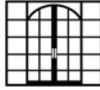

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August 14, 2009

VIA E-MAIL/jestey@ncoil.org

National Conference of Insurance Legislators
c/o Jordan Estey, Director of Legislative Affairs & Education
385 Jordan Road
Troy, New York 12180

Re: NCOIL Draft Independent Contractor Model Law ("Proposed Employee Misclassification Workers' Compensation Coverage Model Act")

Dear Mr. Estey:

On behalf of the American Trucking Associations, Inc. ("ATA"), I submit the enclosed white paper addressing the Use of Owner-Operators in the Trucking Industry, which was submitted by request to the NAIC/IAIABC Joint Working Group's Workers' Compensation Task Force.

ATA is a nonprofit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Arlington, Virginia. ATA is the national trade association of the trucking industry. It has approximately 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others.

Although the enclosed white paper does not directly address the precise language contained in the Draft Independent Contractor Model Law (the

"Draft"), it does address the primary statutory structure used in the Draft and issues related to this structure as applied to the trucking industry. This submission also addresses many of the issues raised and commented upon by other comment contributors from the particular viewpoint of the trucking industry. As an industry that has been given specific mention in several of these comments, ATA feels that a direct response to these comments by the association representing the trucking industry should be helpful to the Committee.

ATA appreciates the opportunity to provide this viewpoint, and looks forward to providing any additional information the Committee may seek.

Very truly yours,

/s/ Gregory M. Feary

Enclosures
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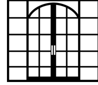

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USE OF OWNER-OPERATORS IN THE TRUCKING INDUSTRY

PREPARED BY:
GREGORY M. FEARY, MANAGING PARTNER
ON BEHALF OF:
AMERICAN TRUCKING ASSOCIATIONS

I. INTRODUCTION

This document is submitted in response to the NAIC/IAIABC Joint Working Group's ("Group") request to the American Trucking Associations ("ATA") for comments regarding workers compensation practices in the trucking industry as they relate to independent contractors (also referred to herein as owner-operators). While use of the traditional common law agency test for differentiating between employees and independent contractors in the trucking industry generally works well, it has not always led to entirely consistent results. Consequently, the trucking industry supports the enactment of trucking-specific independent contactor definitions that may be more easily and consistently applied. As discussed below, approximately 22 states currently have such definitions.

II. THE ROLE OF OWNER-OPERATORS IN THE TRUCKING INDUSTRY

The American trucking industry that services our national economy is of massive size and scope. The Federal Motor Carrier Safety Administration ("FMCSA") lists over 1,000,000 interstate motor carriers, nearly 300,000 of which are for-hire motor carriers. American Trucking Associations, *American Trucking Trends, 2007-2008*, at 2. According to the U.S. Department of Labor, there were nearly 3.5 million active truck drivers in 2006 participating in the American trucking industry. *Id.* at 6. Motor carriers moved over 10 billion tons of freight in 2006 (over 2/3 of domestic freight tonnage). *Id.* at V. The transportation of that freight involved the operation of roughly 3 million heavy trucks (usually tractor-trailer units). *Id.* In 2005, heavy trucks alone accounted for more than 130 billion miles of operation, the vast majority of which undoubtedly involved interstate freight. *Id.*

Owner-operators have long been an important component of virtually every segment of the trucking industry. They are used in most, if not all, sectors of the trucking industry, including but not limited to long-haul trucking, household goods moving, home delivery and intermodal operations.[1] The reasons that independent contracting is attractive to both motor carriers and owner-operators are clear.

