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Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test

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SUMMARY

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Jon O. Shimabukuro
Legislative Attorney

Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test

The classification of workers as "employees" rather than independent contractors is critical for purposes of most federal and state labor and employment laws. In general, the rights and protections afforded by these laws are available only to employees and not to independent contractors. Courts and administrative bodies have used various tests to make worker classification determinations in light of the vague or circular definitions that have been adopted for the term "employee" in some labor and employment laws. This report examines two such tests—the common law agency test and the economic reality test. The report also discusses the so-called "ABC test," which has been adopted in at least 20 states and the District of Columbia to determine employee status for purposes of various state labor and employment laws. Legislation that would adopt the ABC test for purposes of one federal labor and employment law—the National Labor Relations Act (NLRA)—was approved by the House of Representatives in March 2021.

The common law agency test is currently used to determine employee status for purposes of the NLRA, which recognizes a right to engage in collective bargaining for most private sector employees. Applying the test, courts and the National Labor Relations Board (NLRB), the federal agency that enforces the NLRA, consider a variety of factors derived from the Restatement (Second) of Agency to determine whether a worker is an employee or independent contractor. These factors include the extent of control exercised by a hiring entity over the worker, whether the worker is engaged in a distinct occupation or business, and the level of skill required by the worker to provide services. In 2019, the NLRB indicated that a worker's entrepreneurial opportunity for economic gain or loss would be a "prism" through which to examine the common law factors.

The economic reality test is currently used to determine employee status for purposes of the Fair Labor Standards Act (FLSA), the federal law that requires employers to pay a minimum wage and overtime compensation for hours worked in excess of a 40-hour workweek. Federal appellate courts have generally identified six factors that should be considered to determine whether a worker is an employee or independent contractor for purposes of the FLSA. These factors include the nature and degree of control exercised by the hiring entity over the worker, and whether the worker invested in equipment or materials to perform the work. Although courts have indicated that all of the factors should be considered, the U.S. Department of Labor recently promulgated a rule that emphasized two factors—a worker's entrepreneurial opportunity for profit or loss and the hiring entity's control over the worker—as more determinative of employee status.

Unlike the common law agency test and the economic reality test, the ABC test presumes that a worker is an employee. The worker will be classified as an independent contractor only if the hiring entity can satisfy the test's three elements: (a) the individual is free from the entity's control or direction in performing his work, both under a contract for the performance of such work and in fact; (b) the work performed by the individual is outside the usual course of the entity's business; and (c) the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the entity. While the reasons for adopting the ABC test may vary, at least some states have expressly described an interest in preventing employers from misclassifying their workers to avoid labor and employment law obligations.

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The classification of workers as "employees" rather than independent contractors is critical for purposes of most federal and state labor and employment laws. In general, the rights and protections afforded by these laws are available only to employees and not to independent contractors, defined as individuals who are retained to complete a specific project, but are "free to do the assigned work and to choose the method for accomplishing it."[1] The misclassification of workers as independent contractors leads not only to the denial of entitlements like overtime compensation, but also results in economic loss to the government. The U.S. Department of Labor has observed: "Employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers' compensation funds."[2]

Because labor and employment laws often define who may be considered an "employee" in a vague or circular fashion, courts and administrative bodies have adopted various tests for making classification determinations.[3] In general, these tests require consideration of various factors, such as the control exercised by an alleged or putative employer over the worker, to determine whether an individual is an employee or independent contractor. Notably, different laws may require the use of different tests, with some tests possibly emphasizing certain factors over others.[4]

This report examines the tests used to determine employee status for purposes of two federal labor and employment laws: the National Labor Relations Act (NLRA),[5] which recognizes a right to engage in collective bargaining for most private sector employees; and the Fair Labor Standards Act (FLSA),[6] which requires employers to pay a minimum wage and overtime compensation for hours worked in excess of a 40-hour workweek. In addition to being two discreet tests, both have recently been reconsidered by the federal agencies that enforce the NLRA and FLSA.

The report also reviews the so-called "ABC test," an alternative test that has been adopted by at least 20 states and the District of Columbia to determine employee status for purposes of state unemployment compensation programs and at least some state employment laws. Unlike the tests used for the NLRA and FLSA, the ABC test presumes that a worker is an employee. The individual will be classified as an independent contractor only if the hiring entity can satisfy the test's three elements.[7] The test is deemed the "ABC test" because of this standard. Some have argued that the ABC test should be used generally for employee status determinations because it provides greater predictability for workers.[8] Legislation that would adopt the ABC test to

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[1] *Independent Contractor*, Black's L. Dictionary (11th ed. 2019).

[2] U.S. Dep't of Lab., Misclassification of Emps. as Indep. Contractors, https://www.dol.gov/agencies/whd/flsa/misclassification (last visited Apr. 1, 2021).

[3] *See, e.g.*, 29 U.S.C. § 203(e)(1) (defining the term "employee" for purposes of the Fair Labor Standards Act to mean "any individual employed by an employer"); 29 U.S.C. § 203(d) (defining the term "employer" for purposes of the Fair Labor Standards Act to include "any person acting directly or indirectly in the interest of an employer in relation to an employee . . .").

[4] *See, e.g.*, discussion *infra* "SuperShuttle DFW" (describing emphasis on entrepreneurial opportunity when determining employee status for purposes of the National Labor Relations Act).

[5] 29 U.S.C. §§ 151-169.

[6] 29 U.S.C. §§ 201-219.

[7] *See* discussion *infra* "The 'ABC Test'."

[8] *See, e.g.*, Eric Marokovits, Easy as ABC: Why the ABC Test Should be Adopted as the Sole Test of Employee-Independent Contractor Status, 2020 CARDOZO L. REV. DE NOVO 224, 248 (2020).

determine employee status for purposes of the NLRA was recently approved by the U.S. House of Representatives.[9]

National Labor Relations Act

The NLRA attempts to mitigate and eliminate labor-related obstructions to the free flow of commerce by "encouraging the practice and procedure of collective bargaining[.]"[10] Section 7 of the NLRA states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[11] The NLRA requires an employer to negotiate in good faith with a labor organization that becomes the exclusive representative for a bargaining unit of employees.[12] Independent contractors are specifically excluded from the NLRA's definition for the term "employee."[13] Thus, independent contractors do not enjoy the rights and protections afforded by the law, and an employer is not required to negotiate with them over the terms and conditions of their employment.

