



Triad Advisors, Inc.,
Petitioner,

**STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT**

v.

**New Jersey Department of Labor
and Workforce Development,**
Respondent.

**FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER**

**OAL DKT. NO LID 16595-14
AGENCY DKT. NO. DOL 14-010**

Issued: May 31, 2022

The appeal of Triad Advisors, Inc. (Triad or petitioner) concerning an unemployment and temporary disability assessment of the New Jersey Department of Labor and Workforce Development (Department or respondent) for unpaid contributions by petitioner to the unemployment compensation fund and the State disability benefits fund for the period from 2008 through 2011 (“the audit period”) was heard by Administrative Law Judge Susan M. Scarola (ALJ). In her initial decision, the ALJ concluded with regard to the following eleven securities sales agents, who received payment for the performance of services from petitioner during the audit period, that none were employees of petitioner, but rather, were all independent contractors: Daniel Armas, Samuel Bell, Francis Clark, Brian Donnelly, Jennifer Easley, Ian Finnell, Sheila Jacobs, Theodore Kowlchyn, Stanley Sattler, Dennis Schlegel and Lyn Tober (hereafter referred to simply as “the securities sales agents”). As will be described in more detail below, the ALJ based her conclusion regarding the employment status of the securities sales agents on her application to the facts adduced during the Office of Administrative Law (OAL) hearing of two separate tests for independent contractor status: (1) the “20-factor test,” at one time the test used by the Internal Revenue Services (IRS) to determine independent contractor status, and (2) the current IRS test for independence, which consists of a list of factors refined from the original 20-factor test into less a list of 20

discrete factors and more an unnumbered listing of factors, sub-factors and guidance divided into three separate categories: (1) Behavioral Control, (2) Financial Control, and (3) Type of Relationship. Neither of these two tests applied by the ALJ in support of her conclusion that the securities sales agents were all independent contractors is the relevant New Jersey Unemployment Compensation Law (UCL) test for independent contractor status found at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), commonly referred to as the “ABC test.” Based on her finding that each of the securities sales agents were independent contractors, rather than employees, the ALJ ordered the reversal of the Department’s determination regarding petitioner’s tax liability.

The issue to be decided is whether the securities sales agents, who received payment from Triad, were employees of Triad and, therefore, whether Triad was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund with respect to the securities sales agents.¹

Under the UCL (N.J.S.A. 43:21-1 et seq.), the term “employment” is defined broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the Department either that the service is exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7), (i)9 or (i)10, which contain 27 separate specialized exemptions from UCL coverage, including one at N.J.S.A. 43:21-19(i)(7)(J) for “[s]ervice performed by agents of mutual fund brokers or dealers in the sale of mutual funds or other securities, by agents of insurance companies, exclusive of industrial insurance agents or by agents of investment companies, if the compensation to such agents for such services is wholly on a commission basis,” or that the service and the individual performing the service meet the statutory test for independent contractor status found at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C) - the “ABC test.”

Under the UCL, in order to successfully assert any of the 27 separate specialized exemptions set forth at N.J.S.A. 43:21-19(i)(7), (i)(9), and (i)(10), including the exemption at N.J.S.A. 43:21-19(i)(7)(J), a putative employer must establish not only that

¹ Triad is a dealer/broker registered with the United States Securities and Exchange Commission. It is headquartered in Georgia and operates through securities sales agents in numerous states, including New Jersey. The eleven securities sales agents whose services are at issue in this matter worked out of the Iselin, New Jersey, office of Gitterman & Associates, also known as Gitterman Wealth Mangement (referred to throughout the ALJ’s initial decision as the Gitterman firm). The Gitterman firm is what is referred to as an independent registered investment advisor. Notwithstanding that the securities sales agents worked out of the Iselin, New Jersey, office of the Gitterman firm, they were licensed and registered with Triad. Triad received commissions from the company issuing the securities or from its clearing firm and then paid out directly to the securities sales agents.

the services are covered under the terms of the particular UCL exemption (in this instance, that the individual providing the service is an agent of a mutual fund broker or dealer in the sale of mutual funds or other securities, an agent of an insurance company, or an agent of an investment company, and the compensation to such agent for such services is wholly on a commission basis), but also that those services are exempt under the Federal Unemployment Tax Act (FUTA), or that contributions with respect to the services are not required to be paid into a state unemployment fund as a condition for a tax offset credit against the tax imposed by FUTA. If the putative employer is unable to successfully assert one of the 27 separate specialized exemptions from UCL coverage and still seeks to avoid responsibility under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund, the putative employer must establish under the statutory ABC test that the workers at issue are independent contractors, not employees. Under the ABC test, a putative employer who seeks to assert exemption from UCL coverage for the services of an individual who it claims to be an independent contractor, has the burden to establish the following with regard to the services and the individual performing those services:

(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.

