NJAC 12:11 – New Rules

APPLICATION OF THE STATUTORY ABC TEST FOR INDEPENDENT CONTRACTOR STATUS

New Jersey Department of Labor and Workforce Development

PURPOSE

(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.

This law dates back to 1936. For historical reference, around that same time FDR is seen here campaigning in Camden, NJ October 29, 1936.

Harold G. Hoffman, 41st Governor of New Jersey (1935-1938), in office when New Jersey adopted the ABC Test in 1936.

ABC TEST—NJ'S 90 YEAR OLD STATUTORY TEST FOR INDEPENDENT CONTRACTOR STATUS

N.J.S.A. 43:21-19(i)(6): Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S. 43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that:

(A) Such individual has 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;

(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 all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

New Jersey's ABC test has been the test for independent contractor status under the State's Unemployment Compensation Law (UCL) since 1936.

In 2015, the New Jersey Supreme Court in Hargrove v. Sleepy's, LLC, 220 N.J. 289, 303 (2015) held that the ABC test set forth in the UCL also governs whether an individual is an independent contractor under both the New Jersey Wage and Hour Law and the New Jersey Wage Payment Law.

APPLICATION

(b) This Chapter shall be applied when interpreting each statute and each Department of Labor and Workforce Development rule where the issue of independent contractor status is determined based on an application of the ABC test, including, but not limited to:

- Unemployment Compensation Law, N.J.S.A. 43:21-1 et seq.
- Temporary Disability Benefits Law, N.J.S.A. 43:21-25 et seq.
- Wage Payment Law, N.J.S.A. 34:11-4.1 et seq.
- Wage and Hour Law, N.J.S.A. 34:11-56a1 et seq.
- Earned Sick Leave Law, N.J.S.A. 34:11D-1 et seq.
- Call Center Jobs Act, N.J.S.A. 34:21-8 et seq.

STATUTORY EXEMPTIONS FROM COVERAGE OR REQUIREMENTS

(c) Nothing in this Chapter should be construed to alter or eliminate statutory exemptions from coverage under, or exemptions from the requirements of, the individual statutes listed in (b).

Following are examples of statutory exemptions from coverage under, or exemptions from the requirements of, the individual statutes listed in (b) in the prior slide.

EXEMPTION EXAMPLE 1

UNEMPLOYMENT COMPENSATION LAW AND TEMPORARY DISABILITY BENEFITS LAW

The exemptions at N.J.S.A. 43:21-19(i)(7), 43:21-19(i)(9), and 43:21-19(i)(10), from covered "employment" under the Unemployment Compensation Law and Temporary Disability Benefits (TDB) Law

SOURCE

N.J.S.A. 43:21-19(i)(7), 43:21-19(i)(9), and 43:21-19(i)(10)

EXEMPTION EXAMPLE 2

WAGE AND HOUR LAW - OVERTIME REQUIREMENTS

The exemptions at N.J.S.A. 34:11-56a4 from the requirement under the Wage and Hour Law that an employer pay each employee not less than 1 ½ times an employee's regular hourly rate for each our worked in excess of 40 in a workweek, for:

- Individuals employed in a bona fide executive, administrative, or professional capacity
- Employees engaged to labor on a farm or employed in a hotel
- Employees of a common carrier of passengers by motor bus
- Limousine drivers who are employees of an employer engaged in the business of operating limousines
- Employees engaged in labor relative to the raising or care of livestock

SOURCE

N.J.S.A. 34:11-56a4

EXEMPTION EXAMPLE 3

WAGE AND HOUR LAW - MINIMUM HOURLY WAGE

The exemptions at N.J.S.A. 34:11-56a4 from the requirement under the Wage and Hour Law that each employer pay to each of its employees no less than the required minimum hourly wage, for:

- Persons under the age of 18 not possessing a special vocational graduate permit issued pursuant to N.J.S.A. 34:2-21.15
- Persons employed in outside sales
- Persons employed in a volunteer capacity and receiving only incidental benefits at a county or other agricultural fair by a nonprofit or religious association which conducts or participates in that fair; and

SOURCE

N.J.S.A. 34:11-56a4

EXEMPTION EXAMPLE 4

EARNED SICK LEAVE LAW

The exemptions at N.J.S.A. 34:11D-1 from the definition of covered "employee" under the Earned Sick Leave Law for:

- An employee performing a service in the construction industry that is under contract pursuant to a collective bargaining agreement
- A public employee who is provided with sick leave with full pay pursuant to any other law or rule of the State.*

SOURCE

N.J.S.A. 34:11D-1

BURDEN OF PROOF

The burden of proof to establish independent contractor status, pursuant to the ABC test, is on the putative employer.

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

"SERVICES PERFORMED BY AN INDIVIDUAL FOR REMUNERATION SHALL BE DEEMED TO BE EMPLOYMENT SUBJECT TO THIS CHAPTER (R.S.43:21-1 ET SEQ.) UNLESS AND UNTIL IT IS SHOWN TO THE SATISFACTION OF THE DIVISION THAT" EACH OF THE THREE PRONGS OF THE ABC TEST HAVE BEEN MET."

BURDEN OF PROOF

As the ABC test is written in the conjunctive, in order for the putative employer to meet its burden pursuant to 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.

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 581 (1991)

"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. 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 EAST BAY DRYWALL, LLC V. DEP'T OF LABOR AND WORKFORCE DEVELOPMENT, 251 N.J. 477, 495 (2022)."

East Bay Drywall, LLC v. Dep't of Labor and Workforde Development, 251 N.J. 477, 495 (2022)

"THE ABC TEST IS CONJUNCTIVE; THUS, ALL THREE PRONGS MUST BE SATISFIED FOR A WORKER TO BE CONSIDERED AN INDEPENDENT CONTRACTOR. SCHOMP V. FULLER BRUSH CO., 124 N.J.L. 487, 489, 12 A.2D 702 (SUP. CT. 1940). THE ABC TEST PRESUMES A WORKER IS AN EMPLOYEE, HARGROVE, 220 N.J. AT 305, 106 A.3D 449, AND IF THE RECORD FAILS TO ESTABLISH ANY ONE PRONG, THE DEPARTMENT MUST DEEM THE WORKER AN EMPLOYEE, SCHOMP, 124 N.J.L. AT 489, 12 A.2D 702. THE PARTY CHALLENGING THE DIVISION'S CLASSIFICATION CARRIES THE BURDEN TO "ESTABLISH THE EXISTENCE OF ALL THREE CRITERIA OF THE ABC TEST." CARPET REMNANT, 125 N.J. AT 581, 593 A.2D 1177."

PRONG A OF THE ABC TEST

a

In order for the putative employer to meet its burden pursuant to 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.

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

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 582 (1991)

"THE PERSON 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. SEE ALSO SCHOMP, SUPRA, 124 N.J.L. AT 491, 12 A.2D 702 (NOTING THAT EMPLOYER RETAINED RIGHT TO CONTROL IN ITS CONTRACT)."

PRONG A OF THE ABC TEST

b

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

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 582 (1991)

"AN EMPLOYER NEED NOT CONTROL EVERY FACET OF A PERSON'S RESPONSIBILITIES, HOWEVER, FOR THAT PERSON TO BE DEEMED AN EMPLOYEE."

PRONG A OF THE ABC TEST

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 pursuant to Prong A of the ABC test.

c.1.

Whether the individual is required to work any set hours or jobs;

c.2.

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

c.3.

Whether the services must be rendered by the individual personally;

c.4.

Whether the putative employer negotiates for and acquires the services performed by the individual;

c.5.

Whether the individual's rate of pay is fixed by the putative employer;

c.6.

Whether the individual bears any risk of loss for services performed;

c.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;

c.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

c.9.

Whether the putative employer provides training to the individual.

C. 1. WHETHER THE INDIVIDUAL IS REQUIRED TO WORK ANY SET HOURS OR JOBS;

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 590 (1991)

"SPECIFIC FACTORS INDICATIVE OF CONTROL INCLUDE WHETHER THE WORKER IS REQUIRED TO WORK **ANY SET HOURS OR JOBS,** WHETHER THE ENTERPRISE HAS THE RIGHT TO CONTROL THE DETAILS AND MEANS BY WHICH THE SERVICES ARE PERFORMED, AND WHETHER THE SERVICES MUST BE RENDERED PERSONALLY."

C.2.I. WHETHER THE PUTATIVE EMPLOYER HAS THE RIGHT TO CONTROL THE DETAILS AND MEANS BY WHICH THE SERVICES ARE PERFORMED BY THE INDIVIDUAL.

