

**USING INDEPENDENT OWNER OPERATORS:
BEST PRACTICES IN THE MESSENGER COURIER
AND DELIVERY INDUSTRY**

The messenger courier and delivery industry is a vital sector of the transportation industry. By way of common practice, a courier is an individual or entity that provides pick up and delivery of goods for customers, transporting the goods in a motorized vehicle. A messenger provides similar services to customers, albeit via foot or bike delivery. While some companies use both messenger and courier delivery persons, this document identifies best practices solely with respect to courier operations. Courier operations are somewhat unique in that, unlike other sectors of the transportation industry, courier operations typically involve short turn-around, same-day delivery. While messenger courier operations traditionally involve intra-city or metropolitan area territories, broader intra and interstate operations are not uncommon, albeit typically regional in scope. Courier operations are usually (a) on-demand, (b) scheduled or routed deliveries, and (c) regional same day or overnight distribution and ad hoc deliveries.

All sectors of the transportation industry commonly utilize the services of independent contractors that own and operate, or hire drivers to operate equipment owned or leased by the independent contractor. Because of the unpredictable and cyclical nature of the courier industry, the typical business model of the courier industry relies heavily upon the outsourcing of pick up and deliveries to third-party independent contractor drivers. In turn, courier companies utilizing the services of independent contractors recognize that such independently established businesses must have the right to perform courier services for more than one courier company or other clients that the independent contractor obtains through its own initiative. In fact, it is not uncommon for some independent contractors to exercise this right. Because, however, independent contractors operate independent businesses, courier companies cannot control whether or to what extent the independent contractors choose to provide or not to provide services for others.

The common use of the services of independent contractor drivers by courier companies is well documented through surveys commissioned by the Messenger Courier Association of the Americas ("MCAA"), a national voice of the courier industry. Those surveys have, over time, consistently demonstrated that between 60 and 80 percent of courier and delivery companies utilize the services of independent contractor drivers to perform delivery services. Courier companies utilizing independent contractor drivers act in effect as an intermediary or a broker, marrying the delivery needs of customers with various independent contractors that are in the business of transporting goods for others.

As with any industry utilizing the services of independent contractors, their use by courier companies is often the subject of review by various state and federal regulatory authorities, particularly those charged with the administration of workers' compensation, unemployment tax and benefits and income tax. As such, it is essential for both the courier and delivery industry and those regulatory authorities to have available a set of "best practices" or "guidelines" describing the common components of the relationship of the parties that supports the independent contractor arrangement between courier companies and the independent contractor drivers. Unfortunately, because no two courier companies operate exactly alike, nor do independent contractor drivers establish their operations consistent with a particular business model, it is impossible to create a single set of such guidelines or best practices to which every courier company and independent contractor adheres. Nevertheless, through survey of its members, the MCAA has established certain criterion consistently present in both the contractual and operational relationship between courier companies and independent contractor drivers. Many of the criterion have been adopted by various states through statute, regulation or administrative agency guidelines used to establish the independent contractor status of individuals performing services for courier companies.

Whether couched in terms of best practices or industry guidelines, the following elements typify the independent contractor relationship between courier companies and independent contractor drivers performing services for such companies. Certainly, these factors in no way represent the universe of factors that may be utilized in a determination of independent contractor status, nor must all of the factors listed below be present in order to demonstrate the independent contractor status of the relationship between a courier company and an independent contractor driver. Instead, a predominance of the following factors is sufficient for a determination of independent contractor status:

- 1. The courier company is a common carrier.** Where required by state and/or federal law, the courier company for which the independent contractor performs services maintains intra or interstate common carrier authority issued by the state or states in which the courier company operates and/or the Federal Motor Carrier Safety Administration ("FMCSA"). In those states that are completely "deregulated" or that do not otherwise regulate courier companies, the courier companies yet fall under the state's definition of for-hire carrier.
- 2. The independent contractor and the courier company are parties to a written contract.** The relationship between the courier company and the independent contractor is contractual in nature and controlled through the terms of a written independent contractor agreement covering the provision of a motor vehicle and a driver to perform courier transportation services for the courier company. The independent

contractor agreement clearly describes the relationship of the parties as one of principal and independent contractor.

- 3. The independent contractor is paid per completed delivery.** The independent contractor is paid for his or her services on “deliveries accomplished,” commission or other work-sensitive basis, and not on an hourly or flat rate basis. The independent contractor is free to negotiate the rate or fees it will charge the courier company for delivery services.
- 4. The independent contractor is free to negotiate service fees.** The independent contractor is also not prohibited from renegotiating an established rate or fee as business needs dictate during any term of the written independent contractor agreement.
- 5. The independent contractor has a substantial investment in tools and equipment.** The independent contractor has a substantial investment in and provides all tools and equipment necessary to perform courier transportation services, including, but not limited to:
 - a. A motor vehicle owned or leased at a fair market rate by the independent contractor;
 - b. Mobile communication devices owned or leased at a fair market rate by the independent contractor including a mobile telephone, two-way radio and/or a paging device;
 - c. Uniforms, where required for security purposes by mutual customers of the courier company and the independent contractor;
 - d. Dollies or other devices to assist in the loading, unloading and delivery of materials.
- 6. The independent contractor is responsible for his or her expenses.** The independent contractor is solely responsible for all business expenses related to his or her operations, including, but not limited to:
 - a. Vehicle operating expenses including fuel, lubricants, tires, vehicles maintenance and repair.
 - b. Vehicle licensing or plating or any taxes or fees imposed upon the operation of the vehicle.
 - c. Auto liability and cargo insurance.
 - d. Occupational accident or workers' compensation insurance, as well as any other usual and customary business insurance coverages.

