



**Testimony Regarding Maryland Senate Bill 685  
Before the Senate Finance Committee  
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Thank you for this opportunity to submit written testimony on Maryland Senate Bill 685, a proposed amendment that would expand the exemption for messenger service drivers from unemployment insurance coverage. We submit this testimony on behalf of the National Employment Law Project (NELP).

NELP is a non-profit research and advocacy organization that works to ensure good jobs and economic security for our nation's workers. For over 40 years, NELP has specialized in unemployment insurance programs (UI), labor standards enforcement and access to good jobs. We have a long history serving families hardest hit by economic downturns by ensuring that workers are properly paid and treated on the job, and by helping them retain access to unemployment benefits when they are separated from their job.

**Introduction**

Senate Bill 685 would expand an existing narrowly-defined exemption for messengers from the state's unemployment insurance system to encompass a broad range of delivery service workers as long as they have signed an independent contractor agreement containing certain provisions with their employer. Its effect would be to allow a greater number of employers to deprive these workers of the minimum cushion enjoyed by virtually all other workers during periods of unemployment. This proposal is bad policy, for three reasons:

- (1) It would undercut the purposes of the state's unemployment insurance system, which is designed to keep workers economically secure and encourage their re-entry into the workforce;**

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- (2) It would encourage misclassification of employees as independent contractors and create confusion for a whole new set of workers, thereby undermining application of other minimum labor standards and frustrating tax collection; and**
- (3) It would accelerate the erosion of job standards in an industry that is already rife with independent contractor misclassification.**

**I. SB 685 Would Undermine the Purposes of Unemployment Insurance Law.**

The basic goals of our nation’s unemployment insurance systems are to provide involuntarily-unemployed workers with temporary income replacement while they look for work, and to stabilize the economy by maintaining consumer spending during an economic downturn.<sup>2</sup> Unemployment insurance boosts the economy by providing “counter-cyclical” economic growth in downturns.<sup>3</sup> It also alleviates economic hardship by preventing workers from slipping into poverty.<sup>4</sup> And, it helps employers and workers preserve skills and enhance productivity, because income provided by unemployment checks gives workers needed breathing room to search for a good job that matches their experience and skills, and enables employers to retain experienced workers during layoffs. This result benefits society as a whole; by encouraging workers to stay in the professions they have trained for, rather than having to shift from field to field out of short-term necessity, unemployment insurance helps insure that important occupations are not depleted of their experienced workers whenever periods of unemployment strike.

SB 685 would undermine the overall purposes of the unemployment insurance system by exempting a large segment of workers in an occupation vital to the state’s economy. No legitimate rationale exists for broadening the narrowly-defined messenger service exemption in the state’s UI program.

**II. The New Exemption Would Encourage Abuse and Undermine Other Minimum Labor Standards and Tax Laws.**

It is important to recognize that Maryland’s UI law already exempts true independent contractors, so messenger drivers and couriers who are independent contractors would not be covered under the UI law already. Lab. & Empl. Code Sec. 205(a). In addition,

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<sup>2</sup> Advisory Council on Unemployment Compensation, “Defining Federal and State Roles in Unemployment Insurance (1996), at page 7.

<sup>3</sup> Lawrence Chimerine, *et al.* “Unemployment Insurance as an Economic Stabilizer: Evidence of Effectiveness Over Three Decades,” U.S. Department of Labor, Unemployment Insurance Occasional Paper 9908 (1999).

<sup>4</sup> U.S. Congressional Budget Office, “Family Income of Unemployment Insurance Recipients” (March 2004), at page 13.

the law specifically requires the Secretary of the Department of Labor, Licensing and Regulation (DLLR) to adopt regulations clarifying how the independent contractor provisions apply to “certain industries.” Sec. 205 (b)(2). To that end, the Secretary has recently adopted regulations defining “messenger service business,” as “a business primarily engaged in the hand delivery of individually addressed mail, messages, or documents, either in paper or magnetic media format, to the public or to industrial or commercial establishments, generally involving outside travel on foot, by bicycle, or by motor vehicle.” Code of MD Regs. Sec. 9.32.01.18-1.

The proposed SB 685 seeks to statutorily expand the scope of the existing messenger service exemption to encompass a broader range of delivery businesses, including large logistics and courier driver jobs. This provision, if passed, would directly undermine the Department’s recent efforts to combat independent contractor misclassification in the industry, and would stretch the exemption to include the very package delivery businesses that are rife with independent contractor misclassification. It would also create confusion for entire sectors, whose employers may suddenly decide to require “independent contractor” agreements as a condition of getting a job in order to evade UI requirements.

