

# New Jersey Resumes Efforts to Amend ABC Test for Independent Contractor Status, Passes Slate of Laws Targeting Misclassification

Article By:

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The State of New Jersey kicked off this year the same way it closed out the last—with an assault on New Jersey businesses. After a year of unprecedented change—one which saw the passage of significant amendments to New Jersey’s [minimum wage law](#); a [law](#) purporting to prohibit confidential settlement agreements and arbitration agreements relating to claims of discrimination, retaliation, or harassment; and the [New Jersey Wage Theft Act](#)—the New Jersey legislature closed out 2019 by trying to push through a bill that would have substantially amended [the state’s “ABC test” for determining independent contractor status](#), and effectively prohibited New Jersey companies from utilizing independent contractor workforces.

While those efforts stalled—in large part due to the unexpected vocal opposition from the independent contractors, themselves—they have not stopped. On January 14, 2020, the state senate introduced [S863](#), a new version of the bill, which presents many of the same problems for New Jersey businesses that its predecessors did. Making matters worse, on January 21, 2020, Governor Phil Murphy signed into law a slate of bills that seek to root out and punish even the most well-intentioned instances of employee misclassification.

## New Jersey’s Current ABC Test

The ABC test itself is nothing new. New Jersey, like many other states, uses a version of the ABC test to determine whether a worker is an employee or an independent contractor for purposes of its Unemployment Compensation Law. New Jersey has used the ABC test in other contexts as well. It is codified in the Construction Industry Independent Contractor Act (CIICA), and the New Jersey Department of Labor and Workforce Development (NJDOLE) had used it to determine independent contractor status for purposes of the New Jersey Wage and Hour Law and New Jersey Wage Payment Law, even before the Supreme Court of New Jersey approved its use for those purposes in [Hargrove v. Sleepy’s, LLC](#), in January 2015.

Under New Jersey’s current version of the ABC test, as codified in the Unemployment Compensation Law, a worker performing services for remuneration is presumed to be an employee unless the hiring entity proves *each of three circumstances*:

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(A) [the] individual has been and will continue to be free from control or direction over the performance of [the] service, both under his contract of service and in fact; and

(B) [the] service is either outside the usual course of the business for which [the] service is performed, or that [the] service is performed outside of all the places of business of the enterprise for which [the] service is performed; and

(C) [the] individual is customarily engaged in an independently established trade, occupation, profession or business.

### **S863: The New (Proposed) ABC Test**

S863 would amend and supplement the current law in two important ways.

First, it would amend prong C of New Jersey's ABC test to read as follows: "The individual is customarily engaged in an independently established business *or enterprise of the same nature as that involved in the work performed.*" [Emphasis added.] While it is unclear precisely how this revision would be interpreted and applied, it is narrower than the existing prong C and clearly targets the gig economy.

A hiring entity can satisfy the current prong C by showing that the worker "has a business, trade, occupation, or profession that will clearly continue despite termination of the challenged relationship." New Jersey courts have found the current prong C to be satisfied, where, for example, part-time fireworks technicians were full-time employees of companies other than the putative employer or where nurses would be able to obtain work from healthcare providers other than the putative employer.

The proposed amendments to prong C would appear to require most part-time independent contractors or "gig" workers to be classified as employees. In addition, claimants are expected to argue the amendments require putative employers to show not only that the worker could obtain work upon termination of the challenged relationship, but that the worker is already doing such work for other customers. Claimants are also expected to argue that the amendments to prong C require putative employers to demonstrate they contracted with business entities formed by independent contractors, rather than contracting directly with the workers.

Second, S863 would codify this revised version of the ABC test for purposes of the Wage and Hour Law, Wage Payment Law, and New Jersey Wage Collection Law, as well as for purposes of the lesser-known New Jersey Building Service Contracts Act. In its current form, this section exempts only three categories of workers: (1) certified public accountants licensed by the State of New Jersey, (2) real estate agents or brokers, and (3) certain agents of financial services companies, who are able to demonstrate they meet the requirements for exempt status under the Unemployment Compensation Law.

But the most significant concern regarding this section relates to its language that would require a hiring entity to prove all three prongs of the ABC test "to the satisfaction of the Commissioner of the [NJDOLE]," coupled with a lack of clarity as to the intended application of this new section.

On this point, it is important to understand that New Jersey courts have disagreed with the NJDOLE's interpretation of certain requirements of the existing ABC test. For example, the New Jersey Supreme Court has rejected the NJDOLE's position as to what must be shown to demonstrate that a

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worker performed services “outside of all the places of business of the enterprise for which such service is performed,” finding the NJDOL’s interpretation “practically impossible” to satisfy.

It is unclear whether S863’s language, requiring proof of the ABC test “to the satisfaction of the Commissioner,” is intended to enact into law the NJDOL’s questionable interpretations for purposes of all New Jersey wage disputes, including in private lawsuits in court, or whether this language merely confirms the unremarkable proposition that the requirements of the ABC test must be proven to the satisfaction of the NJDOL in matters before the NJDOL.

