



June 4, 2010

VIA E-MAIL [TWINEGLASS@LCB.STATE.NV.US]

Honorable Shirley A. Breeden, Chair
Legislative Commission's Subcommittee to Study Employee Misclassification
c/o Nevada Senate
401 S. Carson Street
Carson City, NV 89701

RE: Senate Concurrent Resolution 26, File No. 100, Statutes of Nevada 2009

Dear Senator Breeden:

In reference to the upcoming June 10, 2010 meeting of the Legislative Commission's Subcommittee to Study Employee Misclassification (Senate Concurrent Resolution No. 26, File No. 100, Statutes of Nevada 2009), FedEx is providing your Subcommittee with written comments for your consideration (see the attached document).

Per instructions from Tracey Wineglass, Senior Research Secretary, these written comments were emailed to Tracey for delivery to your Subcommittee.

Thank you, in advance, for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Mike Yadon". The signature is written in a cursive, flowing style.

Mike Yadon
Senior State and Local Government Affairs Representative

cc: Linda J. Eissmann, Principal Research Analyst
Tracey Wineglass, Senior Research Secretary

EXHIBIT B - EMPMISCLASS
Document consists of 6 pages.
Entire exhibit provided.
Meeting Date: 06-10-10

Public Comment :

Provided by Mike Yadon, Senior State and
Local Government Affairs Representative,
FedEx Corporation

**STATEMENT OF
FEDEX CORPORATION
BEFORE THE
NEVADA LEGISLATIVE COMMISSION'S
SUBCOMMITTEE TO STUDY EMPLOYEE MISCLASSIFICATION
JUNE 10, 2010**

On behalf of FedEx, we thank the Nevada Legislative Commission Subcommittee to Study Employee Misclassification for the opportunity to comment in reference to 2009 S.C.R. 26.

It is our understanding that you are charged with determining the scope of the problem of employee misclassification in Nevada, including: 1) ramifications in terms of economic losses for employees and lost revenues for state and local governments; 2) proposals for state processes to identify employee misclassification; 3) potential penalties for employers engaging in employee misclassification; and 4) legal recourse for affected employees. At the conclusion of your hearings, your Commission must then submit a report of the results of the study and any recommendations for legislation to the Nevada Legislature.

It is our intent to respond to S.C.R. 26 and your efforts to probe the issue of employee misclassification in Nevada, but also to address previous comments and testimony provided in prior Subcommittee hearings making specific reference to FedEx Ground and its use of this entrepreneurial independent contractor (IC) model, as well as your Subcommittee's interest in looking to Colorado House Bill (HB) 1310 as potential model legislation from which legislation may be crafted for use by the Nevada Legislature.

FedEx in Nevada

The FedEx family of companies is privileged to employ 1,540 employees in Nevada. Additionally, FedEx Ground in Nevada currently contracts with 109 independent contractors/business owners who support our goods movement network by providing ground pickup and delivery services for nearly 8 million small packages a year in Nevada. These men and women are independent small business owners who manage and operate their own business, own their work areas, and hire their own employees as they choose. They currently deploy a workforce of more than 300 drivers, helpers and other staff in the state.

FedEx is consistently ranked among the world's most admired and trusted companies. FedEx and its more than 280,000 employees and contractors are proud of their commitment to safety, the highest ethical and professional standards and the needs of their customers and communities.

Appropriate Use of Independent Contractors by FedEx Ground

It is unfortunate that your Subcommittee hearings have previously been used as a forum by, among others, the Teamsters and UPS, for presenting misinformation and misleading allegations of misclassification by one of our operating companies, FedEx Ground. We do not believe it was/is your Subcommittee's intent to allow your hearings to serve such a purpose.

To provide you with a more accurate and current perspective of FedEx Ground and its use of the entrepreneurial independent contractor (IC) business model, please allow us to share some facts and recent news about FedEx Ground and the contractors that provide essential pick-up and delivery services to FedEx Ground customers.

Independent contracting is a well-established practice in the transportation industry, especially as it relates to trucking. This past March, FedEx Ground celebrated its 25th anniversary of working with independent contractors. The company made the decision to adopt the independent contractor business model back in 1985, because we believed these entrepreneurial-minded business owners would help us deliver the most reliable, cost-effective service in a market that was about to become intensely competitive. We were right. As small business owners with a personal stake in our company's success, contractors have shown flexibility, drive and efficiency not often found in a traditional driver workforce. These factors were integral to successfully launching this company against a much larger competitor in UPS, and they remain essential competitive differentiators today as we continue to gain market share.