N.J.S.A. 43:21-19(i)(6).

The above statutory criteria are written in the conjunctive. Therefore, where a putative employer fails to meet any one of the three criteria listed above with regard to an individual who has performed a service for remuneration, that individual is considered to be an employee and the service performed is considered to be employment subject to the requirements of the UCL; in particular, subject to N.J.S.A. 43:21-7, which requires an employer to make contributions to the unemployment compensation fund and the State disability benefits fund with respect to its employees.

In the ALJ's initial decision, she acknowledged that in order to successfully assert an exemption from UCL coverage under N.J.S.A. 43:21-19(i)(7)(J) a putative employer must establish both that the services are covered by the particular UCL exemption and that there exists a corresponding exemption for such services under FUTA. The ALJ also acknowledged that the question of what constitutes evidence of a FUTA exemption for the purpose of asserting any of the specialized exemptions from UCL coverage set forth at N.J.S.A. 43:21-19(i)(7) is governed by Department rule; specifically, N.J.A.C. 12:16-

23.2(a). Regarding N.J.A.C. 12:16-23.2(a), the ALJ noted that it *had* listed the following as acceptable forms of evidence that services are exempt from coverage under FUTA: (1) a private letter ruling(s) from the IRS; (2) An employment tax audit conducted by the IRS after 1987 which determined that there was to be no assessment of employment taxes for the services in question; provided that determination was not the result of an application of Section 530 of the Revenue Act of 1978; (3) a determination letter(s) from the IRS; and/or (4) “[d]ocumentation of responses to the 20 tests required by the IRS to meet its criteria for independence.” The ALJ also noted that on September 17, 2018, the Department amended N.J.A.C. 12:16-23.2(a) so as to eliminate the fourth acceptable form of evidence that services are exempt from coverage under FUTA, namely, the option to document “responses to the 20 tests required by the IRS to meet its criteria for independence,” leaving only three enumerated forms of evidence of a FUTA exemption: (1) an IRS private letter ruling, (2) an IRS employment tax audit, or (3) an IRS determination letter. The ALJ chose to apply the pre-amendment rule; the one still containing the fourth acceptable form of evidence that services are exempt from coverage under FUTA, explaining that although the September 17, 2018 rule amendment occurred prior to the close of the record on September 24, 2019, the pre-amendment rule was in effect during the pendency of the OAL hearing, which concluded on June 28, 2018. In support of her application of the pre-amendment rule, the ALJ cited a 2017 final administrative decision - Big Daddy Drayage, Inc. v. New Jersey Department of Labor and Workforce Development (LID 17680-16) – which involved the “owner-operator exemption” for drivers of large trucks found at N.J.S.A. 43:21-19(i)(7)(X) and hinged on application by the Commissioner of the IRS test for independence, under then-extant N.J.A.C. 12:16-23.2(a)(4), to the question of whether there existed a corresponding FUTA exemption for the truck driving services at issue for the purpose of establishing an exemption from UCL coverage under N.J.S.A. 43:21-19(i)(7)(X).

Based on the foregoing, without at this juncture judging the correctness of the ALJ’s reasoning regarding which version of N.J.A.C. 12:16-23.2(a) should apply, one would have expected the ALJ in her initial decision to have first analyzed whether the securities sales agents are exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7)(J), including for the purpose of determining whether Triad had successfully established the existence of a corresponding FUTA exemption, applying the current IRS test for independence to the facts adduced at hearing; then in the alternative, to have analyzed the same facts under the UCL’s ABC test to determine whether the securities sales agents had been independent contractors, rather than employees, and therefore, whether they were exempt from UCL coverage under N.J.S.A. 43:21-19(i)(6). However, instead, the ALJ:

- (1) Announced that there are three tests to determine independent contractor status; “the ABC test, the twenty-factor test, and the common-law test;”
- (2) Stated that, “[t]he factors [for each of the three tests], while distinctive, essentially overlap and the conclusions are the same for whichever of the three tests is applied;”

(3) Stated that, “[t]he three categories that must be analyzed [under the UCL’s ABC test] are explained on the IRS website as follows: (1) Behavioral Control, (2) Financial Control, and (3) Type of Relationship,” adding, “[t]he application of these three *ABC criteria* is highly fact sensitive” (emphasis added), thereby mistaking the IRS test for the UCL’s ABC test;

(4) Applied the IRS test (referred to throughout the ALJ’s decision as “the common law test”), rather than the UCL’s ABC test, to determine whether the securities sales agents were independent contractors, rather than employees, and therefore, exempt from UCL coverage under N.J.S.A. 43:21-19(i)(6)²;

(5) Also applied the former IRS test for independence – the “twenty-factor test;”

(6) Never applied the UCL’s ABC test;

(7) Never reached any conclusion as to whether the securities sales agents had been engaged in UCL-exempt employment under N.J.S.A. 43:21-19(i)(7)(J), and

(8) Concluded, within the context of the above-described analytical framework, that the securities sales agents had been independent contractors for, rather than employees of, Triad, and on that basis alone ordered that the determination of the Department that Triad be held responsible to “pay for unemployment taxes for these workers,” must be reversed.