To determine whether a worker is an employee or independent contractor, the National Labor Relations Board (NLRB or Board), the federal agency that administers the NLRA, applies a common law agency test that examines various factors derived from the Restatement (Second) of Agency.[14] These factors include the extent of control a hiring entity exercises over the worker, whether the worker is engaged in a distinct occupation or business, and the level of skill required of the worker to provide services.[15]

In applying the common law agency test, the NLRB and courts have indicated that no one factor is determinative, and that the relationship between a hiring entity and an individual should be

[9] Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021).

[10] *See* 29 U.S.C. § 151. *See also Collective Bargaining*, Black's L. Dictionary (11th ed. 2019) (defining "collective bargaining" to mean "[n]egotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits.").

[11] 29 U.S.C. § 157.

[12] *Id.* § 158(d).

[13] *See id.* § 152(3) ("The term 'employee' shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor . . .").

[14] *See* SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019), slip op. at 1 ("To determine whether a worker is an employee or an independent contractor, the Board applies the common-law agency test . . . The inquiry involves application of the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency[.]"). The Restatement of Agency is a treatise published by the American Law Institute that clarifies agency common law for judges and lawyers.

[15] Restatement (Second) of Agency, § 220(2) (Am. Law Inst. 1958) ("In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in the business.").

evaluated in its entirety.[16] In *NLRB v. United Insurance Company of America*, a 1968 case involving the employment classification of a group of insurance workers, the U.S. Supreme Court observed:

> [T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.[17]

The party asserting an individual's classification as an independent contractor has the burden of establishing that worker status.[18]

Since *Universal Insurance*, the NLRB has, on occasion, revisited the use of the common law agency test to determine employee status. For example, in *FedEx Home Delivery*, a 2014 case involving the package delivery company's drivers, the Board explained the significance of considering a worker's entrepreneurial opportunity for economic gain or loss when applying the common law agency test.[19] Although the Board had previously considered entrepreneurial opportunity in the past,[20] it sought in *FedEx Home Delivery* to "more clearly define the analytical significance" of this factor.[21] A majority of the Board maintained that no one factor is decisive, that it would give weight to only actual and not theoretical entrepreneurial opportunity, and that any constraints imposed by a company on an individual's ability to pursue such an opportunity would be considered.[22] Notably, consistent with the Court's decision in *Universal Insurance*, the Board majority emphasized that entrepreneurial opportunity should be considered together with the other common law factors.[23] The majority noted that, along with evaluating the relevant common law factors, it should also consider whether the evidence demonstrated "that the putative independent contractor is, in fact, rendering services as part of an independent business."[24]

Applying the common law agency test to the FedEx drivers, the Board majority concluded that the workers satisfied most of the common law factors and should be considered employees and not independent contractors.[25] The majority found that FedEx exercised pervasive control over the drivers' day-to-day work, that the drivers performed duties that were a regular part of FedEx's business, and that no special skills were required for the drivers to perform their duties.[26] Moreover, the majority maintained that the drivers had little entrepreneurial opportunity for gain or loss for them to be considered independent contractors.[27] For example, the majority considered

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[16] *See, e.g.*, BKN, Inc., 333 NLRB 143, 144 (2001) (discussing the common law agency test factors and indicating that "no single factor is controlling in making this determination.").

[17] NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968).

[18] *See BKN, Inc.*, 333 NLRB at 144; SuperShuttle DFW, 367 NLRB at 1.

[19] FedEx Home Delivery, 361 NLRB 610 (2014).

[20] In cases prior to *FedEx Home Delivery*, the National Labor Relations Board considered a worker's entrepreneurial opportunity for economic gain or loss as part of its application of the common law agency test, but emphasized that no single factor was determinative. *See, e.g.*, Dial-a-Mattress Operating Corp., 326 NLRB 884, 891 (1998) (finding workers who provide customer delivery services to be independent contractors after evaluating the common law factors, as well as their "significant entrepreneurial opportunity for gain or loss.").

[21] *Id*.

[22] *Id*. at 619-21.

[23] *Id*.

[24] *Id*. at 619.

[25] *Id*. at 627.

[26] *Id*.

[27] *Id*. at 624.

the fact that the drivers' arrangement with FedEx prevented them from working with other employers and that the drivers' work commitment to FedEx hindered their abilities to pursue other commercial opportunities.[28] The majority also noted the drivers' inability to exercise control over FedEx's business strategy or change the prices charged to customers as evidence of the drivers' status as employees.[29] Nevertheless, a dissenting Board member criticized the majority's evaluation of the drivers' employee status, contending that the majority reduced entrepreneurial opportunity for gain or loss to a "mere subfactor in their analysis."[30] The dissent identified the drivers' ability to sell their delivery routes, in particular, as evidence of actual entrepreneurial opportunity, and maintained that the majority failed to consider "the full impact of what a sale signifies in the context of the common-law test."[31]

SuperShuttle DFW

In 2019, a new Board majority overruled *FedEx Home Delivery*, criticizing that decision for minimizing consideration of entrepreneurial opportunity when determining employee status.[32] In *SuperShuttle DFW*, a case involving drivers who were contracted to provide services for the shared-ride van company, the majority contended that, as the facts may warrant, entrepreneurial opportunity is a "prism" through which the common law factors should be examined.[33] The majority indicated that employee status determinations should continue to require consideration of the various common law factors, but emphasized that a worker would be deemed an independent contractor when a qualitative evaluation of the factors demonstrate an opportunity for economic gain or loss. According to the majority, entrepreneurial opportunity is a "principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain."[34]

The majority in *SuperShuttle* maintained that the 2014 standard in *FedEx Home Delivery* focused too heavily on economic dependency and a company's control over workers. The majority observed that "[l]arge corporations such as FedEx or SuperShuttle will always be able to set terms of engagement . . . but this fact does not necessarily make the owners of the contractor business the corporation's employees."[35] The majority thus determined that "where a qualitative evaluation of common-law factors shows significant opportunity for economic gain . . . the Board is likely to find an independent contractor.[36]

Applying this standard, the *SuperShuttle* majority concluded that the drivers were independent contractors and not employees.[37] Citing the drivers' ability to work as much as they choose, their discretion in choosing assignments, and their entitlement to the money earned from their chosen assignments, the majority maintained that the drivers have a "significant opportunity for

[28] *Id*.

