



Pennsylvania Compensation Rating Bureau

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Summary of Testimony – HB 1781 April 16, 2018

Pennsylvania Compensation Rating Bureau (PCR B) William V. Taylor, President

Introduction: The PCR B is the licensed rating organization for workers compensation business, other than Coal Mine coverages, in the Commonwealth of Pennsylvania, and has served in that role since 1915. PCR B is a non-profit, private corporation supported by members comprised of all insurers licensed to underwrite workers compensation insurance in Pennsylvania, including the State Workers Insurance Fund. PCR B makes annual rating value filings with the Pennsylvania Insurance Department and, subject to regulation and approval by the Department, PCR B maintains uniform classification and experience rating plans as well as rules and parameters associated with various other mandatory and optional pricing programs. PCR B has approximately 112 employees, the substantial majority of which are located in the Bureau's offices in Philadelphia.

Background: "Independent Contractors", as distinguished from "employees" are not subject to coverage provisions of Pennsylvania's Workers Compensation Act. As such, independent contractors would presumably not be required to obtain insurance, they would not be included in the payroll exposure base of any entity or entities with which they do business, and they would not be eligible for workers compensation benefits if and when they were injured or taken ill in the course of their business endeavors. However, when disputes have arisen (most commonly in the context of someone who has been injured attempting after-the-fact to secure workers compensation benefits), the prevailing criteria used to differentiate between independent contractor status and that of an "employee" has been the right of direction and control over the work done by the person in question. If and when the right of direction and control lies with the entity for which work is being done, courts find that the injured person was an employee of the entity being served. Where no right of direction and control is found to reside with the entity being served, courts find the injured person to be an independent contractor.

In essence, it is not "what" someone is doing as much as "how" they are doing it that determines who may be an employee and who may be an independent contractor. In fact, case law includes instances in which general practices of the person seeking benefits have been acknowledged to be consistent with the status of "independent contractor" but specific circumstances noted in close proximity to the moment of injury were determined to have vested short-term right of direction and control over the injured party by the entity for which work was being done, leading to a finding of employee status and eligibility for benefits. This transitory nature of the legal test makes it impossible to preordain who will be employees and/or independent contractors in their future endeavors, and raises the prospect that some individuals may move rather fluidly between these statuses as time, projects and/or assignments undertaken and related conditions change.

Insurance carriers, being mindful (sometimes from first-hand experience) of the liability that can emanate from activities of individuals perceived by their insured risks as “independent contractors” have increasingly taken the approach that such persons not possessed of their own certificate of workers compensation insurance are presumptively “employees”, and have included payments to such persons as part of the payroll basis for workers compensation premium determinations. These decisions typically happen at audit, after the expiration of the policy, and can impose large, unexpected and disputed additional premium amounts.

In PCRB’s view, the issue is the ongoing uncertainty about who is eligible for benefits (and should thus be covered under an applicable commercial workers compensation insurance policy or an approved self-insurance plan) and who is not eligible for benefits (and should thus NOT be covered under an applicable commercial workers compensation insurance policy or an approved self-insurance plan). It is worthwhile noting that the problems briefly mentioned above are not limited to Pennsylvania, but rather attend almost every workers’ compensation jurisdiction to some degree. PCRB knows of no jurisdiction that has applied a construct or solution embraced without controversy or exception as having fully and fairly resolved the disputes and ambiguities which abound in this area.

Potential Solutions: For additional perspective, PCRB has previously considered the question of independent contractor status, and has identified four potential conceptual approaches to improving the clarity and certainty of the system with respect to the above issues. Very briefly, those alternatives have been:

- “All In” – In this system, independent contractors would be defined to be subject to mandatory provisions of the Workers’ Compensation Act and the entity or entities for which such individual perform services would be obliged to provide workers compensation insurance or benefits for them. No election out of this mandatory coverage would be allowed.
- “All In with Option to Elect Out” – Here the starting point is the system described above, but the difference is that individuals may elect out of coverage using forms and procedures provided and overseen by a regulatory agency such as the Department of Labor & Industry, or they may provide their own workers’ compensation coverage by purchasing a policy in their own name.
- “All Out with Option to Elect In” – This approach would define independent contractors as not being subject to the Workers Compensation Act, but would allow them to elect coverage using forms and procedures provided and overseen by a regulatory agency such as the Department of Labor & Industry and provided that they concurrently purchase insurance in their own name.
- “All Out” – In this method the Workers Compensation Act would exclude independent contractors without exception or the option to obtain coverage.

