555 12th Street NW, Suite 1001
Washington, D.C. 20004

1-800-552-5342
NFIB.com

Via email
and U.S. First Class Mail

July 17, 2025

David Fish, Executive Director
Legal and Regulatory Services
Department of Labor and Workforce Development
PO Box 110, 13th Floor
Trenton, New Jersey 08625-0110

Dear Director Fish:

RE: Proposed New Rules: N.J.A.C. 12:11; ABC Test; Independent Contractors, Published in the New Jersey Register of May 5, 2025.

The National Federation of Independent Business (NFIB)[1] submits these comments in response to the Department of Labor and Workforce Development ("Department") proposal titled "Proposed New Rules: N.J.A.C. 12:11; ABC Test; Independent Contractors," published in the New Jersey Register of May 5, 2025.[2] For the reasons set forth below, NFIB recommends that the proposed rules be withdrawn.

The proposed rules alter the simple and flexible language of the original ABC test into a convoluted classification system, hindering the ability of small businesses to hire independent contractors. Small businesses will face an increased risk of misclassification proceedings for honest mistakes. The Department must work diligently to prevent the placement of such needless burdens upon the shoulders of small business owners.

[1] NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty States hear the voice of small business as they formulate public policies.

[2] 57 N.J.R. 894.

The Current ABC Test

The three-prong ABC test, codified at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), provides that individuals will be considered independent contractors when:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

The proposed rules seek to greatly expand this language in a way that is unhelpful for businesses and creates significant confusion.

Changes to Prong A

In reworking Prong A of the ABC test, the proposed rules list two factors for determining what constitutes "exercising control": first, "[w]hether the individual is required to work any set hours or jobs;" and second, "[w]hether the putative employer has the right to control the details and means by which the services are performed by the individual."[3] This may seem simple enough in itself, but the second factor is broken down into nine sub-factors, and two sub-sub-factors, presenting numerous and vague requirements that make it more difficult to distinguish an independent contractor from an employee.[4]

For example, one of the sub-factors asks "[w]hether the putative employer negotiates for and acquires the services performed by the individual[.]" Is this per job or per the ongoing contract? The rule is silent. As another example, the rule asks "[w]hether the individual's rate of pay is fixed by the putative employer[.]" However, every contract for services fixes a rate of pay—a homeowner, for instance, pays a plumber to fix a sink for a set, agreed-upon fee. Does that make the plumber an employee? Surely, the Department does not mean to go that far. Yet, with this factor remaining vague, it lends itself to any number of interpretations.

A list of factors can be helpful to bring clarity, if the list is actually exhaustive and the weight of the factors is clear. However, the rule goes on to say that the factors listed are not to be used as a checklist where meeting a majority of the factors indicates independent contractor status.[5] In fact, the factors are merely "illustrative" and "not

---

[3] Proposed 12:11-1.3(c)(1)-(2).
[4] Proposed 12:11-1.3(c)(2)(i)(1)-(9).
[5] Proposed 12:11-1.3(e).

exhaustive."[6] Most troubling is the Department's statement that "[s]ome factors may be relevant in one situation and may not be relevant in another."[7] This means that the Department will evaluate what "control" looks like on a case-by-case basis, based on any factors it so desires—even unlisted factors—while some of the factors listed might actually mean nothing, and the weight of the factors is entirely uncertain.

On its face, but especially when combined with the vagueness of the sub-factors, this section offers no clarity, but instead, obscures the Department's interpretation and decision-making process so that the only safe path for small businesses is to misclassify independent contractors as employees.

This seems to be the point. Part (f) of 12:11-1.3 states that this measure of control still applies to actions the business is exercising in compliance with the law. Businesses will thus have to choose between 1) exercising control over independent contractors in compliance with the law, risking misclassification proceedings in doing so; 2) breaking the law in order to save the independent contractor's status; or 3) hiring all of their contractors as employees to be on the safe side. This is no choice at all. The Department must not make small businesses pick between safety and legal compliance on one hand, and a misclassification proceeding on the other. This pits the laws of the State against each other and stacks the deck against independent contractors.

The Department should be mindful that the New Jersey Supreme Court in *Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor* ("*CRW*") did not give the Department as much leeway with Prong A as it supposes: "the doctrine of control is derived from the common law and is therefore 'not inextricably related to the [Commissioner's] expertise[.]'"[8] Though the court also said "that a statutory employer-employee relationship [may] be found even though that relationship may not satisfy common-law principles,"[9] this was in reference to the three prongs taken together—Prong A operates under the common law's significantly narrower understanding of "control."[10]

<u>Changes to Prong B</u>

Instead of introducing a list of factors to the test, as with Prongs A and C, the proposed changes to Prong B come in the form of examples. However, these examples are vague and noncommittal, creating a great deal of confusion for small businesses.

For instance, the proposed rule never commits to saying whether even its own examples are clear-cut cases. In one example, dealing with a cleaning person working at a dentist's office, the most the rule can muster is that "[t]he services performed by the

---

[6] Proposed 12:11-1.3(c)(2)(i).
[7] Proposed 12:11-1.3(e).
[8] 125 N.J. 567, 590 (1991).
[9] *Id.* at 581.
[10] *See Restatement of Agency* § 220 (1933).

cleaning person are *likely* outside of the dentist's usual course of business[.]"[11] Likewise for the musician playing at a restaurant—it is only "likely" that this is outside of the usual course of business,[12] and even for a landscaper at a law firm, the only certainty we have is that it is "likely."[13] As the saying goes, "'almost' only counts in horseshoes." In the law, "likely" counts for nothing. Businesses need clarity. If the examples just mentioned—which are indeed clear-cut cases—can't even be categorically stated as meeting Prong B, then what certainty can any regulated party have that they are correctly applying the test?

