

Testimony of The
Connecticut Messenger Courier Association
Before
The Transportation Committee
Friday, March 8, 2013
10 AM, Room 2C

RE: HB 6560 AAC OWNER-OPERATORS OF CERTAIN VEHICLES.

Good morning. My name is Marshall Collins. I am the Counsel for the Connecticut Messenger Courier Association ("CMCA"). CMCA represents the independent messenger courier industry in Connecticut. Its members are small and independent Connecticut companies engaged in arranging for same day delivery of a wide range of items, not limited to: legal documents, financial records, pharmaceuticals, machinery and parts, transplant organs and many other items that are vital to Connecticut's economy.

CMCA supports the intent of HB 6560 and respectfully requests that you amend the bill to provide much needed assistance to the messenger courier industry in Connecticut.

For nearly 80 years the messenger courier industry had utilized owner operators as independent contractors to meet the demands of its customers. Without the requested statutory relief that we have set forth below, the independent messenger courier cannot continue to exist.

CMCA has worked with the Department of Labor for nearly 20 years to comply with the Department's rules and regulations on independent contractors under the statutory ABC Test. This collaborative effort between the DOL and the messenger courier industry provided the nation with an example of how realistic and effective regulation can protect both legitimate owner operators and the public interest.

Unfortunately, several years ago a CT Supreme Court decision that did not involve CMCA or its members tied the hands of the DOL. The JSF decision made it virtually impossible for messenger courier companies to contract with owner operators as drivers or to maintain that relationship pursuant to the drivers desires to do so.

Without legislative help, CMCA members are at serious financial risk and could not exist if their drivers are determined to be employees rather than owner operator independent contractors. The consequences to the industry and the Connecticut economy which relies on them would be significant if these independent small businesses were forced to close.

Just as 20 years ago, CMCA came to the Legislature for help, we ask you today to enable the DOL to once again work with us.

Therefore, we request that you add the following language as a second section of HB 6560:

Add as a new section 31-222(a) (1) (B)(5) which would state that:

(5) No provision of this chapter, except section 31-254, shall apply to any of the following types of service or employment, except when voluntarily assumed, as provided in section 31-223:

(P) Service performed by an owner-operator of a motor vehicle who enters into a contractual relationship with a messenger courier company to provide delivery services in response to customer demand, where the following conditions have been met and the owner-operator:

- 1) Is not personally supervised by a representative of the messenger courier company.*
- 2) Is not required to render the contracted services personally and may subcontract the services without the company's approval.*
- 3) Shall be responsible for wages and expenses, employment taxes (federal or state), workers' compensation insurance coverage for its assistants or subcontractors as may be required by Connecticut law.*
- 4) Assumes responsibility for the normal overhead business costs of an independent delivery business.*
- 5) Is in a position to realize a profit or suffer a loss subject to the successful outcome of the driver's performance.*
- 6) Is paid on a per-job or per-delivery basis and invoices the company for each job completed.*
- 7) Provides their own vehicle, where necessary for delivery.*
- 8) Selects their own routes and order of delivery.*
- 9) Enters into a written contract with the company for a fixed duration, not to exceed one year, and which specifies that any renewal contract must also be written and for a similar fixed duration.*
- 10) Has the right to accept or reject delivery jobs from other courier companies or delivery services.*
- 11) Executes an Affidavit Of Independent Contractor Status in the following form:*

AFFIDAVIT OF INDEPENDENT CONTRACTOR STATUS

- 1. I (Name of Driver) currently of (Street Address, Town, State and Zip Code), being duly sworn, do hereby affirm that I have operated as (Independent Contractor's Business Name) an independent contractor.*
- 2. I further represent that I have provided and currently provide on demand contract delivery services for entities or persons other than (Name of Company).*
- 3. It is my desire to enter into an agreement with (Name of Company) to provide on demand contract delivery services.*
- 4. I understand that an independent contractor is one who engages to perform certain services for another, according to his own manner, method, free from control and direction in all matters connected with the performance of the service, except as to the result or product of the work.*

5. I further understand that based upon the representations in this Affidavit of Independent Contractor Status, that I am requesting (Name of Company) to consider my business to be that of an independent contractor and that I neither am nor wish to be an employee of (Name of Company).

6. As an Independent Contractor, I acknowledge that (Name of Company) shall not provide me with unemployment insurance or workers' compensation insurance.

7. I further understand that the execution of this affidavit shall establish a rebuttable presumption that, as the executor of this affidavit, I am not an employee of the (Name of Company).