[29] *Id*.

[30] *Id*. at 634.

[31] *Id*. at 636.

[32] SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019).

[33] *Id*. at 9.

[34] *Id*. at15.

[35] *Id*. at 9.

[36] *Id*. at 16.

[37] *Id*. at 12.

economic gain and significant risk of loss."[38] Moreover, the majority contended that these factors were not outweighed by any countervailing factors that might support the conclusion that the drivers were SuperShuttle employees.[39]

Criticizing the standard adopted by the majority in *SuperShuttle*, the dissent maintained that the standard's focus on entrepreneurial opportunity was inconsistent with how the common law agency test was meant to be conducted.[40] The dissent contended that by emphasizing entrepreneurial opportunity, the new standard applied the kind of "shorthand formula" that was criticized by the Court in *United Insurance*.[41] Even when considering the drivers' entrepreneurial opportunity, the dissent argued that such opportunity was "minimal at best" as "it is SuperShuttle that creates, controls, and constrains that 'opportunity.'"[42]

The Board has continued to apply the *SuperShuttle* standard to make classification decisions.[43] In a 2019 advice memorandum involving the ride-share platform Uber,[44] the Board considered the proper classification for UberX[45] and UberBLACK[46] drivers by applying the common-law agency test "as explicated in *SuperShuttle*."[47] While it acknowledged that several factors "point toward employee status," the Board contended that those factors were overwhelmed by the evidence supporting independent contractor status.[48] With regard to UberX drivers, in particular, the Board observed:

> Considering all the common-law factors through "the prism of entrepreneurial opportunity" set forth in *SuperShuttle*, we conclude that UberX drivers were independent contractors. Drivers' virtually complete control of their cars, work schedules, and log-in locations, together with their freedom to work for competitors of Uber, provided them with significant entrepreneurial opportunity. On any given day, at any free moment, UberX drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the App, working for a competing ride-share service, or pursuing a different venture altogether.[49]

The Board further maintained that UberBLACK drivers worked in a manner similar to the UberX drivers.[50] Accordingly, they were also found to be independent contractors.[51]

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[38] *Id*.

[39] *Id*.

[40] *Id*. at 15.

[41] *Id*. at 21.

[42] *Id*. at 28.

[43] *See, e.g.*, Velox Express, Inc., 368 NLRB No. 61 (2019) (finding drivers for medical courier services company to be employees for purposes of National Labor Relations Act).

[44] Advice Memorandum from Jayme L. Sophir, Assoc. Gen. Couns., Div. of Advice, Nat'l Lab. Rel. Bd, to Jill Coffman, Reg'l Dir., Region 20 (Uber Tech., Inc.) (Apr. 16, 2019), https://www.nlrb.gov/guidance/memos-research/advice-memos.

[45] *Id*. at 1 (describing UberX as a "general tier of service" that "involve[s] standard passenger cars of diverse makes and economical fares.").

[46] *Id*. at 2 (describing UberBLACK as "involv[ing] higher-end black-colored vehicles and higher fares than UberX.").

[47] *Id*. at 3.

[48] *Id*. at 13.

[49] *Id*. at 14.

[50] *Id*. at 14-15.

[51] *Id*.

Fair Labor Standards Act

The FLSA requires an employer to pay an employee a minimum wage, as well as overtime compensation at a rate of not less than one and one-half times an employee's hourly rate for hours worked in excess of a forty-hour workweek.[52] Section 3(e)(1) of the FLSA defines the term "employee" simply to mean "any individual employed by an employer."[53] Courts have construed the term to exclude independent contractors.[54]

Whether an individual is an employee or independent contractor is often a threshold question that must be answered to determine whether the FLSA's requirements apply.[55] In *Rutherford Food Corporation v. McComb*, the U.S. Supreme Court observed that the existence of an employer-employee relationship "does not depend on . . . isolated factors but rather upon the circumstances of the whole activity."[56] In *Rutherford Food*, the Court concluded that a group of slaughterhouse workers were employees of a meat packing company after considering a variety of factors, including the use of the company's premises and equipment to complete the relevant work.[57]

In subsequent decisions, the Court maintained that the economic reality of a working relationship will determine whether an individual should be considered an employee or independent contractor for FLSA purposes.[58] Federal appellate courts have generally identified six factors as particularly probative for evaluating the economic reality of such a relationship:

> (1) The nature and degree of the alleged employer's control as to the manner in which the work is to be performed;
>
> (2) The alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> (3) The alleged employee's investment in equipment or materials required for his task, or his employment of workers;
>
> (4) Whether the service rendered requires a special skill;
>
> (5) The degree of permanency and duration of the working relationship;
>
> (6) The extent to which the service rendered is an integral part of the alleged employer's business.[59]

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[52] 29 U.S.C. §§ 201-219. The Fair Labor Standards Act also identifies exemptions from the minimum wage and overtime requirements, and prescribes child labor standards.

[53] 29 U.S.C. § 203(e)(1). *See also* 29 U.S.C. § 203(g) (defining the term "employ" to mean "to suffer or permit to work.").