Each of the above approaches would have perceived strengths and weaknesses, discussion of which would exceed the time available for today’s hearing. PCRB has

some narrative materials prepared with respect to these issues that we would provide to the Committee upon request.

HB 1781: In reading HB 1781 PCRB has identified a number of observations, considerations and/or comments that may be of interest to the Committee. These are briefly summarized below:

- HB 1781 introduces the concept of registration as independent contractor, a variation on the approach mentioned above - "All Out with Option to Elect In." This concept does provide a means of addressing arrangements where parties agree to an independent contractor status (voluntary election or "Election In"). However, since this approach is not all inclusive or mandatory in the marketplace, the remaining system still retains the current drawbacks that presently exist.
- HB 1781 introduces a voluntary process of registration as independent contractor. If instead it was a mandatory registration process and required for any and all independent contractors, perhaps its impact and effectiveness would be complete and better justified. This approach is in essence the model noted above as "All Out with Option to Elect In." However, if an approach of this nature were instituted it would greatly impact and/or void the provisions of the independent contractor tests established by Act 72.
- There are those in the business community that endorse this registration concept for reasons already stated today. However, others from this community are opposed for various reasons such as: negative impact on small businesses where larger businesses with these arrangements are able to marginalize their ability to compete; reduced state revenue from payroll taxes; added bureaucracy to administer and/or participate in a registration system; and a lack of injury protection for the uninsured.
- An insurance industry concern, with the growth of independent contractors, is a certain unknown about the amount of erosion to workers compensation premiums. It is unclear if the offsetting benefit of undisputed claims handling, with this type of registration, would balance the premium erosion.
- Subsequent to the passage of Act 72, the PCRB has taken a limited role in the ongoing issue of determining the status of independent contractor vs. employee. Following the adoption of Act 72, the PCRB instituted language, shown below, that was filed and approved by the PA Insurance Department. This language currently resides in the PA Manual. The language illustrates the "neutrality" of the PCRB's limited role in the determination of independent contractor status and the resulting premium collection question. As a result, any change in procedure, like adoption of HB 1781, will result in adjustment by PCRB on internal procedures, modified rules and test audit processes as necessary. As a result, we ultimately defer to the carrier community's analysis, adjudication and ultimate preference on this matter.

- Separate from the merits of HB 1781, there is a concern expressed by PCRB's test audit staff on what role the PCRB would play in tracking these registrations and resolving any associated disputes. .
- Application of HB 1781 turns in part on the extent to which principals or officers are common between employers that have, and other employers that have not, run afoul of provisions of the Act. Discovery of these relationships, which PCRB deals with continuously as part of its administration of the uniform Experience Rating Plan for workers compensation insurance, is often tedious and time-consuming for us.
- At the point of implementation, this legislation would place impacted Pennsylvania workers compensation policies into a "prior" portion (during which these provisions would not apply) and a "subsequent" portion (during which they would apply). This would unavoidably present some auditing and reporting of exposures issues that would ease somewhat in subsequent years.
- There appears to be a bigger picture developing around the country regarding the independent contractor issue. There are opinions emerging that there are public policy issues stemming from the encouragement of the independent contractor status. These groups are stressing caution on moving too quickly with legislative changes. Trends confirm and indicate a significant growth in this area with the "GIG Economy" as a driving factor in this growth. For purposes of this report, it is important to define "GIG Economy," which is as follows: "A **gig economy** is an environment in which temporary positions are common and organizations contract with independent workers for short-term engagements. The trend toward a **gig economy** has begun. A study by Intuit predicted that by 2020, 40 percent of American workers would be independent contractors."
- There are a number of states that have recently enacted "GIG Economy" oriented legislation which permits and fosters independent contractor status. There are many who oppose this trend indicating that it creates a void and lacks a proper safety net for workers in this status that are unable to obtain or secure proper protections for their work exposure. Georgia recently debated such legislation and information is provided with this testimony as addendum article(s) for context and referencing purposes. HB 1781 could be viewed as another means of encouraging or forcing independent contractor status where it may not have been otherwise. However, there is an important difference with HB 1781 versus other "GIG Economy" legislations in that the registration process provides greater transparency and sheds light on a specific independent contractor arrangement.
- An excellent source of information on this topic comes from two very compelling studies. One is regarding the On-Demand Economy (another term used for the GIG Economy) and the other is about costs associated with Independent Contractors. These studies were conducted in 2015 by the National Employment Law Project. The reports are available as follows:
<http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf>.
<http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf>