The placement of this new section supports the narrower view. The preamble to S863 provides that the new section will supplement the Wage Collection Law, which, historically, has addressed the NJDOL’s authority to investigate and remedy violations of New Jersey wage laws—primarily through “wage collection” proceedings, which are less formal, administrative hearings conducted and decided by wage referees employed by the NJDOL. Thus, the legislature’s choice to amend the Wage Collection Law, rather than the substantive Wage and Hour Law and/or Wage Payment Law, suggests the new section will apply only to independent contractor determinations in the context of wage collection proceedings administered by the NJDOL, and not to such determinations in private lawsuits.

If, on the other hand, the legislature intends for the new section of S863 to govern independent contractor determinations in all disputes alleging violations of New Jersey wage laws, it is unclear what should be made of the requirement that the ABC test must be proven “to the satisfaction of the Commissioner.” Typically, neither the NJDOL, nor the commissioner, has any involvement in private lawsuits, and it is unclear at what point, or through what mechanism, a putative employer would even have the opportunity to prove the requirements of the ABC test “to the satisfaction of the Commissioner,” in the context of a lawsuit filed in court. To the extent the legislature added the new section of S863 to incorporate the commissioner’s known positions as controlling precedent in private litigation under New Jersey’s wage statutes, additional questions arise, not the least of which would be “what constitutes adequate evidence of what has been satisfactory to the commissioner?” And if the idea is that the law should be whatever the commissioner says it is in a given moment, that would be a different problem altogether.

It is anticipated additional revisions will be made to S863 as it makes its way through the legislature. For those looking for a silver lining, S863, by its terms, would not become effective until the one-year anniversary of its enactment. This gives businesses valuable time to evaluate their independent contractor relationships and determine whether any changes need to be made before the new legislation goes into effect.

### **Recently-Enacted Laws Targeting Employee Misclassification**

Although the legislature was unable to push through the predecessors of S863, it was able to pass numerous new bills, which the governor just signed into law. These new laws bolster the state’s already-impressive collection of tools to identify and punish even the most innocent instance of employee misclassification. Brief summaries are below.

**[A5838](#)** (P.L. 2019, c. 372). This law authorizes the NJDOL, upon a finding of violations of state wage, benefit, and tax laws, to issue stop work orders to businesses at the locations at which the violations occurred. The law requires the NJDOL to serve notification of intent to serve a stop work order at least 7 days prior to the issuance of a stop work order. A business subject to a stop work order has the right to appeal within 72 hours, and the commissioner must hold the appeal hearing within 7 days

of his receipt of notice of the appeal. Stop work orders will remain effective until further order of the commissioner, and the commissioner may assess civil penalties of up to \$5,000 for each day a business operates in violation of a stop work order. Employers may seek injunctive relief in court if they believe the stop work order was issued in error. This law is effective immediately.

**A5839** (P.L. 2019, c. 373). This law authorizes the NJDOL to assess *additional* penalties for employee misclassification, beyond those provided by any other law (including, presumably, the Wage Theft Act, which was just enacted in August 2019). The law permits the NJDOL to assess an “administrative misclassification penalty” of \$250 for first time violations and \$1,000 for subsequent violations. The law also provides for a penalty *to be paid to the misclassified worker* of up to 5 percent of the worker’s gross earnings over the past 12 months from the employer that misclassified the worker. This law is effective immediately.

**A5840** (P.L. 2019, c. 374). The Wage Theft Act already provides that employers and staffing agencies shall be jointly and severally liable for violations of New Jersey wage laws. This law expands such joint and several liability to violations of New Jersey tax laws, and further, explicitly imposes liability on owners, directors, officers, and managers, who violate New Jersey wage or tax laws, on behalf of an employer or a staffing agency. This law is effective immediately.

**A5843** (P.L. 2019, c. 375). This law requires businesses to post notices regarding employee misclassification “in a form issued by the Commissioner.” However, this law also expressly prohibits retaliation against any “employee” for complaining about, filing an action regarding, or testifying in a proceeding about, worker misclassification. The law further provides that violators of any section of the law may be found guilty of a disorderly persons’ offense and fined not less than \$100 nor more than \$1,000. When an employer discharges an employee in violation of the anti-retaliation provision, the law requires the violating employer to offer reinstatement to the discharged employee. The law also requires the employer to pay the aggrieved employee for any lost wages and benefits, attorneys’ fees and costs, and punitive damages of up to 200 percent of the lost wages and benefits. This law is effective on April 1, 2020.

**S4228** (P.L. 2019, c. 367). This law significantly expands the categories of otherwise-confidential tax information the director of the Division of Taxation may share with the NJDOL so as to assist with NJDOL investigations. This law is effective immediately.

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