

SURPRISE! FEDERAL PROPOSAL WOULD REQUIRE STATES TO ADOPT CALIFORNIA'S ABC CONTRACTOR CLASSIFICATION TEST FOR UNEMPLOYMENT PURPOSES

Insights
May 10, 2021

Most attention about whether the Biden administration would attempt to adopt a version of California's notorious "ABC test" for determining whether individuals are properly classified as employees or independent contractors has focused on either the high-profile inclusion of the test in the [proposed PRO Act](#) or whether the Department of Labor would install the test for wage and hour purposes after [recently killing off](#) a Trump-era proposed gig economy regulation. However, a pair of Senate Democrats recently released proposed legislation to reform the nation's unemployment system that includes a hidden "nugget" – requiring states to use the restrictive California version of the ABC test for purposes of determining eligibility for unemployment insurance benefits. This proposal has garnered less attention but would have significant impacts on employers should it come to fruition.

The Proposed Unemployment Insurance Modernization Act

Last month, Senators Ron Wyden (D-Oregon) and Michael Bennet (D-Colorado) introduced [comprehensive legislation](#) to reform the nation's unemployment insurance system, which has certainly taken a hit and revealed many flaws during the COVID-19 pandemic. In introducing the legislation on April 14, Senator Wyden stated, "Our unemployment insurance system is broken, and it's been broken for decades. As we've seen the last year, it's much harder for the unemployment system to work in a crisis when it's been

Related People



Benjamin M. Ebbink

Partner

916.210.0400



Usama Kahf, CIPP/US

Partner

949.798.2118

neglected and sabotaged. We can't fail again to fix it in the wake of the second major economic crisis in 10 years."

The main components of the proposal consist of the following:

- Updates to the current federal-state extended benefits program to enact an "automatic stabilizer" that would automatically add additional weeks of benefits when unemployment rises.
- New requirements for state unemployment insurance programs to increase benefits and provide coverage to more workers.
- The establishment of new federal programs, including a Jobseeker Allowance that would be available to unemployed workers not covered by the traditional unemployment insurance system. This \$250 weekly benefit would be available to self-employed "gig workers" and those new to the labor market.
- Upgrades to unemployment insurance technology and changes to financing of such programs, which include programs to streamline delivery of benefits while enhancing cybersecurity and fraud prevention in the system.

But Read the Fine Print

Buried in the language constituting "new requirements for state unemployment insurance programs" is a bombshell. It would also mandate that states adopt an "ABC test" for determining whether individuals are eligible employees for purposes of unemployment insurance.

But more than that, the proposal specifically requires states to adopt not just any ABC test, but more specifically, the most-restrictive California version of the standard. This test would provide that a worker is considered an employee for purposes of unemployment insurance unless:

1. The worker is **free from control and direction** in connection with the performance of the service, both under the contract and in fact;
2. The service is performed **outside of the usual course of the business** of the employer; and



John M. Polson

Chairman & Managing Partner

949.798.2130

Related Offices

Los Angeles

Irvine

Sacramento

San Diego

San Francisco

Woodland Hills

3. The individual is **customarily engaged** in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

If adopted, this proposal would have nationwide implications for employers. While it would only amend state unemployment insurance law – and would not directly apply to other areas of the law such as wage and hour or employment discrimination law – it would erect significant barriers for employers in utilizing independent contractors.

As California employers know all too well, the ABC test (and its over 100 exemptions) have been nightmarishly complex to navigate and administer. The federal proposal, if enacted, would extend this complexity to all employers nationwide.

And while an employer could technically have workers who constitute employees for one purpose and independent contractors for others, this bifurcation becomes complex and challenging as a practical matter for some employers. Moreover, it is easy to see how establishment of a strict ABC test could create a slippery slope which would lead to extension of the test into other areas of the law (such as unionized organizing, wage and hour matters, and more).

Even if the adoption of an ABC test stays in the proposal, there is also the possibility that there could be legislative negotiations to adopt a less-rigid version of the ABC test. A number of states have adopted a version of an ABC test (many for unemployment purposes only) that is not as stringent as California's version. For example, several states have adopted a modified version of the ABC test that includes an easier-to-satisfy version of the "B Prong" That requires the service to be performed either outside of the usual course of business or outside of the hiring entity's place of business. Other states have adopted a test that excludes the B Prong altogether, while others have established a standard that substitutes other factors for the B Prong. Therefore, there could be changes to the test included in the proposed legislation that would minimize some of impacts described above.

ABC Test "Whack-A-Mole"

This development also demonstrates that you will need to be vigilant in monitoring developments to see where the ABC test discussion could creep up next. As discussed above,

most of the attention on this issue has focused on the high-profile fight over inclusion of the ABC test in the PRO Act and President Biden's stated desire to enact that legislation as part of his proposed infrastructure package. Regulatory developments have also been a focus of attention as the Biden DOL looks to undo Trump administration efforts in this area and eventually propose regulations of their own that would make it more difficult to classify workers as independent contractors.

If either of those approaches fall by the wayside – either politically or through litigation – you should look to efforts like the proposed Unemployment Insurance Modernization Act to serve as a potential Plan B for advocates pushing hard for adoption of the ABC test.

Inclusion of the ABC test in this proposal would not be an easy lift and would likely garner significant opposition from Republicans and moderate Democrats. However, the proposal overall is certainly less controversial than the PRO Act and has somewhat flown under the radar to date, and therefore could move the political needle on whether or not it would be likely to pass.

Suffice it to say, this is an issue that is likely not to go away soon and you will need to stay alert to see where it may pop up next. We'll monitor this situation and provide updates as warranted. Sign up for [our Fisher Phillips Insights delivered right to your inbox](#) so you don't miss a thing. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Gig Economy Practice Group](#).