

Suggested wording changes and comments on NCOIL Working Draft
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Draft July 29, 2009

Overall

I think this is clear in intent and a well organized legislative drafting model. My principle concern arises from noting the strong enforcement steps given to the workers' compensation agency without any mention of the resources that would be required. Serving and monitoring stop work orders is labor intensive because many uninsured employers do not maintain reliable or fixed business addresses. They are deliberately maintaining their lack of visibility to official notice.

My second general observation is that some definitions seem a bit loose and likely to lead to confusion.

Some specific section comments:

Sec. 2(F)(2 and 3): Like it; specific, clear

Sec. 2(F)(1): Have problems with the wording. See edits in Track Changes.

Sec. 4(D): Taken literally, seems extreme in demand for records

Sec. 7(B and C): Why is section B needed? Just use an objective rule like the one in C. You might consider raising 1.5 to 2 times premium.

Sec. 7(C): The \$1000 minimum is too high. It will raise dozens of petitions for relief to elected reps, governor and agency heads by small operators. These little operators often are very unsophisticated and with meager net incomes, so public officials will want to try to find a way to mitigate the penalty.

Sec. 7(D): there often is no previous WC insurance, hence would suggest that the WC agency be authorized to "make an estimated premium amount from best available records on payroll by class"

Sec 7(F): Many carriers (except servicing carriers for pool business) will be reluctant to levy the \$500 penalty against accounts they want to retain. Carriers already allow dubious practices discovered on audit if the market is soft and they want to retain the business.

Below are some specific edits shown on the draft of the model, shown in “Track Changes.”.

Definitions

"Affiliated" means and includes one or more corporations or entities, under the same or substantially the same control of a group of business entities which are connected or associated so

that one entity controls or has the power to control each of the other business entities.

2. "Affiliated" includes, but is not limited to, the officers, directors, executives, shareholders active in management, employees, and agents of the affiliated corporation. The ownership by one business

entity of a controlling interest in another business entity or a pooling of equipment or income

among business entities shall be prima facie evidence that one business is affiliated with the other.

Company, or other business entity related through common ownership that allows one of the entities to exercise substantial control over management of the other entities in an affiliated group.

D. 1. "Employee" means any person who receives remuneration from an employer for the performance of any work or service under an express or implied contract that allows for the employer to exercise control of while engaged in any employment under any appointment or

contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

"Employee" includes:

a. Any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous. Services are presumed to have been rendered to the corporation if the officer is compensated by other than dividends upon shares of stock of the corporation which the officer owns.

b. A sole proprietor or a partner who is not engaged in the construction industry, devotes

full time to the proprietorship or partnership, and elects to be included in the definition of employee by filing notice thereof as provided in [Insert Appropriate State Statute].

c. All persons, including independent contractors and sole proprietors who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by [Insert Appropriate State Statute], or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with Section 3(A)(2), for work performed by or as a subcontractor.

F. 1. Except as provided in Section 2(F)(2), anyone holding themselves out to the public for hire as an “independent contractor” is, for the purpose of this Act, an employee of any employer under this Act for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury[GK1].

2. An “independent contractor” is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor is not engaged in the construction industry and meets the following nine criteria:

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- a. The independent contractor maintains a separate business with his or her own office, equipment, materials, and other facilities.
- b. The independent contractor maintains or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.
- c. The independent contractor operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls, under contract and in fact, the performing of the services or work.
- d. The independent contractor incurs the main expenses related to the service or works that he or she performs under contract.
- e. The independent contractor is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
- f. The independent contractor receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
- g. The independent contractor may realize a profit or suffer a loss under contracts to perform work or service.
- h. The independent contractor has continuing or recurring business liabilities or obligations.
- i. The success or failure of the independent contractor's business depends on the

relationship of business receipts to expenditures.

3. ~~Notwithstanding anything to the contrary in this subparagraph, a~~ An individual claiming to be an independent contractor under Section F has the burden of proving that he or she has met all nine of the above criteria.

Section 3. Coverage Requirements

A. 1. Every employer who is deemed to have covered employees coming w within the provisions of this Act shall be liable for, and shall secure, the payment of workers' compensation benefits for its employees.

a. Any officer of a corporation may elect to be exempt from this Act by filing written notice of the election with the [Insert Appropriate State Agency] as provided in [Insert Appropriate State Agency].

b. As to officers of a corporation who are engaged in the construction industry, no more than three officers of a corporation or of any group of affiliated corporations may elect to be exempt from this Act by filing written notice of the election with the [Insert Appropriate State Agency] as provided in [Insert Appropriate State Statute]. Officers must be shareholders, each owning at least 10 percent of the stock of such corporation and listed as an officer of such corporation with the State, in order to elect exemptions under this Act.

c. An officer of a corporation who elects to be exempt from this Act by filing a written notice of the election with the [Insert Appropriate State Department] as provided in this section is not an employee.

2. Any person or entity that contracts to perform ~~contractor or subcontractor [GK2] who engages in~~ any public or private construction in the state shall secure and maintain workers' compensation benefits for his or her employees under this Act.

3. In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

B. 1. If a contractor becomes liable for the payment of compensation to the employees of a subcontractor who has failed to secure such payment in violation of Section 3(A)(3), the contractor or other third-party payor shall be entitled to recover from the subcontractor all benefits paid or payable plus interest unless the contractor and subcontractor have agreed in writing that the contractor will provide coverage.

2. If a contractor or third-party payor becomes liable for the payment of compensation to the corporate officer of a subcontractor who is engaged in the construction industry and has elected to be exempt from the provisions of this Act, but whose election is invalid, the contractor or third party payor may recover from the claimant or corporation all benefits paid or payable plus interest, unless the contractor and the subcontractor have agreed in writing that the contractor will provide coverage.

C. A subcontractor providing services in conjunction with a contractor on the same project or contract work is not liable for the payment of compensation to the employees of another subcontractor or the contractor on such contract work and is protected by the exclusiveness-of-liability provisions of [Insert State Statute Relating to Exclusiveness of Liability] from any action at law or in admiralty on account of injury to an employee of another subcontractor, or of the contractor, provided that:

1. The subcontractor has secured workers' compensation benefits for its employees or the contractor has secured such benefits on behalf of the subcontractor and its employees in accordance with Section 3(A), and

2. The subcontractor's own gross negligence was not the major contributing cause of the injury.

Section 4. Employer/Contractor Disclosure Requirements

A. Employers shall make available all records necessary for the payroll verification audit and permit the auditor to make a physical inspection of the employer's operation.

B. A contractor shall require a subcontractor to provide evidence of workers' compensation insurance. A subcontractor who is a corporation and has an officer who elects to be exempt as permitted under this Act shall provide a copy of his or her certificate of exemption to the contractor.

C. Each employer must submit a copy of the quarterly earning report at the end of each quarter to the insurance carrier and submit self-audits supported by the quarterly earnings reports and the rules adopted by the state agency providing unemployment tax collection services. The reports must include a sworn statement by an officer or principal of the employer attesting to the accuracy of the information contained in the report.

D. A contractor shall require a subcontractor, including independent contractors and sole proprietors working in the construction industry, to be able to produce on demand ~~have available at their principle place of business~~ ~~all times~~, information required by Section 4(B).