SB 685 would allow employers to compel their messenger delivery worker employees to waive the protections of the unemployment insurance system to which they would otherwise be entitled as a condition of getting a job. SB 685 does not require that the workers who would lose these important benefits actually be independent contractors (under the clear criteria set forth in the existing prior section 205), but only that they enter into an agreement so providing. Messenger delivery service employers need only condition employment upon a worker’s signing of such an agreement in order to accomplish this end.

True independent contractors are outside the scope of the unemployment insurance statutes and may not draw unemployment benefits. In turn, one who hires an independent contractor is not required to pay unemployment insurance tax contributions. An employee cannot be transformed into an independent contractor by contract, agreement or fiat. The agency may look through the "tag" the employer has placed on the employment relationship and "determine, as a matter of fact, whether the relationship (regardless of what it may be called) comes within the statute." *Warren v. Board of Appeals*, 226 Md. 1, 14, 172 A.2d 124, 129 (1961).

Other states agree that written contracts by themselves do not determine employment status. "Language in a contract that characterizes an individual as an independent contractor [rather than an employee] is not controlling. The primary concern is what is done under the contract and not what it says. *Insul-Lite Window & Door Mfg., Inc. v. Industrial Commission*, 723 P.2d 151 (Colo. App. 1986)." *Locke v. Longacre*, 772 P.2d 685, 686 (Colo. App. 1989); *Ellison, Inc. v. Board of Review*, 749 P.2d 1280, 1284 (Utah App.), cert. denied, 765 P.2d 1278 (Utah 1988); *Latimer v. Administrator*, 216 Conn. 237 (1990).

Thus, SB 685 would encourage precisely the form of independent contractor misclassification that is the subject of increasing scrutiny, regulatory activity, and enforcement actions at the state and federal level, including in Maryland.

Employers seeking to evade labor and employment laws are increasingly turning to independent contractor structures to escape responsibility for minimum wage and overtime, workers compensation, unemployment insurance, and collective bargaining.<sup>5</sup> By calling employees “independent contractors,” employers stand to save upwards of 30% of payroll costs, while depriving workers and their families of the most fundamental work and pay protections, hurting law-abiding businesses that cannot compete, and costing the states and the federal government billions of dollars in unpaid taxes.

Messenger service business employers, including businesses in Maryland, are jumping on this independent contractor bandwagon, seeking to cut costs on the backs of workers and our state and federal tax revenues.<sup>6</sup> One of the industry’s largest employers, FedEx Ground, a subsidiary of Federal Express, has classified all of its drivers as independent contractors.<sup>7</sup> Courts around the country have ruled against FedEx in suits by its employees asserting their rights under various workplace laws.<sup>8</sup> A recent Maryland DLLR audit of FedEx Ground found that the company had misclassified around 340 workers.<sup>9</sup> Proposed SB 685 would create an unprecedented and special carve-out for these and other workers in the industry.

Additionally, defining the parameters of the messenger service exemption is a task better left to the expertise of the DLLR. The messenger service industry, encompassing a diverse group of workers, from bike messengers to delivery drivers, is evolving rapidly. The Department has the expertise and the flexibility to learn the facts of the employment

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<sup>5</sup> See generally, Testimony of Catherine Ruckelshaus, *Leveling the Playing Field: Protecting Workers and Businesses Affected by Misclassification*, June 17, 2010, and studies cited therein, available at <http://help.senate.gov/imo/media/doc/Ruckelshaus.pdf>.

<sup>6</sup> See Testimony of Thomas E. Perez, Secretary of the MD Department of Labor, Licensing, & Regulation, Hearing on House Bill 1590, before the House Economic Matters Committee (March 20, 2008), available at <http://www.dllr.state.md.us/whatnews/testimonymisclass.shtml> (hereafter “Perez Testimony”).

<sup>7</sup> See, generally, FedUp with FedEx: How FedEx Ground Tramples Workers’ Rights and Civil Rights, American Rights at Work and Leadership Conference on Civil Rights (2007) (hereinafter FedUp with FedEx); Douglas M. Brinley, “Federal Express Drivers: Employees or Independent Contractors,” *Journal of Legal, Ethical and Regulatory Issues*, Vol. 11, No. 1 (2008); Dean Froust, “The Ground War at FedEx” *Business Week* (November 28, 2005).

<sup>8</sup> Id.

<sup>9</sup> Perez testimony.

relationships, and update the definition of exempted work if need be, in response to changes in the industry. The DLLR does this in keeping with the remedial nature of the unemployment insurance statute. Further clarification of the scope of the exemption should come in the form of illustrative regulations developed by the Department, not through a statutory change to the exemption.