In its exceptions, respondent takes issue with the ALJ’s finding that the pre-amendment version of N.J.A.C. 12:16-23.2(a) should apply to the question of whether petitioner has established the existence of a FUTA exemption for the purpose of determining whether the services of the securities sales agents are exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7)(J). That is, citing the holding in Walker v. New Jersey Dep’t of Institutions & Agencies, Div. of Public Welfare, 147 N.J. Super. 485 (App. Div. 1977), respondent asserts that because N.J.A.C. 12:16-23.2(a) was amended on September 17, 2018, prior to the record having closed in the case and prior to the ALJ having issued her initial decision, the post-amendment, rather than pre-amendment,

² With regard to elements of the IRS test that address behavioral and financial control, the ALJ found that because the business activities of Triad, and certain aspects of the business relationship between Triad and its securities sales agents, are governed by regulations of the Financial Industry Regulatory Authority (FINRA), where those regulations specifically dictate that Triad exercise control over the business activities of its securities sales agents in a particular manner, that exercise of control should not be factored into the independent contractor analysis. In that regard, the ALJ found the Department’s analysis on the issue of direction and control to be flawed, because it had taken into consideration that Triad requires its securities sales agents to conduct credit checks of clients, obtain pre-approval from Triad for all advertisements and business cards, and be paid only in the form of commissions, each of which the ALJ stated is expressly dictated by FINRA.

version of the rule should apply under the “time of decision rule.” Thus, maintains respondent, because the September 17, 2018 amendment to N.J.A.C. 12:16-23.2(a) leaves only three forms of evidence to establish the existence of a FUTA exemption: (1) an IRS private letter ruling, (2) an IRS employment tax audit, or (3) an IRS determination letter, and since petitioner failed to produce any of these forms of evidence, the ALJ must conclude that petitioner has failed to meet its burden under N.J.S.A. 43:21-19(i)(7)(J) and, therefore, that the securities sales agents are not exempt from UCL coverage under that section of the UCL.

Turning to the question of whether under N.J.S.A. 43:21-19(i)(6) the securities sales agents are exempt from UCL coverage as independent contractors for Triad, rather than employees of Triad, respondent first objects to the ALJ’s mischaracterization of the IRS test for independence (the “common law test”) as “the ABC test” and the ALJ’s resulting misapplication of that test, rather than the ABC test, to the question of independent contractor status under the UCL. Respondent notes that New Jersey courts, including the New Jersey Supreme Court, have repeatedly re-affirmed the ABC test set forth at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), as the only test to be used under the UCL to determine independent contractor status. See Carpet Remnant Warehouse, Inc. v. Dept. of Labor, 125 N.J. 567 (1991) and Hargrove v. Sleepy’s, LLC, 220 N.J. 289 (2015). Respondent adds with regard to the ALJ’s apparent justification for applying the incorrect test to the question of independent contractor status under the UCL; that is, the ALJ’s statement that “[t]he factors [under the current IRS test, the twenty-factor test, and the ABC test], while distinctive, essentially overlap and the conclusions are the same for whichever of three tests is applied,” that the two tests are, in fact, separate and distinct, and under the holding in Special Care v. Board of Review, 327 N.J. Super. 197, 208 (App. Div. 2000), the Department is not required to grant a UCL exemption based upon “federal common law.”

Next, respondent applies the ABC test found at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), to the facts adduced during the OAL hearing and concludes that Triad has failed to meet its burden under all three prongs of the ABC test with regard to the services performed for Triad by the securities sales agents. Therefore, urges respondent, the services performed by the securities sales agents for Triad should be considered employment subject to the requirements of the UCL and the Department’s assessment against Triad for unpaid contributions to the unemployment compensation fund and State disability benefits fund on behalf of the securities sales agents should be affirmed. Following is the Department’s analysis under each prong of the ABC test:

Prong A

Respondent lists within its exceptions the following indicia of direction and control by Triad over the securities sales agents:

- (1) Triad would terminate a securities sales agent if he or she became part of a larger group that had decided to leave Triad, or if a compliance issue arose with that person. Respondent adds that this is not a FINRA requirement.