- The continued issue surrounding the independent contractor is one of protections for the worker and fairness to the employer and the insurance community. This legislation, HB 1781, addresses the issue of fairness for the marketplace and the insurance community, a step in the right direction from those perspectives. Employers have needed a better, tighter mechanism to address, identify and document justified independent contractors. Additionally, the insurance industry has shouldered abuses in the system due to a lack of transparency and in some cases fraud. This legislation would provide a mechanism for those willing to be transparent (those who perhaps were never the culprits in abuse anyway). Although it appears to be a step in the right direction, it still fails to address the issues of those who are abusing the system and not coming forth transparently. This missing aspect seems to be reflective in the debate surfacing with the emergent GIG Economy. Legislation perhaps needs to offer a comprehensive and complete solution that would appropriately address and provide solutions for all stakeholders.

PCRB would be happy to attempt to provide responses to questions that interested parties may have about the above commentary, and appreciates the opportunity to participate in today's meeting.

Language from the PA Manual, via PCRB

Section 2 – General Auditing & Classification Information

INDEPENDENT CONTRACTOR, OWNER/OPERATOR OR EMPLOYEE

Determinations of Premium Obligations Where Questions of Workers' Compensation Coverage Status Arise

Questions involving whether a person is an independent contractor, owner/operator or employee fall into an area of law for which consideration of many factors is potentially required in order to consider their entitlement to workers' compensation benefits. The Pennsylvania Compensation Rating Bureau (PCRB) does not make and has no authority to make determinations regarding the entitlement of any person(s) to workers' compensation benefits arising out of the course of activities related to any business or other entity, whether any such person has or has not been injured in the course of such activity. However, the PCRB will exercise authority over the issue of whether or not premiums are due for an individual(s) whose workers' compensation coverage status is questioned. This authority is different from finding independent contractor, owner/operator or employee status and is also different from establishing eligibility/ineligibility for benefits arising out of an accident or disease that has occurred or may occur, determinations which the PCRB specifically cannot render. The PCRB's procedure in making determinations regarding premium obligations is as follows:

A carrier insuring an entity to which a sole proprietor, partner, corporate officer or LLC member provides services as a subcontractor may not collect premium from the insured entity for that subcontractor if the subcontractor has or had a standard workers' compensation insurance policy covering the subcontractor for the entire period during which services were provided.

Further, a carrier insuring an entity to which a person provides services as a subcontractor may not collect premium for that person if the subcontractor is working in the capacity of an officer of a corporation in providing such services and has executed a written election not to be subject to the Workers' Compensation Act.

A carrier insuring an entity to which a person provides services as a subcontractor which does not meet either of the above criteria precluding collection of premium may either waive or collect premium from the insured entity for that subcontractor. Carrier decisions to waive or collect premium in such instances may consider a variety of factors, such as but not necessarily including or limited to the right of direction and control of the subcontractor by the entity to which services are provided, whether or not the subcontractor maintains general liability insurance coverage applicable to the services being provided or the possibility that the subcontractor may have additional workers. Carrier decisions in such regard are not subject to review by the PCRB.