### **III. The law would accelerate the erosion of job standards in an industry that is already rife with independent contractor misclassification.**

According to estimates prepared by the Bureau of Labor Statistics, wages for messenger service drivers in Maryland average around \$17 per hour.<sup>10</sup> At this level, many messenger service drivers earn barely enough to support a family in the state.<sup>11</sup> Any reduction in income – through unreimbursed work expenses, increased tax liability, or unpaid wages – can cause a worker to slip quickly into poverty.

And messenger service workers are losing income, due in part to high rates of violations of basic workplace protections. According to a recent survey conducted by NELP and university colleagues, employers in this industry regularly violate basic workplace laws, including the minimum wage, overtime protections, and meal breaks.<sup>12</sup> Messenger service drivers who are misclassified as independent contractors earn far less than their peers who are treated as employees; they often do not realize that they can claim the protection of federal and state labor laws, and they have a harder time asserting their rights because they first have to prove their employee status before they can get to the merits of their case.

For example, drivers employed by United Parcel Service, which classifies its workers as employees, earn significantly more and benefit from a range of workplace benefits and protections as compared with drivers at FedEx, which classifies workers as independent contractors. One federal investigation indicated that, after expenses, FedEx drivers' tax

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<sup>10</sup> The annual median wage for workers in the occupation “Truck drivers, Light or Delivery Services” for Maryland, for 2009, is \$35,810. Bureau of Labor Statistics, “Estimates from the Occupational Employment Statistics Survey, available at [http://www.bls.gov/oes/current/oes\\_md.htm](http://www.bls.gov/oes/current/oes_md.htm)..

<sup>11</sup> The Economic Policy Institute's “Basic Family Budget Calculator” estimates that a family of four in the Baltimore-Towson metropolitan area requires an annual income of \$52,812 to cover basic household needs. EPI Basic Family Budget Calculator available at [http://www.epi.org/content/budget\\_calculator](http://www.epi.org/content/budget_calculator).

<sup>12</sup> Annette Bernhardt, *et al.*, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, Report by the Center for Urban Economic Development, National Employment Law Project, and the UCLA Institute for Research on Labor and Employment (2009). The report found the following violation rates for the occupation “stock/office clerks and couriers”: minimum wage – 18.1%; overtime – 86%; requiring workers to work off-the-clock – 76.6%; meal break – 56.7%, pages 31, 34, 36, 37.

returns showed net incomes ranging from a loss of \$474 to a profit of \$22,902.<sup>13</sup> Unionized UPS drivers, in contrast, earn over \$26 per hour and have employer-paid health insurance and a pension plan.<sup>14</sup> The relative stability of the UPS drivers' employment in turn benefits the state: these employees contribute more in taxes; can spend more in their communities; and have less need to seek government services.

Other states have ruled that messenger couriers are employees and not independent contractors under the state's UI law. *See, e.g., Foster v. ProCourier, Inc.*, Board Case No. 9007-BR-08 (Ct. Board of Rev. 2008), available at [http://ctboard.org/adlib\\_docs/2008/9007br08.html](http://ctboard.org/adlib_docs/2008/9007br08.html); *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill.2d 380 (Ill. 2001). Under current Maryland law, delivery drivers could be found to be employees or independent contractors using the existing standard, so there is no need for an overbroad categorical expansion of the exemption that would prohibit an examination of the true nature of the relationship between the driver and the employer.

Re-classifying these workers as independent contractors for purposes of unemployment insurance would open the door for companies to routinely abuse the range of workplace laws. A change in status would push many messenger service drivers into poverty at the very time when the state can least handle any increase in poverty-wage jobs. With salaries hovering just above the level needed to pay for basic expenses, drivers are unable to weather periods of job loss without the unemployment insurance safety net. These are exactly the type of workers that the unemployment insurance system was designed to protect.

The proposed SB 685 is bad policy for the reasons outlined above, would alter the time-tested test for determining covered employment under Maryland's unemployment system, and would encourage evasion of other employment and tax laws.

Thank you for the opportunity to present testimony on this important issue impacting Maryland's workers and the State's most vulnerable citizens.

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<sup>13</sup> FedUp with FedEx, page 9, citing FedEx Ground Package System d/b/a FedEx Home Delivery, 4-RC-20974, National Labor Relations Board Regional Director's Decision and Direction of Election, June 2005.

<sup>14</sup> FedUp with FedEx, page 8.