- (2) Triad requires its securities sales agents to purchase errors-and-omissions insurance directly from Triad. Although FINRA requires that securities sales agents have errors-and-omissions insurance, it does not require that securities sales agents purchase their errors-and-omissions insurance directly from the broker/dealer.
- (3) Triad also requires that securities sales agents have, and charges securities sales agents for, "Smarsh supervisory email" and a trading platform used by securities sales agents known as "Wealthscape," where securities sales agents make trades for clients. None of this, notes respondent, is required under FINRA.
- (4) "The communications rules require that Triad's name must be on the letterhead and cards so the client would know that securities were offered through Triad Advisors."
- (5) Relative to mutual fund purchases made by Triad's securities sales agents, there were instances when Triad, on its own volition and without consulting the securities sales agents, compared the products purchased by the securities sales agents to other share classes that had been available at the time, determined that a different share class would have been more appropriate for the clients, corrected from the share class selected by the securities sales agents to what Triad deemed a more appropriate share class, reimbursed the clients for any additional expense that they may have incurred, informed the securities sales agents after the fact that it had reimbursed the clients and instructed the securities sales agents that they were now responsible for reimbursing Triad to correct their errors.
- (6) Triad markets to securities sales agents and investment advisors; it does not market directly to the general public.
- (7) Regarding the commission paid to securities sales agents, Triad negotiates with the issuer for the commission and then negotiates with the Gitterman firm. Following these negotiations, the rate of commission paid to the securities sales agents by Triad is set by Triad with no input from the securities sales agents.
- (8) Triad performs background checks and obtains fingerprints for the DOJ. Triad obtains the questionnaire, information on a prospective securities sales agent's credit, bankruptcies, liens and arbitrations – all of the things necessary for the Uniform Application for Securities Industry Registration or Transfer (Form U4) to be completed.
- (9) Each securities sales agent is required to sign a contract to sell Triad's securities products. The contract requires consent from Triad before any promotional materials are issued by a securities sales agent. Under the contract, Triad must review all purchase orders, Triad determines the rate of commissions paid to the securities sales agents, and Triad has the authority at its discretion to

designate the manager of the securities sales agent's "Office of Supervisory Jurisdiction." The contract is exclusive; which is to say, the securities sales agent is prohibited from selling for another broker/dealer.

Based on the foregoing, respondent asserts that petitioner has failed to meet its burden under Prong A of the ABC test to establish that the securities sales agents were free from control or direction by Triad.

Prong B

In order to satisfy Prong B of the ABC test, Triad must establish that the services performed by the securities sales agents were either outside the usual course of Triad's business, or that such services were performed outside of all Triad's places of business. Regarding the first part of Prong B, respondent states that Triad is a securities broker/dealer, in the business of selling securities products, and it engages the securities sales agents to sell those products. Thus, concludes respondent, the services provided to Triad by the securities sales agents are within Triad's "usual course of business." As to the second part of Prong B, respondent maintains that the "override" deducted by Triad from the commission payments to the securities sales agents and paid by Triad to the Gitterman firm, are a form of rental payment by Triad to the Gitterman firm to maintain a shared work location for the securities sales agents who are under contract with Triad. Thus, concludes respondent, the Iselin, New Jersey, office of the Gitterman firm is among Triad's places of business. Based on the foregoing, respondent asserts that petitioner has failed to meet its burden under Prong B of the ABC test.

Prong C

With regard to Prong C, under which it must be established by Triad that during the audit period each securities sales agent was customarily engaged in an independently established trade, occupation, profession or business, respondent maintains that the testimony of the securities sales agents indicates that during the audit period each was employed to work in the Iselin, New Jersey, office of the Gitterman firm, where he or she was an agent for and was paid directly by Triad for the sale of Triad financial products and that none of the securities sales agents were engaged during that time in an independently established business enterprise. In support of this assertion, respondent cites to the testimony during the OAL hearing of securities sales agents Daniel Armas, Jennifer Easley, Sheila Jacobs, and Theodore V. Kowalchyn. For example, according to respondent, Daniel Armas testified that he worked in the Iselin, New Jersey, office of the Gitterman firm; he did not set up a business separate from the office of the Gitterman firm; he did not have his own website; his mail was delivered to the office of the Gitterman firm; he had no trade name; Triad issued checks to him, less the cost of errors-and-omissions insurance and "override," which went to the Gitterman firm to cover overhead expenses, such as rent, postage and office space. According to respondent, Theodore V. Kowalchyn also testified that he did not negotiate his commissions, nor did he know how they had been established; he worked in the Iselin, New Jersey, office of the Gitterman firm and did not have a separate office location; he was a securities sales

agent who sold Triad's products; he did not believe he had a choice as to whether to be paid by a W-2 or 1099 by Triad; and he did not have another registered business in New Jersey.