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 590 (1991)

"SPECIFIC FACTORS INDICATIVE OF CONTROL INCLUDE WHETHER THE WORKER IS REQUIRED TO WORK ANY SET HOURS OR JOBS, WHETHER THE ENTERPRISE HAS THE **RIGHT TO CONTROL THE DETAILS AND MEANS BY WHICH THE SERVICES ARE PERFORMED,** AND WHETHER THE SERVICES MUST BE RENDERED PERSONALLY."

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.

c.2.i.a. Whether the putative employer requires the individual to use specific tools, supplies, or materials;

Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135, 145 (App. Div. 1990)

AS AMONG THE BASES FOR COURT'S FINDING THAT TNI HAD MET ITS BURDEN UNDER PRONG A: "TNI DID NOT FURNISH ANY **SUPPLIES, EQUIPMENT** OR UNIFORMS TO ITS NURSES." THE REASONABLE INFERENCE TO BE DRAWN FROM THE COURT'S REASONING HERE IS THAT THIS IS A RELEVANT FACTOR TO BE CONSIDERED UNDER PRONG A; THAT IS, WHETHER THE PUTATIVE EMPLOYER FURNISHED ANY SUPPLIES, EQUIPMENT OR UNIFORMS FOR USE BY THE INDIVIDUAL TO THE EXCLUSION OF THEIR OWN SUPPLIES, EQUIPMENT OR UNIFORMS.

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 579-580 (1991)

IN DESCRIBING WHICH FACTORS HAVE TRADITIONALLY BEEN USED TO DETERMINE "THE DEGREE OF CONTROL EXERCISED BY THE EMPLOYER OVER THE MEANS, METHODS AND DETAILS OF OPERATION," THE COURT LISTS AMONG THOSE FACTORS, "WHETHER THE EMPLOYER OR THE WORKMAN **SUPPLIES THE INSTRUMENTALITIES,** TOOLS AND THE PLACE OF WORK FOR THE PERSON DOING THE WORK."

C.2.I. WHETHER THE PUTATIVE EMPLOYER HAS THE RIGHT TO CONTROL THE DETAILS AND MEANS BY WHICH THE SERVICES ARE PERFORMED BY THE INDIVIDUAL.

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 590 (1991)

"SPECIFIC FACTORS INDICATIVE OF CONTROL INCLUDE WHETHER THE WORKER IS REQUIRED TO WORK ANY SET HOURS OR JOBS, WHETHER THE ENTERPRISE HAS THE RIGHT TO CONTROL THE DETAILS AND MEANS BY WHICH THE SERVICES ARE PERFORMED, AND WHETHER THE SERVICES MUST BE RENDERED PERSONALLY."

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.

c.2.i.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;

Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135, 145 (App. Div. 1990)

AS AMONG THE BASES FOR COURT'S FINDING THAT TNI HAD MET ITS BURDEN UNDER PRONG A: "TNI DID NOT FURNISH ANY SUPPLIES, EQUIPMENT OR **UNIFORMS** TO ITS NURSES." THE REASONABLE INFERENCE TO BE DRAWN FROM THE COURT'S REASONING HERE IS THAT THIS IS A RELEVANT FACTOR TO BE CONSIDERED UNDER PRONG A; THAT IS, WHETHER THE PUTATIVE EMPLOYER FURNISHED ANY SUPPLIES, EQUIPMENT OR UNIFORMS FOR USE BY THE INDIVIDUAL TO THE EXCLUSION OF THEIR OWN SUPPLIES, EQUIPMENT OR UNIFORMS.

Kismet International, Inc. v. NJDOL (Commissioner FAD, issued December 3, 2021), p. 2, affirmed, Kismet Int'l v. NJ Dep't of Labor & Workforce Dev., 2023 N.J. Super. Unpub. LEXIS 1323, cert. denied, 256 N.J. 194 (2024).

ACCORDING TO THE ALJ, AMONG THE INDICIA OF DIRECTION AND CONTROL EXERCISED BY KISMET OVER ITS DRIVERS, "KISMET REQUIRES THE DRIVERS TO WEAR PROFESSIONAL ATTIRE." THE COMMISSIONER ADOPTED THE ALJ'S FINDINGS, CONCLUSIONS AND RECOMMENDED ORDER.

C.2.I. WHETHER THE PUTATIVE EMPLOYER HAS THE RIGHT TO CONTROL THE DETAILS AND MEANS BY WHICH THE SERVICES ARE PERFORMED BY THE INDIVIDUAL.

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 590 (1991)

"SPECIFIC FACTORS INDICATIVE OF CONTROL INCLUDE WHETHER THE WORKER IS REQUIRED TO WORK ANY SET HOURS OR JOBS, WHETHER THE ENTERPRISE HAS THE RIGHT TO CONTROL THE DETAILS AND MEANS BY WHICH THE SERVICES ARE PERFORMED, AND WHETHER THE SERVICES MUST BE RENDERED PERSONALLY."

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.

c.2.i.c.

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

Superior Life v. Bd. of Review, 127 N.J.L. 537, 538 (Sup. Ct. 1942)

AMONG FACTORS THAT CONTRIBUTED TO THE COURT'S CONCLUSION THAT SUPERIOR HAD FAILED TO MEET ITS BURDEN UNDER PRONG A RELATIVE TO THE INDIVIDUAL WHO HAD PERFORMED WORK FOR THEM IN THE COLLECTION AND SALES OF INSURANCE WERE: **"HE WAS OBLIGED TO REPORT TO [SUPERIOR] PERIODICALLY AND TO ACCOUNT FOR HIS COLLECTIONS."**

C.3. WHETHER THE SERVICES MUST BE RENDERED BY THE INDIVIDUAL PERSONALLY;

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 590 (1991)

SPECIFIC FACTORS INDICATIVE OF CONTROL INCLUDE WHETHER THE WORKER IS REQUIRED TO WORK ANY SET HOURS OR JOBS, WHETHER THE ENTERPRISE HAS THE RIGHT TO CONTROL THE DETAILS AND MEANS BY WHICH THE SERVICES ARE PERFORMED, AND **WHETHER THE SERVICES MUST BE RENDERED PERSONALLY.**

C.4. WHETHER THE PUTATIVE EMPLOYER NEGOTIATES FOR AND ACQUIRES THE SERVICES PERFORMED BY THE INDIVIDUAL;

East Bay Drywall, LLC v. NJDOL (Commissioner FAD, issued January 13, 2020), p. 10.

TURNING TO THE ABC TEST, I AGREE WITH RESPONDENT THAT EAST BAY HAS FAILED TO MEET ITS BURDEN UNDER PRONG "A." THAT IS, I AGREE THAT THE OVERWHELMING WEIGHT OF THE EVIDENCE IN THE RECORD SUPPORTS THE CONCLUSION THAT THE "DRYWALL SUBCONTRACTORS" ENGAGED BY EAST BAY DURING THE AUDIT PERIOD WERE NOT FREE FROM CONTROL OR DIRECTION OVER THE PERFORMANCE OF THEIR WORK. SPECIFICALLY, AS OBSERVED BY RESPONDENT, THE TESTIMONY OF BENJAMIN DESCAŁA, MANAGING MEMBER OF EAST BAY, REVEALS THAT EAST BAY BID ON, NEGOTIATED FOR AND ACQUIRED ALL OF THE WORK PERFORMED BY THE "DRYWALL SUBCONTRACTORS;" THE AMOUNT PAID BY EAST BAY TO THE "DRYWALL SUBCONTRACTORS" WAS A FIXED AMOUNT SET BY EAST BAY AND NOT NEGOTIATED WITH THE "DRYWALL SUBCONTRACTOR;" EAST BAY PROVIDED ALL OF THE MATERIALS FOR THE JOB, SUCH AS SHEETROCK, SCREWS, NAILS, CORNER BEAD, SPACKLE AND LEVEL LINES; AND EAST BAY, NOT THE "DRYWALL SUBCONTRACTORS," BORE THE RISK OF LOSS ON EACH JOB. MR. DESCALA'S TESTIMONY CONFIRMING THE PRACTICES OF EAST BAY REFLECTS A DEGREE OF CONTROL OVER THE "DRYWALL SUBCONTRACTORS" THAT IS CONSISTENT WITH AN EMPLOYMENT RELATIONSHIP AND BELIES PETITIONER'S ASSERTION (AND THE ALJ'S ERRONEOUS CONCLUSION) THAT THESE INDIVIDUALS WERE FREE FROM CONTROL OR DIRECTION BY EAST BAY.

