

# WE ARE YOUR DOL



## Guidelines for Determining Worker Status Messenger Courier Industry

The following guidelines are used by the Unemployment Insurance Division, the Division of Labor Standards and the Division of Safety and Health to establish whether an employment relationship or an independent contractor status exists when companies engage the services of messengers and/or couriers who own or lease vehicles. The factors below are not intended to be relied upon for all possible circumstances. General guidance is provided regarding the many factors that may be considered in making determinations. Every employment situation is different. Therefore, no single factor or group of factors will control the determination. These factors do not create any different rule or test than exists in common law, regulation or statute.

Independent contractors are excluded from coverage under the Unemployment Insurance Law. In addition, independent contractors are not afforded certain protections provided by Labor Standards and Safety and Health law. Independent contractors are persons who are actually in business for themselves and hold themselves available to the general public to perform services. A person is an independent contractor only when free from control and direction in the performance of such services. All factors concerning the relationship between the two parties must be taken into consideration to determine if the party contracting for the services exercises, or has the right to exercise, supervision, direction and control over the courier or messenger. No one single factor is controlling, nor do all factors need to be present to establish the nature of the relationship.

Also, the New York State Commercial Goods Transportation Industry Fair Play Act is in effect as of April 10, 2014. The law creates a new standard to determine whether certain drivers are employees or independent contractors in the commercial goods transportation industry. Some of the "Indicators of Independence" discussed below may be legal prerequisites for some drivers to properly be classified as independent contractors. If couriers fall under the provisions of the Fair Play Act, that Act's provisions take precedence over the guidance contained in this publication.

Employers may request a formal determination of the status of couriers/messengers for unemployment insurance purposes by writing to the Liability and Determination Section and furnishing complete details of the relationship. An employer who assumes a courier/messenger to be an independent contractor, and does not report and pay contributions based upon the assumption, may be subject to retroactive assessment, interest, or penalty if a later audit, benefit claim, or some other review determines that there was an employment relationship. Therefore, it is to the employer's advantage to request a determination when the status of a courier/messenger is in question.

Employers with questions regarding the interpretation or application of the factors outlined in the guidelines in relation to an unemployment insurance matter may contact the Liability and Determination Section at (518) 457-2635. Employers with questions in relation to a Division of Labor Standards issue should call (518) 457-4256. Division of Safety and Health issues may be referred to (518) 457-2238.

### Industry Background

These guidelines will be used to determine the worker status of couriers who own or lease a vehicle. Couriers who use company vehicles are presumed to be employees, as they have no risk of investment or exposure to profit or loss. It is industry practice that bike messengers own their own bikes, and, along with foot messengers, are considered employees of messenger companies providing delivery services to their customers.

A courier is a person who provides pickup and delivery of goods for customers via a motorized vehicle. A messenger provides similar services to customers via foot or bike delivery. Some companies use both messenger and courier delivery persons.

In large metropolitan areas, the pickup and delivery could be within blocks, or within or across boroughs. In suburban or rural areas, the pickup and delivery could involve a large geographic area covering hundreds of miles.

Bike and foot messengers are commonly used to transport smaller goods and packages in metropolitan areas, while couriers are able to accommodate larger and multiple customer requests.

Products and goods to be picked up and delivered are based on the specific need of the customer. These include, but are not limited to:

- Manufactured goods
- Legal, financial, and banking documents
- Office supply products
- Film
- Pharmaceuticals
- Portfolios
- Blueprints
- Clothing
- Costumes
- Art work
- Personal items

Courier and messenger companies may provide 24/7, on-demand pickup and delivery services for customers. A courier company may also provide established routes involving multiple pickup and delivery services for customers. A courier may perform both on-demand and route delivery services.

Courier and messenger companies offer on-demand assignments via a dispatch system. They use communication devices, such as two-way radios, pagers, beepers, cell phones or palm pilots, to relay the details of the assignment. Assignments are offered to one courier or messenger at a time.

The courier and messenger company establishes the fee charged to its customer. The fee may be based on factors such as:

- Size and weight of package
- Volume
- Distance
- Urgency of the delivery
- Frequency of the route
- Number of stops

Couriers are generally paid a percentage of the fee charged to the customer for on-demand assignments. Messengers are normally paid the higher of an hourly rate or fee charged for similar-type assignments.

A courier who performs a fixed-route delivery is aware of the established stops and the fee to be received before beginning each day's route. The fee is usually not hourly or a percentage of the amount charged to the customer. It is usually a set amount, which might, for example, be on a daily or weekly basis.

A courier company may use a third party as its agent. The third party (agent) may:

- Pay the courier
- Issue end-of-year tax documents
- Offer discount insurance and benefit packages
- Perform background checks on the potential courier pool

The courier may be required to enter into a contract with the third party. The provisions contained in the contract are mutually agreed on between the courier company and the third party, and the provisions are as if required and enforced by the courier company. Both the courier company and the courier may pay the third party an administrative fee for its services.