FedEx Ground independent contractors are small businesses, plain and simple. They use their own initiative and skills to manage and operate their businesses. They have a transferable, financial/ownership interest in the work areas they service. They also own the equipment they use to service their work areas. They choose and hire the employees that operate their equipment. And they supervise the employees they hire.

FedEx Ground independent contractors are not paid by the hour. They earn in proportion to how well they satisfy customers and how well they produce the results they have contracted to provide. In 2009, the highest earning contractor in Nevada brought in more than a million dollars in revenue and the average annual revenue of Nevada contractors was \$178,000.

Like millions of small business owners across the U.S., these contractors are responsible for paying federal, state and local taxes, as well as their own labor costs. They are also responsible for paying workers' compensation coverage on those they hire, unemployment insurance premiums, payroll taxes, disability insurance premiums, social security taxes, and the like.

FedEx Ground contractors voluntarily enter into an independent contractor relationship by signing an operating agreement that spells out the pick-up and delivery activities and service expectations to be performed in support of our network. Included in the agreement, importantly, is a requirement that each independent contractor comply with all federal, state and local laws, regulations and ordinances. In fact, failure to comply with this provision is a breach of contract and basis for contract termination. And FedEx has terminated for such breaches.

Recently, in response to concerns raised by several states, FedEx Ground announced new standards for all U.S. independent contractors with whom we do business. Going forward, all contractors renewing or entering into new operating agreements will be incorporated, registered and in good standing with the states in which they do business, ensure all personnel who provide services under the agreement are treated and properly reported as employees, and agree to provide proof of compliance upon request. While many contractors already satisfy these standards, we want to be sure all contractors with whom we do business take the necessary steps to protect their businesses within a rapidly changing legal, regulatory and legislative environment.

Correcting the Record

Fortunately for shippers and consumers, UPS and FedEx do not have the same business model, nor similar supporting truck networks.

While UPS uses a single truck network to serve both its air system for customers requiring time-sensitive expedited, overnight deliveries AND uses the same truck network to serve its ground delivery customers requiring deliveries within a specified multiple-day period, FedEx has separate operating companies with separate truck networks; one truck network (FedEx Express) that serves expedited, overnight, time-sensitive delivery customers and another truck network (FedEx Ground) that serves multiple-day delivery customers.

UPS claims that “painstaking control and coordination” are required for the UPS network to deliver time-sensitive, expedited, overnight service. For overnight express delivery, we couldn’t agree more. That is why FedEx Express uses employee couriers – not independent contractors – to provide its time-definite, expedited overnight pickup and delivery service.

On the other hand, FedEx Ground provides a “day-definite” ground delivery service that allows far more flexibility in how results are achieved. FedEx Ground independent contractors are free to determine the best manner and means at their disposal to meet their contractual obligations. There are no set start or finish times and no time clocks for contractors to punch. All so-called “controls” guiding contractor services are determined by government regulations and customer requirements, not FedEx Ground. The model enables contractors to use their ingenuity, drive and in-depth knowledge of their work areas to meet customer needs.

The result is a win-win-win situation for customers, contractors and the company. FedEx Ground and its contractors have worked together to deliver the industry’s fastest and most reliable service. In turn we’ve been rewarded by customers. Market share for FedEx Ground has grown steadily from nothing in 1985 to greater than 20%.

In the spirit of free enterprise and global competition, FedEx Ground chooses not to operate in the same manner as UPS and should be free to continue to differentiate its service from its chief competitor.

Lastly, it is important to note for the record two recent court rulings handed down last year – one in the D.C. Circuit Court of Appeals and another in Washington State Court – validating our long-standing position that FedEx Ground contractors are properly classified.

Existence of Laws, Regulations and Enforcement Mechanisms **Addressing Misclassification**

In reference to S.C.R. 26 and its intent to address employee misclassification in Nevada, we believe that sufficient remedies addressing misclassification already exist in current state and federal law. A similar point was also shared with your Subcommittee in a prior Subcommittee hearing by Nevada Labor Commissioner Michael Tanchek on January 22, 2010.

Federal and state agencies, including the Internal Revenue Service (IRS), the Nevada Office of the Labor Commissioner, as well as the Courts, already have extensive authority to address allegations of misclassification, including the ability to levy substantial fines and penalties, and award back wages and other compensation, damages and attorneys’ fees.

The potential of new and more severe legislation further addressing misclassification in Nevada would threaten the livelihood of this vital entrepreneurial business model in the state; and, if signed into law, would result in depriving the citizens of Nevada the opportunity to own, operate and grow a small business in the industry of their choosing.