[54] *See, e.g.*, Karlson v. Action Process Serv. & Priv. Investigations, LLC, 860 F.3d 1089, 1092 (8th Cir. 2017) ("FLSA wage and hour requirements do not apply to true independent contractors[.]").

[55] *See, e.g.*, Sec'y of Lab. v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988) (determining whether migrant workers are employees for purposes of the Fair Labor Standards Act or "independent contractors not subject to the requirements of the Act.").

[56] Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

[57] *Id*.

[58] Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985) ("The test of employment under the [Fair Labor Standards] Act is one of 'economic reality' . . ."); Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) (discussing economic reality rather than technical concepts as the "test of employment" under the Fair Labor Standards Act).

[59] *See* Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311-12 (11th Cir. 2013) (identifying the six factors that "guide the 'economic reality' inquiry."); McFeeley v. Jackson St. Ent., LLC, 825 F.3d 235, 241 (4th Cir. 2016) ("Application

Because the economic reality test is fact-specific, workers in similarly labeled positions have sometimes been classified as "employees" covered by the FLSA, but in other instances, they have been considered independent contractors.[60] For example, janitors have been classified as employees, as well as independent contractors, after applying the economic reality test. In *Bulaj v. Wilmette Real Estate & Management Company*, a janitor who provided maintenance, landscaping, and repair services for the defendant's residential properties alleged violations of the FLSA's overtime provisions.[61] The real estate management company argued that the janitor was an independent contractor who was not subject to these provisions.

Applying the economic reality test, the federal district court in *Bulaj* contended that all six of the relevant factors weighed in the janitor's favor.[62] For example, the court noted that the company exercised control over the manner of the janitor's work by instructing him to perform specific duties, setting his work schedule, monitoring the quality of his work, and disciplining him when his work did not meet expectations.[63] The court also found that the janitor did not possess an opportunity for additional profit or loss because his compensation consisted of a fixed salary and a rent-free apartment at one of the properties.[64]

In contrast, the U.S. Court of Appeals for the Tenth Circuit concluded that another janitor was an independent contractor and not an employee for purposes of the FLSA. Like the janitor in *Bulaj*, the janitor in *Barlow v. C.R. England* argued that the defendant, a trucking company that operated a maintenance yard, violated the FLSA's overtime provisions.[65] The defendant contended that the janitor provided his services as an independent contractor, particularly because he formed his own cleaning company and provided his services pursuant to an agreement between the parties.[66]

Applying the economic reality test, the Tenth Circuit acknowledged that some of its factors supported the janitor's position, while others favored the trucking company.[67] For example, the court noted that the company, and not the janitor, provided cleaning supplies for the work.[68] Ultimately, however, the court determined that the janitor was an independent contractor.[69] The court found that the relationship between the trucking company and the janitor did not involve employment, but instead resembled a business relationship the company would have with any other cleaning service.[70] The court also acknowledged the janitor's freedom to determine how he would accomplish his work.[71] Rather than being an employee of the trucking company, the plaintiff "was in business for himself as a janitor[.]"[72]

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of the test turns on six factors . . ."); Lauritzen, 835 F.2d at 1535.

[60] The Fair Lab. Standards Act § 3.III.A.2 (Ellen C. Kearns et al. eds., 3d ed., 2015).

[61] Bulaj v. Wilmette Real Est. & Mgmt. Co., LLC, 2010 WL 4237851 (N.D. Ill. 2010).

[62] *Id*. at 10.

[63] *Id*. at 6.

[64] *Id*.

[65] Barlow v. C.R. Eng., Inc., 703 F.3d 497, 500 (10th Cir. 2012).

[66] *Id*. at 501.

[67] *Id*. at 506.

[68] *Id*. at 501.

[69] *Id*. at 506.

[70] *Id*. at 507.

[71] *Id*. at 506.

[72] *Id*. at 507.

Finally, how a hiring entity characterizes the individual will not determine a worker's employee status. In *Scantland v. Jeffry Knight, Inc.*, a 2013 case involving technicians who installed and repaired cable, internet, and digital phone services, the U.S. Court of Appeals for the Eleventh Circuit observed that its inquiry into the working relationship was "not governed by the 'label' put on the relationship by the parties or the contract controlling that relationship, but rather focuses on whether 'the work done, in its essence, follows the usual path of an employee.'"[73]

Independent Contractor Rule

Motivated by its belief that the economic reality test has become "less clear and consistent" in its application, the U.S. Department of Labor (DOL) proposed a new independent contractor rule in September 2020.[74] The rule was intended to be the agency's sole authoritative interpretation of independent contractor status under the FLSA.[75] Discussing the need for the new rule, DOL explained:

> [T]he [economic reality] test's underpinning and the process for its application lack focus and have not always been sufficiently explained by courts or the Department, resulting in uncertainty among the regulated community. The Department believes that clear articulation will lead to increased precision and predictability in the economic reality test's application, which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy.[76]

Like the economic reality test, the new rule describes factors that should be evaluated to determine whether an individual is properly classified as an employee or individual contractor.[77] The rule identifies the following five factors to be considered:

> (1) The nature and degree of control over the work;
>
> (2) The individual's opportunity for profit or loss;
>
> (3) The amount of skill required for the work;
>
> (4) The degree of permanence of the working relationship between the individual and the potential employer;
>
> (5) Whether the work is part of an integrated unit of production.[78]

Unlike the economic reality test, however, the new rule characterizes the first two factors—the nature and degree of control over the work and the individual's opportunity for profit or loss—as "core factors" that are the most probative for determining employee status.[79] The rule provides that if both factors point toward the same classification, there is a substantial likelihood that it is the accurate classification.[80] The rule further states: "This is because other factors are less

[73] Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311 (11th Cir. 2013) (quoting Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947).

[74] U.S. Dep't of Lab., Indep. Contractor Status Under the Fair Lab. Standards Act, 85 Fed. Reg. 60,600, 60,605 (Sept. 25, 2020) (to be codified at 29 C.F.R. pts. 780, 788, & 795).

[75] *Id*. at 60,600-01.

[76] *Id*. at 60,600.

