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LABOR AND WORKFORCE DEVELOPMENT

OFFICE OF THE COMMISSIONER

ABC Test; Independent Contractors

Proposed New Rules: N.J.A.C. 12:11

Authorized By: _____

Robert Asaro-Angelo, Commissioner

Department of Labor and Workforce Development

Authority: N.J.S.A. 34:1-20; 34:1A-3(e); 34:11-4.11; 34:11-56a5; 34:11D-11; and 43:21-7g.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2025 - _____

Submit written comments by _____ to:

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The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) is proposing new N.J.A.C. 12:11, which would address through regulations application of N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), commonly referred to as the statutory "ABC test," to the question of independent contractor status; specifically, to the question of whether a particular worker is considered an employee or an independent contractor under the New Jersey Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 et seq., and under other New Jersey statutes for which the Department uses the ABC test to determine independent contractor status, such as, but not limited to, the Temporary Disability Benefits Law (TDBL), N.J.S.A. 43:21-25 et seq., the Wage and Hour Law (WHL), N.J.S.A. 34:11-56a4 et seq., the Wage Payment Law (WPL), N.J.S.A. 34:11-4.1 et seq., and the Earned Sick Leave Law (ESLL), N.J.S.A. 34:8D-1 et seq. In short, it is the Department's intent to codify its interpretation of the statutory ABC test, which brings to bear its expertise as the administrative agency tasked by statute with enforcing the above-listed laws. As will be explained in detail below, the Department's interpretation of the ABC test relies heavily on the New Jersey Supreme Court opinions in Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor, 125 N.J. 567 (1991) and East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477 (2022), hereafter referred to as "CRW" and EBD," respectively. Although the Court's opinions in CRW and EBD should be known to attorneys and accountants who practice in this area, they may not (and likely will not) be known to employers who are making those consequential classification decisions. It is the Department's hope that by enumerating within its rules its interpretation of the ABC test, including the factors used

by the Court in CRW and EBD, their predecessors and progeny, to evaluate independent contractor status under the ABC test, employers will be better informed and, consequently, more likely to make appropriate decisions regarding classification of workers.

Many of the new rules that are within proposed N.J.A.C. 12:11 reflect either a direct statutory mandate, or a statutory interpretation that has been announced in published opinions of the New Jersey Supreme Court or the Appellate Division of the New Jersey Superior Court. Also included among the proposed new rules are those that reflect the Department's own interpretation of the statutory ABC test. As explained in detail below, each such interpretation is consistent with both statute and binding precedent. The principles embodied in the latter rules have been announced in final administrative determinations (FADs) of Department Commissioners over the course of decades, through multiple administrations. Many of those FADs have been affirmed by courts in both published and unpublished opinions. In one particular instance – regarding the Department's interpretation of Prong B of the ABC test – the proposed new rule at N.J.A.C. 12:11-1.4 is directly responsive to the New Jesey Supreme Court's suggestion that "the Department exercise its statutory authority and expertise, particularly in light of the prevalence of remote work today, to promulgate regulations clarifying where an enterprise 'conducts an integral part of its business' and what constitutes the 'usual course of the business.'" EBD, supra at 496. Within the descriptions of each section of the proposed new rules that follow, the Department will cite the statute and/or court precedent that supports the rule.

The Department is proposing a new Chapter 11, which, as described in proposed new N.J.A.C. 12:11-1.1, entitled, "Purpose," would provide guidance in the form of a listing of principles and factors used to determine whether an individual worker is an independent contractor under the ABC test. The new rules would also reflect the statutory dictate, recognized on multiple occasions by the courts (see below), that the putative employer has the burden of proof under the ABC test to establish that the individual providing the services at issue is an independent contractor. Toward that end, proposed new N.J.A.C. 12:11-1.2 would state that the burden of proof to establish independent contractor status under the ABC test is on the putative employer and that, because the ABC test is written in the conjunctive, in order for a putative employer to meet its burden under the ABC test, the putative employer must establish that the services at issue and the individual providing those services meet ***all three*** prongs of the ABC test – Prong A, Prong B, and Prong C.

