



## NEW JERSEY STATE BAR ASSOCIATION

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**Via Electronic Mail ([david.fish@dol.nj.gov](mailto:david.fish@dol.nj.gov))**

David Fish, Executive Director  
Legal and Regulatory Services  
Department of Labor and Workforce Development  
Post Office Box 110, 13<sup>th</sup> Floor  
Trenton, New Jersey 08625-0110

Re: Proposed New Rules: N.J.A.C. 12:11 – ABC Test; Independent Contractors

Dear Mr. Fish:

On behalf of the New Jersey State Bar Association, I submit these comments raising significant concerns with the New Jersey Department of Labor and Workforce Development's ("Department") proposed new rules to address the classification of employees and independent contractors ("Proposed Rules"). These Proposed Rules outlining the application of the ABC test narrow the scope of independent contractors through overbroad interpretations of well-settled case law and generalized application of factors to a test which "determination is fact-sensitive, requiring an evaluation in each case of the substance, not the form, of the relationship." Carpet Remnant Warehouse, Inc. v. New Jersey Dept. of Labor, 125 N.J. 567, 581 (1991); East Bay Drywall, LLC v. Dept. of Labor and Workforce Development, 251 N.J. 477, 496 (2022). The NJSBA opposes these Proposed Rules and strongly urges the Department not to adopt them.

The Proposed Rules conflate existing case law and Department interpretation of the ABC test, expanding the reach of employee classification and narrowing independent contractor status. As it pertains to attorneys, the Proposed Rules significantly impact solo and small law firms by potentially misclassifying *per diem* attorneys and removing flexibility in staffing. Under the Proposed Rules, even pool attorneys used by the State and Federal government – namely the Office of the Public Defender and those assigned under the federal Criminal Justice Act – could be misclassified as employees under the Department's interpretation of the ABC test.

The Proposed Rules are a confusing amalgamation of factors from cases that span decades, and do not take into consideration the realities of the current work force which seeks flexibility and work life balance. Workers today may choose to work remote or engage in various aspects of the gig economy where they can decide when and what kind of work to take on. The case law fairly and clearly articulates the ABC test. But by enumerating "non-exhaustive factors"

in a set of rules that look and feel like a checklist despite the Department's admonition that they are not, the Department has attempted to circumvent the Court's holding that the ABC test is "fact sensitive."

The Proposed Rules use outdated factors interpreted in a context that no longer exists; fail to consider the misapplication of the ABC test on professionals, such as attorneys, financial services workers, accountants, insurance agents and nurses, who have specific training and licensure requirements and are subject to regulatory supervision; and potentially lead to an unnecessary uptick in challenges because of the abundance of "non exhaustive" factors that beg more questions than provide answers to the status of employee versus independent contractor. In fact, consistent with the case law, there should be no bright line definition or set of factors that could fairly and accurately classify certain types of workers without a lengthy list of exemptions, similar to the extensive list that exists in California.

The impact of these Proposed Rules may not only be felt by all attorneys, but also by the professionals regularly engaged by attorneys in the practice of law. These rules would be most detrimental to solo and small firms – the same firms used by a large number of New Jersey residents for their legal needs. A majority of attorneys licensed in New Jersey associate themselves with solo or small law firms. Solo and small firms rely on flexible staffing models to deliver quality legal services at more affordable prices. The broad interpretation of the ABC test, which potentially misclassifies attorneys as employees of solo or small firms is a costly endeavor that makes access to justice unnecessarily more expensive and less accessible.

Unlike larger firms that have the resources to employ attorneys in specialized areas of the law, solo and small firms often use the services of *per diem* counsel as the need arises. The ABC test – in particular the expansion of Prong C – risks misclassification of these *per diem* attorneys for simply lacking formal business trappings, despite functioning as *bona fide* independent businesses.

The current proposal subjects even short-term, low-dollar-value engagements to the full weight of the ABC test. This will deter small firms from bringing in limited-scope assistance to the detriment of their clients. Even for legitimate contractors, the burden of proof shifts entirely to the firm to show all three prongs of the test. This burden-shift will have a chilling effect, particularly on firms working with new or smaller contractors and professionals such as new parents, semi-retired attorneys, or paralegals who intentionally avoid business formalities, but work independently in fact. These Proposed Rules make susceptible to misclassification a majority of those who provide services to small law firms, most of which use these flexible contractor relationships not to avoid taxes, but to manage fluctuating caseloads and offer flexible, inclusive work opportunities.

The Proposed Rules conflate this legally required review with employment control, as it is the Department's position, without citing any support, that control to ensure compliance with a law or rule "shall be given equal weight to what would be given any other control or direction." See N.J.A.C. 12:11-1.3(f). In this regard, the Department overlooks Law Office of Gerard C. Vince, LLC v. Bd. of Review, Docket No. A-5441-17T2, 2019 WL 4165066 (App. Div. Sep. 3, 2019), where the court held that a paralegal was properly classified as an independent contractor under the ABC test although some supervision was exercised to ensure the paralegal's compliance with the Rules of Professional Conduct.