C.4. WHETHER THE PUTATIVE EMPLOYER NEGOTIATES FOR AND ACQUIRES THE SERVICES PERFORMED BY THE INDIVIDUAL;

MKI Associates, LLC v. NJDOL (Commissioner FAD, issued April 25, 2018), Page 10, affirmed, MKI Assocs., LLC v. N.J. Dep't of Labor & Workforce Dev., 2019 N.J. Super. Unpub. LEXIS 2088 (App. Div. 2019), cert. denied, MKI Assocs., LLC v. New Jersey DOL & Workforce Dev., 241 N.J. 51 (2020).

"REGARDING PRONG "A" OF THE ABC TEST, I AGREE WITH RESPONDENT THAT MKI HAS FAILED TO MEET ITS BURDEN. THAT IS, I AGREE THAT THE DOCUMENTS GOVERNING THE RELATIONSHIPS BETWEEN MKI AND THE THERAPISTS AND BETWEEN MKI AND ITS CLIENTS, AS WELL AS THE TESTIMONY OF WITNESSES CONFIRMING THE PRACTICES OF MKI, REFLECT A DEGREE OF CONTROL OVER THE THERAPISTS THAT IS CONSISTENT WITH AN EMPLOYMENT RELATIONSHIP AND BELIES PETITIONER'S ASSERTION (AND THE ALJ'S ERRONEOUS CONCLUSION) THAT THESE INDIVIDUALS WERE FREE FROM CONTROL OR DIRECTION BY MKI. SPECIFICALLY, THE "STAFFING CONTRACT" BETWEEN MKI AND ITS CLIENTS CONTAINS A "RATE SCHEDULE" LISTING THE HOURLY RATES TO BE CHARGED FOR THE SERVICES OF PTS, OTS, PTAS AND OTAS. TESTIMONY OFFERED DURING THE HEARING CONFIRMS THAT THE HOURLY RATE CHARGED TO MKI'S CLIENTS FOR THE SERVICES OF THERAPISTS AND THE HOURLY RATE PAID BY MKI TO ITS THERAPISTS ARE BOTH SET BY MKI. THE THERAPISTS ARE NOT FREE TO NEGOTIATE THEIR HOURLY RATE OF PAY WITH THE CLIENTS."

MKI Assocs., LLC v. N.J. Dep't of Labor & Workforce Dev., 2019 N.J. Super. Unpaub. LEXIS 2088, 14 (App. Div. 2019), cert. denied, MKI Assocs., LLC v. New Jersey DOL & Workforce Dev., 241 N.J. 51 (2020).

"ADDITIONALLY, EVIDENCE IN THE RECORD ESTABLISHED MKI PAID THERAPISTS FOR THE SERVICES PERFORMED AT THE HEALTHCARE FACILITIES. THERAPISTS WERE NOT PERMITTED TO CONTACT OR NEGOTIATE THEIR WAGES DIRECTLY WITH THE FACILITIES. INTEAD, THE THERAPISTS' WAGES WERE NEGOTIATED WITH MKI AND IT SEPARATELY NEGOTIATED THE RATES THE FACILITIES WOULD PAY."

C.5. WHETHER THE INDIVIDUAL'S RATE OF PAY IS FIXED BY THE PUTATIVE EMPLOYER;

East Bay Drywall, LLC v. NJDOL (Commissioner FAD, issued January 13, 2020), p. 10.

TURNING TO THE ABC TEST, I AGREE WITH RESPONDENT THAT EAST BAY HAS FAILED TO MEET ITS BURDEN UNDER PRONG "A." THAT IS, I AGREE THAT THE OVERWHELMING WEIGHT OF THE EVIDENCE IN THE RECORD SUPPORTS THE CONCLUSION THAT THE "DRYWALL SUBCONTRACTORS" ENGAGED BY EAST BAY DURING THE AUDIT PERIOD WERE NOT FREE FROM CONTROL OR DIRECTION OVER THE PERFORMANCE OF THEIR WORK. SPECIFICALLY, AS OBSERVED BY RESPONDENT, THE TESTIMONY OF BENJAMIN DESCAŁA, MANAGING MEMBER OF EAST BAY, REVEALS THAT EAST BAY BID ON, NEGOTIATED FOR AND ACQUIRED ALL OF THE WORK PERFORMED BY THE "DRYWALL SUBCONTRACTORS;" THE AMOUNT PAID BY EAST BAY TO THE "DRYWALL SUBCONTRACTORS" WAS A FIXED AMOUNT SET BY EAST BAY AND NOT NEGOTIATED WITH THE "DRYWALL SUBCONTRACTOR;" EAST BAY PROVIDED ALL OFTHE MATERIALS FOR THE JOB, SUCH AS SHEETROCK, SCREWS, NAILS, CORNER BEAD, SPACKLE AND LEVEL LINES; AND EAST BAY, NOT THE "DRYWALL SUBCONTRACTORS," BORE THE RISK OF LOSS ON EACH JOB. MR. DESCALA'S TESTIMONY CONFIRMING THE PRACTICES OF EAST BAY REFLECTS A DEGREE OF CONTROL OVER THE "DRYWALL SUBCONTRACTORS" THAT IS CONSISTENT WITH AN EMPLOYMENT RELATIONSHIP AND BELIES PETITIONER'S ASSERTION (AND THE ALJ'S ERRONEOUS CONCLUSION) THAT THESE INDIVIDUALS WERE FREE FROM CONTROL OR DIRECTION BY EAST BAY.

C.5. WHETHER THE INDIVIDUAL'S RATE OF PAY IS FIXED BY THE PUTATIVE EMPLOYER;

MKI Associates, LLC v. NJDOL (Commissioner FAD, issued April 25, 2018), Page 10, affirmed, MKI Assocs., LLC v. N.J. Dep't of Labor & Workforce Dev., 2019 N.J. Super. Unpub. LEXIS 2088 (App. Div. 2019), cert. denied, MKI Assocs., LLC v. New Jersey DOL & Workforce Dev., 241 N.J. 51 (2020).

"REGARDING PRONG "A" OF THE ABC TEST, I AGREE WITH RESPONDENT THAT MKI HAS FAILED TO MEET ITS BURDEN. ...SPECIFICALLY, THE "STAFFING CONTRACT" BETWEEN MKI AND ITS CLIENTS CONTAINS A "RATE SCHEDULE" LISTING THE HOURLY RATES TO BE CHARGED FOR THE SERVICES OF PTS, OTS, PTAS AND OTAS. TESTIMONY OFFERED DURING THE HEARING CONFIRMS THAT THE HOURLY RATE CHARGED TO MKI'S CLIENTS FOR THE SERVICES OF THERAPISTS AND THE HOURLY RATE PAID BY MKI TO ITS THERAPISTS ARE BOTH SET BY MKI. THE THERAPISTS ARE NOT FREE TO NEGOTIATE THEIR HOURLY RATE OF PAY WITH THE CLIENTS."

Pennsauken Diagnostic Center, LLC v. NJDOL (Commissioner FAD, issued March 16, 2023), affirmed, Pennsauken Diagnostic Ctr., LLC v. NJ Dep't of Labor and Workforce Dev., 2024 N.J. Super. Unpub. LEXIS 1232

FROM THE APP. DIV. OPINION, P. 17: "THIS CASE IS DISTINCT FROM THE PUTATIVE EMPLOYER IN TRAUMA NURSES V. BOARD OF REVIEW. THERE...[E]ACH OF THOSE NURSES NEGOTIATED THEIR OWN HOURLY RATE, AND THE PUTATIVE EMPLOYER ACTED AS A BROKER FOR NURSES PLACING THEM WITH HOSPITALS ON A TEMPORARY BASIS. HERE, THE RADIOLOGISTS' PAY RATE WAS SET FORTH IN THE AGREEMENT WITHOUT THEIR OWN NEGOTIATION." (CITATIONS OMITTED)

Yeamon Music, Inc. v. NJDOL (Commissioner FAD, issued January 19, 2023), p. 8

"I AGREE WITH RESPONDENT THAT YEAMON EXERCISED DIRECTION OR CONTROL OVER THE MUSICIANS AND SOUND TECHNICIAN WHEN YEAMON UNILATERALLY NEGOTIATED A SINGLE PRICE FOR EACH "GIG" WITH THE VENUE OWNER, AND WHEN JIMMY MARAVENTANO DECIDED HOW MUCH TO PAY EACH INDIVIDUAL FOR THE GIG FROM THAT CHECK. THAT IS, I AGREE WITH RESPONDENT THAT '[U]NLIKE AN INDEPENDENT CONTRACTOR, THESE INDIVIDUALS ARE NOT FREE TO NEGOTIATE THEIR COMPENSATION AND MUST ACCEPT THE AMOUNT OFFERED TO THEM FOR THE SERVICES THEY PROVIDE TO YEAMON.'"