Proposed new N.J.A.C. 12:11-1.2(a), which indicates that the burden of proof to establish independent contractor status under the ABC test is on the putative employer, is a restatement of the principle set forth at N.J.S.A. 43:21-19(i)(6), that "[s]ervices 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" (emphasis added), each of the three prongs of the ABC test have been met. Similarly, proposed new N.J.A.C. 12:11-1.2(b), which indicates that, because the ABC test is written in the conjunctive, in order for a putative employer to meet its burden under the ABC test, the putative employer must establish that the services at issue and the individual providing the services meet all three prongs of the ABC test,

reflects the Legislature's use of the word "and" at N.J.S.A. 43:21-19(i)(6)(B) as it relates to each of the three pongs of the ABC test at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), and paraphrases the following from the Court's opinion in CRW:

> If the Department determines that the relationship falls within that definition [of employment; that is, service performed for remuneration], and is not statutorily excluded, see N.J.S.A. 43:21-19(i)(7), then the party challenging the Department's classification must establish the existence of all three criteria of the ABC test. Conversely, the failure to satisfy any one of the three criteria results in an "employment" classification.
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> CRW, supra at 581 (internal citations omitted) See also, Schomp v. Fuller Brush, Co., 124 N.J.L. 487, 489 (Sup. Ct. 1940); Philadelphia Newspapers, Inc., v. Board of Review, 397 N.J. Super. 309, 325 (App. Div. 2007); Hargrove v. Sleepy's, LLC, 220 N.J. 289, 305 (2015); and EBD, supra at 495.

Proposed new N.J.A.C. 12:11-1.3, entitled, "Prong A of the ABC test," would indicate, (1) that in order to meet its burden under Prong A, the putative employer must establish not only that the employer has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance, (2) that a putative employer need not control every facet of a person's responsibilities for that person to be deemed an employee, and (3) that the following factors may be considered when evaluating under Prong A whether a worker has been and will continue to be free from control or direction over the performance of services:

1. Whether the individual is required to work any set hours or jobs,

2. Whether the putative employer has the right to control the details and means by which the services are performed by the individual,

3. Whether the services must be rendered by the individual personally,

4. Whether the putative employer negotiates for and acquires the work performed by the individual,

5. Whether the individual's rate of pay is fixed by the putative employer,

6. Whether the individual bears any risk of loss for the work he or she performs,

7. Whether the individual is required to be on call, on standby, or otherwise available to perform services at set times determined by the putative employer, even if the individual does not actually perform services at such times,

8. Whether the putative employer limits the individual's performance of services for other parties such as by limiting the individual's geographic area or potential clientele, and

9. Whether the putative employer provides training to the individual.

Each of the first two Subsections of proposed N.J.A.C. 12:11-1.3 – Subsections (a) and (b) - are taken directly from the opinion in CRW. See CRW, supra at 582 and 590. See also, Philadelphia Newspapers, Inc., supra at 321. Some of the factors listed within subsection (c) are also taken directly from the opinion in CRW, supra, such as (1) whether the individual is required to work any set hours or jobs, (2) whether the putative employer has the right to control the details and means by which the services are performed, and (3) whether the services must be rendered personally. Certain other factors have been gleaned from opinions of the New Jersey Superior Court, Appellate

Division, and Supreme Court issued both before and after the opinion in CRW, supra. See, for example, MKI Assocs., LLC v. N.J. Dep't of Labor & Workforce Dev., 2019 N.J. Super. Unpub. LEXIS 2088 (App. Div. 2019), certif. denied, 241 N.J. 51 (2020) (Court concluded that MKI had failed to meet its burden under Prong "A" of the ABC test for among the following reasons: MKI's "consultant agreements" contained non-compete and non-solicitation clauses; the agreements contained a buy-out provision and clauses restricting the ability of the facility and a therapist to engage in full-time employment without MKI's written approval; therapists were not permitted to negotiate their wages directly with the facilities; therapists submitted their timesheets to MKI, which paid them and guaranteed their wages); Pennsauken Diagnostics Ctr., LLC (PDC) v. N.J. Dep't of Labor & Workforce Dev., 2024 N.J. Super. Unpub. LEXIS 1232 (App. Div. 2024) (Court concluded that PDC had failed to meet its burden under Prong "A" of the ABC test for among the following reasons: the pay rate of the radiologists engaged by PDC was fixed by PDC without negotiation; the radiologists were required to log into PDC's portal to determine which diagnostic images to read and were required to issue reports within 24 hours); Trauma Nurses, Inc. (TNI) v. Board of Review, 242 N.J. super. 135 (App. Div. 1990) (among the factors considered by the court when determining whether TNI had exercised control or direction over its nurses, were whether the nurses were required to comply with any rules, practices or procedures set by TNI; whether TNI required nurses to report to its offices; whether TNI offered training to the nurses; and whether TNI furnished any supplies equipment or uniforms to its nurses); Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147 (App. Div. 1957) (putative employer's acceptance of risk of loss included among factors contributing to finding of employment

status - “when a customer defaulted, [the putative employer] assumed the possible loss and the salesman retained his commission”); and Schomp v. Fuller Brush Co., 124 N.J.L. 487 (1940) (Instruction and training provided to salesmen by putative employer among indicia of control; also, salesmen could sell merchandise only in specified area, and subject to dismissal for failure to sell a given amount).

