

# NEW JERSEY FINALIZES RULES FOR CONTROVERSIAL ABC CLASSIFICATION TEST: BUSINESSES WITH INDEPENDENT CONTRACTORS SHOULD ACT NOW

Insights  
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## New Jersey Finalizes Rules for Controversial ABC Classification Test: Businesses with Independent Contractors Should Act Now

New Jersey businesses should get ready for new regulations on classifying workers as independent contractors under the state's ABC test. The rules aim to provide clarity, protection for legitimate independent contractors, and transparent enforcement guidelines for businesses, according to a May 5 announcement from the NJ Department of Labor. Compliance is critically important, particularly for businesses that rely on freelancers or gig workers, because misclassification can expose companies to significant liability, including unpaid wages, tax assessments, penalties, and aggressive audits by the NJDOL. Here's what businesses need to know about the finalized regulations and three steps you should consider taking now.

### What Does This Mean for NJ Businesses?

The ABC test makes it difficult for many companies to treat workers as independent contractors, and for businesses to hire smaller, entrepreneurial businesses. But there's some good news for businesses: The NJDOL made some key changes to controversial parts of the proposed regulations in response to concerns from the business community.

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Notably, while the rules are new, the ABC test is not new in New Jersey. The goal of the rules was to clarify and codify case law on the issue. Businesses should take steps now to ensure compliance, if they haven't already.

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### ABC Test Overview

When classifying workers as independent contractors in New Jersey, businesses have the burden of proving all three prongs of the ABC test:

- A. the worker has been and will continue to be free from control or direction over the performance of services, both under the service contract and in reality;
- B. the work performed is either outside the usual course of your business or the work is performed outside of all the enterprise's places of business; and
- C. the worker is customarily engaged in an independently established trade, occupation, profession or business.

The ABC test and regulations apply to multiple New Jersey laws, including:

- New Jersey Unemployment Compensation Law
- New Jersey Wage and Hour Law
- New Jersey Wage Payment Law

### New Regulations Aim to Provide Clarity

While the test may seem clear, it can become murky in application. For example:

- What does it mean to be truly "free" from control or direction?
- What specific type of work is considered "outside the usual course" of business?
- What exactly constitutes an "independently established" business?

The regulations, which the NJDOL adopted on May 5, aim to provide New Jersey businesses with clarity and classification guidance. The Department received thousands of comments to the proposed regulations it issued over a

year ago, and “incorporated significant feedback from the business community that led to meaningful changes,” according to the announcement.

The new rules take effect on October 1.

### **Key Changes in Final Regulations**

The NJDOL received many comments from businesses in insurance, trucking, financial services, and other industries that were concerned that the rule failed to acknowledge exemptions – like for commission-based insurance agents – under the New Jersey Unemployment Compensation Law and other statutes. So, the Department added a new subsection stating that nothing in the rule alters or eliminates those statutory exemptions. Additional changes from [the proposed regulations](#) to the final regulations as adopted include:

#### **Prong A:**

- Removal of language contained in a sub-factor asking whether the business requires the worker to use a digital application or software primarily or solely controlled by the business.
- Certain language was softened to say actions taken **solely** to comply with federal, state, or local laws will not, **standing alone**, be considered evidence of control or direction under Prong A.

#### **Prong B:**

- Examples were eliminated after the business community said they created confusion rather than providing clarity. The final regulations omit detailed examples of services that would typically be inside or outside an entity’s “usual course of business,” what constitutes a “places of business,” and when a client or customer location counts as a place of business.
- The final regulations state that a worker’s personal residence where they perform remote work is not part of the entity’s places of business. This change provides greater clarity for businesses relying on freelancers who work remotely.

#### **Prong C:**

- The NJDOL eliminated a duplicative section addressing whether an individual's trade or business exists independent of the service relationship.

"We removed provisions in the draft rules that created uncertainty and built a framework shaped by their input, one that protects legitimate independent contractors, supports employees, and respects businesses that follow the rules," said Acting Labor Commissioner Kevin D. Jarvis.

## **Compliance Considerations Under Each Prong**

### **Prong A: Freedom From Control**

Businesses will need to show that they do not exercise – or even reserve the right to exercise – control over the individual's work. The fact that you don't control *every* facet of an individual's responsibilities will not be enough to satisfy this prong. Here are some key factors to consider (note that this list is non-exhaustive, and some factors might not always be relevant):

- Does the individual set their own hours?
- Do you require the individual to use specific tools, supplies, or materials?
- Do you require the individual to wear a uniform or display a specific logo, color, or other insignia?
- Do you require the individual to report on any aspect of their services at certain times or intervals?
- Must the services be rendered by this individual personally?
- Do you negotiate for and acquire the work performed by the individual?
- Do you fix the individual's rate of pay?
- Does the individual bear any risk of loss for the work they perform?
- Is the individual required to be on call, on standby, or otherwise available to perform services at set times you've determined?
- Do you limit the individual's performance of services for other parties?

- Do you provide training to the individual?

**Example:** A contractor required to wear a branded uniform, use specific tools and supplies, and report daily likely fails Prong A and is more likely an employee.

## **Prong B: Work is Outside the Usual Course or Place of Business**

Businesses will need to show that an individual's work is either:

- **Outside the usual course of business.** The “usual course of business” may include activities you regularly engage in to generate revenue or develop, produce, sell, market, or provide goods or services. You may have more than one usual course of business.
- **Performed entirely outside your places of business.** Your “places of business” may include locations where your enterprise has a physical plant, such as an office, store, or factory, as well as locations where you conduct an integral part of your business. The adopted rule clarifies that a worker's personal residence where they perform remote work is not considered one of your places of business.

**Example:** A restaurant hiring a musician for one night likely satisfies Prong B, but a drywall company hiring drywall installers does not.

## **Prong C: Independently Established Business**

Businesses must show that the contractor operates a viable independent business that can exist separately and survive the termination of the work relationship. Key factors include:

- Does the worker have other clients?
- Do they advertise services or set their own rates?
- Do they invest in their own equipment or operate under a distinct business entity?

The rules make clear that the NJDOL will look at the real substance of the relationship, not just the paperwork. Given the agency's intention “to evaluate the entire relationship” to

determine whether an individual is “customarily engaged in an independently established trade, occupation or business, proactive compliance is essential for businesses seeking to reduce the risk of misclassification.

The adopted rules also clarify that some factors standing alone are not sufficient to establish independent contractor status, such as having multiple jobs, working part-time, registering a business entity, or carrying insurance. If you require or encourage the worker to obtain insurance or form a business entity solely as a means of establishing independence, those factors will not help prove (and could weigh against) independent contractor status.

**Example:** A worker who merely forms an LLC or carries insurance because the business required it likely fails Prong C.

### 3 Steps to Take Now

With the NJDOL sharpening its focus on misclassification issues, business and leadership teams should consider taking these three steps:

- 1. Conduct proactive audits** of current independent contractor relationships.
- 2. Review internal policies**, contracts, and practices for compliance with the ABC test and the new rules.
- 3. Reach out to your FP attorney** to help create a compliant strategy and update your policies and practices accordingly.

### Conclusion

We will monitor these developments and provide updates as warranted, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox. If you have questions about how New Jersey's rules affect your business, or if you need help reviewing your independent contractor arrangements, reach out to your Fisher Phillips' attorney, the authors of this Insight, any member of our [Wage and Hour Practice Group](#), or any attorney in our [New Jersey office](#).