There are myriad scenarios where an attorney may be misclassified as an employee under the Proposed Rules and for that reason, examples are both easy to provide and too many to list. Prong A of the ABC test addresses whether a putative employer exercises control or direction over the individual's work or that the putative employer reserves the right to control or direct that individual's work. If an attorney drafts correspondence or a brief using the logo of the firm, is that control? See N.J.A.C. 12:11-1.3(c)(2)(i)(b). If the person uses the firm's software to store files associated with a particular matter, is that control? See N.J.A.C. 12:11-1.3(c)(2)(i)(c). If the firm provides training to the attorney in order to utilize the firm's software, is that control? See N.J.A.C. 12:11-1.3(c)(9). Nevertheless, even if all three exist, or none exist, these factors "are not exhaustive and additional factors may be considered." See N.J.A.C. 12:11-1.3(d).

Of significant concern is the Department's dismissal of case law holding that the regulatory or legally required supervision cannot be confused with control. In 2019, the District Court held that an insurance company did not exercise control and direction over insurance agents that are subject to regulatory guidance and state and federal law. Walfish v. Northwestern Mutual Life Ins. Co., No. 2:16-CV 4981, 2019 WL 1987013, at \*7 (D.N.J. May 6, 2019). "Were that so, any business operating in a regulated industry would necessarily no longer be able to hire workers under an independent contractor relationship unless it was willing to risk regulatory non-compliance." Id. Like insurance agents, attorneys and those professionals retained by attorneys are subject to rules governing their practice. The Rules of Professional Conduct are promulgated by the New Jersey Supreme Court, which is vested with the sole authority to govern the practice of law. See N.J. State Constitution, Article VI, Section II (1947). Attorneys are bound by the Rules of Professional Conduct to ensure proper supervision over those with whom they work to avoid the unauthorized practice of law. See In re Opinion No. 24 of the Committee on Unauthorized Practice of Law, 128 N.J. 114, 127 (1992); see also Rules of Professional Conduct 5.1, 5.2, and 5.3. This includes non attorneys. See RPC 5.3.

In 2019, the Appellate Division reversed the finding of the Department that a paralegal was an employee. Vince, 2019 WL 4165066, \*4. In analyzing Prongs A and B, the Appellate Division disagreed with the Department that the firm exercised control over the paralegal beyond that "required by the Rules of Professional Conduct." Id., at \*3. Compare this to Mia Tomasello v. ICF Tech, Inc., No. CV 23-3759, 2025 WL 1177718, at \*12 (D.N.J. Apr. 23, 2025) where the court noted that in determining control under the ABC test, the contractual requirements went "beyond legal compliance" therefore the ABC test was not met. This approach is in line with how other jurisdictions have treated regulatory supervision in the ABC test context. See Global Home Care, Inc. v. State, Dep't of Labor, 521 So. 2d 220, 222 (Fla. App. 2003) (quoting NLRB v. Associated Diamond Cabs, Inc., 702 F.3d 912, 922 (11<sup>th</sup> Cir. 1983)); see also Parrish v. Premier Directional Drilling, L.P., 917 F.3d 369, 379 (5<sup>th</sup> Cir. 2019) (training and drug testing to insure compliance with OSHA safety regulations not evidence of control over the work).

Prong B addresses whether an individual's services are outside of the putative employer's usual course of business or that such services are performed outside of all of the putative employer's places of business. See N.J.A.C. 12:11-1.4(a). The nature of an attorney's work,

including the privileged and confidential nature of communications and documents, may require that a *per diem* attorney go to the law firm to perform some of the work. Similarly, a paralegal could be required to go into the office to provide support on a matter. It could mean reviewing discovery or having a meeting with the client. While remote work may be outside of a putative employer's place of business, if an attorney or paralegal performs the assignment within the putative employer's office, that *per diem* attorney or paralegal could fail Prong B of the test.

Prong C addresses whether an individual is customarily engaged in an independently established trade, occupation, profession, or business. See N.J.A.C. 12:11-1.5(a). The factors address many examples of how an individual can demonstrate independence and in the same breath states that this – alone – does not establish independence. This is not consistent with the case law.

