



Proposed Employee Misclassification Workers' Compensation Coverage Model Act

By National Conference of Insurance Legislators

UPS believes that worker misclassification is a serious and growing concern that adversely impacts the small package delivery sector of the transportation industry and, for that reason, appreciates the opportunity to comment on NCOIL's Working Draft of the Proposed Employee Misclassification Workers' Compensation Coverage Model Act ("Working Draft").

UPS congratulates NCOIL for its proactive approach in trying to bring additional clarity to the workers' compensation coverage rules in various states relating to misclassification of employees as independent contractors. As numerous state workers' compensation agencies have discovered, through ongoing audits and through participation in statewide task forces on the issue of worker misclassification, there is a serious problem caused by employers that attempt to avoid or minimize workers' compensation premiums (and avoid paying unemployment taxes) by treating workers as independent contractors rather than employees.

Recommendations for Modification to Working Draft

With the above concerns in mind, UPS believes that the "independent contractor" definition in the Working Draft should be modified as set forth below (1) to indicate that the burden of proof regarding independent contractor status is on the employer, (2) to give additional clarity to the "control" factor (consistent with the "control" test now applied in many states) and (3) to make clear that an independent contractor must customarily be engaged in an independently established trade or business (as opposed to providing substantially all of his or her services to a single employer).

[Proposed Revisions to Section 2(F) of the Working Draft with insertions in CAPS and deletions struck through]

F. 1. Except as provided in Section 2(F)(2), 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.

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 **THE EMPLOYER DEMONSTRATES WITH RESPECT TO THE INDEPENDENT CONTRACTOR THE SATISFACTION OF EACH OF** the following nine criteria:

- a. The independent contractor **IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS** ~~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 **HAS BEEN AND WILL CONTINUE TO BE FREE FROM THE EMPLOYER'S CONTROL OR DIRECTION OVER THE PERFORMANCE OF SUCH SERVICES, BOTH ~~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.