C.6. WHETHER THE INDIVIDUAL BEARS ANY RISK OF LOSS FOR SERVICES PERFORMED;

East Bay Drywall, LLC v. NJDOL (Commissioner FAD, issued January 13, 2020), p. 10.

TURNING TO THE ABC TEST, I AGREE WITH RESPONDENT THAT EAST BAY HAS FAILED TO MEET ITS BURDEN UNDER PRONG "A." THAT IS, I AGREE THAT THE OVERWHELMING WEIGHT OF THE EVIDENCE IN THE RECORD SUPPORTS THE CONCLUSION THAT THE "DRYWALL SUBCONTRACTORS" ENGAGED BY EAST BAY DURING THE AUDIT PERIOD WERE NOT FREE FROM CONTROL OR DIRECTION OVER THE PERFORMANCE OF THEIR WORK. SPECIFICALLY, AS OBSERVED BY RESPONDENT, THE TESTIMONY OF BENJAMIN DESCAŁA, MANAGING MEMBER OF EAST BAY, REVEALS THAT EAST BAY BID ON, NEGOTIATED FOR AND ACQUIRED ALL OF THE WORK PERFORMED BY THE "DRYWALL SUBCONTRACTORS;" THE AMOUNT PAID BY EAST BAY TO THE "DRYWALL SUBCONTRACTORS" WAS A FIXED AMOUNT SET BY EAST BAY AND NOT NEGOTIATED WITH THE "DRYWALL SUBCONTRACTOR;" EAST BAY PROVIDED ALL OFTHE MATERIALS FOR THE JOB, SUCH AS SHEETROCK, SCREWS, NAILS, CORNER BEAD, SPACKLE AND LEVEL LINES; AND EAST BAY, NOT THE "DRYWALL SUBCONTRACTORS," BORE THE RISK OF LOSS ON EACH JOB. MR. DESCALA'S TESTIMONY CONFIRMING THE PRACTICES OF EAST BAY REFLECTS A DEGREE OF CONTROL OVER THE "DRYWALL SUBCONTRACTORS" THAT IS CONSISTENT WITH AN EMPLOYMENT RELATIONSHIP AND BELIES PETITIONER'S ASSERTION (AND THE ALJ'S ERRONEOUS CONCLUSION) THAT THESE INDIVIDUALS WERE FREE FROM CONTROL OR DIRECTION BY EAST BAY.

C.6. WHETHER THE INDIVIDUAL BEARS ANY RISK OF LOSS FOR SERVICES PERFORMED;

Pennsauken Diagnostic Center, LLC v. NJDOL (Commissioner FAD, issued March 16, 2023), p. 9, affirmed, Pennsauken Diagnostic Ctr., LLC v. NJ Dep't of Labor and Workforce Dev., 2024 N.J. Super. Unpub. LEXIS 1232

COMMISSIONER DETERMINED THAT PDC HAD FAILED TO MEET ITS BURDEN UNDER PRONG A TO ESTABLISH THAT THE RADIOLOGISTS WHO PROVIDED SERVICES TO PDC WERE FREE FROM CONTROL OR DIRECATION BY PDC. AMONG THE REASONS STATED BY THE COMMISSIONER: "PDC BORE THE RISK OF LOSS FOR THE SERVICES PERFORMED FOR ITS DIAGNOSTIC-IMAGING PAREINTS, INCLUDING FOR THE SERVICES PERFORMED BY THE RADIOLOGISTS."

C.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;

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 582 (1991)

CARPET REMNANT DOES NOT EXPRESSLY ADDRESS REQUIRING A WORKER TO BE ON CALL OR STANDBY, BUT IT DOES SAY THE FOLLOWING REGARDING PRONG A AND DIRECTION OR CONTROL:"THE PERSON 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. SEE ALSO SCHOMP, SUPRA, 124 N.J.L. AT 491, 12 A.2D 702 (NOTING THAT EMPLOYER RETAINED RIGHT TO CONTROL IN ITS CONTRACT)."

C.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

Superior Life v. Bd. of Review, 127 N.J.L. 537, 538 (Sup. Ct. 1942)

AMONG FACTORS THAT CONTRIBUTED TO THE COURT'S CONCLUSION THAT SUPERIOR HAD FAILED TO MEET ITS BURDEN UNDER PRONG A RELATIVE TO THE INDIVIDUAL WHO HAD PERFORMED WORK FOR THEM IN THE COLLECTION AND SALES OF INSURANCE WERE: "HE WAS EMPLOYED TO MAKE COLLECTIONS OF PREMIUMS DUE FROM CERTAIN POLICY HOLDERS LOCATED WITHIN AN AREA CONSISTING OF SEVERAL MUNICIPALITIES WITIHN THIS STATE AND TO SELL INSURANCE TO ANY ONE HE COULD WITHIN THAT AREA."

William H. Goldberg & Co. v. Division of Employment Sec., 21 N.J. 107, 113 (1956)

FROM GOLDBERG AT 113 - "...HE [THE INSURANCE SALESPERSON] COULD SOLICIT AND NEGOTIATE CONTRACTS OF INSURANCE SOLELY ON BEHALF OF [THE] AGENT OR BROKER BY WHOM HE WAS EMPLOYED. HE COULD NOT SOLICIT INSURANCE FOR ANYONE ELSE..."

C.9. WHETHER THE PUTATIVE EMPLOYER PROVIDES TRAINING TO THE INDIVIDUAL.

Superior Life v. Bd. of Review, 127 N.J.L. 537, 538 (Sup. Ct. 1942)

AMONG FACTORS THAT CONTRIBUTED TO THE COURT'S CONCLUSION THAT SUPERIOR HAD FAILED TO MEET ITS BURDEN UNDER PRONG A RELATIVE TO THE INDIVIDUAL WHO HAD PERFORMED WORK FOR THEM IN THE COLLECTION AND SALES OF INSURANCE WERE: "HE WAS…**SO ACQUAINTED AND INSTRUCTED** WITH WHAT HE WAS ENGAGED TO SELL, CONTRACTS OF INSURANCE, UNDER CERTAIN TERMS AND CONDITIONS. HE COULD NOT DEVIATE FROM THOSE INSTRUCTIONS.

Schomp v. Fuller Brush Co., 124 N.J.L. 487, 491 (1940)

"FURTHERMORE, AS EVIDENCE OF THE 'CONTROL' IN FACT THAT WAS EXERCISED IT IS NOT DISPUTED THAT THE BRANCH MANAGERS OF THE COMPANY **INSTRUCTED THE DEALERS IN THE METHOD OF SALESMANSHIP DESIRED BY THE COMPANY;** THAT THESE MANAGERS ALSO PERSONALLY DEMONSTRATED THIS METHOD IN THE FIELD – THESE AND SIMILAR INSTRUCTIONS IN WEEKLY PAPERS, ETC., SHOW AN EXERCISE OF CONTINUOUS CONTROL WHICH THE STATUS OF INDEPENDENT CONTRACTOR DOES NOT TOLERATE."

1.3.d.

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

Consistent with what the court in East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477, 498 (2022) found with regard to the Prong C factors, namely, that they are all just "pieces in the puzzle." No one should want any list of factors to be considered exhaustive, because that would foreclose the possibility of considering unforseen factors; unforseen because of the evolving nature of work and the workplace, among other reasons.

1.3.e.

The factors listed in (c) shall not be used as a checklist; that is, a conclusion that the putative employer has met Prong A of the ABC test shall not be based on whether a majority of the factors listed in (c) 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.

Similar language from IRS guidance on application of the factors considered under their test for independent contractor status: "Businesses must weigh these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. ***There is no 'magic' or set number of factors that 'makes' the worker an employee or an independent contractor and no one factor stands alone in making this determination.*** *Also, factors which are relevant in one situation may not be relevant in another."*

ADDITIONAL INFORMATION AVAILABLE AT: IRS.GOV

1.3.f.

Actions taken by a putative employer solely to comply with federal, state, or local laws or regulations shall not, standing alone, be considered evidence of control or direction under Prong A.

TRIAD ADVISORS, INC. V. NJDOL, 2025 N.J. SUPER. UNPUB. LEXIS 375, 24 (APP. DIV. 2025)

"[W]e affirm the portions of the May 31, 2022 decision concerning the ABC Test for the reasons stated by the Commissioner in his thorough and well-reasoned written decision."

TRIAD ADVISORS, INC. V. NJDOL (COMMISSIONER FAD, ISSUED MAY 31, 2022), P. 12 AND 13.