Article Addendum Independent Contractor and GIG Economy Legislation example

Georgia Set to Become the Seventh State With 'Gig Economy' Law

Tuesday, March 27, 2018 --- © 2018 WorkCompCentral - Workers Compensation Information

The state Senate as early as today could pass a bill that would make Georgia the seventh state this year to approve “gig economy” laws that classify thousands of workers as independent contractors — not employees — of online marketplace platforms.

The Georgia legislative session ends Thursday night, and supporters and opponents have been marshaling forces on both sides this week.

“We’re against it,” said Yvonne Robinson, secretary-treasurer of the Georgia AFL-CIO, which launched an email and social media campaign this week to urge members to contact their legislators. “This will further rig the economy against working families and favor the interests of millionaire and billionaire corporations.”

HB 789, which passed the House 102-66 last month, is similar to bills that easily have passed in Indiana, Utah, Kentucky, Tennessee, Florida and Iowa. They were all introduced at the request of Handy Technologies, which runs an online site and mobile app that connects workers with customers needing handyman, landscaping and housecleaning services.

“This is something to encourage these online companies to come and expand in Georgia to give our citizens more choices,” the bill’s sponsor, state Rep. Barry Fleming, R-Harlem, told WABE, the Atlanta public radio station.

Labor groups and some Democratic lawmakers have charged that the legislation could spark a rush by companies all over the country to set up similar platforms and re-label workers as independent contractors. That would exclude workers from traditional protections such as workers’ compensation and could undermine the system over time, critics said.

“This would mean that all these workers would have no safety net, no workers’ comp and no health insurance,” Robinson said.

With fewer companies paying into the workers’ compensation system every year, it could also spell trouble for insurance carriers down the line, some analysts have argued.

“We are still evaluating the possible impact on workers’ compensation systems and whether there may be unintended consequences to the legislation,” said Trey Gillespie, assistant vice president at the Property Casualty Insurers Association of America.

Lawmakers have said the legislation was requested by Handy after several lawsuits against the platform, against the ride-service apps Uber and Lyft, and against the food-delivery platform Grubhub. The suits have argued that the companies misclassify workers as independent contractors and skirt insurance and tax requirements.

A California class-action suit, Robin Easton v. Handy Technologies, settled earlier this year, and Handy agreed to pay former workers, pay fines to the state and pay more than \$400,000 in attorneys’ fees.

In *Lawson v. Grubhub*, a federal judge in the Northern District of California ruled in February that a delivery driver, an aspiring actor, was, in fact, an independent contractor. But Judge Jacqueline Corley also appeared to lament the fact that there was no third category, perhaps something between employee and contractor.

"With the advent of the gig economy, and the creation of a low-wage workforce performing low-skill but highly flexible episodic jobs, the Legislature may want to address this stark dichotomy," the judge wrote in her ruling.

To help clear up the confusion and preclude further litigation, Handy targeted Republican-controlled legislatures in eight states and has had remarkable success in winning bills that clarify that on-demand platform workers are not employees.

Tennessee's and Iowa's bills are awaiting their governors' signatures. A bill in Colorado passed the state Senate and is now in the House.

"What is ultimately a better business decision? To try to change the law in a way that you think works for your platform, or to make sure your platform fits into the existing law?" Bradley Tusk, whose firm represents Handy, told [CNN](#) earlier this month.

Georgia's bill, like those in the other six states, states it plainly: "The marketplace contractors performing services arranged through the marketplace platform's digital network are independent contractors and are not agents or employees of the marketplace platform."

The bill makes it clear that workers and the platform company would have to agree in writing that the worker is an independent contractor, that the platform could not unilaterally prescribe hours to be available for work and could not prohibit the worker from using other marketplace platforms.

The bill would not apply to workers for state or local government, nonprofit organizations or freight transportation companies.

"Legislators in Georgia and across the country are supporting legislation that focuses on creating a clear test for worker classification in the on-demand sector because this sector is not going away — it is the future," Handy's general counsel, Brian Miller, told WorkCompCentral. "By providing a clear, objective framework for everyone to follow, bills like this will bring much-needed clarity to the law and enable the on-demand economy to continue to grow, innovate and bring new income opportunities to millions of Americans."