DATE: _____

SIGNATURE: _____
(Independent Contractor)

Subscribed and sworn to before me (Name) on this _____ Day of _____,
_____.

Signature of Notary Public
or Commissioner of the Superior Court _____

BACKGROUND

- In 1992 members of the Connecticut Messenger Courier Association ("CMCA") increasingly were being audited by the Department of Labor ("DOL") which generally determined that their drivers were not owner operator independent contractors, but instead employees.
- Consequently, CMCA asked then House Chairman of the Labor & Public Employees Committee, Representative Mike Lawlor, for help. Representative Lawlor recognized the importance of these small businesses to Connecticut's economy as a whole and directed the DOL to work with the CMCA members to solve the problem. If they couldn't, he told them that he would pursue legislation.
- To the Department's credit, the DOL and I worked together to request and issue a Declaratory Ruling from then DOL Commissioner Petronella.
- On June 7, 1994 Commissioner Petronella issued a Declaratory Ruling which recognized that messenger courier: "companies rely on a pool of drivers to respond to significant fluctuation in customer demand."
- Under the ruling, CMCA companies and the owner operator drivers who they contracted with had to comply in law and in fact with more than twenty conditions for the DOL to determine that they had met the requirements of the statutory ABC Test.
- The Declaratory Ruling concluded that:

“Individuals who contract to perform delivery services and do in fact perform such services under the terms and conditions set forth in the petition for a declaratory ruling submitted by the Connecticut Messenger and Courier Association, dated April 4, 1994 would not be engaged in employment subject to coverage under the provisions of *Conn. Gen. Stat. Sec. 31-222(a)(1)(B)(ii)*. ”

- After the JSF decision, in 2008 CMCA went back to DOL to update the Declaratory Ruling and to keep the industry in compliance with both the letter and the spirit of the ABC test.
- After again working with DOL, CMCA members prepared the “*CT Messenger Courier Association Best Practices Owner-Operator Agreement*” that incorporated suggestions from the DOL. The “Best Practices Agreement” between the companies and owner-operator drivers, clearly sets forth what companies and owner operator drivers need to do to remain in compliance with DOL’s interpretation of the ABC test.
- Additionally, the DOL suggested that CMCA members and their owner operators utilize an “*Affidavit of Independent Contractor Status*,” which CMCA members did. The affidavit which is part of our requested amendment is in the form suggested by the DOL.
- Nevertheless, even if CMCA members contract with legitimate owner operator drivers and meet all the conditions of the Declaratory Ruling, the Best Practices Agreement, and the Affidavit, the companies are still subject to significant fines and financial exposure. There is nothing that the DOL can do about the handcuffs of the JSF decision.
- As a result, CMCA joined with the Motor Transport Association to seek legislation during the 2012 Legislative Session.
- The language of HB 6560 represents an attempt to address the DOL’s concerns.
- By itself, however, the language of HB 6560 would not apply to the independent messenger courier industry because their owner operator drivers are not driving vehicles over 10,000 lbs.
- CMCA members need the amended language to continue to exist.
- CMCA has worked with the DOL and wishes to continue to do so, but DOL can go no further without legislation. Just as Representative Lawlor recognized in 1992, CMCA members need help. Legislation is required in 2013.

GOING FORWARD

CMCA believes that its HB 6560 as amended by its proposed language and affidavit, addresses the concerns of the DOL, CMCA members, and importantly the owner operator drivers that CMCA members contract with.

The CMCA amendment codifies the Declaratory Ruling, the Best Practices Agreement, and the Owner Operator Affidavit. It allows DOL to continue to work with CMCA members.

Please note that there is no fiscal note whatsoever due to the CMCA offered amendment. CMCA members do not have employee drivers. All of the CMCA member companies use a pool of owner operator drivers to meet the fluctuating demand for same day delivery. Thus, no employee would become an independent contractor under the CMCA proposal. Contributions to the Unemployment Compensation Trust Fund would not decrease one penny.

This would be a narrow solution that recognizes the historic and unique business model of the messenger courier industry. It would allow the DOL and the industry to continue to provide an example for the rest of the nation of how to effectively and fairly regulate the messenger courier industry.

The independent CMCA companies need the Legislature to cut the Gordian Knot which resulted from the JSF decision. After 20 years of good faith efforts to work with the DOL, CMCA has no alternative but to pursue legislative relief because the DOL's hands are tied.

Please amend HB 6560 by adding the CMCA language which is set forth above.

This completes my testimony. Thank you for your consideration.