[77] Final Rule, 86 Fed. Reg. at 1246-47 (new 29 C.F.R. § 795.105(d)).

[78] *Id*.

[79] *Id*. (new 29 C.F.R. § 795.105(c)).

[80] *Id*.

probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors."[81]

DOL issued a final independent contractor rule in January 2021.[82] When the final rule was issued, DOL maintained that a focus on the two core factors would "improve the certainty and predictability of the economic reality test[.]"[83] However, many viewed the rule as inconsistent with the economic reality test.[84] They argued, for example, that the test requires equal consideration of all of the various factors.[85] Moreover, they feared that emphasizing the two core factors would narrow the scope of who may be considered an employee.[86]

In March 2021, the agency proposed withdrawing the rule.[87] Among the reasons provided by the agency was its skepticism that the rule is "fully aligned with the FLSA's text and purpose" or case law applying the economic reality test.[88] DOL sought comments on its proposal to withdraw the rule, with the comment period ending on April 12, 2021.[89]

Notably, by identifying an individual's opportunity for profit or loss as a core factor, the new rule would seem to resemble more closely the approach taken by the NLRB for determining employee status in *SuperShuttle*. While it may be possible to distinguish entrepreneurial opportunity as a core factor from the "prism" of entrepreneurial opportunity through which to view other common-law factors, DOL and the Board both appear to elevate entrepreneurial opportunity as a consideration for distinguishing between employees and independent contractors.

The "ABC Test"

At least 20 states and the District of Columbia have adopted a multi-part test to determine whether an individual should be classified as an employee or independent contractor for purposes of their unemployment compensation programs and/or at least some of their employment laws.[90] The so-called "ABC test" presumes that an individual is an employee and not an independent contractor unless the hiring entity can establish the following three elements:[91] (a) the individual is free from the entity's control or direction in performing his work, both under a contract for the

[81] *Id*.

[82] U.S. Dep't of Lab., Indep. Contractor Status Under the Fair Lab. Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, & 795) (hereinafter referred to as "Final Rule").

[83] *Id*. at 1196.

[84] *Id*. at 1197.

[85] *Id*.

[86] *Id*.

[87] U.S. Dep't of Lab., Indep. Contractor Status Under the Fair Lab. Standards Act; Withdrawal, 86 Fed. Reg. 14,027 (Mar. 12, 2021).

[88] *Id*. at 14,031.

[89] *Id*. at 14,027.

[90] While the reasons for adopting the ABC test may vary, at least some states have expressly described an interest in preventing misclassification for the purpose of avoiding labor and employment law obligations. *See, e.g.*, A.B. 5, § 1(e) (Cal. 2019) ("It is also the intent of the Legislature in enacting this act to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave.").

[91] *See* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J. L. & SOC. CHANGE 53, 65 (2015).

performance of such work and in fact;[92] (b) the work performed by the individual is outside the usual course of the entity's business;[93] and (c) the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the entity.[94] This test has been deemed the "ABC test" because all three elements must be satisfied before an individual will be classified as an independent contractor.[95]

The 20 states, as well as the District of Columbia, that have adopted the ABC test through legislation or judicial decision are identified in the **Appendix**. The **Appendix** is organized by state and three areas where the ABC test has been prescribed: for purposes of a state's unemployment compensation program; for purposes of a state's wage and hour or other employment laws; and for purposes of a specific industry's employment standards (e.g., the construction industry). The **Appendix** includes excerpts from the relevant statutes, as well as case descriptions when the use of the ABC test has been judicially prescribed.

By presuming a worker's status as an employee and placing the burden on the hiring entity to establish that the individual is an independent contractor, proponents of the ABC test believe that employers may be less likely to misclassify their workers.[96] They also contend that the ABC test provides greater predictability about employee status because courts and administrative bodies do not have to weigh a variety of factors, as required by the economic reality and common law agency tests.[97] Critics of the test argue, however, that greater use of the ABC test will likely discourage businesses from contracting for services or retaining freelance workers.[98] These businesses may be reluctant to accept an employer-employee relationship that does not currently exist and would require compliance with the various laws that protect employees.[99]

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[92] Courts interpreting this element have generally concluded that the hiring entity may exercise control over an individual even if it does not oversee every aspect of the individual's responsibilities. *See, e.g.*, Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Lab., 593 A.2d 1177, 1185 (N.J. 1991) ("An employer need not control every facet of a person's responsibilities, however, for that person to be deemed an employee."); Dynamex Operations W., Inc. v. Super. Ct. of L.A. Cnty., 416 P.3d 1, 36 (Cal. 2018) ("[D]epending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor.").

[93] Courts have generally considered various factors to determine whether an individual's work is outside the usual course of the hiring entity's business. *See, e.g.*, Great N. Constr., Inc. v. Dep't of Lab., 161 A.3d 1207, 1216 (Vt. 2016) ("Factors relevant to part B include whether the worker's business is a 'key component' of the putative employer's business, how the purported employer defines its own business, which of the parties supplies equipment and materials, and whether the service the worker provides is necessary to the business of the putative employer or is merely incidental.").

[94] A court may evaluate various factors to determine whether an individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. *See, e.g.*, Kirby of Norwich v. Admin., Unemp. Comp. Act, 176 A.3d 1180, 1188 (Conn. 2018) ("[F]actors that may be relevant when determining whether part C is satisfied include, but are not limited to, the fact that the putative employee maintained a home office, that he was independently licensed by the state, that he had business cards, that he sought similar work from third parties, that he maintained his own liability insurance, and that he advertised his services to third parties.").

[95] *See, e.g.*, Hargrove v. Sleepy's, LLC, 106 A.3d 449, 464 (N.J. 2015) ("In order to be classified as an independent contractor, the retained individual must satisfy all criteria.").

[96] *See* Marokovits, *supra* note 8.

[97] *Id*. at 250.

