brotherhood of Teamsters, the Leadership Conference on Civil and Human Rights, and American Rights at Work have all pointed out the significant problems with the Proposed Model Act.

In its November 10, 2010, letter to the Committee, FedEx Ground said that it stands with the American Trucking Associations (ATA) in supporting the legislation and that the "ATA has thoroughly reviewed the model legislation in light of the interests of the trucking and messenger courier industries…." We think that quote demonstrates exactly our point that the trucking and messenger courier company supporters are looking at the legislation with only their interests in mind; lost is any consideration of the best interests of the drivers who work for them. It would be inconsistent with the underlying protective purposes of workers' compensation laws to provide employers in the trucking and messenger courier industries what amounts to an opt-out for workers' compensation responsibilities as long as they satisfy the loose standards in the Proposed Model Act. As the NAIC and the IAIABC pointed out, the proposed "law seems to offer excessive latitude for employers to attempt mass conversions of their workforces to independent contractor status."

Conclusion

UPS appreciates the opportunity to provide these supplemental comments and urges the Committee to put aside the proposed Model Act.