Subsection (d) of proposed N.J.A.C. 12:11-1.3 would state that the factors listed in subsection (c) are not exhaustive and that additional factors may be considered.

Subsection (e) of proposed N.J.A.C. 12:11-1.3 would make clear that the factors listed in subsection (c) should not be used as a checklist; which is to say, a conclusion that the putative employer has met Prong A of the ABC test should not be based on whether a majority of the factors listed in subsection (c) have been met.

Subsection (f) of proposed N.J.A.C. 12:11-1.3, would state that when evaluating under Prong A of the ABC test whether an individual has been and will continue to be free from control or direction over the performance of services for remuneration, 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; that is, it shall be given the same weight as would be given to any other control or direction that the putative employer has exercised or has reserved the right to exercise. There is nothing in New Jersey statute, including but not limited to the UCL, to indicate that control or direction exercised by a putative employer to ensure compliance with a law or rule should be excluded from consideration when evaluating the facts of a potential employment relationship under Prong A of the ABC test. The Department’s reading is also consistent with the remedial purposes of both the UCL and WPL. See CRW, at 581

("[b]ecause the [UCL] is remedial, its provisions have been construed liberally, permitting a statutory employer-employee relationship to be found even though that relationship may not satisfy common-law principles [of employment]") and Hargrove v. Sleepy's, LLC v. 220 N.J. 289 (2015) ("As a remedial statute, the Wage Payment Law should be liberally construed"), citing, Turon v. J. & L. Constr. Co., 8 N.J. 558 (1952) and KAS Oriental Rugs, Inc. v. Ellman, 407 N.J Super. 538 (App. Div. 2009) (noting the Wage Payment Law's humanitarian purpose).

Proposed new N.J.A.C. 12:11-1.4, entitled, "Prong B of the ABC test," would indicate that when evaluating under Prong B whether a 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 enterprise for which such service is performed, the phrase, "places of business" refers to those locations where the enterprise has a physical plant or conducts an integral part of its business. This is taken directly from the opinion in CRW, supra at 592 ("In our view, [the phrase, 'places of business'] refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business"). The proposed new rule would describe what constitutes a service outside of the putative employer's usual course of business, and would provide examples of both (1) services that ***will*** typically be outside of the putative employer's usual course of business, and (2) services that will typically ***not*** be outside of the putative employer's usual course of business. The proposed new rule would announce that when (1) a service is performed by the worker at the residence or place of business of the putative employer's customer, and (2) the service performed by the worker is an essential component of the putative employer's business, the residence or

place of business of the putative employer's customer is among putative employer's places of business. The proposed new rule would, for illustrative purposes, apply this test to two particular sets of facts. In addition, the proposed new rule would provide examples of locations that are outside of the putative employer's physical plant, but which remain among the putative employer's places of business; and examples of locations that are outside of the putative employer's physical plant and are also not included among the putative employer's places of business. With the enumeration and illustration of the principles described above, as set forth within proposed N.J.A.C. 12:11-1.4, the Department is, as unanimously suggested by the New Jersey Supreme Court in EBD, supra, "exercise[ing] its statutory authority and expertise…to promulgate regulations clarifying where an enterprise 'conducts an integral part of its business' and what constitutes the 'usual course of the business.'"

Proposed new N.J.A.C. 12:11-1.5 would indicate that the following factors are among those that may be considered when evaluating under Prong C whether a worker is customarily engaged in an independently established trade, occupation, profession or business:

1. The duration, strength, and viability of the individual's business (independent of the putative employer),

2. The number of customers of the individual's business and the volume of business from each respective customer,

3. The amount of remuneration the individual receives from the putative employer compared to the amount of remuneration the individual receives from others in the same industry,

4. The number of employees of the individual's business,

5. The extent of the individual's investment in their own tools, equipment, vehicles, buildings, infrastructure, and other resources,

6. Whether the individual sets their own rate of pay; and

7. Whether the individual advertises, maintains a visible business location, and is available to work in the relevant market.

The above list of Prong C factors is paraphrased from the opinion in CRW, supra, and its progeny. Proposed new N.J.A.C. 12:11-1.5 would also state that the above-listed factors are not exhaustive and that the factors listed should not be used as a checklist; which is to say, a conclusion that the putative employer has met Prong C of the ABC test should not be based on whether a majority of the factors listed in subsection (c) have been met. The proposed new rule would offer further guidance regarding application of Prong C. Specifically, it would indicate that the requirement under Prong C that one 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 independent of and apart from the particular service relationship with the putative employer; that is, an enterprise or business that is a stable and lasting one that will survive the termination of the relationship with the putative employer. This is taken directly from the opinion in CRW, supra at 585, quoting Gilchrist v. Division of Employment Sec., 48 Super. 147 (App. Div. 1957), where the Court stated the following:

> [T]he requirement that a person be customarily engaged in an independently-established trade, occupation, profession, or business "calls for an enterprise that exists and can continue to exist independently

> of and apart from the particular service relationship. The enterprise must be one that is stable and lasting – one that will survive the termination of the relationship." Gilchrist, 48 N.J. Super. at 158.