[98] *See* Sean P. Redmond, U.S. Chamber of Com., The PRO Act's Attack on Indep. Contracting (Mar. 19, 2021), https://www.uschamber.com/article/the-pro-act-s-attack-independent-contracting.

[99] *Id*.

The predictability arguably provided by the ABC test was discussed by the New Jersey Supreme Court when it prescribed the test's use for purposes of two of the state's employment laws.[100] In *Hargrove v. Sleepy's, LLC*, the Court sought to identify the appropriate test for employee status determinations for the Wage and Hour Law (WHL), which prescribes a minimum wage and the availability of overtime pay for hours worked in excess of a 40-hour workweek, and the Wage Payment Law (WPL), which governs the timing and method of wage payments. Regulations issued by the New Jersey Department of Labor to implement the WHL incorporated the ABC test used in the state's unemployment program.[101] However, neither the WPL nor its implementing regulations similarly prescribed the use of the ABC test for employee status determinations.

After considering the plain language and similar purposes of the WHL and WPL, the Court concluded that the ABC test should be used to determine an individual's employee status for purposes of both laws.[102] The Court maintained that there was no good reason for disavowing the WHL regulations or disregarding the long-standing practice of implementing both statutes in a similar fashion, noting that "statutes addressing similar concerns should resolve similar issues, such as the employment status of those seeking the protection of one or both statutes, by the same standard."[103]

In prescribing the use of the ABC test, the Court also observed that the test provides more predictability for workers, in contrast with the economic reality test.[104] Unlike the latter test, which could "yield a different result from case to case," the Court determined that the ABC test would likely identify fewer individuals as independent contractors because each of the three elements has to be satisfied.[105] Accordingly, the Court maintained that "the 'ABC' test fosters the provision of greater income security for workers, which is the express purpose of both the WPL and WHL."[106]

The Court's interest in adopting a test that yields more predictable results also prompted it to reject an alternative common law test that encompassed the economic reality test, but focused on a totality-of-the-circumstances evaluation of the hiring entity's control over the individual.[107] In criticizing this alternative test, the Court observed that "permitting an employee to know when, how, and how much he will be paid requires a test designed to yield a more predictable result than a totality-of-the-circumstances analysis that is by its nature case specific."[108]

In *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, the California Supreme Court also acknowledged the "greater clarity and consistency" provided by the ABC test.[109] In *Dynamex*, a 2018 case involving delivery drivers for a package and document delivery company, the Court considered the appropriate employee classification standard for purposes of California's wage orders. These orders impose various wage and hour requirements, including

[100] *Hargrove*, 220 N.J. at 464.

[101] *Id*. at 458.

[102] *Id*. at 465.

[103] *Id*. at 463.

[104] *Id*. at 464.

[105] *Id*.

[106] *Id*.

[107] *Id*. at 464-65.

[108] *Id*. at 465.

[109] Dynamex Operations W., Inc. v. Super. Ct. of L.A. Cnty., 416 P.3d 1, 40 (Cal. 2018).

certain mandatory meal and rest periods, for different industries operating in the state.[110] After reviewing the provisions of the applicable transportation order, and considering its objectives and past judicial interpretations of the state's wage orders, the Court concluded that the ABC test should be used to make employee status determinations.[111] The Court explained that the ABC test is faithful to "the fundamental purpose of the wage orders and will provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis."[112]

The ABC Test and Federal Legislation

Although the ABC test is not currently used to determine employee status for purposes of federal labor and employment laws, legislation that would adopt the test for the NLRA has been introduced in the 117th Congress. The Protecting the Right to Organize Act of 2021 (H.R. 842/S. 420) would amend the NLRA's definition for the term "employee" to add the following:

> An individual performing any service shall be considered an employee . . . 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.[113]

Rep. Bobby Scott, the bill's House sponsor, contends that the amended definition will "prevent[] employers from misclassifying employees as independent contractors in order to prevent their workers from organizing."[114] The revised definition for the term "employee" could expand the potential pool of workers eligible for unionization. Specifically, by establishing a presumption of employee status for purposes of the NLRA, it seems possible that the bill's enactment could increase union membership in the United States. According to the Bureau of Labor Statistics, the union membership rate for private-sector employees in 2020 was 6.3 percent.[115]

The House passed H.R. 842 on March 9, 2021, by a vote of 225-206. If H.R. 842 were enacted, it may arguably provide the predictability proponents of the ABC test espouse. By amending only

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[110] *See id*. at 5.

[111] *Id*. at 40.

[112] *Id*. In 2019, California enacted Assembly Bill No. 5, which codified the ABC test for purposes of the state's labor and unemployment insurance codes, as well as the Industrial Welfare Commission's wage orders. In 2020, the state enacted Assembly Bill No. 2257, which exempts specified workers, such as musicians and songwriters, from the ABC test. Employee status for these exempt workers will be determined in accordance with a multifactor test adopted by the California Supreme Court in S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations, 769 P.2d 399 (Cal. 1989). *See* A.B. 2257, § 2 (Cal. 2020). Adoption of Proposition 22, a 2020 ballot measure in California, also resulted in application-based ride-share and delivery drivers no longer being subject to the ABC test. Employee status for these workers will be determined pursuant to an alternative multi-part test that considers, among other factors, whether the hiring entity unilaterally requires the driver to be logged into its application or platform at specific times of day or for a minimum number of hours. *See* Cal. Bus. & Prof. Code § 7451.

[113] S. 420, 117th Cong. § 101(b) (2021); H.R. 842, 117th Cong. § 101(b) (2021).

[114] Press Release, Hon. Bobby Scott, Scott Urges Passages of the Protecting the Right to Organize Act (Mar. 9, 2021), https://bobbyscott.house.gov/media-center/press-releases/scott-urges-passage-of-the-protecting-the-right-to-organize-act.