[1] Estimates of the number of owner-operators vary. The Owner-Operator Independent Drivers Association ("OOIDA")—the international trade association representing independent owner-operators and professional drivers—boasts more than 160,000 members in the U.S. and Canada. *See* OOIDA.com—What is OOIDA? http://www.ooida.com/about_us/about_us.html). According to an article in *Fleet Owner Magazine*, a Vehicle Inventory and Use Survey issued by the U.S. Census Bureau and Department of Commerce estimated that there were

For motor carriers, owner-operators provide a number of advantages. Owner-operators quite often are seasoned business persons with truck driving experience who are highly skilled and motivated. The availability of such owner-operators and their equipment (through leases of equipment and driver services to motor carriers with operating authority) enables motor carriers to save on equipment and capital costs and provides flexibility to meet fluctuations in demand for trucking services. In addition, owner-operators, like other independent contractor business vendors, typically share the motor carriers' interests in meeting customer demand and increasing revenues and profits. In short, many motor carriers believe owner-operator/independent contractors to be more productive, dedicated, and safety conscious than employee drivers. *See generally,* David H. Maister, *Management of Owner-Operator Fleets*, 25-30 (1980).

For owner-operators, independent contracting provides numerous advantages. The trucking industry offers a unique opportunity for individuals to begin their own businesses. Start-up costs in the trucking industry are within reason and reach of many small business entrepreneurs, consisting principally of the cost of a power unit and various licensing and insurance fees. Thus, while not inexpensive, an initial investment of $50,000 to $75,000 can place such a small business person in some segments of the trucking industry in a position to earn annual revenue of three times that amount. Motivated individuals can establish their businesses rather expediently while working with motor carriers to negotiate terms to the business contract commonly referred to as the lease. Owner-operators can eventually purchase additional trucks and trailers and employ drivers and other staff to assist in carrying out their business. While most will not have the success—or ambition—of J.B. Hunt, who started with five trucks and seven trailers in 1969 and took his company public in 1983, independent contracting in the trucking industry allows owner-operators to live out their own version of the American dream.

Owner-operators feel strongly about their independent status. It allows them to run their own businesses, control their own finances, work the hours and days they choose and ultimately control their working environment. Studies show high levels of job satisfaction among independent contractors. *See* Upper Great Plains Transp. Inst., *Creating a Competitive Advantage Through P'ship with Owner-Operators* 12 (1992) (95% of the owner-operators surveyed rated "independent lifestyle" as the most important aspect of their job).

III. CONSISTENT TREATMENT OF OWNER OPERATORS AS INDENDENT CONTRACTORS IS CRITICALLY IMPORTANT TO THE SUCCESS OF INTERSTATE MOTOR CARRIERS.

Motor carriers are exposed to potential workers' compensation claims in more than one jurisdiction. Generally, an injured "employee" driver may seek workers compensation benefits in one of several states' workers' compensation forums: (1) the state where the injury occurred; (2) the domicile or place of business of the parties (also known as the principal localization of the work); or (3) the state where the contract of hire was made. *See Pierce v. Foley Bros., Inc.*, 168 N.W.2d 346, 353 (Minn. 1969). If the standard for determining whether a driver is a covered employee for workers compensation purposes varies from state to state, it becomes a costly and difficult burden to structure a relationship that attempts to reasonably assure broad recognition of both the motor carriers' and owner-operators' desired independent contractor

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390,000 owner-operators as of 2002. Terrance Nguyen, *Gauging the Owner-Operator Population,* FLEET OWNER MAGAZINE (Dec. 13, 2004), *available* http://fleetowner.com/news/owner_operator_population_121304/index.html. In the same article, an OOIDA spokesman estimated that there might be as many as 500,000 owner-operators in the U.S.

status. This places motor carriers contracting with owner-operators in an unpredictable situation.

To some degree, the uniformity needed by the trucking industry in terms of independent contractor classification of owner-operators for workers' compensation purposes is being achieved by virtue of most states' use and proper application of the common law right to control legal standard. Unfortunately, as further discussed below, inconsistent or overly technical application of the common law standards can still prevent uniformity and consistency on the legal status issue.