The proposed new rule would also explain that multiple employment does not equate to an independently established enterprise or business sufficient to meet Prong C; that working in employment full-time or part-time in industries or professions unrelated to the service performed for the putative employer does not constitute being customarily engaged in an independently established trade, occupation, profession or business sufficient to meet Prong C; and that licensure in an occupation or profession, such as a nurse or attorney, is not alone (absent proof that during the time period in question the individual was actively and independently in business for himself or herself in that occupation or profession) sufficient to meet Prong C. The proposed new rule would indicate that proof of business registration, including the establishment of a Limited Liability Company or a corporation, by the individual performing a service for a putative employer, and/or the individual having obtained liability insurance or workers' compensation insurance, are not alone sufficient to meet Prong C. Each of these principles is contained in FADs issued by Commissioners through decades and across administrations under both Democratic and Republican Governors, each reflects the Department's interpretation of the ABC test and its application to the question of independent contractor status, and each is consistent with statute and binding court precedent. Proposed Subsections (f) and (g) of N.J.A.C. 12:11-1.5, in particular, are consistent with the express holding in EBD, where the putative employer, East Bay Drywall, had provided certificates of insurance and business entity registration

information for most of the individuals it alleged had performed work for East Bay Drywall as independent contractors, and where the Court ultimately found that information insufficient to prove that the individuals had been customarily engaged in independently established business enterprises. EDB, supra at 498. Regarding East Bay Drywall's exclusive reliance on business registration and insurance information for proof that its drywall installers were engaged in independently established business enterprises, the Court in EDB, added:

> A business practice that requires workers to assume the appearance of an independent entity – a company in name only – could give rise to an inference that such a practice was intended to obscure the employer's responsibility to remit its fund contributions as mandated by the State's employee protection statutes. That type of subterfuge is particularly damaging in the construction context, where workers may be less likely to be familiar with the public policy protections afforded by the ABC test and consequently particularly vulnerable to the manipulation of the laws intended to protect all employees. Such a business practice also undermines the public policy codified in the UCL.

It is important, for the benefit of employers, employees, and Department staff, that the principles embodied in proposed N.J.A.C. 12:11-1.5, which have guided Commissioners of the Department for many years, and which as described above, are consistent with statute and binding case law, finally are memorialized in Departmental rule.

Proposed N.J.A.C. 12:11-1.6 would list other principles that impact application of the ABC test. Specifically, the proposed new rule would state that one cannot make an

independent contractor of an individual who would otherwise be considered an employee, either by reporting the earnings of that individual using a Federal Form 1099, as opposed to a Federal Form W-2, or by having the individual sign an agreement that labels the individual an independent contractor. These principles are consistent with the opinion in CRW, where the Court stated, "[t]hat determination [regarding independent contractor status under the ABC test] is fact sensitive, requiring an evaluation in each case of the **substance, not the form**, of the relationship." CRW, supra at 581 (emphasis added), citing Provident Inst. for Sav. In Jersey City, 32 N.J. 585, 591 (1960); Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135, 142 (App. Div. 1990); and Schomp v. Fuller Brush Co., supra, at 490-91. That is, if the Department was to base its evaluation of a particular individual's services under the statutory ABC test for independent contractor status on which federal tax form the putative employer chose to use to report the individual's earnings to the IRS, or on the existence of an agreement that labels the individual an independent contractor, that would be inconsistent with N.J.S.A. 43:21-19(i)(6), which requires an evaluation under all three prongs of the ABC test of the facts of the relationship between each individual performing a service and the putative employer for whom the service was performed. It would also be inconsistent with the Court's express instruction in CRW, quoted above, that any determination of independent contractor status must be fact sensitive, requiring an evaluation of the substance, not the form, of the relationship between the individual and the putative employer.

