New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
VOL. 226 NO. 1 MONDAY, JANUARY 6, 2020 NJLJ.COM

EMPLOYMENT LAW

After Eventful 2019, NJ Positioned as Leading Pro-Employee State

By John C. Roberts

PHOTO BY: DANIEL DROR/SHUTTERSTOCK

New Jersey is known nationally for any number of things. Great blueberries and tomatoes. The birthplace of Jon Bon Jovi and Bruce Springsteen. Atlantic City. The first drive-in movie theater in the United States. But after a year that saw the state tackle head-on one of the dirty secrets of the "gig economy"—the misclassification of employees as independent contractors—New Jersey appears poised to become known nationally for something new: being one of the, if not the most, pro-employee, anti-misclassification states in the union.

Employee Misclassification Basics

Employee misclassification has probably been around as long as the law has recognized a difference between employees and independent contractors. But the practice is now firmly in the spotlight given the rise of gig economy companies like Uber, Lyft, and DoorDash, which owe their daily operations to the workers those companies claim are independent contractors.

Currently, New Jersey applies the "ABC" test, codified in N.J.S.A. 43:21-19(i)(6)(A-C), to determine if a worker is an employee or an independent contractor.

Under New Jersey law, a worker can be properly classified as an independent contractor when:

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.

Because independent contractors enjoy fewer legal protections than employees, some employers will classify their workers as independent contractors even when, based

John C. Roberts is an associate with Shepherd, Finkelman, Miller & Shah in Philadelphia. He works on various litigation matters including False Claims Act cases, consumer litigation, and wage/hour issues.

on those workers' specific situations, New Jersey law would recognize those workers as employees.

By doing so, employers avoid providing those workers the benefits and legal accommodations they must provide employees, such as wage and hour protections, paid sick leave, and unemployment benefits. And, by under-reporting employee wages, employers that misclassify their workers also deprive the state from collecting employment taxes on those wages.

Apparently sensing support from New Jersey taxpayers and would-be voters to end employers' misclassification of workers, New Jersey's executive and legislative branches took three bold steps in 2019 toward doing exactly that.

The Task Force on Employee Misclassification

In May 2018, Governor Phil Murphy signed an executive order establishing the Task Force on Employee Misclassification. The Task Force was "charged with a number of responsibilities to combat employee misclassification," including "examining and evaluating existing misclassification enforcement by executive departments and agencies," and "conducting a review of existing law and applicable procedures related to misclassification."

This past July, the Task Force published its report. According to the Task Force, the practice of employee misclassification in New Jersey had increased by 40% over the previous 10 years.

To no one's surprise, the Task Force attributed this increase to the "fissured workplace"—that is, the gig economy. The Task Force stated that companies are misclassifying employees in "an effort to limit legal exposure and increase profits; [which] is marked by declining wages, eroding benefits, inadequate health and safety conditions, and ever-widening income inequality."

According to the report, the New Jersey Department of Labor's Employer Accounts section found that in 2018:

- 12,315 workers were misclassified;
- $462,058,602.55 in wages were under-reported; and
- $13,911,968.34 in contributions such as unemployment, disability, and family leave insurance were under-reported.

While these numbers are eye-popping in their own right, they likely represent a fraction of the actual negative impact of misclassification. The Employer Accounts section is only required to audit 1% of registered New Jersey employers annually.

To combat misclassification, the Task Force made a number of recommendations, including: (i) bringing criminal charges against companies whose misclassification practices are "egregious"; (ii) suspending or revoking licenses for repeat violators; and (iii) increasing fines and penalties and imposing investigation costs and attorney fees if a company is found to have misclassified its employees.

New Jersey DOL Sends a Nine-Figure Message About Misclassification

This past November, just four months after the Task Force published its report, the New Jersey Department of Labor made clear that it believes some companies are misclassifying their workers—and that it wants those companies to pay the price for doing so.

The DOL announced publicly that Uber and one of its subsidiaries owes the state roughly $650 million in unemployment and disability insurance taxes because the company misclassified its New Jersey drivers as independent contractors. That tax bill is made up of about $523 million in past-due taxes going back to 2015, along with as much as $119 million in interest and penalties.

While the DOL has not said so publicly, one has to think that its decision to publicly announce this action against Uber, arguably the poster child for the gig economy and accusations of employee misclassification, is meant to serve as a warning to companies of all types and all sizes that the state is cracking down on misclassification.

The timing of the announcement, the middle of November 2019, does not appear to be an accident either.

A Proposed Legislative Solution to Employee Misclassification

That's because just a few days before the DOL's announcement, N.J. Senate President Stephen Sweeney introduced S4204 in the

New Jersey Senate. The bill creates a presumption of employment status for workers. It also expands the state's current "ABC" test.

S4204 creates a presumption that "individuals who are offered or permitted to work shall be deemed employees, not independent contractors … unless and until it is shown to the satisfaction of the Commissioner of Labor and Workforce Development that" a particular worker satisfies the new ABC test created by the law.

In the version of S4204 that is most recent as of the date this article was published, New Jersey's ABC test would be modified as follows, replacing some text with the text italicized here, so that a worker could be properly classified as an independent contractor if:

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 individual's* 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 business *or enterprise of the same nature as that involved in the work performed.*

The change in the last prong means that a worker can properly be considered an independent contractor only when they are performing the same kind of work for the employer in question that the worker customarily engages in outside of that relationship.

For example, a graphic designer that does freelance graphic design for an advertising agency while maintaining her own design company would satisfy this last prong. But if the designer works as a delivery person for an online food delivery company, she would not.

This change could upend the New Jersey operations of many employers, notably gig economy companies. When coupled with its new presumption of employment, the passage of S4204 could force these employers to add their New Jersey workers as employees—or cease doing business in the state.

The bill's new "ABC" test is clearly inspired by California's highly publicized (and contentious) Assembly Bill 5, which goes into effect on Jan. 1, 2020. But S4204 goes one step further. Whereas California's AB5 applies only to non-exempt industries, S4204 contains no such exemption. (It does, however, exempt certified public accountants licensed by the state.)

Thus, if S4204 becomes law, it will be the strongest employee classification law in the country.

As of the date of this article, that has not happened. Nor has the bill even been scheduled for a full vote by the New Jersey Senate. And while State Sen. Sweeney believes it is possible for a vote to be held before the current Senate session ends, passage of the bill is not a sure thing given the vocal and organized opposition to it.

A New Title for New Jersey?

2019 was the year that New Jersey made a concerted effort to push back against employers' misclassifying New Jersey workers as independent contractors.

The pièce de résistance of the state's three-step approach to tackling the problem, a worker-friendly legislative framework for determining whether a worker is an independent contractor, has yet to come to fruition.

If and when it does, assuming it mirrors the language of current S4204, New Jersey will likely add to its mantle the title of the most pro-employee, anti-misclassification state in the union. ■