Under the common law test, one overriding question is dispositive: if the employer has the "right to control" the method and manner of the contractor's work, an employment relationship exists. To determine whether control is being exercised, a set of well-accepted factors is used to evaluate the relationship. Analysis reveals that virtually all states utilize in some form the right to control test. Most importantly, at least 16 states have expressly applied the test to assess worker status in the specific context of the motor carrier/owner-operator relationship, as revealed by cases in Arizona, Connecticut, Idaho, Illinois, Massachusetts, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, and Wisconsin.[2] And 12 more—Alabama, Georgia, Iowa, Kansas, Louisiana, Minnesota, Maryland, Missouri, Montana, North Carolina, Washington, and Wyoming—have enacted owner-operator specific laws, but defer to the right to control test if the owner-operator does not meet the statutory definition of independent contractor.[3]

Certain factors in the right to control test are particularly applicable to the motor carrier industry. Besides observing that owner-operators independently carry out the specific details of their work—for example, by choosing their own driving routes—courts also routinely note the following factors evidencing the motor carrier's lack of control: (1) owner-operators make a substantial investment in their business; (2) owner-operators have a right to reject loads; (3) owner-operators are responsible for their own business expenses; (4) owner-operators are not paid on an hourly basis; and (5) owner-operators have an opportunity for profit or loss. *See State Comp. Ins. Fund v. Brown*, 32 Cal. App. 4th 188, 105-07 (Cal. Ct. App. 1995); *see also Behner v. Indus. Comm'n*, 96 N.E.2d 403, 412 (Ohio 1951). These factors demonstrate that the owner-operator is truly an independent business person, but, if in any isolated case he is not, the right to control test will appropriately "catch" the fact-specific instance in which a determination of employment is the right result.

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[2] *State Comp. Fund v. Yellow Cab Co. of Phoenix*, 3 P.3d 1040, 1044 (Ariz. Ct. App. 1999); *Hanson v. Transportation Gen., Inc.*, 716 A.2d 857, 860 (Conn. 1998); *Smith v. Sindt*, 405 P.2d 959, 963 (Idaho 1965); *Earley v. Indus. Comm'n*, 553 N.E.2d 1112 (Ill. Ct. App. 1990); *Ferullo's Case*, 121 N.E.2d 858 (Mass. 1954); *Wilson v. Kelleher Motor Freight Lines*, 96 A.2d 531 (N.J. 1953); Y*erbich v. Heald*, 547 P.2d 72 (N.M. Ct. App. 1976); *Gregg v. Randazzo*, 216 A.D.2d 747 (N.Y. 1995); *Behner v. Indus. Comm'n*, 96 N.E.2d 403 (Ohio 1951); U*niversal Am-Cam, Ltd. v. Workers' Comp. Appeals Bd.*, 762 A.2d 328, 333 (Pa. 2000); *Beany v. Paul Arpin Van Lines Co.*, 200 A.2d 592, 594 (R.I. 1964): *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 638 S.E.2d 109, 113-14 (S.C. Ct. App. 2006); *Averett v. Grange*, 909 P.2d 246, 250 (Utah 1995); *Falconer v. Cameron*, 561 A.2d 1357, 1358 (Vt. 1989); *Intermodal Servs., Inc. v. Smith*, 364 S.E.2d 221, 224 (Va. 1988); *Jarrett v. Labor & Indus. Review Comm'n*, 607 N.W.2d 326, 332 (Wis. Ct. App. 2000).

[3] *Liberty Mut. Ins. Co. v. D&G Trucking, Inc.*, 966 So.2d 266 (Ala. Civ. App. 2006) (citing *White v. Henshaw*, 363 So.2d 986, 988 (Ala. Civ. App. 1978); *C. Brown Trucking, Inc. v. Rushing*, 595 S.E.2d 346 (Ga. Ct. App. 2004); *Thompson v. Club Group, Ltd.*, 553 S.E.2d 842 (Ga. Ct. App. 2001); *Van DeGarde v. Osceola County Co-op. Creamery Ass'n*, 4 N.W.2d 234 (Iowa 1942); *Ortiz v. Johnson*, 105 P.3d 742 (Kan. Ct. App. 2005); *Guillory v. Overland Express Co.*, 796 So.2d 887 (La. Ct. App. 2001); *Hix v. Minn. Workers' Comp. Assigned Risk Plan*, 520 N.W.2d 497 (Min. Ct. App. 1994); *Williams Const. Co. v. Bohlen*, 56 A.2d 694, 696 (Md. Ct. App. 1948); *Nunn v. C.C. Midwest*, 151 S.W.3d 388 (Mo. Ct. App. 2004); *Schrock v. Evans Transfer & Storage*, 732 P.2d 848 (Mont. 1987); *Williams v. ARL, Inc.*, 516 S.E.2d 187 (N.C. 1999); *Risher v. Department of Labor & Indus.*, 350 P.2d 645 (Wash. 1960); *Standard Oil Co. v. Smith*, 111 P.2d 132 (Wyo. 1941).