For example, N.J.A.C. 12:11-1-5(e)(3) specifically says that licensure in an occupation or profession, such as a nurse or an attorney, is not alone sufficient to meet Prong C. In holding that nurses were independent contractors, the Appellate Division noted that nurses “must fulfill educational and licensure requirements in order to practice their profession.” Trauma Nurses, Inc. v. Board of Review, New Jersey Dept. of Labor, 242 N.J. Super. 135, 148 (App. Div. 1990). The Appellate Division further pointed out that the nurses in question were permitted to work for others as full- or part-time employees or as independent contractors and that “most” did not work exclusively through the nursing broker. Id. Contrary to the holding in Trauma Nurses, however, the Proposed Rules lists these factors disjunctively as examples of what would **not** meet Prong C, at least on their own. See N.J.A.C. 12:11-1.5(e)(1)-(3) (having multiple employers, working full-time or part-time for an entity or individual other than the putative employer, or maintaining licensure in an occupation or profession “such as a nurse or attorney”). Never mind that some of the nurses in Trauma Nurses **did** work exclusively for the nursing broker. It begs the question of what would meet Prong C?

Under the Department's interpretation of the ABC test, pool attorneys would not meet Prong C. Pool attorneys are routinely used by the State of New Jersey when the need arises, for example when there is a conflict. The Office of the Public Defender is a prime example. Many attorneys only take pool attorney work. Does their status as an independent contractor change if these attorneys only do pool work and therefore receive income from a single source - the State of New Jersey? Pool attorneys do not set their own rate of pay. They are required to undergo training with OPD. They are required to utilize the state's software program. They are required to register as a business.<sup>1</sup> Arguably, pool attorneys would be considered employees of the State of New Jersey under the ABC test as interpreted in these Proposed Rules.<sup>2</sup>

The Proposed Rules do not clearly protect defined-scope, project-based contractor relationships. Firms will be discouraged from bringing on *ad hoc* help during trial, when attempting to close a corporate transaction, or when appellate work dramatically increases, even where flexibility benefits both sides. This reduces the capacity for solo or small firms to scale up

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<sup>1</sup> . See Pool Attorney Guidelines & Application Process, New Jersey Office of the Public Defender, Revised and Updated August 2024 [here](#).

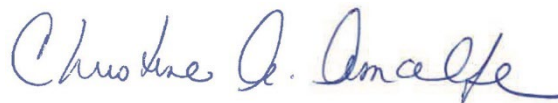
<sup>2</sup> Similarly, pool attorneys are used in federal court pursuant to 18 U.S.C. §3006A. Criminal Justice Act panel attorneys undergo training and have fixed fee maximums, for example.

efficiently, and limits opportunities for newer lawyers, caretakers and other professionals from seeking project work. These issues are further exacerbated when these firms retain professionals, such as investigators, bookkeepers, or paralegals, for example. Under Prong C, these professionals could unwittingly be swept in as employees. Prong C disfavors retention of professionals for *ad hoc* assignments, especially if that professional only performs work for that firm. Consider an investigator who may be a retired law enforcement officer who picks up work from time to time. If the person does not have other clients or only receives remuneration from one firm, that person could be seen as an employee. Consider a paralegal brought on by the firm to handle a large volume matter who only works as needed. Consider a retired accountant who does bookkeeping for a law firm from time to time. Prong A may be met because some or all of these examples are likely outside the normal course of business, but under Prong C, it is irrelevant if that person works part-time or full-time, for that firm or some other entity, limits the work flow to suit a personal schedule, or any number of other situations. Not every matter may require an investigator, or additional professionals, but if a law firm favors one person for this purpose this could trigger employee status under the Proposed Rules.

Solo and small firms also now become exposed to significant liability because the Proposed Rules apply not just to the Unemployment Compensation Law, but also to the Wage Payment Law, the Wage and Hour Law, the Earned Sick Leave Law, the Temporary Disability Benefits Law and the Call Center Jobs Act. This creates the risk that even a technical misclassification could expose small firms to wage claims, benefits penalties, interest, and attorneys' fees under multiple overlapping statutes, which may differ in procedural rules and enforcement mechanisms. As a result, the cost of a single audit or complaint, even if ultimately resolved in the firm's favor, could be destabilizing for a solo practice operating with already-thin profit margins.

For these reasons, the NJSBA opposes these Proposed Rules and respectfully urges the Department not to adopt them. We appreciate your consideration of these comments and welcome an opportunity to discuss any questions you may have. Please reach out to NJSBA's Assistant General Counsel of Legislative Affairs, Lisa Chapland, at [lchapland@njsba.com](mailto:lchapland@njsba.com) or 732-239-3356 for further inquiries. On behalf of the NJSBA, thank you for your continued leadership.

Very truly yours,

A handwritten signature in blue ink that reads "Christine A. Amalfe". The signature is fluid and cursive, with the first name "Christine" and last name "Amalfe" clearly legible.

Christine A. Amalfe, Esq.  
NJSBA President

cc: Norberto A. Garcia, Esq., NJSBA President-Elect  
Angela Scheck, NJSBA Executive Director