"[D]ue to the multiple layers of control exercised by Triad over the securities sales agents, some required under FINRA [Financial Industry Regulatory Authority] regulations ***<u>and some not,</u>*** *I find that Triad has failed to meet Prong A of the ABC test."*

PRONG B OF THE ABC TEST

a

In order to meet its burden pursuant to 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.

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

"(B) SUCH SERVICE IS EITHER OUTSIDE THE USUAL COURSE OF BUSINESS FOR WHICH SUCH SERVICE IS PERFORMED, OR THAT SUCH SERVICES IS PERFORMED OUTSIDE OF ALL THE PLACES OF THE ENTERPRISE FOR WHICH SUCH SERVICE IS PERFORMED."

PRONG B OF THE ABC TEST

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.

This language is not taken directly from any court decision or Commissioner final administrative determination. However, it is responsive to the New Jersey Supreme Court's express suggestion in EBD that the Department exercise its statutory authority and expertise to promulgate regulations regarding Prong B of the ABC test. EDB, supra, FN3.

PRONG B OF THE ABC TEST

c

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.

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 592 (1991)

"IN OUR VIEW, THAT PHRASE ['PLACES OF BUSINESS'] REFERS ONLY TO THOSE LOCATIONS WHERE THE ENTERPRISE **HAS A PHYSICAL PLANT OR CONDUCTS AN INTEGRAL PART OF ITS BUSINESS."**

PRONG B OF THE ABC TEST

d

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.

This language is not taken directly from any court decision or Commissioner final administrative determination. However, it is responsive to the New Jersey Supreme Court's express suggestion in EBD that the Department exercise its statutory authority and expertise to promulgate regulations regarding Prong B of the ABC test. EDB, supra, FN3.

PRONG B OF THE ABC TEST

e

An individual's personal residence where they perform remote work, i.e., performing services from a location other than a location operated by the putative employer, shall not be considered among the putative employer’s places of business.

As suggested by the Court in EBD, the Department is "exercis[ing] 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, FN3.

PRONG C OF THE ABC TEST

a

In order to meet its burden pursuant to 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.

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

"(C) SUCH INDIVIDUAL IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS."

PRONG C OF THE ABC TEST

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, pursuant to Prong C of the ABC test:

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 592-593 (1991)

"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' BUSINESSES, 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 COMPARED TO THAT RECEIVED FROM OTHER RETAILERS. THOSE WHO RECEIVED A SMALL PROPORTION OF COMPENSATION FROM CRW ARE MORE LIKELY TO BE ABLE TO WITHSTAND LOSING CRW'S BUSINESS."

PRONG C OF THE ABC TEST

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, pursuant to Prong C of the ABC test:

b.1.

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

b.2.

The number of customers of the individual's business and the volume of business from each respective customer;

b.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;

b.4.

The number of employees of the individual's business;

b.5.

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

b.6.

Whether the individual sets their own rate of pay; and

b.7.

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

PRONG C

B.1. THE DURATION, STRENGTH, AND VIABILITY OF THE INDIVIDUAL'S BUSINESS (INDEPENDENT OF THE PUTATIVE EMPLOYER);

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 590 (1991)

"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' BUSINESSES,** 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 COMPARED TO THAT RECEIVED FROM OTHER RETAILERS. THOSE WHO RECEIVED A SMALL PROPORTION OF COMPENSATION FROM CRW ARE MORE LIKELY TO BE ABLE TO WITHSTAND LOSING CRW'S BUSINESS."

PRONG C

B.2. THE NUMBER OF CUSTOMERS OF THE INDIVIDUAL'S BUSINESS AND THE VOLUME OF BUSINESS FROM EACH RESPECTIVE CUSTOMER;

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 592-593 (1991)

"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' BUSINESSES, **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 COMPARED TO THAT RECEIVED FROM OTHER RETAILERS. THOSE WHO RECEIVED A SMALL PROPORTION OF COMPENSATION FROM CRW ARE MORE LIKELY TO BE ABLE TO WITHSTAND LOSING CRW'S BUSINESS."

PRONG C

B.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;

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 592-593 (1991)

"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' BUSINESSES, 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 COMPARED TO THAT RECEIVED FROM OTHER RETAILERS.** THOSE WHO RECEIVED A SMALL PROPORTION OF COMPENSATION FROM CRW ARE MORE LIKELY TO BE ABLE TO WITHSTAND LOSING CRW'S BUSINESS."

PRONG C

B.4. THE NUMBER OF EMPLOYEES OF THE INDIVIDUAL'S BUSINESS;

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 592-593 (1991)

"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' BUSINESSES, 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 COMPARED TO THAT RECEIVED FROM OTHER RETAILERS. THOSE WHO RECEIVED A SMALL PROPORTION OF COMPENSATION FROM CRW ARE MORE LIKELY TO BE ABLE TO WITHSTAND LOSING CRW'S BUSINESS."

PRONG C

B.5. THE EXTENT OF THE INDIVIDUAL'S INVESTMENT IN THEIR OWN TOOLS, EQUIPMENT, VEHICLES, BUILDINGS, INFRASTRUCTURE, AND OTHER RESOURCES;

Carpet Remnant Warehouse, Inc. v. NJDOL (CRW), 125 N.J. 567, 592-593 (1991)

"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' BUSINESSES, 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 COMPARED TO THAT RECEIVED FROM OTHER RETAILERS. THOSE WHO RECEIVED A SMALL PROPORTION OF COMPENSATION FROM CRW ARE MORE LIKELY TO BE ABLE TO WITHSTAND LOSING CRW'S BUSINESS."

PRONG C

B6. WHETHER THE INDIVIDUAL SETS THEIR OWN RATE OF PAY; AND

East Bay Drywall, LLC v. NJDOL (Commissioner FAD, issued January 13, 2020), Page 10-11

MKI Associates, LLC v. NJDOL (Commissioner FAD, issued April 25, 2018), Page 13, affirmed, MKI Assocs., LLC v. N.J. Dep't of Labor & Workforce Dev., 2019 N.J. Super. Unpub. LEXIS 2088 (App. Div. 2019), cert. denied, MKI Assocs., LLC v. New Jersey DOL & Workforce Dev., 241 N.J. 51 (2020).

"REGARDING PRONG "C" OF THE ABC TEST, I AGREE WITH RESPONDENT THAT THE OPINION IN TRAUMA NURSES, SUPRA, IS DISTINGUISHABLE FROM THE MATTER AT HAND. ... IN TRAUMA NURSES, SUPRA, THE COURT STATES RELATIVE TO TNI'S NURSES THAT, "[E]ACH NURSE NEGOTIATES WITH TNI TO SET AN INDIVIDUAL HOURLY RATE, WHICH VARIES DEPENDING UPON HIS OR HER EXPERIENCE AND QUALIFICATIONS." ID., AT 138. BY CONTRAST, MKI ESTABLISHES THE HOURLY RATE IT BILLS CLIENTS FOR THE SERVICES PROVIDED BY ITS THERAPISTS, AS EVIDENCED BY THE DETAILED "RATE SCHEDULES" THAT IT ATTACHES TO EACH "STAFFING CONTRACT" WITH ITS CLIENTS AND MR. IULA'S TESTIMONY THAT THAT FOR EVERY HOUR OF SERVICES PERFORMED BY A THERAPIST, MKI MAKES $5.00 PROFIT. THUS, THE HOURLY RATE OF PAY FOR THE THERAPISTS ENGAGED BY MKI IS ESTABLISHED BY MKI, NOT THROUGH NEGOTIATIONS WITH EACH INDIVIDUAL THERAPIST. "

PRONG C

B.7. WHETHER THE INDIVIDUAL ADVERTISES, MAINTAINS A VISIBLE BUSINESS LOCATION, AND IS AVAILABLE TO WORK IN THE RELEVANT MARKET.

East Bay Drywall, LLC v. NJDOL (Commissioner FAD, issued January 13, 2020), Page 10-11

Philadelphia Newspapers, Inc. v. Board of Review, 397 N.J. Super. 309, 323 (App. Div. 2007)

"WHILE DELIVERING NEWSPAPERS FOR PNI, CLAIMANT NEVER ADVERTISED HIMSELF AS A NEWSPAPER DELIVERY PERSON, NOR CARRIED OR DISTRIBUTED BUSINESS CARDS..."