Proposed new N.J.A.C. 12:11-1.6 would also indicate that under the ABC test it is not relevant that an individual would not qualify monetarily for receipt of

unemployment compensation benefits based upon earnings, which includes, but is not limited to, where the individual would not qualify monetarily for receipt of unemployment compensation benefits based on earnings from the putative employer alone. As to the overarching principle expressed in the proposed new rule - that the insufficiency of earnings to establish monetary eligibility for unemployment compensation benefits is not relevant to the determination of whether one is an employee or an independent contractor under the ABC test – that principle is supported by the language of N.J.S.A. 43:21-19(i), which states that under the Unemployment Compensation Law once services have been performed for remuneration a presumption of employment arises and that the presumption of employment may be rebutted only if the putative employer is able to establish that the services and the individual performing those services meet all three prongs of the ABC test. The statute does not state that the presumption of employment only arises when the remuneration paid by the putative employer to the individual performing services is in an amount sufficient to establish monetary eligibility for unemployment compensation, nor does the ABC test make any mention of the sufficiency of earnings to establish monetary eligibility for unemployment compensation benefits as a factor to be considered when determining whether an individual is an employee or an independent contractor. The inclusion of this provision within the proposed new rules is a direct response to those who would assert (and have asserted) that because an individual's employment is or was for a limited duration or frequency, the earnings for which would not alone be sufficient to establish monetary eligibility for unemployment compensation benefits, the relationship between the individual providing the services and the putative employer cannot be considered one of employment. That

is, this particular argument, previously encountered by the Department, is without merit for among other reasons, that under N.J.SA. 43:21-4(e), wages from all employment is combined to establish a valid claim for benefits under the Unemployment Compensation Law. As was explained in a recent Commissioner FAD:

> [U]nder N.J.S.A. 43:21-4(e), an individual's wages from all employment are combined to establish a valid claim for benefits under the UCL. Thus, for example, an individual who works full-time with the State as an Investigator earning $45,000 per year, and who also works on a seasonal basis (during November and December) as a salesperson for a retail establishment earning $2,000 per year, is no less an employee of the retail establishment, nor is the retail establishment any less responsible to remit UI/DI contributions on behalf of its seasonal employee, simply because the individual holds full-time employment with the State, or because the individual would be unable to file a valid claim for benefits based on the $2,000 in earnings from the retail establishment alone. Each is employment under the UCL (one full-time and the other part-time/seasonal) and each carries with it an obligation on the part of the employer to remit UI/DI contributions on behalf of its employee based on wages earned.
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> Yeamon Music, Inc. v. Department of Labor and Workforce Development
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> (Issued January 19, 2023).

Furthermore, under the New Jersey Wage and Hour Law and New Jersey Wage Payment Law, under which, as affirmed by the New Jersey Supreme Court in Hargrove,

supra, the Department also uses the ABC test to determine independent contractor status, the presumption of employment arises not when services have been performed for remuneration, but rather, when an individual is "suffered or permitted to work" (see N.J.S.A. 34:11-4.1 and N.J.S.A. 34:11-56a1). Thus, under the Wage Payment Law and Wage and Hour Law, once one has suffered or been permitted to work, a presumption of employment arises regardless of whether remuneration was paid for the services performed.

As the Department has provided a 60-day comment period for this Notice of Proposal, this notice is excepted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rules would have a positive social impact in that they would mitigate or eliminate possible confusion among employers and employees as to the question of independent contractor status for the purpose of determining coverage under various laws enforced by the Department, including but not limited to, the Unemployment Compensation Law, the Wage Payment Law, the Wage and Hour Law and the Earned Sick Leave Law. Furthermore, since the added clarity stemming from the proposed new rules should result in more workers being *properly* classified (either as employees or independent contractors), those who become properly classified as employees (and their families) will most assuredly be impacted positively by the availability to them, as the law intended, of vital assistance in times of need in the form of unemployment compensation, temporary disability benefits, family leave insurance benefits and earned sick leave.

The proposed new rules would also benefit the Department in that they would provide clarity to both employers and employees regarding the issue of independent contractor status, thereby assisting in a more effective enforcement by the Department of the law.

Economic Impact

The proposed new rules would have a positive economic impact on employers who, but for the proposed new rules, might misunderstand the issue of independent contactor status and, thereby, run the risk of incurring unnecessary expenses related to assessments for unpaid contributions, unpaid wages, and penalties levied by the Department for violations of the law and rules. As indicated in the Social Impact statement above, the proposed new rules would mitigate or eliminate possible confusion among employers and employees with regard to the issue of independent contractor status. This would presumably result in fewer violations and, consequently, the levying of fewer assessments for unpaid contributions, unpaid wages, and penalties by the Department. As also indicated in the Social Impact statement above, the added clarity stemming from the proposed new rules should result in more workers being *properly* classified (either as employees or independent contractors), which means that those who become properly classified as employees (and their families) would be impacted positively from an economic, as well as social perspective, by the availability to them of unemployment compensation, temporary disability benefits, family leave insurance benefits and earned sick leave.

Federal Standards Statement

The proposed new rules do not exceed standards or requirements imposed by Federal law. Specifically, the proposed new rules and amendment are not inconsistent with the Federal Unemployment Tax Act, 26 U.S.C. 3301 et seq. Consequently, no Federal standards analysis is required.