To eliminate the uncertainty associated with a strict application of the right to control test, 22 states currently have trucking-specific statutory definitions of what constitutes an independent contractor relationship between a motor carrier and an owner-operator. Most of those statutes simply recognize the well-settled industry practice of an independent contractor relationship. *See e.g.*, GA. CODE ANN. § 34-9-1 ("For purposes of this chapter, an owner-operator . . . shall be deemed to be an independent contractor."). Other trucking-specific definitions simply adopt a codified version of the common law test directed at the factors most relevant to whether right of control is present in a motor carrier/owner-operator relationship. *See e.g.,* IOWA CODE § 85.61 (13) (c).

The standardized use of the right to control test in workers' compensation or the application of a trucking-specific independent contractor definition based on that test provides the uniformity needed by the interstate motor carrier industry.

IV. CHALLENGES TO THE RIGHT TO CONTROL TEST IN THE TRUCKING INDUSTRY

The uniformity of the right to control test (as supplemented by various statutes codifying the test or otherwise deeming owner-operators independent contractors by operation of law) has been undermined in a few states by ill-advised efforts to reclassify owner-operators as employees for purposes of workers' compensation coverage for political reasons. Each of these inter-related efforts undermines the uniform application of the right to control test as it has developed over the history of workers' compensation programs and inappropriately expands the reach of workers' compensation laws, which are not intended to make every worker in America an employee.

Overly technical application of the right to control test is one example of an instance in which some agencies and courts occasionally may misinterpret the reasoning underlying the test. Although using the term "right to control" is convenient shorthand for examining the nature of the relationship between two parties, not every manifestation of "control" is sufficient to transform an independent contractor into an employee. What might be indicia of control in other cases are inapplicable to the motor carrier industry because of the Federal Motor Carrier Safety Regulations ("FMCSRs") and leasing regulations. *See generally* 49 C.F.R. Pt. 390 (2007); *see also* 49 C.F.R. Pt. 376 (2007). For those unfamiliar with the regulatory requirements, motor carriers' requiring owner-operators to keep daily log books, display truck identification tags, and obtain maintenance inspections could be construed as proof of control. The FMCSA mandates these requirements, however, not motor carriers, *id.*, and, as most courts have observed, ensuring compliance with regulatory and safety requirements is not evidence of the right to control. *See Reed v. Indus. Comm'n*, 534 P.2d 1090 (Ariz. Ct. App. 1975) (government regulations imposed on motor carriers, and in turn required of owner-operators, are not indicative of control); *North Am. Van Lines, Inc. v. N.L.R.B.*, 869 F.2d 596, 599 (D.C. Cir. 1989) ("[E]mployer efforts to ensure the worker's compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status."). Indeed, trucking "regulations should have no bearing" on the subject of state tort, contract, and agency law and must not "create carrier liability where none would otherwise exist." *Lease and Interchange of Vehicles—Declaratory Order*, Fed. Carrier Cas. P 38,121, 1994 WL 70557 at *6 (I.C.C. Mar. 8, 1994); *see also* 49 C.F.R. § 376.12(c)(4) (2007) ("Nothing in the provisions . . . is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. § 14102 and attendant administrative requirements.").

