

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
BOSTON, MASSACHUSETTS
JULY 8, 2010
MINUTES

The National Conference of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at the Park Plaza Hotel & Towers in Boston, Massachusetts, on Thursday, July 8, 2010, at 9:30 a.m.

Rep. William Sandifer, III, of South Carolina, chair of the Committee, presided.

Other members of the Committee present were:

Rep. Barry Hyde, AR	Sen. Jerry Klein, ND
Sen. Ralph Hudgens, GA	Rep. Don Flanders, NH
Sen. Vi Simpson, IN	Assem. Nancy Calhoun, NY
Sen. Ruth Teichman, KS	Sen. Keith Faber, OH
Rep. Steve Riggs, KY	Rep. Charles Curtiss, TN
Rep. Susan Westrom, KY	Sen. Ann Cummings, VT
Rep. Barb Byrum, MI	Rep. Kathleen Keenan, VT
Rep. George Keiser, ND	Rep. Gini Milkey, VT

Other legislators present were:

Rep. Pat Patterson, FL
Rep. Matt Lehman, IN
Rep. Ron Crimm, KY
Rep. Robert Damron, KY
Rep. Ed Butler, NH
Sen. Gerald Malloy, SC
Sen. David Thomas, SC

Also in attendance were:

Susan Nolan, NCOIL Executive Director
Candace Thorson, NCOIL Deputy Executive Director
Michael Humphreys, NCOIL Director of State-Federal Relations
Jordan Estey, NCOIL Director of Legislative Affairs & Education

MINUTES

Upon a motion made and seconded, the Committee voted unanimously to approve the minutes of its March 5, 2010, meeting in Isles of Palms, South Carolina.

WORKERS' COMP COVERAGE FOR TRUCKING AND MESSENGER COURIERS

Mr. Estey said, by way of background, that a proposed *Trucking and Messenger Courier Industries Workers' Compensation Coverage Model Act* was first introduced at the March 2010 Spring Meeting in Isles of Palms, South Carolina. He said that the model was sponsored for discussion by Rep. Keiser and based on a 2009 Minnesota law that would, among other things, establish a seven-point test to determine who is an independent contractor, not an employee, for workers' compensation purposes.

Mr. Estey said that independent contractors under most state laws aren't required to carry workers' compensation coverage and there was growing concern that employers were increasingly misclassifying employees to avoid paying income, unemployment, and other taxes, as well as workers' compensation premiums.

Mr. Estey reported on the Committee's 2009 review of misclassification and abuse in the construction industry, which culminated in passage of a *Construction Industry Workers' Compensation Coverage Model Act*. He said that during discussions regarding the model, the Committee had become aware of similar problems in the trucking and messenger courier industries because of unique challenges and cross-border issues, among others. He said that Rep. Keiser, to fulfill a 2010 Committee charge, had introduced the draft model for discussion and would presume truck drivers or messenger couriers to be employees for workers' compensation purposes unless they satisfy each of the model's seven factors.

Rep. Sandifer said that several interested parties, upon request, had weighed in and offered changes. He said that comments from the American Trucking Association (ATA), Dart Transit Company, International Brotherhood of Teamsters (IBT), Messenger Courier Association of the Americas (MCAA), a National Association of Insurance Commissioners (NAIC) and International Association of Industrial Boards and Accident Commissions (IAIABC) joint-working group, the National Employment Law Project (NELP), Property Casualty Insurers Association of America (PCI), and the United Parcel Service (UPS) were available on the NCOIL Web site. He said that interested party amendments had been incorporated into a working draft for the Committee's review.

Greg Feary of the ATA said his group supported the model as drafted, but offered a few minor amendments. He said that motor-carriers and other employers struggled with a lack of consistency regarding workers' compensation coverage for owner-operators and independent contractors across states. He said the NCOIL model would build on similar approaches already used in 24 states and help bring needed clarity and uniformity.

Sen. Simpson asked why the Committee was considering a seven-factor test instead of alternative versions. She said that, in her opinion, legislators should consider an "ABC test," similar to ones commonly used in state unemployment and workers' compensation laws, which measures:

- an individual's freedom from an employer's control
- if the hired individual's work is outside the employer's usual course of business
- if the individual is customarily engaged in an independent established trade, occupation, profession, or business

Dan Reilly of IBT supported Sen. Simpson's comments and the use of the ABC test. He opposed the model as introduced and expressed concerns with the seven-point test. He said there was a growing consensus among states, as evidenced by 25 states that already used it, that the "ABC" test is the appropriate way to determine independent contractor status. He urged the Committee to rethink the seven-factor approach.

Greg Feary of the ATA disagreed with Mr. Reilly and said the ABC test was more commonly applied under unemployment and tax, not workers' compensation, laws. He said a model using the ABC test to determine workers' compensation would be a "sea change" and "diametrically opposite" of court rulings.