At least one analyst said any potential drain on the workers' compensation system in Georgia and the other six states with similar laws may be short-lived.

"My sense is this is not going to last," said Joe Paduda, co-owner of CompPharma, a consortium of pharmacy benefit managers. "From an insurance perspective, group health and individual health insurers are going to rebel and stop covering occupational injuries, placing these workers in some sort of limbo. Thus, while these workers may be 'contractors,' the entities they work for may have to figure out how to attract workers who are going to be completely at risk for any accidents."

Ultimately, without workers' compensation, many injured workers will be forced to the emergency room for more expensive care, Paduda said. "So, someone is going to pay, and this is just cost-shifting to the taxpayer. Thus, I don't see it as sustainable."

'Handy' Bill runs out of time in Senate

Monday, April 2, 2018 --- © 2018 WorkCompCentral - Workers Compensation Information

A bill that would have made Georgia the seventh state this year to adopt a law that classifies marketplace platform workers as independent contractors died a quiet death in the state Senate Thursday night.

Supporters and opponents of the bill, known as the "gig economy" bill, had expected it to pass after it had cleared the House by a wide margin last month. But state law dictated that the legislative session had to end at midnight Thursday, and with dozens of other bills on the floor, lawmakers ran out of time.

HB 789 was requested by Handy Technologies, an online and mobile app platform that connects customers with local handymen, cleaning crews and landscapers. Six other states have passed very similar laws, which aim to preclude legal challenges that contend the workers should be considered employees.

As independent contractors, hundreds of workers would be excluded from the workers' compensation system, critics have said.

Colorado's legislature is the last state of eight this year to consider the legislation. SB18-171 passed the Senate and is now in the House Judiciary Committee. The Colorado legislative session ends May 9.

**PA House Labor & Industry Committee
PCRB Hearing Testimony on HB 1781 – 4/16/18**

Good afternoon. Chairman Kauffman, Representatives Galloway and Keller, and distinguished members of the Committee, on behalf of the Pennsylvania Compensation Rating Bureau (PCRB), I appreciate the opportunity to provide this oral and written testimony on HB 1781 regarding the merits on registration of independent contractors.

By way of brief background, the PCRB is the licensed rating organization for workers compensation insurance in the State of Pennsylvania.

We've heard much background thus far on independent contractors, so I will attempt not to cover the same territory. We can say that "Independent Contractors", are distinguished from "employees" are not subject to coverage provisions of Pennsylvania's Workers Compensation Act.

Thus they would presumably not be required to obtain insurance, they would not be included in the payroll exposure base of any entity or entities with which they do business, and they would not be eligible for workers compensation benefits if and when they were injured or taken ill in the course of their business endeavors.

And as a result, disputes have arisen, primarily on the issue on whether direction and control lies with the entity for which work is being done

In essence, it is not "what" someone is doing as much as "how" they are doing it that determines who may be an employee and who may be an independent contractor.

Insurance carriers, being mindful (sometimes from first-hand experience) of the liability that can emanate from activities of individuals perceived by their insured risks as "independent contractors" have increasingly taken the approach that such persons not possessed of their own certificate of workers compensation insurance are presumptively "employees", and have included payments to such persons as part of the payroll basis for workers compensation premium determinations. These decisions typically happen at audit, after the expiration of the policy, and can impose large, unexpected and disputed additional premium amounts.

The result is the issue of ongoing uncertainty about who is eligible for benefits and who is not eligible for benefits

States and the Federal government have applied a variety of approaches to deal with the independent contractor issue. However, PCRB knows of no jurisdiction that has applied a construct or solution embraced without controversy or exception as having

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fully and fairly resolved the disputes and ambiguities which abound in this area. It is not for a lack of trying. Misclassification is serious, has consequences, and is often fraud.