## **Determining Worker Status**

### **Couriers**

With respect to couriers, there are two types of services that may be performed:

- 1) On-Demand – customer requests same-day or next-day pickup and delivery of an item from Point A to Point B, for which a courier receives an established or negotiated fee. The requests may vary each day.
- 2) Route Delivery – customer or courier company has established routes or territories, within which are multiple locations for pickup and delivery of items. The requests may vary each day, and a courier receives an established or negotiated fee.

Through the application of these guidelines, the worker status of a courier who performs both on-demand and route delivery services will be based on the factors that apply to each type of service. This may result in two different worker status outcomes.

### **On-Demand Services**

#### **Indicators of Independence**

Under the Commercial Goods Transportation Industry Fair Play Act, there is a presumption that a driver is an employee. If the company can show that the driver is a separate business entity by meeting all of the law's listed criteria, that driver will be considered a separate business subject to the provisions of the Act. Some of the factors indicating a courier performing on-demand services is an independent contractor are:

- 1) The courier owns or leases a motorized vehicle. Couriers driving such vehicles need not hold a commercial driver's license.

A lease must have evidence of substantial investment by the courier, such as:

- a. The lease is fair market value
  - b. It is for a minimum of at least one year
  - c. The courier is obligated to satisfy the terms of the lease, even if courier services are discontinued
  - d. There is a reasonable interest rate
- 2) The courier is responsible for all expenses, such as:
    - a. Fuel
    - b. Vehicle repairs
    - c. Maintenance
    - d. Insurance
    - e. Tolls
    - f. Occupational accident insurance or workers' compensation coverage
    - g. Communication devices or scanning equipment

- 3) The courier is free to negotiate the fee offered for services and is not prohibited from renegotiating an established fee on an assignment-by-assignment basis.

- 4) The courier is paid on a negotiated, per-completed-assignment basis, and not by the hour.

- 5) The courier is free to accept or reject a dispatched assignment, based on conditions such as work hours and schedule.
- 6) The courier receives an advertising fee for displaying courier company or courier company's customer's signage on the vehicle.
- 7) The courier's services are not exclusive to a courier company, and the courier is free to obtain and accept assignments from others.
- 8) The courier establishes own route and sequence, or priority of pickups and deliveries.
- 9) The courier receives and resolves customer complaints.
- 10) The courier is not required to display the courier company name on the vehicle, other than what may be required for security purposes while on an assignment.
- 11) Manifests are provided by the courier.
- 12) The courier possessed a "dba" or a Federal Employer Identification Number at the time of hire.
- 13) The courier is able to provide a substitute or engage other couriers without approval or notification of the courier company, subject to applicable qualification requirements or federal or state laws, rules or regulations, *and* pays the employees without reimbursement from the courier company.
- 14) The courier is not provided with training, other than a general orientation session to familiarize the courier with basic customer pickup or delivery characteristics.

### **Indicators of Employment**

The strong factors a courier performing on-demand services is an employee are:

- 1) The courier company sets the rate of pay.
- 2) The courier company pays or reimburses the courier for expenses such as fuel, tolls, vehicle repairs, maintenance, and insurances.
- 3) The courier is required to accept assignments.
- 4) The courier is not free to obtain assignments from others.
- 5) The courier is covered under the courier company's Workers' Compensation Policy.
- 6) The courier has a set work schedule, or is required to be available for assignments during a pre-established period.
- 7) The courier company establishes the route, sequence, or priority of the pickup or delivery.
- 8) The courier company maintains authority to insure all customer requirements are carried

out by the courier, even if the courier agreed to the requirements at the time his/her services were engaged.

However, the courier company's right to insure that customer requirements are carried out by the courier regarding security and appearance of vehicle, delivery and pickup times, shipment integrity, compliance with governmental regulations, and general standards of conduct is a reasonable business practice. This is not an indication of control over the courier's services.

- 9) The courier company prohibits the courier from participating in the process of resolving customer complaints.
- 10) The courier is required to display courier company name or customer name on the vehicle at all times, even when not on an assignment.
- 11) Manifests are provided free of charge by the courier company.
- 12) The courier company establishes earlier delivery/pickup time frames than those required by the customer. Or, if no time frame was established by the customer, the courier company specifies a time frame to the courier.
- 13) The courier is required to keep in communication with the courier company while on route for purposes beyond relaying information from the courier company customer to the courier, or beyond the customer's request regarding the status of delivery.
- 14) The courier company provides substitutes or replacement drivers.
- 15) The courier company requires attendance at training or orientation sessions for issues other than those required by governmental agencies, or on subjects such as:
  - a. Use of the communication equipment
  - b. The proper completion of paperwork
  - c. The courier company's customer policies and/or procedures
- 16) The courier company restricts the courier from performing courier service for any customer of the courier company upon termination of the relationship between the parties.
- 17) The courier company requires the courier to wear a uniform or attire that includes identifications or logos beyond those associated with the courier company.
- 18) The courier is required to perform services personally.