In response to a question from Sen. Hudgens about how the ABC test worked, Mr. Feary said

someone was considered an employee unless they meet each of three parts—A, B, and C. He said that “part A” of the test—which focuses on employer control—is commonly applied in all state workers’ compensation laws, but that prongs “B” and “C” are not. He said that using the ABC test to determine workers’ compensation coverage would run counter to years of case law and pointed out that only a few states—including Massachusetts and Nevada—used the ABC test under workers’ compensation statutes.

Assem. Calhoun and Rep. Byrum said that the Committee should look at the ABC and other tests before taking final action. Rep. Keiser said that a full review of the ABC test could be done but said the model, as introduced, was similar to a North Dakota law that was working well. He said that his state had looked at the issue and believed the ABC test wouldn’t work for these industries.

Rep. Sandifer recommended that the Committee move forward with consideration of the model with an understanding that interim meeting conference calls would be conducted prior to the November Annual Meeting in Austin, Texas, to discuss the pros/cons of alternative approaches and prepare the model consideration at the November Annual Meeting.

Victoria King of UPS reiterated comments she made at the 2010 Spring Meeting and said the seven-factor test could lead to greater levels of misclassification among the industry. She felt that, for example, several of the seven points could be easily manipulated. She also supported the ABC test as a new approach.

Deirdre Manna of PCI supported the model as a starting point, but said that more work was needed. She supported the model’s presumption of employee status—where everyone is considered an employee until they prove otherwise—and requirement that individuals satisfy all seven factors instead of some combination. She urged the Committee to conduct a comprehensive review of state workers’ compensation laws for the trucking and messenger courier industries as well as federal liability laws for parallel conflicts.

Sen. Faber also said that trucking and messenger courier industries struggle with cross-border workers’ compensation issues because businesses located in one state often have employees and independent contractors who travel and work in others. He said that often, it’s unclear which state’s laws apply when an injury occurs. He asked that the Committee also look at these issues as well.

Upon the Chair’s request, the Committee opted to move forward with consideration of certain proposed changes to the draft model.

The Committee, among other things, took the following actions:

- voted unanimously to approve sections 1 and 2 regarding purpose and definitions, which referenced existing state laws
- voted unanimously to remove language from Section 3 that would limit owner-operators as only those licensed and registered with a department of motor vehicles
- voted unanimously to insert in Section 3 language applying to seven-factor test to “any truck operator that is an employee and subject to state workers’ compensation laws”
- voted unanimously to add “bears the responsibility” to Section 3(2) relating to equipment maintenance
- voted unanimously to amend Section 3(3) to make the individual responsible for “substantially all” of the vehicle’s operating costs
- voted unanimously to remove “personal” from “personal services” in Section 3(4)

The Committee also debated extensively the Section 3(1) requirement that an individual must own his equipment or hold it under a bona fide lease arrangement. Assem. Calhoun had proposed specifying that the lease arrangement between motor-carriers and owner-operators be a “long-term” one. Several legislators, including Rep. Curtiss, Sen. Hudgens, Rep. Keiser, and Rep. Riggs disagreed with the proposed amendment because they believed, among other things, that:

- it would be difficult to define “long-term” lease
- owner-operators may need to sign a short-term lease in certain circumstances and that long-term leases may impede business models

Rep. Milkey asked if companies could force an owner-operator or independent contractor to purchase or lease a truck as a condition of employment. In response, Mr. Feary replied that federal leasing regulations prohibit motor-carriers from requiring owner-operators to purchase any item, including a truck. He said motor-carriers could, however, make available equipment not needed by their fleet to the owner-operators, similar to rental agreements with companies like Penski and Ryder.

Ms. King responded that while requiring the lease or purchase of a motor-carrier’s equipment wasn’t illegal, the motor-carrier can impose rigid requirements on what the truck must look like, etc. She said this would make it impossible for an owner-operator to otherwise find a vehicle that will meet these specifications, leaving him or her with no choice but to enter into a leasing arrangement with the motor-carrier.

Mr. Feary responded that Ms. King was referring to an issue known as “illusory” choice and that most motor-carriers wanted to avoid these allegations and subsequent lawsuits and stayed away from such rigid requirements.

Sen. Faber said the Committee was getting stuck on only one of seven tests used in the model and reminded legislators that the model required that all seven factors be met in order to become an independent contractor. He also cautioned against getting too involved in the contractual relationship between an owner-operator and motor-carriers. In response to Rep. Milkey’s question and Ms. King’s comments, he said that, in his opinion, motor-carriers entered into leasing arrangements and made their fleets available to owner-operators not because they were trying to deny them workers’ compensation benefits but because it was a part of their business model.

Upon a motion made and seconded, the Committee voted unanimously to resolve remaining issues at a later date.

DATA COLLECTION AND ANALYSIS

Due to time constraints, the Committee deferred further consideration of a [proposed letter](#) concerning the use of data collection and analysis in workers’ compensation systems until the November Annual Meeting in Austin, Texas.

ADJOURNMENT

There being no other business, the Workers’ Compensation Insurance Committee adjourned at 10:30 a.m.