PRONG C OF THE ABC TEST

c

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

East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477, 498 (2022)

"THOSE PRONG C FACTORS THEMSELVES ARE JUST PIECES OF THE PUZZLE, FACTORS THAT CAN ILLUMINATE WHETHER A WORKER HAS A TRULY INDEPENDENT BUSINESS. FURTHER, NEW JERSEY COURTS HAVE LOOKED TO OTHER FACTORS TO DETERMINE A WORKER'S INDEPENDENCE UNDER PRONG C. IN GILCHRIST, FOR INSTANCE, THE APPELLATE DIVISION CONSIDERED WHETHER DOOR-TO-DOOR SALESMEN OPERATED BUSINESS ESTABLISHMENTS; WHETHER THEY MAINTAINED TELEPHONE LISTINGS OR BUSINESS STATIONERY; WHO POSSESSED THE INVENTORY; WHO BORE THE RISK OF LOSS; AND WHO BENEFITTED FROM THE GOODWILL THAT THE COMPANY GENERATED. 48 N.J. SUPER. AT 158-59, 137 A.2D 29."

PRONG C OF THE ABC TEST

d

The factors listed at (b) shall not be used as a checklist; that is, a conclusion that the putative employer has met Prong C of the ABC test shall not be based on whether a majority of the factors listed at (b) 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 pursuant to Prong C of the ABC test. Some factors may be relevant in one situation and may not be relevant in another. What is required pursuant to 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.

Similar language from IRS guidance on application of the factors considered under their test for independent contractor status: "Businesses must weigh these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. ***There is no 'magic' or set number of factors that 'makes' the worker an employee or an independent contractor and no one factor stands alone in making this determination.*** *Also, factors which are relevant in one situation may not be relevant in another."*

ADDITIONAL INFORMATION AVAILABLE AT: IRS.GOV

PRONG C OF THE ABC TEST

e

In order to meet its burden pursuant to 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.

Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147, 158 (App. Div. 1957)

"TEST C REQUIRES THAT "SUCH INDIVIDUAL IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS." AS WAS POINTED OUT IN FULLER BRUSH CO. V. INDUSTRIAL COMMISSION OF UTAH, ABOVE, 99 UTAH 97, 104 P.2D 201, 129 A.L.R. 511 (SUP. CT. 1940), "INDEPENDENTLY" CLEARLY MODIFIES THE WORD "ESTABLISHED." IT THEREFORE CARRIES THE MEANING THAT THE "TRADE, OCCUPATION, PROFESSION OR BUSINESS" WAS ESTABLISHED INDEPENDENTLY OF THE EMPLOYER OR THE RENDERING OF THE PERSONAL SERVICE FORMING THE BASIS OF THE CLAIM. THE PRESENT TENSE OF THE VERB, "IS," INDICATES THAT THE EMPLOYEE MUST BE ENGAGED IN SUCH INDEPENDENTLY ESTABLISHED ACTIVITY AT THE TIME OF RENDERING THE SERVICE INVOLVED. AND "CUSTOMARILY" MEANS USUALLY; HABITUALLY; ACCORDING TO THE CUSTOM, GENERAL PRACTICE OR USUAL ORDER OF THINGS; REGULARLY.

THE FACT THAT A SALESMAN WHO WORKS ON COMMISSION MUST RELY ON HIS EFFORTS AND ABILITY TO SECURE ORDERS TO MAKE A LIVELIHOOD DOES NOT NECESSARILY MEAN THAT HE IS WORKING FOR HIMSELF AS AN ENTREPRENEUR OR BUSINESSMAN, WITHIN THE INTENDMENT OF TEST C. THE DOUBLE REQUIREMENT THAT AN INDIVIDUAL MUST BE "CUSTOMARILY ENGAGED" AND "INDEPENDENTLY ESTABLISHED" 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."

PRONG C OF THE ABC TEST

e

In order to meet its burden pursuant to 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.

The Lester A. Drenk Behavioral Health Center, Inc. v. NJDOL, 2007 N.J. AGEN LEXIS 15592, pp. 37-38, adopted, The Lester A. Drenk Behavioral Health Center, Inc. v. NUDOL (Commissioner FAD, issued October 10, 2007).

"IN SUMMARY, I FIND INSUFFICIENT EVIDENCE IN THE RECORD TO ESTABLISH THAT THE PROVIDERS [OF THERAPEUTIC FOSTER CARE SERVICES] IN QUESTION POSSESSED AN INDEPENDENT VIABLE ENTERPRISE. ...THEREFORE, I FIND THAT DRENK FAILED TO MEET ITS BURDEN OF PROVING THAT THESE INDIVIDUALS WERE NOT ITS EMPLOYEES."

Devereux Foundation v. NJDOL, (Commissioner FAD, issued September 26, 2019), p. 25, affirmed, Devereux Foundation v. NJ Dep't of Labor & Workforce Dev., 2021 N.J. Super. Unpub. LEXIS 997, cert. denied, 248 NJ 380 (2021)

"EVEN IF THE THERAPEUTIC FOSTER CARE PROVIDERS HERE HAVE OUTSIDE SOURCES OF INCOME, THAT IS NOT RELEVANT TO THE C PRONG ANALYSIS. WHAT WOULD BE RELEVANT WOULD BE A SHOWING THAT THEY HAVE OUTSIDE SOURCES OF INCOME FROM PROVIDING THERAPEUTIC SERVICES. AS DESCRIBED ABOVE IN PART 11.B, I DISAGREE WITH DEVEREUX'S ARGUMENT THAT THE PROVIDERS' TRUE BUSINESS HERE IS "PARENTING" OR "RUNNING A HOME." (DEVEREUX'S REPLY BRIEF, P. 23). RATHER, THEIR BUSINESS IS PROVIDING THERAPEUTIC SERVICES, AND I HAVE NO EVIDENCE IN THE RECORD TO DEMONSTRATE THAT THE PROVIDERS "HAVE AN OUTSIDE RELATIONSHIP WITH OTHER ENTITIES TO PROVIDE THERAPEUTIC FOSTER-PARENTING SERVICES," OR WERE "CONDUCTING THEIR OWN INDEPENDENTLY ESTABLISHED ENTERPRISES AS PROVIDERS." DRENK AT 9. THEREFORE, I FIND THAT DEVEREUX HAS NOT MET PART C OF THE ABC TEST."

PRONG C OF THE ABC TEST

e

In order to meet its burden pursuant to 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.

Bloom v. Division of Employment Sec etc., 69 N.J. Super. 175, 179-180 (App. Div. 1961)

"ON THIS APPEAL PETITIONER CONTENDS THAT THE REQUIREMENTS OF (C) WERE MET BECAUSE (1) THE TELEPHONE SOLICITORS WERE CONTINUALLY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION OR BUSINESS, NAMELY, THE TRADE OR OCCUPATION OF TELEPHONE SOLICITORS; (2) ALL OF HIS SOLICITORS WERE HOUSEWIVES AND PERFORMED THEIR SERVICE FOR PETITIONER AS INCIDENT TO THEIR HOUSEWORK, SO THAT THEY WERE CONTINUALLY ENGAGED IN THE INDEPENDENTLY ESTABLISHED OCCUPATION OF HOUSEWIFE; AND (3) THE UNEMPLOYMENT COMPENSATION ACT WAS NEVER INTENDED TO COVER THE RELATIONSHIP BETWEEN PETITIONER AND HIS SOLICITORS WHO ARE ONLY HOUSEWIVES **EARNING "PIN MONEY"** IN THEIR SPARE TIME AND WHO WOULD NOT BE ELIGIBLE FOR BENEFITS UNDER THE LAW SINCE THEY WOULD NOT EARN ENOUGH TO QUALIFY THEM FOR BENEFITS, N.J.S.A. 43:21-4(E), N.J.S.A. 43:21-19(T); FURTHERMORE, THEY WOULD NEVER BECOME "TOTALLY OR PARTIALLY UNEMPLOYED," N.J.S.A. 43:21-4(D); OR BE "AVAILABLE FOR WORK," OR "ACTIVELY SEEKING WORK," N.J.S.A. 43:21-4(C).

PETITIONER'S ARGUMENTS ARE NOT PERSUASIVE. IT IS A PLAY ON WORDS TO SAY THAT THESE WOMEN ARE CUSTOMARILY ENGAGED IN THE INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION OR BUSINESS OF TELEPHONE SOLICITING. THE PROVISIONS OF (C) CALL FOR A TRADE, OCCUPATION, PROFESSION OR BUSINESS THAT EXISTS INDEPENDENTLY OF THE PARTICULAR SERVICE RELATIONSHIP AND WILL SURVIVE THE TERMINATION OF THE PARTICULAR RELATIONSHIP. SUCH IS NOT THE CASE HERE. NOR DOES THE SOLICITORS' STATUS AS HOUSEWIVES BRING THEM WITHIN THE (C) TEST, THE PROVISIONS OF WHICH MANIFESTLY REFER TO A TRADE, OCCUPATION, PROFESSION OR BUSINESS WHICH IS CUSTOMARILY ENGAGED IN FOR REMUNERATION AND NOT TO SUCH AN ESTATE AS HOUSEWIFERY."