Efforts to streamline the definitions of “employee” versus “independent contractor” have also created workable tests ill-suited to the trucking industry. One method used to streamline such definitions has resulted in application of[4] what is commonly known as the “ABC Test”[5]. The ABC Test is difficult to apply correctly in the trucking industry. The uninitiated may believe that an owner-operator is providing services in the course of a motor carrier’s business and is not engaged in an independently established trade, business, or occupation. However, when understood from the perspective of a motor carrier and owner-operator, the two businesses are distinct, although interrelated, in that an owner-operator provides the independent business operation of transporting cargo in contrast to the motor carrier’s business of providing logistics management to the shipper.

Another ill-advised trend in distinguishing employees from independent contractors for workers’ compensation purposes is the use of an overly broad multi-factor approach. As the Draft comments, the use of a multi-factor (or “weight-of-evidence”) approach does little to provide the essential certainty that is necessary to contracting parties and to independent contractors to ensure that they are, in fact, establishing an independent contractor relationship. Multi-factor tests are often too susceptible to disparate application with highly subjective decision making resulting. New Hampshire recently modified its definition of employee and independent contractor throughout its code by using a 12-factor[6] approach. While the multi-factor approach on its face may appear reasonable, as applied to the trucking industry it quickly becomes unworkable. For example, factor (e) requires the individual to hold himself out to be in business for himself and factor (l) requires the individual to not be required to work exclusively for the employer. In a typical industry, these requirements may be uncomplicated. However, in the trucking industry, these requirements are not straightforward, as a motor carrier is required, by operation of the federal leasing regulations, 49 C.F.R. Pt. 376, to have exclusive possession, use and control of the equipment (which is a requirement tied

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[4] This is most typically done by introducing a law (or an Executive Order issued by a state Governor) that prohibits misclassification of employees as independent contractors for some area of the law other than workers’ compensation (e.g., for wage and hour or other labor laws) and including the ABC Test as the applicable definition of an independent contractor. *See e.g.* MASS. GEN. LAWS C. 149, § 148B. The danger of this approach is that violation of a labor misclassification provision will trigger a notification by the state labor department to the state workers’ compensation department. *See e.g.* MARYLAND HOUSE BILL 1590 (2008). Such inter-agency notification, while appealing, has the potential to cause inappropriate application of the ABC Test to the employment determination in workers’ compensation, where the ABC Test should not apply. This has happened in Massachusetts, where, despite a seeming lack of pure technical legal support, at least one Massachusetts court applied the ABC Test to the determination of work status under the Massachusetts Workers’ Compensation Act. *Coll. News Serv. v. Dep't Indus. Accidents*, No. 04-4559-A, 2006 WL 2830971, *6 (Mass. Super. Ct. Sept. 14, 2006). Other states, when examining potential tests to use when revising a workers’ compensation code, have rejected use of the ABC Test in workers’ compensation. Maryland, for example, rejected this approach when it failed to pass House Bill 1590.

[5] The “ABC Test” is a three-prong test commonly used in unemployment statutes defining an independent contractor. The prongs are (A) an individual is free from direction or control; (B) service is performed outside the usual course of the employer’s business; and/or (C) the individual is customarily engaged in an independently established trade, occupation, or business. *See e.g.* MASS. GEN. LAWS C. 149, § 148B.

[6] The 12-factor test requires the individual (a) have a social security number, FEIN, or a written agreement by the individual to carry out the responsibilities imposed on employers by law; (b) have control and discretion over the means and manner of work; (c) have control over the time the work is performed; (d) hire and pay any assistants; (e) hold himself out to be in business for himself; (f) have continuing or recurring business liabilities or obligations; (g) engage in a business the success or failure of which depends on the relationship of business expenditures to receipts; (h) receive compensation for work or services performed and not be determined unilaterally by the hiring party; (i) be responsible in the first instance for main expenses related to the work performed; (j) be responsible for the satisfactory completion of the work and may be held contractually responsible for failure to do the work; (k) supply the principal tools and instrumentalities used in the work; and (l) not be required to work exclusively for the employer.

directly to public liability issues, not work status issues). Likewise, the nature of the trucking industry and the federal laws and regulations that govern it are such that it is difficult for an owner-operator to hold himself out as in business for himself in a traditional sense. The federal regulations grant authority to provide service to the public to motor carriers, and these motor carriers in turn contract with the owner-operators. While the owner-operators provide service on behalf of a myriad of shippers, the mechanism used by the federal government (largely to protect the public) prevents a direct "holding oneself out" type relationship between the shippers and the owner-operators.