PCRB has previously considered the question of independent contractor status, and has identified four potential conceptual approaches

- “All In” – independent contractors would be defined to be subject to mandatory provisions (our neighboring state of DE uses this approach)
- “All In with Option to Elect Out”
- “All Out with Option to Elect In”
- “All Out”

Each of these approaches would have perceived strengths and weaknesses,

Regarding HB 17818, PCRB has identified a number of neutral observations (as we neither endorse nor oppose the legislation, but simply offer our pro & con observations), and they are briefly stated as follows:

- HB 1781 introduces the concept of registration as independent contractor, a variation on the approach just mentioned - “All Out with Option to Elect In.”
- The Bill introduces a voluntary process of registration as independent contractor. If instead it was a mandatory registration process and required for any and all independent contractors, perhaps its impact and effectiveness would be complete and better justified.
- It would impact and/or void the provisions of the independent contractor tests established by Act 72 in 2015 for the construction industry.
- Reasons why the business community may oppose this are: 1) negative impact on small businesses where larger businesses with these arrangements are able to marginalize their ability to compete; 2) reduced state revenue from payroll taxes; 3) added bureaucracy to administer and/or participate in a registration system; 4) lack of injury protection for the uninsured, and 5) loss of exclusive remedy provision for the employer.
- A reason why the insurance industry may have opposition if from the unknown amount of erosion to workers compensation premiums. It is unclear if the offsetting benefit of undisputed claims handling, with this type of registration, would balance the premium erosion.

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- Following the adoption of Act 72, the PCRB instituted language regarding the handling of independent contractors. This language is in the PA Manual. The language illustrates the “neutrality” of the PCRB’s limited role in the determination of independent contractor status and the resulting premium collection question. As a result, any change in procedure, like adoption of HB 1781, will result in adjustment by PCRB on internal procedures, modified rules and test audit processes as necessary. PCRB ultimately defers to the carrier community’s analysis, adjudication and ultimate preference on this matter.
- There is also concern expressed by PCRB’s test audit staff on what role the PCRB would play in tracking these registrations and resolving any associated disputes.
- Discovery of independent contractor relationships that have run afoul, which PCRB deals with continuously as part of its administration of the uniform Experience Rating Plan for workers compensation insurance, is often tedious and time-consuming for us.
- Perhaps of growing importance is the bigger picture developing around the country regarding the independent contractor issue. There are opinions emerging that there are public policy issues stemming from the encouragement of the independent contractor status. These groups are stressing caution on moving too quickly with legislative changes. Trends confirm and indicate a significant growth in this area with the “GIG Economy” as a driving factor in this growth.
- To define, a quote, “A **gig economy** is an environment in which temporary positions are common and organizations contract with independent workers for short-term engagements. The trend toward a **gig economy** has begun. A study by Intuit predicted that by 2020, 40 percent of American workers would be independent contractors.” (end quote)
- A number of states have recently enacted “GIG Economy” oriented legislation which permits and fosters independent contractor status. These are likely not be registered independent contractors. A recent GA legislation article on this topic is provided in the written testimony.
- HB 1781 could be viewed as another means of encouraging or forcing independent contractor status where it may not have been otherwise.

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- For additional insight, PCRB's written testimony provides reference to two very compelling studies. One is regarding the On-Demand Economy (another term used for the GIG Economy) and the other is about costs associated with Independent Contractors. These studies were conducted in 2015 by the National Employment Law Project.

In conclusion

The continued issue surrounding the independent contractor is one of protections for the worker and fairness to the employer and the insurance community. This legislation, HB 1781, addresses the issue of fairness for the marketplace and the insurance community, a step in the right direction from those perspectives. Employers have needed a better, tighter mechanism to address, identify and document justified and legitimate independent contractors. Additionally, the insurance industry has shouldered abuses in the system due to a lack of transparency and in some cases fraud. This legislation would provide a mechanism for those willing to be transparent (unlikely culprits in this abuse anyway). Although it appears to be a step in the right direction, it still fails to address the issues of those who are abusing the system and not coming forth transparently. This missing aspect seems to be reflective in the debate surfacing with the emergent GIG Economy. Legislation perhaps needs to offer a more comprehensive and complete solution that would appropriately address and provide long range solutions for all stakeholders.