In reply to the exceptions filed by respondent, petitioner asserts that applying the post-amendment version of N.J.A.C. 12:16-23.2(a) would be a retroactive application, is not permitted, and would be manifestly unjust. Consequently, petitioner summarizes and indicates its concurrence with the ALJ's analysis under the IRS test for independence, concluding based on that analysis that the securities sales agents are exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7)(J). Petitioner also asserts that it has met its burden under the ABC test, because (1) according to petitioner, all of the control that Triad exercised over the securities sales agents was required by investor protection laws, (2) the services performed by the securities sales agents were performed at the office of the Gitterman firm, which petitioner maintains is not among Triad's "places of business," and (3) according to petitioner, Prong C of the ABC test does not require in order for the securities sales agents to be considered independent contractors that each be engaged during the audit period in an independently established business or enterprise, but rather, it suffices under Prong C of the ABC test that the securities sales agents are employees of another who *is* engaged in an independently established business or enterprise, namely, the Gitterman firm.

CONCLUSION

Upon *de novo* review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions filed by respondent and petitioner's reply, I hereby reject the ALJ's reversal of the Department's determination that Triad had employed the securities sales agents it engaged and, therefore, that petitioner is liable for unpaid contributions to the unemployment compensation fund and State disability benefits fund on behalf of those employees for the audit period, 2008 through 2011.

Regarding whether the services of the securities sales agents are exempt from UCL coverage under the specialized exemption at N.J.S.A. 43:21-19(i)(7)(J), for "[s]ervice performed by agents of mutual fund brokers or dealers in the sale of mutual funds or other securities, by agents of insurance companies, exclusive of industrial insurance agents or by agents of investment companies, if the compensation to such agents for such services is wholly on a commission basis," I agree with respondent that petitioner may *not* assert that exemption from UCL coverage for the services performed for Triad by its securities sales agents, because petitioner failed to establish the existence of a corresponding FUTA exemption. As explained earlier, the latter is a statutory prerequisite to successful assertion of any one of the specialized exemptions set forth at N.J.S.A. 43:21-19(i)(7), including the exemption at N.J.S.A. 43:21-19(i)(7)(J). With regard to the related question - whether the pre-amendment or post-amendment version of N.J.A.C. 12:16-23.2(a), should apply to the issue of whether petitioner has established the existence of a FUTA exemption - I also agree with respondent. That is, I agree that under the "time of decision rule," because N.J.A.C. 12:16-23.2(a) was amended on September 17, 2018, over one year prior to the record having closed in the case and

almost three years prior to the ALJ having issued her initial decision, the post-amendment, rather than the pre-amendment, version of the rule should apply. See Walker v. N.J. Dept. of Institutions & Agencies, Div. of Public Welfare, 147 N.J. Super. 485, 489 (App. Div. 1977) (administrative bodies exercising quasi-judicial functions must decide appeals in the context of the law as it exists at the time that administrative appeal is decided); See also, In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 333 (App. Div. 2002) (court reviewing agency action required to use the most current version of regulations); Newton Board of Education v. NJDOE, 2005 N.J. AGEN LEXIS 463 (2005) (“An administrative agency must apply the law at the time of its decision, otherwise the administrative body would issue orders contrary to the existing legislation.”) Maragliano v. Land Use Bd. of Township of Wantage, 403 N.J. Super. 80, 83 (App. Div. 2008) (“Under the time of decision rule, an agency or reviewing court will apply the law in effect at the time of its decision rather than the law in effect when the issues were initially presented.”); James Durr t/a Durr Wholesale Florist v. NJDEP, 2010 N.J. AGEN LEXIS 13 (2010) (“The “time of decision” rule holds that generally a reviewing court or an administrative agency that is reviewing a pending matter should apply the law in effect at the time that it decides the matter so that the legislative determination as to the issue is not thwarted.”); Commissioner, NJDOBI v. Peter A. Ladas, 2004 N.J. AGEN LEXIS 938 (2004) (“The “time of decision” rule provides that, in administrative decision making, where a case is pending and there is a change in the law, the law that is in effect at the time a decision is rendered is generally applicable.”) Therefore, since the September 17, 2018 amendment to N.J.A.C. 12:16-23.2(a) leaves only three forms of evidence to establish the existence of a FUTA exemption - (1) an IRS private letter ruling, (2) an IRS employment tax audit, or (3) an IRS determination letter; since that is the version of N.J.A.C. 12:16-23.2(a) which existed “at the time of decision;” and since petitioner failed to produce any of these forms of evidence, I cannot credit petitioner with having established a parallel FUTA exemption. Consequently, petitioner has failed to meet its burden under N.J.S.A. 43:21-19(i)(7)(J).³

