

## Employment Counseling & Litigation

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# New Jersey Following California's Lead? Changes for Independent Contractor Classification Coast to Coast

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### What You Need To Know:

- The New Jersey Legislature recently introduced a bill that would codify a stricter version of the "ABC Test" for independent contractor classification.
- If enacted, the bill will make it more difficult for companies to properly classify workers as independent contractors as opposed to employees.
- The bill is in line with the developing trend in employee-friendly states to crack down on worker misclassification.

Independent contractor classification is about to get more difficult in New Jersey. S.B. 4204, recently introduced in the New Jersey Legislature, proposes a stricter version of New Jersey's already-stringent "ABC Test" for determining independent contractor classification. Signaling an emerging trend among employee-friendly states, New Jersey's bill comes on the heels of California's A.B. 5, pertaining to independent contractor classification, which we detailed [here](#) and which will become effective Jan. 1, 2020, in California.

Significantly, New Jersey's bill would go further than simply codifying existing practice, making it even harder for companies to classify workers as independent contractors rather than employees. Under New Jersey's existing ABC Test, a worker is presumed to be an employee, and the burden is on the employer to show all three of the following components for proper independent contractor classification:

(A) The individual has been and will continue to be free from control or direction over the performance of the service, both under the individual's 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 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.

In 2015, the New Jersey Supreme Court held in *Hargrove v. Sleepy's LLC* that the ABC Test was the appropriate standard to determine whether delivery drivers for Sleepy's, the mattress company, were employees or independent contractors for purposes of the state's wage payment and wage and hour laws. New Jersey currently uses the ABC Test for purposes of its wage payment and wage and hour laws, as well as in other contexts.

As proposed, New Jersey S.B. 4204 modifies the B and C portions of the ABC Test. The bill narrows the "B" prong by requiring a company to show that the service is outside the usual course of the business and changes the "C" prong by requiring the company to show that the individual must be "customarily engaged in an independently established trade, occupation,

profession or business of the same nature as that involved in the work performed.” Therefore, a worker will have to provide the company with the same type of services he or she provides in that profession or trade. These proposed changes conform to the ABC Test set forth in California’s recently passed A.B. 5. As with A.B. 5, there are various businesses that are excluded from the bill, but the proposed exceptions in New Jersey differ from those in California, and may still be subject to change based on anticipated lobbying efforts of different industry groups before the bill is finalized.

If S.B. 4204 is enacted, which seems likely, the law will significantly impact businesses of all sizes and industries in New Jersey. In particular, the bill may cause upheaval for so-called gig economy companies, many of which rely on independent contractors as a large component of their workforce. Just last week, it was

reported that New Jersey intends to impose a tax bill of about \$650 million on Uber Technologies Inc. in unemployment and disability insurance taxes based on the state’s determination that the ride-hailing company has been misclassifying drivers as independent contractors rather than employees. Additionally, given New Jersey’s recent amendments to its wage and hour laws imposing increased penalties and damages as detailed [here](#), a business’s risk of exposure for misclassifying its workforce is even more profound.

New Jersey businesses are encouraged to examine their current classification practices and anticipate steps for compliance. Lowenstein Sandler’s Employment Law Practice Group lawyers are available to answer questions and assist businesses seeking to assess the impact of the current *Sleepy’s* case and proposed S.B. 4204 on their workforce.

## Contacts

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