Jobs Impact

The proposed new rules would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed new rules would have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The proposed new rules would impose no reporting, recordkeeping or compliance requirements on small businesses, as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Rather, the proposed new rules would simply facilitate a better understanding by employers and employees of the laws enforced by the Department. The clarity which would result from the proposed new rules would inure to the benefit of all concerned, including employers, large and small.

Housing Affordability Impact Analysis

The proposed new rules would have no impact on affordable housing in New Jersey and would not evoke a change in the average costs associated with housing

because the proposed new rules pertain to Department determinations regarding independent contractor status and have nothing to do with housing.

Smart Growth Development Impact Analysis

The proposed new rules would have no impact on smart growth and would not evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey because the proposed new rules pertain to Department determinations regarding independent contractor status and have nothing to do with housing.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Commissioner has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the proposed new rules follows:

CHAPTER 11 ABC TEST; INDEPENDENT CONTRACTORS

SUBCHAPTER 1 REGULATIONS REGARDING APPLICATION OF THE ABC TEST

12:11-1.1 Purpose and scope

(a) The purpose of this Chapter is to delineate the manner in which N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the "ABC test," shall be applied to the question of independent contractor status.

(b) This Chapter shall be applied when interpreting each statute and each Department rule where the issue of independent contractor status is determined based on an application of the ABC test, including but not limited to, the Unemployment Compensation Law, N.J.S.A. 43:21-1 et seq., the Temporary Disability Benefits Law, N.J.S.A. 43:21-25 et seq., the Wage Payment Law, N.J.S.A. 34:11-4.1 et seq., the Wage and Hour Law, N.J.S.A. 34:11-56a1 et seq., the Earned Sick Leave Law, N.J.S.A. 34:11D-1 et seq., and the Call Center Jobs Act, N.J.S.A. 34:21-8 et seq.

12:11-1.2 Burden of proof

(a) The burden of proof to establish independent contractor status under the ABC test is on the putative employer.

(b) Because the ABC test is written in the conjunctive, in order for the putative employer to meet its burden under the ABC test, the putative employer must establish that the services at issue and the individual providing those services meet all three prongs of the ABC test - Prong A, Prong B, and Prong C.

12:11-1.3 Prong A of the ABC test

(a) In order for the putative employer to meet its burden under Prong A of the ABC test, the putative employer must establish that it does not exercise

control or direction over the individual's work in fact, and that it does not reserve the right to control or direct the individual's work.

(b) The putative employer need not control every facet of a person's work for that person to be an employee.

(c) The following factors are among those that shall be considered when evaluating whether an individual has been and will continue to be free from control or direction under Prong A of the ABC test:

1. Whether the individual is required to work any set hours or jobs,

2. Whether the putative employer has the right to control the details and means by which the services are performed by the individual,

i. The following sub-factors may be considered when determining whether the putative employer has exercised control over the details and means by which the services are performed by the individual. It is intended to be illustrative and is not exhaustive.

a. Whether the putative employer requires the individual to use specific tools, supplies, or materials,

b. Whether the putative employer requires the individual to wear a uniform or to don or display a specific logo, color(s), or other insignia,

c. Whether the putative employer requires the individual to use a digital application or software in the course of performing the services that is primarily or unilaterally controlled by the putative employer, and

d. Whether the putative employer requires the individual to report on any aspect of the individual's services at prescribed times or intervals.

3. Whether the services must be rendered by the individual personally,

4. Whether the putative employer negotiates for and acquires the services performed by the individual,

5. Whether the individual's rate of pay is fixed by the putative employer,

6. Whether the individual bears any risk of loss for services performed,

7. Whether the individual is required to be on call, on standby, or otherwise available to perform services at set times determined by the putative employer, even if the individual does not actually perform services at such times,

8. Whether the putative employer limits the individual's performance of services for other parties such as by limiting the individual's geographic area or potential clientele, and

9. Whether the putative employer provides training to the individual.

(d) The factors listed in (c) above are not exhaustive and additional factors may be considered.

(e) The factors listed in (c) above shall <u>not</u> be used as a checklist; that is, a conclusion that the putative employer has met Prong A of the ABC test shall <u>not</u>

be based on whether a majority of the factors listed in (c) above have been met. There is no set number of factors that will in every instance result in a finding that the putative employer either has or has not met its burden under Prong A of the ABC test. Some factors may be relevant in one situation and may not be relevant in another. What is required under Prong A of the ABC test is to evaluate the entire relationship between the individual and the putative employer and to determine whether the Individual has been and will continue to be free from control or direction by the putative employer.