Regarding the question of whether under N.J.S.A. 43:21-19(i)(6) the securities sales agents are exempt from UCL coverage as independent contractors, rather than employees, the ALJ erred egregiously when she characterized the IRS test for independence (referred to by the ALJ as the “common law test”) as the “ABC test,” and then proceeded to misapply that test, rather than the ABC test, to the question of independent contractor status under the UCL. As noted by respondent, the ABC test

³ The ALJ’s reliance in support of her application of the pre-amendment version of N.J.A.C. 12:16-23.2(a) on the final administrative decision in Big Daddy Drayage, Inc. v. New Jersey Department of Labor and Workforce Development (LID 17680-16), is misguided. That is to say, the Big Daddy Drayage final administrative decision was issued in December 2017, almost an entire year prior to the amendment of N.J.A.C. 12:16-23.2(a), which eliminated the fourth acceptable form of evidence that services are exempt from coverage under FUTA, namely, the option to document “responses to the 20 tests required by the IRS to meet its criteria for independence.” Both the ALJ and the Commissioner in Big Daddy Drayage applied the version of N.J.A.C. 12:16-23.2(a) that existed at “the time of decision.”

found at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C) is the *only* test to be used when determining independent contractor status under the UCL. Having conducted my own independent review of the record, applying the appropriate test to the question of independent contractor status under the UCL, I agree with respondent that Triad has failed to meet its burden under all three prongs of the ABC test with regard to the services performed for Triad by the securities sales agents.

As to Prong A of the ABC test, Triad exercised control over the securities sales agents in multiple ways. Pursuant to the registered representative agreements, Triad has to approve all advertisements, stationery, business cards, signage, or other promotional materials. All orders have to be reviewed by Triad. The securities sales agents have to work under an Office of Supervisory Jurisdiction (OSJ) designated by Triad (in this instance, the Gitterman firm). The securities sales agents had to advise Triad of business and personal addresses, telephone numbers, and electronic addresses. Securities sales agents also had to notify Triad of customer complaints. Sale of Triad products was required to be the securities sales agents' exclusive business activity, unless approved by Triad. Per the registered representative agreement, securities sales agents could only make securities transactions through Triad.

Additionally, Triad utilized a computer program called "Smash" to monitor the securities sales agents' emails. Triad requires its securities sales agents to purchase errors-and-omissions insurance directly from Triad. Although FINRA requires that securities sales agents have errors-and-omissions insurance, it does not require that securities sales agents purchase their errors-and-omissions insurance directly from the broker/dealer. Triad performed background checks and obtained fingerprints to supply to the Department of Justice.

Certain aspects of the control exercised by Triad were pursuant to investor protection laws. Triad argued, and the ALJ agreed, that any control required by investor protection laws should not count as control. In support of that position, Triad cited to the Federal Taxpayer Relief Act of 1997, which states in Section 92 of Public Law 105-34, subparagraph A:

In determining for the purpose of Internal Revenue Code of 1986 whether a registered representative of a securities broker/dealer is an employee as defined in Section 3121(d) of the Internal Revenue Code of 1986, no weight shall be given to instructions for the service recipient which are imposed only in compliance with the Investor Protection Standards imposed by the Federal Government, any State Government, or Governing Body pursuant to a delegation by a Federal or State Agency.

However, New Jersey is not bound by this federal determination. The federal government empowered the states to develop their own unemployment compensation laws, which are not required to mirror the federal law. As explained by the New Jersey Superior Court, Appellate Division:

Although they are complementary, FUTA and New Jersey's unemployment tax law are distinct and separate, representing "independent acts of two distinct legislative bodies." Quality Coal Co. v. United States, 66 F. Supp. 105, 107 (W.D.Ark.1946). They, of course, may coexist, but each can exist without the other. *Ibid.* State programs need not mirror the provisions under FUTA in all respects; they are empowered to vary their programs so long as they meet the requirements for certification under § 3304. Macias v. New Mexico Dep't of Labor, 21 F.3d 366, 368 (10th Cir.1994). Therefore, the fact that FUTA excludes certain persons or entities from its payroll tax "does not preclude a state from including those [persons or entities] in its definition." In re Forrence Orchards, Inc., 85 A.D.2d 44, 448 N.Y.S.2d 803, 804 (App.Div.1982). A state legislature is thus empowered to determine what is exempt "without regard to existing definitions, and is not required to conform in every respect to the federal scheme." *Ibid.* See also Equitable Life Ins. Co. v. Iowa Employment Sec. Comm'n, 231 Iowa 889, 2 N.W.2d 262, 265 (1942) ("That the [state] legislature may determine what shall constitute employment subject to taxation without regard to existing definitions or categories and that it is not required to conform in every respect to the national ideology upon the subject as expressed in the Acts of Congress, is well settled.").