Finally, the uniformity of the right to control test is routinely undermined by insurers conducting aggressive, self-serving premium audits. As the Draft discusses, insurers may use premium audits to deter "aggressive interpretations" of independent contractor status by employers. *Draft*, at 29. However, as the Draft also notes, some insurers use the ambiguity inherent in the control standard to impose inappropriate standards and burdens upon employers using independent contractors. *Id.* One common technique used by insurers is to require proof of workers' compensation coverage for all owner-operators, claiming that without such proof, the insurer "could" be liable for claims made by the owner-operator. Relying on such audits to police the propriety of owner-operator use is unreliable, as it often places the insurer in a position to act in its own self-interest by claiming potential liability, however remote, often after a policy period has expired. Moreover, this mechanism misappropriates the adjudicative role of determining employment status and in so doing challenges the due process rights of insureds.

V. A TRUCKING-SPECIFIC INDEPENDENT CONTRACTOR DEFINITION PROVIDES THE MOST EFFICIENT SYSTEM FOR ADMINISTERING STATE WORKERS' COMPENSATION LAWS

The lack of uniformity in the legal standard for determining independent contractor status for purposes of state workers compensation laws creates problems in the trucking industry, where consistency across state lines is essential to efficient operations. Although consistent use and application of the right to control test legal standard would eliminate those problems, that standard is not being consistently used or applied in some states. In an effort to provide guidance to legislative bodies and to appropriately consider the needs of both motor carriers and owner-operators for predictability in their business relationships, ATA has developed model trucking-specific legislative language that, if enacted by every state, would establish this essential uniformity. We respectfully request that the Group consider this language (Attachment A) for possible endorsement by your organizations.

Two types of definitions are offered. First is a bright-line approach that is directly applicable to the trucking industry and simply identifies owner-operators or others who lease trucks and driving services to motor carriers as falling within the independent contractor classification. This approach is built upon what we believe is broad recognition that owner-operators in the trucking industry are, as a matter of course, independent contractors. This approach also has the advantages of the bright-line tests discussed in the Draft, with straightforward application to a clearly defined set of individuals that have historically been treated as independent contractors. This approach requires minimal administrative oversight but provides for application of the right to control test in cases of overt abuse.

The wording of this trucking-specific exclusion was informed by similar general exclusions enacted in various states. For example, in Georgia, under the workers' compensation system, there is an exemption that states: "[f]or purposes of this chapter, an owner-operator as such term is defined in Code Section 40-2-87 shall be deemed to be an independent contractor." GA.

CODE ANN. § 34-9-1. Under Section 40-2-87, owner-operator is simply defined as "an equipment lessor who leases his vehicular equipment with driver to a carrier." Similarly, Indiana law simply provides that "an owner-operator that provides a motor vehicle and the services of a driver under a written contract that is subject to [Indiana or federal leasing regulations] to a motor carrier is not an employee of the motor carrier for purposes of [the State's workers' compensation provisions]." Indiana law further provides that the owner-operator can elect to be covered if he pays appropriate premiums to the motor carrier. IND. CODE § 22-3-6-1. This general exclusion provides the simplest and surest method of protecting owner-operator independent contractor status, with, if properly drafted, little room for misapplication of its provisions by administrative agencies or courts.

The other option is to define the elements of what makes an owner-operator or others an independent contractor and provide a fact-based test related to those elements whose satisfaction ensures independent contractor treatment. The model language establishes a six criteria test. In short, those criteria are: (1) significant investment in equipment by contractor; (2) the contractor determines details of service; (3) the contractor has principal burden of costs and expenses; (4) compensation is based on work performed and allows for profit or loss; (5) the contractor is responsible for supplying personnel to operate equipment; and (6) a written contract recognizes independent contractor status. These factors focus on elements of specific importance to the trucking industry and their use eliminates some of the subjectivity and uncertainty in applying an overly broad multi-factor test.