PRONG C

E.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.

Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147, 158 (App. Div. 1957)

"THE STIPULATED FACTS SHOW AN ABSENCE OF ANY FORM OF **INDEPENDENTLY ESTABLISHED BUSINESS** CUSTOMARILY ENGAGED IN BY PETITIONER'S SALESMEN."

Pilates by Meghan, LLC v. NJDOL (Commissioner FAD, issued August 23, 2016), p. 11.

"TURNING TO THE ABC TEST, I AGREE WITH RESPONDENT THAT THE ALJ'S LEGAL ANALYSIS RELATIVE TO PRONG "C" IS FATALLY FLAWED. THAT IS, THE ALJ INCORRECTLY CONCLUDED THAT BECAUSE THE PILATES INSTRUCTORS ENGAGED BY PETITIONER WERE ALSO EMPLOYED FULL-TIME AND PART-TIME IN OTHER INDUSTRIES AND PROFESSIONS UNRELATED TO PILATES INSTRUCTION, SUCH AS, BARTENDER AT A COUNTRY CLUB, HIGH SCHOOL BIOLOGY TEACHER, AND ENGINEER AT LOCKHEED MARTIN, OR WERE "JUST STAY AT HOME MOMS," THEY WERE CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS, AS THAT PHRASE IS USED WITHIN N.J.S.A. 43:21-19(I)(6)(C). I ALSO DISAGREE WITH THE FOLLOWING CONCLUSION OF THE ALJ CONTAINED WITHIN THE BODY OF THE INITIAL DECISION: THE DEPARTMENT FOCUSES ON THE FACT THAT ALL OF THE SUBCONTRACTORS DO NOT MAINTAIN INDEPENDENT BUSINESSES. HOWEVER, THE ABSENCE OF OTHER BUSINESS [SIC] IS NOT DISPOSITIVE, AND IT IS NOT BY ANY MEANS INDICATIVE OF AN EMPLOYEE RELATIONSHIP IN THIS CASE. AS REFLECTED IN THE OPINIONS IN BOTH CARPET REMNANT AND GILCHRIST, 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 INDEPENDENT OF AND APART FROM THE PARTICULAR SERVICE RELATIONSHIP. MULTIPLE EMPLOYMENT, SUCH AS THAT RELIED UPON BY THE ALJ IN SUPPORT OF HER CONCLUSION RELATIVE TO PRONG "C" OF THE ABC TEST, DOES NOT EQUATE TO AN INDEPENDENTLY ESTABLISHED ENTERPRISE OR BUSINESS. "

PRONG C

E.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.

Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147, 158 (App. Div. 1957)

"THE STIPULATED FACTS SHOW AN ABSENCE OF ANY FORM OF **INDEPENDENTLY ESTABLISHED BUSINESS** CUSTOMARILY ENGAGED IN BY PETITIONER'S SALESMEN."

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PRONG C

E.3. LICENSURE IN AN OCCUPATION OR PROFESSION, SUCH AS A NURSE OR ATTORNEY, IS NOT ALONE SUFFICIENT TO MEET PRONG C.

Superior Life v. Bd. of Review, 127 N.J.L. 537, 540 (Sup. Ct. 1942)

THE COURT CONCLUDED THAT THE INSURANCE SALESMAN HAD NOT BEEN CUSTOMARILY ENGAGED IN AN INDEPENDENT PROFESSION, TRADE OR OCCUPATION, EXPLAINING, "[W]E THINK THIS SO DESPITE THE FACT THAT HE WAS OBLIGED TO OBTAIN A LICENSE FROM THE STATE TO QUALIFY HIM TO SELL INSURANCE. **THAT FACT ALONE DOES NOT ESTABLISH HIS STATUS AS ONE ENGAGED IN AN INDEPENDENTLY ESTABLISHED BUSINESS,** C., ANY MORE THAN ONE EMPLOYED AS A DRIVER OF AN AUTOMOBILE WITH A LICENSE TO DRIVE WOULD BE."

West Berlin Dental Care, LLC v. NJDOL (Commissioner FAD, issued October 22, 2018), p. 3.

SPECIFICALLY, RELATIVE TO MS. KAZIMI, THE ALJ FOUND THE FOLLOWING:
DR. KAZIMI IS A DENTIST PRACTICING AT DR. HAMMOND'S DENTAL OFFICES. ALTHOUGH DR. KAZIMI WOULD STILL CONTINUE HER PROFESSION AS A DENTIST IN THE VENT HER RELATIONSHIP WITH DR. HAMMOND WAS TERMINATED, SHE WOULD LOSE THE BULK OF HER INCOME WHICH WAS DERIVED FROM WEST BERLIN DENTAL. DR. KAZIMI WAS NOT ENGAGED IN HER OWN INDEPENDENTLY ESTABLISHED DENTAL PRACTICE, BUT PERFORMED SERVICES FOR WEST BERLIN DENTAL LLC. IF HER BUSINESS RELATIONSHIP WITH WEST BERLIN DENTAL ENDED, IT IS UNLIKELY THAT SHE WOULD BE ABLE TO MAINTAIN AN INDEPENDENT PRACTICE WITHOUT AN OFFICE, STAFF OR EQUIPMENT, SINCE SHE UTILIZED WEST BERLIN DENTAL'S OFFICES, STAFF AND EQUIPMENT WHILE ENGAGING IN HER PROFESSION. SO, ALTHOUGH DR. KAZEMI HAS WORKED FOR OTHER DENTISTS, MOST OF HER INCOME IS DERIVED FROM HER RELATIONSHIP WITH WEST BERLIN DENTAL. THEREFORE, I CONCLUDE THAT PETITIONER HAS FAILED TO MEET PRONG "C" OF THE ABC TEST AS TO DR. KAZIMI. ...HAVING CONSIDERED THE RECORD AND THE ALJ'S INITIAL DECISION, AND HAVING MADE AN INDEPENDENT EVALUATION OF THE RECORD, I HAVE ACCEPTED AND ADOPTED THE FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION CONTAINED IN THE ALJ'S INITIAL DECISION."

PRONG C OF THE ABC TEST

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.

East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477, 498-499 (2022)

WHERE ONLY EVIDENCE THAT DRYWALL INSTALLERS WERE CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED BUSINESS UNDER PRONG C WAS BUSINESS REGISTRATION AND POSSESSION OF WORKERS COMPENSATION AND/OR LIABILITY INSURANCE, COURT FOUND THAT EBD HAD FAILED TO SATSIFY ITS BURDEN UNDER PRONG C, EXPLAINING: "A BUSINESS PRACTICE THAT REQUIRES WORKERS TO ASSUME THE APPEARANCE OF AN INDEPENDENT BUSINESS 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 PROTECTIONS 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.4 SUCH A BUSINESS PRACTICE ALSO UNDERMINES THE PUBLIC POLICY CODIFIED IN THE UCL."

PRONG C

F.1. THE EXISTENCE OF A BUSINESS ENTITY, WITHOUT MORE, MAY SUGGEST A BUSINESS IN NAME ONLY AND DOES NOT SUGGEST INDEPENDENT CONTRACTOR STATUS.

East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477, 500-501 (2022)

WHERE ONLY EVIDENCE THAT DRYWALL INSTALLERS WERE CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED BUSINESS UNDER PRONG C WAS BUSINESS REGISTRATION AND POSSESSION OF WORKERS COMPENSATION AND/OR LIABILITY INSURANCE, COURT FOUND THAT EBD HAD FAILED TO SATSIFY ITS BURDEN UNDER PRONG C, EXPLAINING: "A BUSINESS PRACTICE THAT REQUIRES WORKERS TO ASSUME THE APPEARANCE OF AN INDEPENDENT BUSINESS 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 PROTECTIONS 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.4 SUCH A BUSINESS PRACTICE ALSO UNDERMINES THE PUBLIC POLICY CODIFIED IN THE UCL."

PRONG C

F.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.

East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477, 500-501 (2022)

WHERE ONLY EVIDENCE THAT DRYWALL INSTALLERS WERE CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED BUSINESS UNDER PRONG C WAS BUSINESS REGISTRATION AND POSSESSION OF WORKERS COMPENSATION AND/OR LIABILITY INSURANCE, COURT FOUND THAT EBD HAD FAILED TO SATISFY ITS BURDEN UNDER PRONG C, EXPLAINING: "A BUSINESS PRACTICE THAT REQUIRES WORKERS TO ASSUME THE APPEARANCE OF AN INDEPENDENT BUSINESS 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 PROTECTIONS 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.4 SUCH A BUSINESS PRACTICE ALSO UNDERMINES THE PUBLIC POLICY CODIFIED IN THE UCL."