Indeed, the United States Supreme Court has expressly held that the existence of an exemption under FUTA does not mandate the same exemption under state law. Standard Dredging Corp. v. Murphy, 319 U.S. 306, 310, 63 S. Ct. 1067, 1069, 87 L. Ed. 1416, 1420 (1943). In Standard Dredging Corp., New York collected unemployment insurance taxes from employers of maritime workers. The employers challenged the tax, arguing that since FUTA exempted employers of maritime workers from federal unemployment taxes, Congress had declared expressly or by implication that no such tax should be imposed by the state. *Id.* at 307, 63 S. Ct. at 1068, 87 L. Ed. at 1418-19. The Supreme Court rejected the employers' preemption claim, reasoning that the federal exemption had been created because of certain administrative difficulties regarding coverage. The Court found no evidence that Congress intended to prevent states from tackling those difficulties, if they so choose.

Special Care of New Jersey, Inc. v. Board of Review, 327 N.J. Super. 197, 208-209 (App. Div. 2000).

Neither the UCL, nor the Department rules promulgated to implement the UCL, nor any other New Jersey law or rule for that matter, contain any such instruction as to discounting control required by investor protection laws. Therefore, due to the multiple layers of control exercised by Triad over the securities sales agents, some required under

FINRA regulations and some not, I find that Triad has failed to meet Prong A of the ABC test.⁴

Regarding Prong “B” of the ABC test, I agree with respondent that petitioner has failed to meet its burden; which is to say, petitioner has failed to establish that the service at issue 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 enterprise for which such service is performed. In that regard, I would note, the Court in Carpet Remnant, supra, defined the phrase “all places of business” to mean those locations where the enterprise has a physical plant *or conducts an integral part of its business.*” (emphasis added). Relative to the latter part of that definition, Triad is in the business of selling securities. It does not market to the general public. Instead, Triad selects an OSJ to supervise the securities sales agents it works with to sell the securities. A portion of the commissions the securities sales agents receive is given to the OSJ in the form of an override to cover overhead costs such as rent, administrative staff, telephones, computers, and equipment. The majority of Triad’s securities sales business is conducted from its selected OSJ offices. Therefore, those OSJ offices where the sale of Triad’s securities products occur are locations where Triad conducts an “integral part of its business” and,

⁴ Under the UCL, unlike under FUTA, there are specialized exemptions from coverage for a number of types of services provided in industries that are heavily regulated for the purpose of consumer protection, including the service/industry at issue in this case, namely, for services performed by agents of investment companies in the sale of securities (N.J.S.A. 43:21-19(i)(7)(J)); as well as services performed by real estate salesmen or brokers (N.J.S.A. 43:21-19(i)(7)(K)), and services performed by certain operators of motor vehicles weighing 18,000 pounds or more, licensed for commercial use and for the highway movement of motor freight (N.J.S.A. 43:21-19(i)(7)(X)). As is described above, the securities industry is regulated by FINRA. The sale of real estate in New Jersey is regulated by the New Jersey Real Estate Commission. The operation of certain large trucks is governed by the Federal Motor Carrier Safety Administration. Each of the specialized exemptions from UCL coverage described above permit the putative employer to avoid UI/DI contribution liability for the services covered under the particular specialized exemption, so long as it is able to demonstrate the existence of a corresponding FUTA exemption. In each such case, since there is no express exemption for these services in the body of FUTA, the latter requirement would necessitate obtaining a determination from the IRS, applying the IRS test for independence, that the services are exempt from FUTA coverage as those of an independent contractor. If Triad, or any similarly situated putative employer, was to apply to the IRS for an SS-8 determination letter to establish under N.J.A.C. 12:16-23.2(a)(3) the existence of a FUTA exemption for the purpose of asserting one of the specialized UCL exemptions within N.J.S.A. 43:21-19(i)(7), it would be *at that time and under those circumstances, before the IRS*, that Triad could benefit from the instruction contained in the federal Taxpayer Relief Act that discounts the exercise of control required by consumer protection laws. However, as indicated in the body of this decision, under the UCL, there is no such instruction to discount control required by investor protection laws when determining independent contractor status under the ABC test.

therefore, are among Triad's "places of business." Similarly, I would agree with respondent that since the principal part of Triad's business enterprise is providing selling securities, the actual sale of securities by the securities sales agents is a service performed within, not outside of, Triad's usual course of business.

Regarding Prong "C" of the ABC test, as reflected in the opinions in both Carpet Remnant, supra., and Gilchrist, supra., the requirement that a person be customarily engaged in an independently established trade, occupation, profession or business calls for an "enterprise" or "business" that exists and can continue to exist independently of and apart from the particular service relationship. Furthermore, in order to satisfy Prong "C" of the ABC test, Triad must demonstrate that *each* securities sales agent who performed services for Triad during the audit period was engaged in a viable, independently established, business at the time that he or she rendered services to Triad. See Gilchrist, supra., and Schomp v. Fuller Brush Co., 124 N.J.L. 487 (Sup. Ct. 1940).

