



The U.S. House Wants The ABC Test Adopted On A National Scale. The Senate? Not So Much.

Insights

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My colleague Todd Lyon wrote an excellent piece earlier this week about the House of Representatives passing the PRO Act, essentially a “wish list” for labor advocates seeking to tip the scales back towards unions. One of the items tucked away in that long laundry list of provisions that would come to pass should this bill become law: the notorious ABC test would be put into place across the country. Currently restricted to just a handful for states (most infamously, California), this test would become the law of the land if the House has its way.

Specifically, the bill says:

Section 2(3) of the National Labor Relations Act (29 U.S.C. 152(3)) is amended by adding at the end the following: “An individual performing any service shall be considered an employee (except as provided in the previous sentence) and not an independent contractor, unless—

- (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
- (B) the service is performed outside the usual course of the business of the employer; and
- (C) 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.”

The bill just passed the House by a vote of 224-194. However, as The Hill noted, the bill will be “dead on arrival” in the Republican-controlled Senate, and the Trump administration has already indicated it would veto the bill if it somehow made it out of Congress. Therefore, as Lyon states, “the chances of the bill actually becoming law in 2020 is virtually impossible.”

So what’s the big deal, and why should you care about this development? It’s another step closer for the ABC test to become a part in the country’s workplace law dynamics. An increasing number of states are considering adopting some form of the test, and everyday workers are paying attention to this new misclassification test in a way like never before. And of course, depending on how November’s elections turn out, we could be seeing a very different calculus for the PRO Act and the ABC test in 2021. We’ll keep an eye on this and provide updates as necessary.

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