(f) When evaluating under Prong A of the ABC test whether an individual has been and will continue to be free from 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; 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.

12:11-1.4 Prong B of the ABC test

(a) In order to meet its burden under Prong B of the ABC test, the putative employer must establish either that an individual's services are outside of the putative employer's usual course of business or that such services are performed outside of all of the putative employer's places of business.

(b) The putative employer's usual course of business may include activities that the putative employer regularly engages in to generate revenue or develop,

produce, sell, market, or provide goods or services. An entity may have more than one usual course of business.

(c) The following are examples of services that will typically be outside of the putative employer's usual course of business:

1. A dentist engages the services of a cleaning person to clean the dental office. The services performed by the cleaning person are likely outside of the dentist's usual course of business.

2. A restaurant engages the services of a musician to perform on a given night for the restaurant's patrons. The services performed by the musician are likely outside of the restaurant's usual course of business.

3. A law firm engages the services of a landscaper to mow the lawn and trim hedges on the grounds of its building. The services performed by the landscaper are likely outside of the law firm's usual course of business.

(d) The following are examples of services that will typically <u>not</u> be outside of the putative employer's usual course of business:

1. A transportation network company, as defined at N.J.S.A. 39:5H-2, engages the services of a driver to transport riders (customers) of the transportation network company from one location to another. The services performed by the driver are likely not outside of the transportation network company's usual course of business.

2. A drywall installation company engages the services of a drywall installer to install drywall at sites where the drywall installation company's customers are constructing or renovating homes or commercial buildings.

The services performed by the drywall installer are likely not outside of the drywall installation company's usual course of business.

3. A country club engages the services of a caddie to assist the country club's members on the country club's golf course. The services performed by the caddie are likely not outside of the country club's usual course of business.

(e) When evaluating whether services are performed outside of all the places of business of the enterprise for which such service was performed, the phrase "places of business" refers to locations where the enterprise has a physical plant or conducts an integral part of its business.

(f) The locations where the putative employer has a physical plant include, but are not limited to, a physical office, store, or factory; where a substantial amount of the putative employer's work is performed.

(g) The locations where the putative employer conducts an "integral part of its business," include but are not limited to, locations outside of the putative employer's physical plant, where the services performed by the individual are an essential component of, rather than ancillary to, the putative employer's business. This includes the residence or place of business of the putative employer's client or customer, when the services performed by the individual at such location are an essential component of, rather than ancillary to, the putative employer's business.

i. For example, when an individual is engaged by a carpet sales business to install carpet at the residences of the carpet sales business'

customers; customers who have purchased carpet from the carpet sales business and who have opted to avail themselves of the carpet sales business' offer to have the carpet installed at the customer's residence, the service being performed by the carpet installer at the residences of the carpet sales business' customers has not been performed at among the carpet sales business' places of business, because although the service was performed at the residence or place of business of a customer of the carpet sales business, the service of carpet installation was not an essential component of the carpet sales business. That is, the showroom where the carpet sales business displayed and sold carpet was its physical plant, the optional service of carpet installation was ancillary to, rather than an essential component of, the putative employer's business of carpet sales, and, therefore, the residences of the carpet sales business' customers were not among the carpet sales business' places of business.

ii. For example, and by way of contrast to the example in i., above, when an individual is engaged by a drywall installation business to install drywall at the residences of the drywall installation business' customers, the service being performed by the drywall installer at the residences of the drywall installation business' customers has been performed at among the drywall installation business' places of business, because the service was performed at the residences of customers of the drywall installation business and the service of drywall installation was an essential component of, rather than ancillary to, the drywall installation business.

That is, the focus of the drywall installation business' enterprise is the installation of drywall (not the sale of drywall). Therefore, drywall installation is an essential component of, rather than ancillary to, the putative employer's business, and the residences of the drywall installation business' customers were among the drywall installation business' places of business.

iii. Other examples of locations that are outside of the putative employer's physical plant, but remain among the putative employer's places of business, because they are locations where the putative employer conducts an integral part of its business, include, but are not limited to, the following:

a. An airplane, for an airline business;

b. A truck, for a trucking company; and

c. A vehicle operated by a driver, whether for a limousine, taxi, transportation network company or delivery service, the purpose of which is to transport people or goods.

iv. Other examples of locations that are outside of the putative employer's physical plant, and are also not included among the putative employer's places of business, because they are not locations where the putative employer conducts an integral part of its business, include, but are not limited to, the following:

a. Public buildings such as the County Clerk's office, where a Title Abstractor performs abstracting services, or a public library or archive, where a Title Abstractor performs research;

b An individual's personal residence where they perform remote work. For the purpose of this subparagraph, the term "remote work" means performing services from a location other than a location operated by the putative employer.

