

Garden State May Soon Become Even Less Hospitable to Independent Contractors ?Than the Golden State ?

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This article was republished in [Employee Benefit Plan Review](#), September 2025, Volume 79, Number 7.

The New Jersey Department of Labor and Industry (the Department) announced on April 28, 2025, that it was filing a notice of a proposed regulation addressing the test for independent contractor (IC) status under New Jersey law. In 2015, the New Jersey Supreme Court ruled that the three-prong test for IC status under the New Jersey Unemployment Compensation Law also governed IC status under the state's wage laws. As we reported in our [blog post](#) at the time, this three-pronged test, commonly referred to as the ABC test, set a low bar for workers to satisfy in an IC misclassification case in New Jersey. The [proposed regulation](#), if issued in its proposed form, would lower that bar even further. It would also likely prompt blowback from freelancers and other ICs as well as from industry trade organizations, as occurred when California enacted its AB5 legislation in 2020?. The new regulation would likely prompt companies utilizing ICs in New Jersey to either cease operating their businesses in the Garden State or double down in their efforts to enhance their IC compliance using a process such as [IC Diagnostics™](#). At the same time, industry stakeholders, including ICs and trade organizations, are likely to seek industry-by-industry exemptions (as was done in California) through legislative action or a voter initiative such as California's Prop 22.

How does the proposed regulation further curb the use of legitimate ICs in New Jersey?

In its [press release](#) regarding the proposed new regulation on IC status, the Department announced that the proposed regulation, currently released on a preliminary basis, will be formally published in the New Jersey Register on May 5, 2025, and that there will be a 60-day public comment period beginning that day.

The proposed regulation is accompanied by a lengthy "Summary." It states that the Department's regulation "relies heavily" on two New Jersey Supreme Court opinions: one issued in 1991 in a case called *Carpet Remnant Warehouse*, the other in 2022 in a case called *East Bay Drywall*. However, as noted below, the proposed regulation appears to deviate considerably from the *Carpet Remnant Warehouse* case.

The proposed regulation starts by noting that all three prongs of the ABC test must be met to establish IC status, and the burden is on the hiring party, which the regulations refer to as the "putative employer." This is consistent with current law in New Jersey and ABC tests in other states.

The proposed regulation then addresses the first prong of the ABC test: that the putative employer "does not

exercise control or direction over the individual's work in fact, and that it does not reserve the right to control the individual's work." It lists nine factors that will be considered in determining whether the worker is "free from control or direction" under Prong A. The proposed regulation also notes that such factors "are not exhaustive and additional factors may be considered" because the purpose of "[w]hat is required under Prong A of the ABC test is to evaluate the entire relationship between the individual and the putative employer...." This part of the proposed regulation is consistent with prevailing law in New Jersey and elsewhere around the country.

One of the most objectionable provisions dealing with Prong A: requiring compliance with applicable laws.

The proposed regulation pertaining to Prong A departs in a dramatic manner from virtually every other test for IC status under federal law and the laws in every state — and unless clarified in the final version of the regulation, would not merely tilt the balance in favor of employee status and against legitimate ICs but rather lead to the elimination of all ICs in New Jersey.

The services provided by almost all ICs are typically governed by a number of laws. But the regulation seems to regard a commonplace requirement found in almost every IC agreement — a clause requiring the contractor to comply with all applicable laws — as a form of direction and control. As drafted, the proposed regulation states:

Any control or direction over the performance of services, any control or direction that the putative employer has exercised, or has reserved the right to exercise, **in order to be in compliance with a law or rule** shall be considered [a form of direction and control]; that is, it shall be given equal weight to what would be given any other control or direction that the putative employer has exercised or has reserved the right to exercise.

Even in the absence of any contractual provision requiring a contractor to comply with applicable laws, the proposed regulation, as drafted, appears to treat as an impermissible form of direction and control a decision by a hiring party to terminate the IC agreement of a contractor who violates the law. Under the proposed regulation it appears that a hiring party cannot, without jeopardizing the IC classification, terminate the IC agreement of, for example:

- An independent salesperson who repeatedly steals merchandise from either the hiring party or a customer;
- A contractor providing driving services who repeatedly drives a vehicle in a manner that violates the law; or
- A contractor providing notary services who notarizes documents for persons he or she knows are not the person who signed the legal papers.

It is anticipated that this part of the proposed regulation, as drafted, will prompt an avalanche of public comments, almost all of which are likely to be in opposition to the above quoted language dealing with Prong A.

One of the most objectionable provisions dealing with Prong B: the customer's residence or business location as a hiring party's "place of business."

New Jersey's ABC test, like most of the other states that have a three-prong test for IC status, has a "B prong" that can be met in one of two alternative ways: by a showing (i) that the services are performed "outside of the usual course of business" of the party that engages the contractor (sometimes called the "hiring party), or (ii) that such services "are performed outside of all of the [hiring party's] places of business."

Some states with ABC tests have taken a broad view of the hiring party's "usual course of business," and so does the proposed regulation. Nonetheless, it is likely that many of those who will file comments on the proposed regulation will argue in favor of a more balanced approach to this first part of the B prong.