In Carpet Remnant, supra., the Court remanded the matter to the Department with the following direction as to how one should undertake the Prong "C" analysis:

That determination [whether Prong "C" has been satisfied] should take into account various factors relating to the installers ability to maintain an independent business or trade, including the duration and strength of the installers' business, the number of customers and their respective volume of business, the number of employees, and the extent of the installers' tools, equipment, vehicles, and similar resources. The Department should also consider the amount of remuneration each installer received from CRW [Carpet Remnant Warehouse, Inc.] compared to that received from other retailers.

Relative to the latter part of the Prong "C" analysis; that is, consideration of the amount of remuneration each individual received from the putative employer compared to that received from others, the holding in Spar Marketing, Inc. v. New Jersey Department of Labor and Workforce Development, 2013 N.J. Super. Unpub. LEXIS 549 (App. Div. 2013), certification denied, 215 N.J. 487 (2013), is instructive. In that case, the services of retail merchandisers were at issue and the court observed:

No proof that the merchandisers worked simultaneously for other merchandising companies was provided; Brown's general claims to the contrary,⁵ without documentary support, are not persuasive. As a result, petitioner failed to provide, by a preponderance of the credible evidence, proofs sufficient to satisfy subsection (C) of the ABC test.

⁵ Brown was one of the merchandisers who had been engaged to perform services for Spar Marketing, Inc.

Thus, in order to satisfy Prong “C” of the ABC test, Triad must prove by a preponderance of the credible evidence with regard to *each* securities sales agent whose services it engaged during the audit period that the securities sales agent was during the audit period customarily engaged in an independently established business or enterprise (not multiple employment). Under the holding in Carpet Remnant, supra., that means that relative to each securities sales agent whose services Triad engaged during the audit period, it must address the duration and strength of each securities sales agent’s business during that period, the number of customers and their respective volume of business during that period, the number of employees of the securities sales agent’s business or enterprise during that period, the extent of each securities sales agent’s business resources during that period, and the amount of remuneration each securities sales agent received from Triad during that period compared to that received from others; which is to say, not a general claim that each securities sales agent worked for or was free to work for others, but actual evidence reflecting the amount of remuneration that *each* securities sales agent received from Triad compared to that received from others.

Triad provided no evidence that the securities sales agents engaged by it during the audit period - Daniel Armas, Brian Donnelly, Jennifer Easley, Ian Finnell, Sheila Jacobs, Theodore Kowalchyn, Dennis Schlegel, Samuel Bell, Francis Clark, Stanley Sattler and Lyn Toberall - were customarily engaged in an independently established trade, occupation, profession or business. All of the securities sales agents could only sell securities through Triad. Those who testified stated that they did not have their own registered businesses, office space, trade name, or employees. They did not negotiate commissions with Triad. Thus, I find that Triad has failed to meet its burden under Prong C of the ABC test.⁶

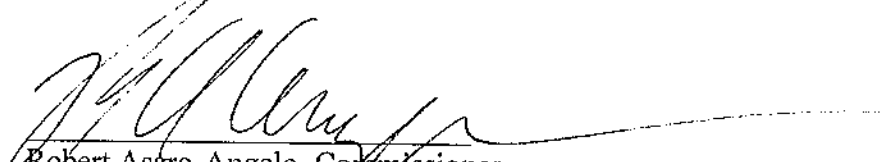
ORDER

Therefore, with regard to the securities sales agents engaged by Triad during the audit period, petitioner’s appeal is hereby dismissed and petitioner is hereby ordered to immediately remit to the Department for the years 2008 through 2011 all unpaid unemployment and temporary disability contributions for which it was assessed by the Department, plus interest and penalties, that are attributable to the services performed for Triad by the following eleven individuals: Daniel Armas, Brian Donnelly, Jennifer Easley, Ian Finnell, Sheila Jacobs, Theodore Kowalchyn, Dennis Schlegel, Samuel Bell, Francis Clark, Stanley Sattler and Lyn Toberall.

⁶ I also categorically reject petitioner’s assertion that Prong C of the ABC test does not require in order for the securities sales agents to be considered independent contractors that each be engaged during the audit period in an independently established business or enterprise, but rather, that it suffices under Prong C of the ABC test that the securities sales agents are employees of another who *is* engaged in an independently established business or enterprise, namely, the Gitterman firm. That is multiple employment; not independent contractor status.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT



Robert Asaro-Angelo, Commissioner
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