- e. Tolls, miscellaneous expenses and other expenses required to meet customer requirements.
7. **The independent contractor's services are not required to be exclusive.** The independent contractor is not required by contract or in fact to perform exclusive services for a courier company. At his or her prerogative, the independent contractor is free to obtain and accept assignments from others while under contract with a particular courier company.
 8. **The independent contractor is not provided training.** The courier company does not provide the independent contractor with training in the core functions necessary to perform service as a courier, but may provide general orientation to familiarize the independent contractor with procedural operations of the courier company and/or specific customer pick up or delivery characteristics, security issues, to comply with applicable federal, state or local laws, regulations, requirements or procedures.
 9. **Regular meeting attendance is not required of independent contractors.** The independent contractor is not required to attend frequent or regular meetings conducted by the courier company.
 10. **The independent contractor is free to establish routes.** After accepting offers of work, the independent contractor is free to establish his or her own routes and sequence or priority of pick ups and deliveries consistent with the pick up and delivery timeframes established by the mutual customers of the courier company and the independent contractors.
 11. **The independent contractor is not required to physically report to the courier company each day.** The independent contractor is not required to physically report to the courier company's place of business on a daily or regular basis and is free to set his or her own hours consistent with the ability to perform the services for which the individual has contracted. The independent contractor may contact the courier company to report that he or she is available for dispatch.
 12. **The independent contractor is not required to keep in constant contact with the courier company.** The independent contractor may contact the courier company upon pick up or delivery of material, but does so as a courtesy, as a means to obtain additional offers of work and/or to provide information for the courier company to bill the customer for the independent contractor's services. In some instances, for security purposes or otherwise, the customer may require the independent contractor to report his or her status during the course of a

delivery either by directly contacting the customer or having the status relayed to the customer through the courier company's dispatch.

- 13. The independent contractor is free to accept or reject delivery opportunities.** The independent contractor is not subject to “forced dispatch” and is free to accept or reject offers of work. The independent contractor is not penalized for rejecting such offers, but may ultimately be in breach of contract if the individual fails to perform the service for which he or she is contracted with the courier company.
- 14. The independent contractor is free to provide substitute drivers.** The independent contractor may provide a substitute driver or engage other independent contractors to perform services pursuant to the contract with the courier company so long as the substitute driver is qualified pursuant to regulatory driver qualification requirements (including, but not limited to, commercial drivers license (“CDL”), OSHA, TSA and/or state and federal motor carrier safety requirements), motor vehicle licensing, and/or requirements of the courier company with respect to, for example, drug testing, criminal background checks and insurance requirements.
- 15. The independent contractor displays the courier company's name on the vehicle as required by law.** The independent contractor may or may not display its business name and identification on the motor vehicle, but may be required to display the courier company name and operating authority number on the vehicle identified in the independent contractor agreement as required for customer security purposes or by local, state or federal regulatory authorities.
- 16. The independent contractor is paid based upon customer billing by the courier company.** The courier company is responsible for customer billing and collection and pays the independent contractor's negotiated rate from the collected billing or other agreed amount as set forth in the independent contractor agreement.
- 17. The independent contractor may wear uniforms for security purposes.** The independent contractor may wear a uniform or attire with the courier company logo or identification, or carry an identification badge or other identification as required by customers for security purposes while providing contracted courier transportation services.
- 18. The independent contractor is responsible for damages.** The independent contractor is responsible for any loss or damage incurred as a result of the actions of the independent contractor causing damage, injury or loss to a customer or third party. The independent contractor is also liable for a loss or damage to cargo after accepting control of the

same, or for otherwise failing to satisfactorily perform accepted assignments.

- 19. The independent contractor can agree to provide service within a prescribed geographic area or pursuant to a scheduled route.** If an independent contractor agrees to provide service to its and the courier company's mutual customers within a prescribed geographic area or pursuant to a designated route, the independent contractor shall have the right to establish the sequence of pick ups, deliveries and routes to service customers subject only to specific requirements of the mutual customers of the courier company and the independent contractor. Further, while providing service in the prescribed geographic area or on the designated route, the independent contractor retains the right to provide services for others at its discretion, subject only to the requirements of the customer of the courier company and the independent contractor.