## Neutral Factors

Factors that neither point to an independent contractor status nor an employment relationship are:

- 1) The courier is only required to wear a uniform, attire, and/or identification with the courier company logo for the limited purposes of security, and only while the security need is present.
- 2) The courier is required to carry a courier company badge or other identification for security purposes, and only while the security need is present.
- 3) The courier company or its third party agent interviews or screens prospective couriers by performing background checks and verification for compliance with state and federal laws, rules, and regulations prior to issuing assignments.
- 4) The courier is paid by the courier company for the delivery, even if the delivery did not meet the standards or parameters of the courier company's customer.
- 5) The courier may contact the courier company upon pickup or delivery of item/article, but does so out of courtesy, as a means to obtain additional assignments.
- 6) The courier is required to keep in contact with the courier company while on route for purposes of relaying information from the courier company's customer to the courier, or for purposes of confirming with the courier company's customer its adherence to the pickup and delivery time frame.
- 7) The delivery/pickup time frame is set by the courier company's customer.
- 8) The courier is required by the courier company to attend training or orientation sessions for issues mandated by governmental agencies (such as OSHA or the Transportation Security Administration), or on subjects such as proper completion of paperwork or courier company customer policies and/or procedures.
- 9) The courier may be required to obtain a "dba" or a Federal Employer Identification Number as a condition of obtaining assignments.
- 10) The courier and the courier company jointly resolve customer complaints.
- 11) The courier company is responsible for customer billing and collecting.
- 12) The courier is required to sign a Non-Disclosure Agreement (NDA). The purpose of such an agreement is to protect the courier company's confidential information, including, but not limited to, clients, addresses, billing rates, and contact names and telephone numbers.
- 13) Customer or third party provides manifests.

## Route Delivery

### Indicators of Independence

The strong factors a courier performing route delivery services is an independent contractor are:

- 1) The courier owns or leases a motorized vehicle used for delivery services. A lease must have evidence of substantial investment by the courier, such as:
  - a. The lease is fair market value
  - b. It is for a minimum of at least one year
  - c. The courier is obligated to satisfy the terms of the lease, even if courier services are discontinued
  - d. There is a reasonable interest rate
- 2) The courier is responsible for all expenses, such as:
  - a. Fuel
  - b. Vehicle repairs
  - c. Maintenance
  - d. Insurance
  - e. Tolls
  - f. Occupational accident insurance or workers' compensation coverage
  - g. Communication devices or scanning equipment
- 3) The courier is free to negotiate or renegotiate terms of the route, such as the stops or rate of pay.
- 4) The courier negotiates the rate of pay that is other than an hourly rate.
- 5) The courier is free to accept or reject assignments.
- 6) The courier receives an advertising fee for displaying courier company or courier company's customer's signage on the vehicle.
- 7) The courier receives an advertising fee from either the courier company or the courier company's customer for wearing a customer's badge, ID, uniform or attire.
- 8) The courier is unrestricted from performing delivery services for others; including while on route for courier company's customer, except as may be restricted by governmental authorities, such as DEA or DOT Office of Hazardous Materials.
- 9) The courier's services are not routinely monitored by the courier company to insure customer requirements are carried out, but the services may be monitored for administrative purposes, such as customer billing or determining courier compensation.
- 10) The courier receives and resolves customer complaints.
- 11) The courier is not required to display the courier company's name on the vehicle, other than what may be required on an assignment for security purposes.
- 12) Manifests are provided by the courier.
- 13) The courier possessed a "dba" or a Federal Employer Identification Number at the time of hire.



- 14) The courier is able to provide a substitute or engage other couriers without approval or notification to the courier company, subject to applicable qualification requirements or federal or state laws, rules, or regulations, *and* pays the employees without reimbursement from the courier company.
- 15) The courier is responsible for lost or damaged product.
- 16) The courier is responsible for providing or obtaining appropriate containers required for the delivery/pickup of the product.

### **Indicators of Employment**

The strong factors a courier performing route delivery services is an employee are:

- 1) The courier is paid at a base hourly rate or on a fee basis established by the courier company.
- 2) The courier company pays or reimburses the courier for expenses such as fuel, tolls, vehicle repairs, maintenance, and insurances.
- 3) The courier is required to accept additional assignments.
- 4) The courier company prohibits the courier from performing delivery services for others.
- 5) The courier is covered under the courier company's Workers' Compensation Policy.
- 6) The courier company maintains authority to insure all customer requirements are carried out by the courier, even if the courier agreed to the requirements at the time his/her services were engaged.