The answer here is not to enact more onerous and business-discouraging misclassification legislation; the answer is to provide more resources to existing state agencies to address egregious and criminally-willful violators under existing state and federal laws.

Opposition to Proposed Use of Colorado HB09-1310 as Model for Legislation

In reference to your Subcommittee's interest in Colorado HB09-1310 as a basis for model Nevada legislation, FedEx would like to point out specific concerns with the Colorado legislation for your consideration.

As it was explained to Colorado legislators and Governor Bill Ritter in 2009, HB09-1310 threatens the livelihood of the independent contractor (IC) entrepreneurial business model in Colorado and, over time, will likely result in a unwarranted reduction in job/business opportunities within the state.

This bill created a new state program under the Colorado Department of Labor and Employment to address the misclassification of an employee as an independent contractor whereby ANY individual, organization or business, with or without direct standing or being directly harmed, can file a written complaint against another business or person claiming that someone is being misclassified as an independent contractor. In actuality, this bill created new mechanisms and incentives for alleging misclassification violations where sufficient remedies to address misclassification already existed in Colorado law.

FedEx opposed HB09-1310 for the following reasons:

1. Lacks adequate legal controls to discourage frivolous and/or false misclassification complaints and investigations - The threat of complaints filed by any individual, organization or business, with or without direct standing or being directly harmed, could unreasonably and unfairly deter the use of independent contractors as a fundamental entrepreneurial work force in Colorado. Additionally, the legislation does not provide an opportunity for the accused to respond to the allegations until after the Director initiates an investigation.
2. Provides a legislatively-created tool to discourage legitimate use of independent contractors – Without proper legal controls to discourage misuse of the new complaint process, the complaint process could be used by individuals, businesses or organizations to force legitimate IC entrepreneurs out of business, unduly coerce businesses to hire employees to perform specialized project work that is appropriately done by ICs in order to avoid malicious complaints, and/or target complaints filed against specific businesses/industries in order to unfairly force businesses/industries to restrict or eliminate their appropriate use of ICs.
3. Increases costs to government, businesses, and citizens – The legislation results in increased costs to government, businesses and citizens that now appropriately utilize independent contractors to address their specialized needs, as opposed to hiring

additional employees. This increase in costs impacts state and local bond-funded projects and federally-, state- and local-funded programs providing essential basic social and health services that currently utilize ICs to perform specialized services.

4. Current laws and enforcement authority exist to deter improper classifications – Federal and state agencies, including the Internal Revenue Service (IRS), the Colorado Department of Labor and Employment, as well as the Courts, already had extensive authority to address allegations of misclassification, including the ability to levy substantial fines and penalties, and award back wages and other compensation, damages and attorneys' fees.
5. Places unreasonable and unrealistic new mandates on the Department of Labor and Employment without new funding/resources to effectively meet the new mandates – The legislation requires the Director of the Division of Employment and Training within Department of Labor ("Director"), within 30 days of the receipt of a written complaint, to determine whether or not an investigation of the complaint is warranted and to notify the complainant that the investigation will be conducted. Upon conclusion of an investigation, the Director shall issue a written order and impose any appropriate taxes, interest and penalties. The Director shall also provide advisory opinions to requesting parties, publicize this new complaint process throughout the state, develop and provide a notice for use by employers about the program, and shall conduct a statewide study of the issue of employment misclassification and present the report to the Senate and House within two years.

Since the passage and implementation of HB09-1310, both FedEx and the Colorado Motor Carriers Association (CMCA) have continued to address serious concerns with the legislation and the implementation of the legislation by the Colorado Department of Labor and Employment (DOLE). In fact, it is the current position of the CMCA that the legislation has encouraged the DOLE to unfairly target the trucking industry and its use of the IC (owner-operator) model in Colorado, in spite of specific IC provisions in existing Colorado law that are intended to recognize the unique federal regulatory oversight provisions relating to the trucking industry and its long-standing use of independent owner-operators to support both intra- and interstate commerce.

Conclusion

FedEx appreciates the important work of this Subcommittee. We concur that properly classifying those who are employees and those working as independent contractors is essential to the fair treatment of employees, contractors, and the taxpayers of Nevada.

While no one should intentionally misclassify an employee as an independent contractor in order to avoid employment tax, workers' compensation insurance, unemployment insurance, employee wage and benefit, and other legal obligations, the solution is not to enact legislation to discourage the use of this entrepreneurial business model. To do so would only add to pressures driving businesses out of the state and would deprive our citizens of the right to own and grow their own business in the industry/career of their choosing; thereby, eliminating jobs in the state during the most bleak of recessionary times.

Thank you for consideration of these comments.