[115] Bureau of Lab. Stat., Union Members—2020 (Jan. 22, 2021), https://www.bls.gov/news.release/pdf/union2.pdf.

the NLRA, however, the economic reality test and other standards for determining employee status would continue for other employment laws. Legislation that would have more broadly adopted the ABC test was introduced during the 116th Congress. The Worker Flexibility and Small Business Protection Act of 2020 (WFSBPA) (H.R. 8375/S. 4738) would have adopted the ABC test for purposes of seven labor and employment laws: the NLRA, the FLSA, the Occupational Safety and Health Act, the Federal Mine Safety and Health Act, the Migrant and Seasonal Agricultural Worker Protection Act, the Davis-Bacon Act, and the Walsh-Healy Public Contract Act. To date, the WFSBPA has not been reintroduced in the 117th Congress.

Appendix. State Laws and Judicial Decisions Providing for Use of ABC Test

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
Alaska	ALASKA STAT. § 23.20.525(a)(8): Defining covered "employment" for purposes of the Alaska Employment Security Act to include "service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that (A) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under the individual's contract for the performance of service and in fact; (B) the service is performed either outside the usual course of the business for which the service is performed or 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 of the same nature as that involved in the service performed[.]"		
California	CAL. UN. INS. CODE § 621(b): "Any individual providing labor or services for remuneration has the status of an employee rather than an independent contractor unless the hiring entity demonstrates all of the following conditions: (1) The individual is free from control and direction of the hiring entity in connection with the performance of the work, both under the	CAL. LAB. CODE § 2775(b)(1): "[A] person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the	

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
	contract for the performance of the work and in fact. (2) The individual performs work that is outside the usual course of the hiring entity's business. (3) The individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."	work, both under the contract for the performance of the work and in fact. (B) The person performs work that is outside the usual course of the hiring entity's business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." The ABC test will be used to determine whether workers are properly classified as employees or independent contractors for purposes of applicable wage orders (Dynamex Operations W., Inc. v. Super. Ct. of L.A. Cnty., 416 P.3d 1 (Cal. 2018)).	
Connecticut	CONN. GEN. STAT. § 31-222(a)(1)(B): "Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such 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 ABC test used to determine employment status for purposes of unemployment compensation entitlement should also be used when resolving claims involving unpaid compensation (Tianti, ex rel. Gluck v. William Raveis Real Estate, Inc., 651 A.2d 1286, 1290 (Conn. 1995)).	

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
Delaware	DEL. CODE ANN. tit. 19 § 3302(10)(K): Defining the term "employment" to include "[n]otwithstanding any other provisions of this chapter and irrespective of whether the common-law relationship of employer and employee exists, services performed by an individual for wages, unless and until it is shown to the satisfaction of the Department that: (i) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract for the performance of services and in fact; and (ii) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed."		
District of Columbia			D.C. CODE § 32-1331.04(c) (construction industry): "An employer-employee relationship shall be presumed to exist when work is performed by an individual for remuneration paid by an employer, unless to the satisfaction of the Mayor, the employer demonstrates that: (1) The individual is an exempt person; or (2)(A) The individual who performs the work is free from control and direction over the performance of services, subject only to the

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
			right of the person or entity for whom services are provided to specify the desired result; (B) The individual is customarily engaged in an independently established trade, occupation, profession, or business; and (C) The work is outside of the usual course of business of the employer for whom the work is performed."
Hawaii	HAW. REV. STAT. § 383-6: "Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless and until it is shown to the satisfaction of the department of labor and industrial relations that: (1) The individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact; (2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service."		
Illinois	820 ILL. COMP. STAT. 405/212: "Service performed by an individual for an employing unit, whether or not such individual employs others in connection with the performance of such services, shall be deemed to be employment unless and until it		820 ILL. COMP. STAT. 185/10(b) (construction industry): "An individual performing services for a contractor is deemed to be an employee of the contractor unless it is shown that:

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
	is proven in any proceeding where such issue is involved that— A. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and B. Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and C. Such individual is engaged in an independently established trade, occupation, profession, or business."		(1) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact; (2) the service performed by the individual is outside the usual course of services performed by the contractor; and (3) the individual is engaged in an independently established trade, occupation, profession or business; or (4) the individual is deemed a legitimate sole proprietor or partnership under subsection (c) of this Section."
Indiana	IND. CODE § 22-4-8-1(b): "Services performed by an individual for remuneration shall be deemed to be employment subject to [Indiana's unemployment compensation system] irrespective of whether the common-law relationship of master and servant exists, unless and until all the following conditions are shown to the satisfaction of the department: (1) The individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract of service and in fact. (2) The service is performed outside the usual course of the business for which the service is performed. (3) The individual: (A) is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed; or (B) is a		

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
	sales agent who receives remuneration solely upon a commission basis and who is the master of the individual's own time and effort."		
Louisiana	LA. STAT. ANN. § 23:1472(12)(E): "Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, shall be deemed to be employment subject to [Louisiana's unemployment compensation chapter] unless and until it is shown to the satisfaction of the administrator that[:] (I) such individual has been and will continue to be free from any control or direction over the performance of such services both under his contract and in fact; (II) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business[.]"		
Maine	ME. STAT. tit. 26, § 1043.11.E: "Services performed by an individual for remuneration are considered to be employment subject to [Maine's unemployment compensation] chapter unless it is shown to the satisfaction of the [Bureau of Unemployment Compensation] that the individual is free from the essential direction and control of the employing unit, both under the individual's contract of service and in fact, and the employing unit proves that the individual meets all of the criteria in subparagraph (1)		

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
	and criteria of at least 3 divisions of subparagraph (2). In order for an individual to be considered an independent contractor: (1) The following criteria must be met: (a) The individual has the essential right to control the means and progress of the work except as to final results; (b) The individual is customarily engaged in an independently established trade, occupation, profession or business; (c) The individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity; (d) The individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and (e) The individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted; and (2) At least 3 of the following criteria must be met: (a) The individual has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the individual to complete the work; (b) The individual is not required to work exclusively for the other individual or entity; (c) The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work; (d) The parties have a contract that defines the		