PRONG C OF THE ABC TEST

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.

East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477, 498-499 (2022)

WHERE ONLY EVIDENCE THAT DRYWALL INSTALLERS WERE CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED BUSINESS UNDER PRONG C WAS BUSINESS REGISTRATION AND POSSESSION OF WORKERS COMPENSATION AND/OR LIABILITY INSURANCE, COURT FOUND THAT EBD HAD FAILED TO SATISFY ITS BURDEN UNDER PRONG C, EXPLAINING: "A BUSINESS PRACTICE THAT REQUIRES WORKERS TO ASSUME THE APPEARANCE OF AN INDEPENDENT BUSINESS 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 PROTECTIONS 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.4 SUCH A BUSINESS PRACTICE ALSO UNDERMINES THE PUBLIC POLICY CODIFIED IN THE UCL."

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.

East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477, 496 (2022)

"WHETHER A WORKER IS AN EMPLOYEE UNDER THE ABC TEST "IS FACT-SENSITIVE, REQUIRING AN EVALUATION IN EACH CASE OF THE SUBSTANCE, NOT THE FORM, OF THE RELATIONSHIP." IBID THE FACTFINDER MUST LOOK BEYOND THE EMPLOYMENT CONTRACT AND THE PAYMENT METHOD TO DETERMINE THE TRUE NATURE OF THE RELATIONSHIP. SEE PHILA. NEWSPAPERS INC. V. BD. OF REV., 397 N.J. SUPER. 309, 320, 937 A.2D 318 (APP. DIV. 2007) (FINDING THAT A NEWSPAPER SALESMAN WAS AN EMPLOYEE EVEN THOUGH HIS EMPLOYMENT CONTRACT EXPLICITLY CLASSIFIED HIM AS AN INDEPENDENT CONTRACTOR AND HE RECEIVED AN IRS FORM 1099)."

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.

Philadelphia Newspapers, Inc. v. Board of Review, 397 N.J. Super. 309, 320-322 and 323 (App. Div. 2007)

THE COURT IN PHILADELPHIA NEWSPAPERS FOUND THAT A NEWSPAPER SALESMAN WAS AN EMPLOYEE EVEN THOUGH HIS EMPLOYMENT CONTRACT EXPLICITLY CLASSIFIED HIM AS AN INDEPENDENT CONTRACTOR AND HE RECEIVED AN IRS FORM 1099.

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 PURSUANT TO THE ABC TEST.

Electrolux Corp. v. Board of Review, 129 N.J.L. 154, 155 (1942)

"IT IS CONCEDED THAT THE WRITING [THAT IS, THE WRITTEN CONTRACT BETWEEN THE CLAIMANTS AND ELECTROLUX] WAS DESIGNED TO REMOVE APPELLANT'S SALESMEN FROM THE CATEGORY OF EMPLOYEES GOVERNED BY THE UNEMPLOYMENT COMPENSATION ACT, SUPRA. BUT IT WAS INEFFECTUAL AS SUCH. BOTH BY THE WRITTEN EXPRESSION AND IN FACT, THE CLAIMANTS WERE NOT FREE OF APPELLANT'S 'CONTROL OR DIRECTION' AS RESPECTS THE PERFORMANCE OF THE STIPULATED SERVICE. UNDER THE WRITING, SALESMEN THERETOFORE ADMITTEDLY IN THE EMPLOYEE CATEGORY WERE TERMED 'SALES REPRESENTATIVES.' THERE WERE PROVISIONS OBVIOUSLY INTENDED TO INVEST THEM WITH THE STATUS OF INDEPENDENT CONTRACTORS. YET THE CHANGE WAS OF THE FORM RATHER THAN THE SUBSTANCE SO FAR AS CONTROL WAS CONCERNED - ONE WHOSE SOLE MOTIVATION WAS EVASION OF THE CITED STATUTE WITHOUT AN ALTERATION OF THE ESSENSE OF THE RELATIONSHIP."

East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477, 496 (2022)

"WHETHER A WORKER IS AN EMPLOYEE UNDER THE ABC TEST "IS FACT-SENSITIVE, REQUIRING AN EVALUATION IN EACH CASE OF THE SUBSTANCE, NOT THE FORM, OF THE RELATIONSHIP." IBID **THE FACTFINDER MUST LOOK BEYOND THE EMPLOYMENT CONTRACT** AND THE PAYMENT METHOD TO DETERMINE THE TRUE NATURE OF THE RELATIONSHIP. SEE PHILA. NEWSPAPERS INC. V. BD. OF REV., 397 N.J. SUPER. 309, 320, 937 A.2D 318 (APP. DIV. 2007) (FINDING THAT A NEWSPAPER SALESMAN WAS AN EMPLOYEE EVEN THOUGH HIS EMPLOYMENT CONTRACT EXPLICITLY CLASSIFIED HIM AS AN INDEPENDENT CONTRACTOR AND HE RECEIVED AN IRS FORM 1099).

Philadelphia Newspapers, Inc. v. Board of Review, 397 N.J. Super. 309, 321 (App. Div. 2007)

"WE ACKNOWLEDGE THAT THE ISSUE OF WHETHER PNI PROVED PRONG (A) SHOULD NOT BE DETERMINED UNDER THE AGREEMENT ALONE, BUT RATHER ON ALL FACTS SURROUNDING CLAIMANT'S RELATIONSHIP WITH PNI, INCLUDING THE AGREEMENT. TO CONSIDER ONLY THE AGREEMENT, AND NOT THE TOTALITY OF THE FACTS SURROUNDING THE PARTIES' RELATIONSHIP, WOULD BE TO PLACE FORM OVER SUBSTANCE. ELECTROLUX CORP. V. BD. OF [*322] REVIEW, 129 N.J.L. 154, 155, 28 A.2D 207 (E. & A.1942)."

C.1. WHEN DETERMINING THE WEIGHT GIVEN TO AN ALLEGED INDEPENDENT CONTRACTOR AGREEMENT, THE FOLLOWING FACTORS MAY BE CONSIDERED, AMONG OTHERS:

THESE ARE CONTRACT LAW CONCEPTS REGARDING THE WEIGHT TO BE GIVEN CONTRACTS WHEN THERE IS SOME INEQUALITY IN POWER RELATIVE TO ENTERING OR THE DRAFTING OF THE CONTRACT.

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 PURSUANT TO 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 PURSUANT TO THE ABC TEST.

Yeamon Music, Inc. v. NJDOL (Commissioner FAD, issued January 19, 2023)

"WITH SPECIFIC REGARD TO PETITIONER'S ASSERTION THAT AMONG THE REASONS THE SERVICES IN QUESTION ARE EXEMPT FROM UCL COVERAGE IS THAT THE INDIVIDUALS WHO PERFORMED THE SERVICES WOULD NOT HAVE BEEN ELIGIBLE FOR BENEFITS UNDER THE UCL BASED ON PAYMENTS FROM PETITIONER ALONE; UNDER 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."

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 PURSUANT TO 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 PURSUANT TO THE ABC TEST.

McKnight v. Bd. Of Review, Dep't of Labor, 476 N.J. super. 154 (App. Div. 2023).

IN THAT CASE, THE ISSUE WAS "WHETHER A CLAIMANT, WHO IS OTHERWISE SEPARATED FROM FULL-TIME EMPLOYMENT, MAY INCLUDE WAGES RECEIVED FROM A PART-TIME POSITION, WHICH THEY CONTINUE TO MAINTAIN, IN THE CALCULATION OF THEIR AVERAGE WEEKLY WAGE FOR THE PURPOSES OF UNEMPLOYMENT BENEFITS." ID. AT 164. THE COURT CONCLUDED THAT **ALL** OF THE CLAIMANT'S BASE-YEAR EARNINGS, THAT IS ALL BASE YEAR EARNINGS FROM THE CLAIMANT'S FULL-TIME POSITION **AND ALL BASE YEAR EARNINGS FROM THE CLAIMANT'S PART-TIME POSITION,** SHOULD BE INCLUDED IN THE CALCULATION OF THEIR AVERAGE WEEKLY WAGE FOR THE PURPOSE OF UNEMPLOYMENT BENEFITS, WITHOUT REGARD TO WHETHER THE CLAIMANT'S EARNINGS FROM EITHER POSITION ALONE WOULD BE SUFFICIENT TO QUALIFY THE CLAIMANT FOR BENEFITS. SEE ID. AT 169.