But the proposed regulation takes an extraordinarily expansive view of the second part of the B prong. It states that a hiring party's "places of business" not only include "locations where the enterprise has a physical plant or conducts an integral part of its business," but also include "locations *outside* of the putative employer's physical plant, where the services performed by the individual [worker] are an essential component of, rather than ancillary to, the putative employer's business."

It is unclear what those words "essential" or "ancillary" mean in the context of the proposed regulation, which continues in an effort to try to explain the use of those words: "This includes the residence or place of business of the putative employer's client or customer." The regulation then gives an illustration: if a contracted worker is engaged by a carpet sales business to install carpet at the residences of the carpet company's customers, each of the customer locations are also the hiring party's place of business if carpet installation is an "essential component" (as opposed to an "ancillary" part) of the sale.

This view of the second part of the "B prong" almost entirely eviscerates any chance for most ICs and companies using their services from establishing the workers' IC status. In addition, this part of the proposed regulation appears to be directly contrary to one of the two main New Jersey Supreme Court cases cited in the Summary of the proposed regulation: *Carpet Remnant Warehouse*.

In that case, the New Jersey Supreme Court held that the hiring party had shown that independent carpet installers met the "B Prong" of the ABC test under the Unemployment Compensation Law when they installed carpet at customers' homes for a carpet company that offered carpeting at both an installed and uninstalled price. In that case, the Court concluded that the residences of the carpet company are "clearly 'outside all of the places of business of [the carpet company],' cautioning that if the B prong were extended to "every geographical point of installation," as the Department argued, it would be "practically impossible" for a party to satisfy the second alternative of the B prong.

This part of the proposed regulation is likely to provoke as many if not more comments in opposition to the proposed regulation. Unlike the Summary where the Department says it is relying heavily on the New Jersey Supreme Court opinions in *Carpet Remnant Warehouse*, the proposed regulation appears to change established law by the courts. If this part of the proposed regulation is not abandoned when a final regulation is issued by the Department, it may not survive a court challenge.

There are a number of other locations that bear little or no resemblance to a hiring party's places of business that the proposed regulation regards as locations "where the putative employer conducts an integral part of its business, even "[p]ublic buildings such as the County Clerk's office, where a Title Abstractor performs abstracting services, or a public library where a Title Abstractor performs research." Industries affected by this part of the proposed regulation are likely to file comments questioning how and why the Department construes these types of locations are the putative employer's "places of business" even if the hiring party leaves it up to the contractor to determine where and how they will render services.

Prong C is tilted toward curtailing IC status but does not seem likely to receive many comments.

The final prong is whether the hiring party can show that the contractor is “customarily engaged in an independently established trade, occupation, profession, or business.” The proposed regulation lists seven factors as relevant to this factor, noting they are not exhaustive and additional factors may be considered. New Jersey court decisions have imposed a higher burden on hiring parties than the courts in many other states when addressing this factor. But nothing stands out as either changing the law or expanding the current requirements under this prong.

The likely ramifications from this new proposed regulation, especially if issued with few if any changes

Unlike California’s AB5 and successor bills enacted in that state with [65 or more exemptions](#) from its strict ABC test, the proposed regulation has none. The regulations carry out the 2015 New Jersey Supreme Court decision applying the ABC test under the New Jersey Unemployment Compensation Law to the New Jersey wage, sick leave, and temporary disability benefits laws, but the Unemployment Compensation Law continues to include over two dozen exemptions from the ABC test. Nowhere in the proposed regulations do they mention that any of these exemptions apply to the wage, sick leave, or disability benefits laws; indeed, the proposed regulation does not even mention that the exemptions in the Unemployment Compensation Law continue.

As a result of the uncertainty as to whether any of the Unemployment Compensation Law exemptions apply to the state wage laws, one industry that was covered by an exemption to the ABC test under the unemployment law in New Jersey, working with the legislature and governor, has been excluded from the ABC test. Real estate salespersons classified as ICs are currently exempted from the ABC test in New Jersey for wage and hour laws under a [2022 amendment](#) to the New Jersey Brokers Act. As the article by [Chris Marr](#) in Bloomberg Law’s *Daily Labor Report* stated, quoting the publisher of this blog, “Like California, the legislators in New Jersey will be inundated by lobbyists” seeking exemptions, if the labor department implements the regulation as it’s currently written, Reibstein said.” Some industries may also proceed with voter initiatives such as what transpired in California when voters approved [Prop 22](#) in November 2020.

Many businesses currently operating in New Jersey with ICs have sought to enhance their level of compliance with IC laws by using a process such as [IC Diagnostics™](#), which seeks to maximize compliance in a sustained and customized manner consistent with a company’s current business model. Due to the issuance of the proposed regulation in New Jersey governing IC status, more businesses are likely to take steps to elevate their compliance including re-documenting and restructuring or tweaking their business models to minimize IC misclassification liability in the Garden State. This is particularly important because New Jersey increased the penalties for IC misclassification to permit treble damages for wage violations including those resulting from misclassification of employees as ICs.

In the meantime, public comments to the proposed regulation governing IC status in New Jersey may be filed through July 4, according to the Executive Director of Legal and Regulatory Services for the Department.

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