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
	relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work; (e) Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual; (f) The work is outside the usual course of business for which the service is performed; or (g) The individual has been determined to be an independent contractor by the federal Internal Revenue Service."		
Maryland	MD. CODE ANN., LAB. & EMPL. § 8-205(a): "Work that an individual performs under any contract of hire is not covered employment if the Secretary is satisfied that: (1) the individual who performs the work is free from control and direction over its performance both in fact and under the contract; (2) the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and (3) the work is: (i) outside of the usual course of business of the person for whom the work is performed; or (ii) performed outside of any place of business of the person for whom the work is performed."		MD. CODE ANN., LAB. & EMPL. § 3-903(c)(1) (construction and landscaping industries): "Except as provided in § 3-903.1 of this subtitle, for purposes of enforcement of this subtitle only, work performed by an individual for remuneration paid by an employer shall be presumed to create an employer-employee relationship, unless: (i) the individual is an exempt person; or (ii) an employer demonstrates that: 1. the individual who performs the work is free from control and direction over its performance both in fact and under the contract; 2. the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and 3. the work is: A. outside of the usual course of business of the person for whom the work is performed; or B. performed outside of any place of business of the

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
			person for whom the work is performed."
Massachusetts	MASS. GEN. LAWS ch. 151A § 2: "Service performed by an individual, except in such cases as the context of this chapter otherwise requires, shall be deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the commissioner that— (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed."	MASS. GEN. LAWS ch. 149 § 148B(a): "For the purpose of this chapter ['Labor and Industries'] and chapter 151 ['Minimum Fair Wages'], an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:— (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (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."	
Nebraska	NEB. REV. STAT. § 48-604(5): "Services performed by an individual for wages, including wages received under a contract of hire, shall be deemed to be employment unless it is shown to the satisfaction of the commissioner that (a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact,	NEB. REV. STAT. § 48-1229(1) (Nebraska Wage Payment and Collection Act): "Services performed by an individual for an employer shall be deemed to be employment, unless it is shown that (a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact, (b) such service is either outside the usual course of business for which such	

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
	(b) such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business."	service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business."	
Nevada	NEV. REV. STAT. § 612.085: "Services performed by a person for wages shall be deemed to be employment subject to this chapter unless it is shown to the satisfaction of the Administrator that: 1. The person has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact; 2. The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; and 3. The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service."		
New Hampshire	N.H. REV. STAT. ANN. § 282-A:9(III): "Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the commissioner of the department of employment security that:		

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
	(a) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and (b) Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business."		
New Jersey	N.J. REV. STAT. § 43:21-19(i)(6): "Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that: (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business."	The ABC test derived from the New Jersey Unemployment Compensation Act governs the classification of employees and independent contractors for both the New Jersey Wage and Hour Law and the New Jersey Wage Payment Law (Hargrove v. Sleepy's, LLC, 220 N.J. 289, 316 (N.J. 2015)).	N.J. REV. STAT. § 34:20-4 (classification of construction employees): "For purposes of the 'New Jersey Prevailing Wage Act,' P.L.1963, c. 150 (C.34:11-56.25 et seq.), the 'unemployment compensation law,' R.S.43:21-1 et seq., the 'Temporary Disability Benefits Law,' P.L.1948, c. 110 (C.43:21-25 et seq.), the 'New Jersey Gross Income Tax Act,' N.J.S.54A:1-1 et seq., or other applicable State tax laws, P.L.1965, c. 173 (C.34:11-4.1 et seq.) and the 'New Jersey State Wage and Hour Law,' P.L.1966, c. 113 (C.34:11-56a et seq.), services performed in the making of improvements to real property by an individual for remuneration paid by an employer shall be deemed to be employment unless and until it is shown to the satisfaction of the Department of Labor and Workforce Development that: a. the individual has been and will continue to be free from control or direction over the performance of that service,

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
			both under his 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 employer for which the service is performed; and c. the individual is customarily engaged in an independently established trade, occupation, profession or business."
New Mexico	N.M. STAT. ANN. § 51-1-42(F)(5): Defining the term "employment" to mean "services performed by an individual for an employer for wages or other remuneration unless and until it is established by a preponderance of evidence that: (a) the individual has been and will continue to be free from control or direction over the performance of the services both under the individual's contract of service and in fact; (b) the service is either outside the usual course of business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; 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 contract of service."		
New York			N.Y. LAB. LAW § 861-c(1) (presumption of employment for purposes of New York State Construction Industry Fair Play Act): "Any person performing services for a contractor shall be classified as an employee unless the person is a separate business entity under subdivision two

	Unemployment Compensation	Wage and Hour/Other Employment Applications	Specific Industry Applications
			of this section or all of the following criteria are met, in which case the person shall be an independent contractor: (a) the individual is free from control and direction in performing the job, both under his or her contract and in fact; (b) the service must be performed outside the usual course of business for which the service is performed; and (c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue."
Vermont	VT. STAT. ANN. tit. 21 § 1301(6)(B): "Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Commissioner that: (i) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact; and (ii) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (iii) Such individual is customarily engaged in an independently established trade, occupation, profession, or business."	VT. STAT. ANN. tit. 21 § 341(1): Defining the term "employee" for purposes of wage-payment requirements to mean "a person who has entered into the employment of an employer, where the employer is unable to show that: (A) the individual has been and will continue to be free from control or direction over the performance of such services, both under the contract of service and in fact; and (B) the service is either outside all the usual course of business for which such service is performed, or outside all the places of business of the enterprise for which such service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business."	
Washington	WASH. REV. CODE § 50.04.140(1): "Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless and until it is		

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	shown to the satisfaction of the commissioner that: (1)(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and (b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and (c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service."		
West Virginia	W. VA. CODE § 21A-1A-16(7): "Services performed by an individual for wages are employment subject to this chapter unless and until it is shown to the satisfaction of the commissioner that: (A) The individual has been and will continue to be free from control or direction over the performance of the services, both under his or her 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 that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business[.]"		

Author Information

Jon O. Shimabukuro
Legislative Attorney

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