12:11-1.5 Prong C of the ABC test

(a) In order to meet its burden under Prong C of the ABC test, the putative employer must establish that an individual is customarily engaged in an independently established trade, occupation, profession, or business.

(b) The following factors are among those that shall be considered when evaluating whether an individual is customarily engaged in an independently established trade, occupation, profession, or business, under Prong C of the ABC test:

1. The duration, strength, and viability of the individual's business (independent of the putative employer),

2. The number of customers of the individual's business and the volume of business from each respective customer,

3. The amount of remuneration the individual receives from the putative employer compared to the amount of remuneration the individual receives from others in the same industry,

4. The number of employees of the individual's business,

5. The extent of the individual's investment in their own tools, equipment, vehicles, buildings, infrastructure, and other resources,

6. Whether the individual sets their own rate of pay; and

7. Whether the individual advertises, maintains a visible business location, and is available to work in the relevant market.

(c) The factors listed in (b) above are not exhaustive and additional factors may be considered.

(d) The factors listed in (b) above shall <u>not</u> be used as a checklist; that is, a conclusion that the putative employer has met Prong C of the ABC test shall <u>not</u> be based on whether a majority of the factors listed in (b) above have been met. There is no set number of factors that will in every instance result in a finding that the putative employer either has or has not met its burden under Prong C of the ABC test. Some factors may be relevant in one situation and may not be relevant in another. What is required under Prong C of the ABC test is to evaluate the totality of the facts, including, but not limited to, the entire relationship between the individual and the putative employer, and to determine whether the individual is customarily engaged in an independently established trade, occupation, profession, or business.

(d) Under Prong C, what is relevant is not whether an individual was free to work for others, but rather, whether the individual did perform services for, and receive remuneration for the performance of such services from, others during the relevant period; for example, regarding coverage under the Unemployment

Compensation Law within the context of an audit to determine contribution liability, during the audit period.

(e) In order to meet its burden under Prong C of the ABC test, the putative employer must establish that an individual's independently established trade, occupation, profession, or business, is an enterprise that exists and can continue to exist independent of, and apart from, the particular service relationship with the putative employer; that is, the enterprise must be stable and lasting and able to survive the termination of the relationship with the putative employer.

1. An individual having multiple employers does not equate to an individual having an independently established trade, occupation, profession, or business sufficient to meet Prong C.

2. Working full-time or part-time for an entity or individual other than the putative employer does not alone equate to an individual being customarily engaged in an independently established trade, occupation, profession, or business sufficient to meet Prong C.

3. Licensure in an occupation or profession, such as a nurse or attorney, is not alone sufficient to meet Prong C.

(f) Proof of business registration, including the establishment of a sole proprietorship, a limited liability company, or a corporation, by the individual performing a service for the putative employer, is not alone sufficient to meet Prong C.

1. The existence of a business entity, without more, may suggest a business in name only and does not suggest independent contractor status.

2. Where the putative employer requires or encourages the individual to establish a business entity, this may suggest a business in name only and does not suggest independent contractor status.

(g) Proof that the individual performing services for the putative employer has their own liability insurance and/or workers' compensation insurance, is not alone sufficient to meet Prong C. Where the putative employer requires or encourages the individual to obtain such insurance, the existence of such insurance does not suggest independent contractor status.

12:11-1.6 Additional principles governing application of the ABC test

(a) The question of independent contractor status is determined based on an evaluation of the facts surrounding the relationship between the putative employer and the individual providing the services and the application of the ABC test to those facts.

(b) One cannot transform into an independent contractor an individual who would otherwise be considered an employee, by reporting the earnings of that individual using a Federal Form 1099, as opposed to a Federal Form W-2.

(c) A written or oral contract or agreement labeling an individual as an independent contractor is not dispositive of whether an individual is an independent contractor under the ABC test.

1. When determining the weight given to an alleged independent contractor agreement, the following factors may be considered, among others:

i. Whether either the putative employer or the individual is the primary or unilateral drafter of the alleged independent contractor agreement,

ii. Whether material terms of the alleged independent contractor agreement are negotiable or it is a contract of adhesion,

iii. Whether the putative employer reserves the right to unilaterally modify any term of the alleged independent contractor agreement or the conditions of service during the term of the agreement, and

iv. Whether either the putative employer or the individual may terminate the alleged independent contractor agreement or the relationship at any time during the term of the agreement.

(d) The fact that an individual would not qualify for receipt of unemployment compensation benefits based on their earnings is not relevant to the question of whether such individual is an independent contractor under the ABC test. Likewise, that an individual would not qualify for receipt of unemployment compensation benefits based on their earnings solely from the putative employer also does not impact whether such individual is an independent contractor under the ABC test.