However, the courier company's right to insure customer requirements are carried out by the courier regarding security and appearance of vehicle, delivery and pickup times, shipment integrity, compliance with governmental regulations, and general standards of conduct is a reasonable business practice. This is not an indication of control over the courier's services.

- 7) The courier company prohibits the courier from participating in the process of resolving customer complaints.
- 8) The courier is required to display courier company name or customer name on the vehicle at all times, even when not on an assignment.
- 9) Manifests are provided free of charge by the courier company.
- 10) The courier is required to keep in communication with the courier company while on route for purposes beyond relaying information from the courier company customer to the courier, or beyond the courier company's customer request regarding the status of delivery.
- 11) The courier company provides substitute or replacement drivers.
- 12) The courier company requires attendance at training or orientation sessions for issues other than those required by governmental agencies, or on subjects such as:

- a. Use of the communication equipment
  - b. The proper completion of paperwork
  - c. The courier company's customer policies and/or procedures
- 13) The courier company restricts the courier from performing courier service for any customer of the courier company upon termination of the relationship between the parties.
- 14) The courier is required to wear, without compensation, a courier company badge, ID, uniform or attire other than as necessary for security purposes, and only while an assignment.
- 15) The courier is required to perform services personally.

### **Neutral Factors**

Factors that neither point to an independent contractor status nor an employment relationship are:

- 1) The courier is only required to wear a uniform, attire, and/or identification with the courier company logo for the limited purposes of security, and only while the security need is present.
- 2) The courier is required to carry a courier company badge or other identification for security purposes, and only while the security need is present.
- 3) The courier company or its third party agent interviews or screens prospective couriers by performing background checks and verification for compliance with state and federal laws, rules, and regulations prior to issuing assignments.
- 4) The courier is paid by the courier company for the delivery, even if the delivery did not meet the standards or parameters of the courier company's customer.
- 5) The courier is required to keep in contact with the courier company while on route for purposes of relaying information from the courier company's customer to the courier, or for purposes of confirming with the courier company's customer its adherence to the pickup and delivery time frame.
- 6) The frequency, sequence, time frame, or delivery instructions/regulations of the route are established by the courier company's customer.
- 7) The courier is required to report daily to a distribution center to initiate the day's assignments.
- 8) The courier is required by the courier company to attend training or orientation sessions for issues mandated by governmental agencies (such as OSHA or the Transportation Security Administration), or on subjects such as proper completion of paperwork, or courier company customer policies and/or procedures.
- 9) The courier may be restricted by the courier company's customer from performing delivery services for others while on route for the customer for reasons established by the customer, such as a concern for security or identity theft of customer's product, or product integrity of the customer's goods.

- 10) The courier may be required to obtain a “dba” or a Federal Employer Identification Number as a condition of obtaining assignments.
- 11) The courier and the courier company jointly resolve customer complaints.
- 12) The courier company is responsible for customer billing and collecting.
- 13) The courier is required to sign a Non-Disclosure Agreement (NDA). The purpose of such an agreement is to protect the courier company’s confidential information, including but not limited to, clients, addresses, billing rates, and contact names and telephone numbers.
- 14) The courier company’s customer or third party provides manifests.
- 15) The courier company’s customer may provide special containers required for delivery/pickup of the customer’s product.
- 16) The courier may be required to be responsible to load or unload the vehicle at a distribution center, and may perform other routine functions normally associated with the delivery of the product, such as the boxing of the product.

### **Bike and Foot Messengers**

Within the messenger industry, it is standard practice that bike and foot messengers (messengers) are considered to be employees of the messenger company providing delivery services to its customers. It is also the custom that bike messengers provide and maintain their own:

- Bike
- Bag
- Lock
- Helmet
- Map
- Clipboard
- Cycling clothing
- Mobile communication devices

The working relationship between messengers and the messenger company using their delivery services for its customers contains significant common law indicators of an employment relationship:

- 1) The messenger company makes standard withholding deductions from the messenger’s earnings.
- 2) The messenger company may provide fringe benefits to the messenger.
- 3) The messenger company sets the rate of pay, which is normally based on the higher of an hourly rate or fee basis.
- 4) The messenger company sets the work schedule.
- 5) The messenger company requires the services to be performed personally, and the messenger is not able to provide his/her own substitute.

- 6) The messenger company covers the messenger under the company's Workers' Compensation policy.
- 7) The messenger company sets the order and priority of delivery.
- 8) The messenger company requires the messenger to accept an assignment.
- 9) The messenger company requires the messenger to follow all company rules and regulations.