

The Insurance Federation of Pennsylvania, Inc.
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April 16, 2015

To: The Honorable Members of the House Labor and Industry Committee

From: Samuel R. Marshall

Re: HB 1781 – a constructive approach to the ongoing problem of distinguishing between an independent contractor and an employee

Here we are again: We have a well-chronicled, persistent and growing problem in our workers compensation system, one that has been around for a number of years and gets sporadic legislative and regulatory attention but not the conclusive action it merits – and meanwhile, the ramifications on the Commonwealth and the difficulties for injured workers grow.

And we have a bill that directly addresses the problem, not by allowing unilateral actions by any private party, but through a process run by the Department of Labor and Industry.

This time, the problem is the ongoing uncertainty of whether an individual is an employee or an independent contractor for purposes of coverage under the Workers Compensation Act.

If you are in this business, you've heard the phrase: "Everyone is an independent contractor until just before they get hurt – then they are an employee." When that happens, the claim may go to the employer's insurance policy, or it may go to the Uninsured Employer Guaranty Fund, one reason that Fund continues to see more claims and continues to need more money – and it may invite protracted and costly litigation.

That uncertainty – is a worker an independent contractor or an employee - isn't fair to anyone. The challenge is better addressing it up front, not after an injury, by making sure the individual and the employer understand the relation they have for workers compensation purposes at the outset, not only after an injury.

We support Representative Keller's bill as a solid step in doing that. It allows the employer and the individual to agree up front on what their relation is, and what that means in terms of workers compensation rights and obligations. It also allows the individual to back out of the agreement at any time.

That's really what the registration established in the bill is – an agreement between an individual and employer at the outset setting forth what both parties understand and agree to be the status of their relation and what that means for workers compensation purposes.

The bill is clear in requiring this be a knowledgeable, informed and arms-length agreement – both through the bill's own terms, and in requiring that the form, and the waiver and affidavit from the individual, be as prescribed by the Department.

The bill is also clear in allowing the individual to back out at any time.

We're sensitive to unrealistic burdens on the regulatory process, so we're interested in ways to make this registration process more efficient, and we welcome the Department's input. But we're seeing the cost of this uncertainty grow every year – so while this bill may impose some new expenses and responsibilities on the Department, we are confident that will be greatly outweighed by a reduction in claims to the UEGF and other savings to the system, as with reduced litigation.

Normally, we point out that a bill is only as good as it is understood and followed by the affected parties. That shouldn't be a problem here: Employers and individuals both know this issue well, and neither side will be confused by this registration requirement.

But here, the bill will also only be as good as it is enforced and followed by workers comp judges and the courts. You may find a scenario where an employer and an individual have filed a registration, with the proper waiver and affidavit, but a judge or court may nonetheless find the individual was acting as an employee at the time of injury and therefore find that the individual is entitled to workers comp benefits despite the registration.

We think the bill is strong on that, expressly stating that an individual covered under a properly executed and filed registration "is not entitled to benefits under this act from the person." There may be ways to strengthen that, as with also stating that the individual is not entitled to benefits from the UEGF and is barred from filing a claim under the act.

As with that other problem we referred to at the outset, we close with a request for those who oppose this: If you object to this solution, what do you recommend? You can't say there isn't a problem, or it doesn't merit a solution: Look at the challenges the UEGF's financial woes are creating; more important, look at the uncertainty an injured worker faces, when he might have been prudent to get his own insurance coverage at the outset rather than hope he can qualify as an employee if injured.

As we have said with the other problem, we are willing to work with any and all parties interested in solving this. We'll confess to being wary, though. Let's all work to solve the problem, not allow it to be ignored or delayed.

Thank you for the chance to be part of this, and we're happy to answer any questions.