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## **Independent Contractor Status: Is It a Good Gig for Workers?**

**By Megan Knowlton Balne and Michael G. Greenfield**

In January 2020, Governor Phil Murphy signed an array of laws aimed at improper worker classification. These new laws included enhanced penalties for misclassification, broader liability for violations, increased information to workers, and even public disclosure of violators. These laws became effective Jan. 20, 2020, through April 1, 2020. Then, COVID-19 hit, and the world shut down.

In the midst of COVID-19, the gig economy was transformed and grew as a result of the pandemic. As the world begins to reopen, the gig economy continues to be a vital part of the market. It is unclear how New Jersey's new legislation, crafted before the pandemic, will affect the gig economy, which has proved essential to many in navigating the shutdown.

New Jersey is not alone in looking at how to properly classify workers. The Biden Administration proposed to withdraw a rule promulgated at the end of the Trump Administration, on Jan. 7, 2021, titled "Independent Contractor Status under the Fair Labor Standards Act." The current administration is reviewing the rule, and is currently in the public comment process.

With independent contractor status at the forefront of the Murphy Administration, and under federal review, it is prudent to stay current on developments in this complicated area.

### **New Jersey's New Independent Contractor Laws**

New Jersey's independent contractor laws passed on Jan. 20, 2020, heighten penalties for misclassification and provide broader protections for workers who believe they have been misclassified.

The new legislation provides sweeping steps to target and penalize worker misclassification. The New Jersey Department of Labor is now permitted to issue stop work orders at locations where worker misclassification violations have occurred on seven-day notice. Businesses are subject to additional monetary penalties for misclassification. Workers are given additional protections, including new notice requirements and anti-retaliation provisions for complaints filed about worker misclassification. Violations of the anti-retaliation provision could subject employers to a disorderly persons offense in addition to fines. Employers are now jointly and severally liable with staffing agencies for violations of New Jersey wage laws, including officers, directors, owners and managers who violate state wage or tax laws. Finally, the new legislation broadens the categories of otherwise confidential tax information the New Jersey Division of Taxation can release to the New Jersey Department of Labor during an investigation by the Department of Labor.

With these robust penalties and expansion of liability, New Jersey continues to hinge independent contractor classification on the ABC test, and the new legislation reinforces its reliance on the ABC test for the imposition of fines, penalties, and liability. The ABC test provides that an individual shall be deemed an employee unless and until the following three criteria are met:

- (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
- (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

N.J. Stat. Ann. §43:21-19(i)(6)(A);(B);(C).The Legislature has introduced bills to change the ABC test, but these bills have not passed.

The ABC test is difficult to understand and apply, especially since it has its origins in the 1930s and the current world, almost 100 years later, looks a lot different than it did post World War I and in the midst of the Great Depression. The New Jersey Department of Labor openly states on its website, “The determination of employee v. independent contractor status is particularly difficult in certain situations.”

<https://www.nj.gov/labor/ea/audit/independent-contractor-vs-employees/>.

This is complicated by the fact that New Jersey courts apply a different, common law test, when determining issues such as negligence and personal injury liability. As the New Jersey Supreme Court has explained, “where a person engages a contractor, who conducts an independent business by means of his own employees, to do work not in itself a nuisance ... he is not liable for the negligent acts of the contractor in the performance of the contract. The immunity granted to a principal who hires an independent contractor rests on the distinction between an independent contractor and an employee. Generally stated, an independent contractor, in contrast to the average employee, contracts to do certain work according to his own methods, without being subject to the control of his employer except as to the product or result of his work.” *Basil v. Wolf*, 193 N.J. 38, 62 (2007).

With the outdated, statutory ABC test governing wage and hour violations, tax obligations, and heightened penalties, in contrast to a more common sense test applied for negligence liability, businesses are truly stuck in a precarious, no-win situation. These heightened penalties appear to be aimed at stopping the growth of the gig economy and treating more workers as employees. However, what the legislature could not have predicted, was the onset of COVID-19 and its impact on the market.

### **COVID-19’s Impact on Growing the Gig Economy**

Less than two months after New Jersey’s new legislation on independent contractor misclassification was signed, the COVID-19 pandemic caused the world to shut down.

Employers were forced to reduce their workforces. Working parents were forced to stay home to provide schooling and childcare. Employers were driven to conduct their business remotely on staggered schedules. Consumers relied upon home delivery instead of in-store shopping. While many industries were struggling, the gig economy grew.

In 2014, gig workers represented approximately 14–20% of the U.S. workforce. In 2017, the number of gig workers in the U.S. workforce rose to 34%. In 2020, it is estimated that 43% of the U.S. workforce were gig workers.

The substantial increase in the gig economy during the pandemic is not surprising. Working parents, forced to work remotely or to forgo traditional working hours to provide childcare and schooling, looked for alternative solutions to supplement their household income. Gig work provided flexibility needed to balance home and income challenges. In addition, the demand for gig workers has increased as businesses turned remote, home delivery expanded and online platforms grew.

Given the exponential increase the gig economy experienced in 2020, and the changed business landscape, it appears gig workers are going to continue to be a viable part of the market. New Jersey's new legislation, however, continues to put an onerous burden on businesses attempting to use the outdated ABC test to classify workers in a world substantially reliant on independent contractors.

### **The Federal Response: The American Rescue Plan and the PRO Act**

The federal government has attempted both to benefit and redefine the gig economy with legislation. Most recently, the federal government enacted the American Rescue Plan to continue to provide economic relief to workers during the COVID-19 pandemic. The American Rescue Plan expressly provides that freelancers, gig workers and independent contractors are eligible for unemployment insurance programs. This continues the unemployment coverage provided by the CARES Act for independent contractors. This is a huge shift from pre-pandemic unemployment benefits that were not available to gig workers.

In addition, currently pending in Congress is the PRO Act which seeks to amend the National Labor Relations Act to include the ABC test to determine independent contractor status. This has been hotly contested by politicians, unions and business owners. If the PRO Act is passed, then the ABC test would be used to determine which workers could unionize under the NLRA, and other federal laws would conflict with the new, broader definition of employment, resulting in uncertainty and likely years of court battles.

The partisan divide in defining independent contractors is evident. On Jan. 7, 2021, shortly before inauguration, the Trump Administration issued a rule utilizing a simplified economic realities test to determine if a worker is an employee or independent contractor under the Fair Labor Standards Act. The Biden Administration recently announced that it will propose to withdraw the rule, but has not clarified guidance on the issue. This is happening concurrently with the PRO Act debate.

## Conclusion

The gig economy has not been slowed down by New Jersey's new legislation addressing the misclassification of independent contractors. The COVID-19 pandemic expanded the gig economy, and the implementation of remote work, the need for flexibility and the ongoing uncertainty have caused an increase in gig workers.

The law is in a constant state of flux with a push to use the ABC test to provide broader classification of individuals as employees, and to increase penalties on employers for misclassification. However, the ABC test is outdated, confusing and difficult to apply, and lacks uniformity in application across agencies. In addition, federal law may change to incorporate the ABC test, providing for another set of standards in applying this three-prong analysis.

Lawyers must remain vigilant as these changes occur, as the gig economy grows and regulations increase.

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