Although this approach has the benefit of being tailored to the trucking industry, the concerns discussed in the Draft with regards to a weight of evidence or multi-factor test are not completely ameliorated with the application of the trucking-specific fact-based definition. It is ATA's belief that the bright-line test first articulated will be the most efficient for both the trucking industry and state workers' compensation commissions to apply. In the interest of providing flexibility to the Group, the ATA provides both versions of the model language for its consideration.

Additionally, included in the attached model language are optional provisions dealing with exempting motor carriers from possible responsibility for owner-operator employees and with allowing elective owner-operator coverage (with appropriate charges) under a motor carrier's workers' compensation insurance. These provisions clarify coverage options and obligations and by doing so encourage alternative coverage arrangements that might not otherwise be pursued while addressing unforeseen or unintended restrictions on these arrangements that might otherwise exist in state law (such as prohibitions against group workers' compensation coverage).

VI. OCCUPATIONAL ACCIDENT INSURANCE COVERAGE PROVIDES AN APPROPRIATE MECHANISM FOR INSURING WORKERS NOT SUBJECT TO TRADITIONAL WORKERS COMPENSATION REQUIREMENTS

In some instances, state regulators have expressed concern that owner-operators are choosing to purchase occupational-accident insurance coverage as an alternative to workers' compensation coverage. *See* New Jersey Compensation Rating and Inspection Bureau *Advisory Bulletin #10* (later amended as *#10A*). While it is understandable that state workers' compensation regulators desire to see a worker obtain the highest amount of insurance coverage possible, the concern misses the mark. Many owner-operators, as independent business persons, are not required (and may not even by eligible) to obtain work accident coverage that otherwise may be available to independent contractors. Procuring occupational-accident coverage, therefore, provides protection to workers who might otherwise have no

coverage. In such instances, occupational-accident coverage is not being characterized as an alternative to workers' compensation coverage – indeed, it is well accepted that the coverage is not identical and would not be accepted by any state workers' compensation board as a replacement for workers' compensation. These arguments were recognized by New Jersey in its decision to reissue the above *Advisory Bulletin #10* as *Advisory Bulletin #10A*, with a recognition that occupational-accident coverage is acceptable coverage to those not subject to traditional workers' compensation requirements.

A review of the occupational-accident insurance products on the market reveals that very legitimate insurers (e.g., Zurich America) have designed this product with an eye to ensuring that it is not mistaken as a substitute for workers' compensation insurance. It is also important to note that two states have formally recognized the legitimacy of this insurance product by including a specific coverage requirement reference to it as part of the criteria necessary to perfect independent contractor status of owner-operators under workers' compensation law. Kansas and Mississippi recognize the value of occupational-accident coverage in precisely this manner, as each state requires owner-operators to be covered by an occupational-accident policy before they may be considered independent contractors by statute. KAN. STAT. ANN. § 44-503c; MISS. CODE ANN. § 71-3-5.

Occupational-accident coverage has the further benefit of removing claimants from the workers' compensation system that do not belong there. In many instances, independent contractors either are not eligible for workers' compensation coverage or elected not to purchase workers' compensation coverage for themselves prior to an injury. In the absence of relatively-affordable occupational-accident coverage, these injured workers have two options, to bear the cost of the injury themselves or attempt to collect workers' compensation coverage from a putative employer. Very typically, this putative employer will not have paid premium on the independent contractor, as all concerned parties (the insurer, the putative employer, and the independent contractor) agreed that coverage was not appropriate. Only after an injury will the injured independent contractor make a contested claim for benefits that he might or might not receive but certainly litigation ensues at a cost to the employer, possibly the insurer, and certainly to the system that is not designed for these additional and self-serving claims. Occupational-accident provides a middle ground, whereby the independent contractor may choose the level of coverage he wishes to purchase and therefore have protection in the event of an injury at a lower overall cost to the owner-operator.

VII. CONCLUSION

The owner-operator business model is deeply engrained in the trucking industry, with benefits to both the owner-operators and the motor carriers with which they contract. The interstate nature of the trucking industry makes it vulnerable to inconsistent state regulation in terms of worker classification and the uniformity needed by the industry can only be achieved through consistent application of a consistent legal standard. The right to control test generally provides that standard. Because of the regulatory structure of the trucking industry, if the right to control test is not used, a trucking-specific definition of independent contractor status is needed to take into account the unique circumstances of trucking. Attached are model definitions developed by American Trucking Associations, Inc. for use by states in defining independent contractors. We suggest that the Group consider endorsing this language to state workers compensation commissions as the most efficient way to administer the exclusion of independent contractors from workers compensation coverage.

Once again, ATA appreciates the opportunity to provide additional insight into these issues and welcomes the chance to provide any further information the Group deems instructive.

AMERICAN TRUCKING ASSOCIATIONS
OWNER-OPERATORS/INDEPENDENT CONTRACTOR
MODEL STATUTE

(PREFERRED LANGUAGE)

PROPOSED BLANKET EXEMPTION

General Exemption:

An independent contractor is an individual who owns or holds under a written lease a motor vehicle which the individual leases to a motor carrier and who personally or through an employee or independent contractor operates such leased equipment under a written agreement with the motor carrier that specifies that such operations involve an independent contractor relationship.

OPTIONAL PROVISIONS FOR USE WITH FACTOR AND BLANKET EXEMPTIONS

Option One - Statutory Employment Language:

No motor carrier shall be held responsible for the liabilities of an independent contractor exempted under Section ____ to the independent contractor's employees under the workers' compensation laws of any state where the motor carrier has taken reasonable steps to ensure the independent contractor has secured its responsibilities to the independent contractor's employees by obtaining a certificate of workers' compensation for any such employees at the time the independent contractor is engaged and where no notice of cancellation of such coverage has been received by the motor carrier.

Option Two - Chargeback Language:

A motor carrier and an independent contractor meeting the criteria contained in Section ___ may agree in writing that the independent contractor and any of the independent contractor's employees may be covered by the motor carriers' workers' compensation policy or self-insurance and that the independent contractor and any of its employees would be deemed to be employees of the motor carrier for purposes of workers' compensation only. The motor carrier may charge the independent contractor for any agreed upon premiums, or if self-insured, for any equitable assessments for such coverage. Such election shall not affect the employment status of the independent contractor for any purpose other than for workers' compensation.

Questions-contact Gregory Feary, Managing Partner, Scopelitis, Garvin, Light, Hanson & Feary P.C. (317-492-9223) or Robert Digges, Chief Counsel, ATA Litigation Center (703-838-1889)

AMERICAN TRUCKING ASSOCIATIONS
OWNER-OPERATOR-INDEPENDENT CONTRACTOR
MODEL STATUTE

(USED AS SECOND ALTERNATIVE TO THE PREFERRED BLANKET EXEMPTION LANGUAGE)

PROPOSED FACTOR TEST/STATE

Independent Contractor Determination

A person operating a motor vehicle for a carrier of property under this chapter shall be considered an independent contractor and not an employee if each of the following factors is substantially present:

a. The person makes a material investment or incurs a material obligation related to equipment contracted to the carrier and used in performing service.
b. The person has direction and control in meeting and performing contract obligations subject to conformance with governmental dictates, lawful requirements of third parties relative to the transport or other contractual obligations undertaken, and any reasonable administrative, safety and/or clerical procedures needed for contract administration.
c. The person has the principal burden of the operating costs and personal expenses related to contract work.
d. The person's compensation is based primarily on factors related to contract work and not on the number of hours worked and affords the person the opportunity to realize a profit or loss based on the relationship of business receipts and expenditures.
e. The person is responsible for hiring or otherwise engaging and paying the necessary personnel to operate the equipment and meet any contract obligations related to it.
f. A written contract governs the relationship and specifies the relationship of the parties to be that of independent contractor and not an employer-employee relationship.

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