Further, the distinctions raise more questions than they answer due to the absence of explanations. A caddie helping patrons play golf at a country club is "likely" within the usual course of business,[14] but a musician entertaining patrons at a restaurant is "likely" outside of it.[15] Why? The rule provides no rationale. Businesses are left to fill in the blanks themselves. If they can't figure out the distinction, they will either guess wrong, or refuse to guess, and classify contractors as employees. If the Department truly does value "more workers being properly classified (either as employees or independent contractors),"[16] then this result should be unacceptable.

<u>Changes to Prong C</u>

The proposed rules likewise distort the meaning of Prong C, which asks whether a worker is "customarily engaged in an independently established . . . business[.]"[17] By a plain reading of the text, this could be a straightforward inquiry. However, as with Prongs A and B, the proposed rules add yet another vague list of factors. Though these factors are lifted from the *CDW* case, the Department does not clarify what they mean and how they factor into the analysis. These factors are:

> 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;

---

[11] Proposed 12:11-1.4(c)(1).
[12] Proposed 12:11-1.4(c)(2).
[13] Proposed 12:11-1.4(c)(3).
[14] Proposed 12:11-1.4(d)(3).
[15] Proposed 12:11-1.4(c)(2).
[16] 57 N.J.R. 897.
[17] N.J.S.A. 43:21-19(i)(6)(C).

> 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.[18]

To start, the first factor is vague—what, indeed, is a durable, strong, and viable business, and how is another business who contracts with it to make that judgment? The same goes for many of the other factors. What number of customers would make a business sufficiently "independently established"? What percentage of renumeration coming from which sources would meet this threshold? How many employees does it take—keeping in mind that many small businesses, including NFIB members, have zero or even just one employee—to make a business "independent" under the rule?

The rule provides no answers to these questions, and instead reiterates, as above, that the many listed factors are not to be used as a checklist, presenting serious issues of arbitrariness, vagueness, and confusion.[19]

Further, this list improperly considers factors that are entirely up to the contractor. Indeed, the rule states that "what is relevant is not whether an individual was free to work for others," but instead "whether the individual did perform services for, and receive remuneration for the performance of such services from others[.]"[20] A business has no control over (and indeed, may have no knowledge of) these insider details of a contractor's business. Nor is an independent contractor likely to disclose these details to every business with which he or she contracts. In the absence of this information, small businesses will be forced to throw up their hands and misclassify contractors as employees.

The rule makes clear, in no uncertain terms, that even if a business can prove that its contractor has other clients, thus navigating through the central element of Prong C,[21] these relationships may still be mislabeled as employer-employee and put the business back at square one: "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."[22] So even if someone could be defined as a contractor under Prong C, if *any other* work relationship the contractor has is defined as an employment relationship, it cuts against them on Prong C. This is convoluted and requires endless evaluations of every single business relationship a contractor may

---

[18] Proposed 12:11-1.5(b)(1)-(7).
[19] *See* Proposed 12:11-1.5(d).
[20] Proposed 12:11-1.5(e).
[21] *See* Proposed 12:11-1.5(e).
[22] Proposed 12:11-1.5(f)(1).

have. It would be inadvisable—not to mention impossible—for a small business to conduct such inquiries just to ensure that they are correctly applying the rules.

The proposed rules also warp the explicit statutory language and court precedent surrounding Prong C. As the proposed rules have it:

> 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.[23]

But the New Jersey Supreme Court in *East Bay Drywall, LLC v. Department of Labor and Workforce Development* ("*EBD*") stated the opposite: "[t]he Legislature made clear that the public policy underpinning the UCL[,]"—namely, to remedy "'economic insecurity due to unemployment'"—"*must* be considered when determining its application[.]" [24] The word "must" means that this consideration is mandatory. To instead claim that unemployment is not even relevant is to blatantly violate the statute and case law.

The Proposed Rules Give Short Shrift to Agreements and Forms

Finally, the rules downplay probative evidence found in contracts and official filings, which should be critical in determining independent contractor status under Prongs A and C.

The text of the ABC statute requires the contract to serve as strong evidence of independent contractor status. Prong A evaluates control "*both* under [the] contract of service and in fact."[25] Yet, the proposed rules diminish this clear statement by refusing to give weight to independent contractor agreements as written, instead finding ways to undermine their terms.

Under Proposed 12:11-1.6(c), an express agreement to be classified as an independent contractor is not dispositive, and indeed, is subject to yet another list of factors that will be difficult to apply in practice.[26] One such factor is "whether either the putative employer or the individual is the primary or unilateral drafter of the alleged independent contractor agreement[.]"[27] Under this factor, a business may draft an agreement, the contractor may offer edits, reaching a true meeting of the minds essential to any contract, and yet, because the business wrote the first draft, he or she is the "primary drafter," and the agreement should be given less weight. This means that an agreement between a business and a worker—who are both contracting in good faith to create an independent contractor relationship—can't be given full weight unless the contractor

---

[23] Proposed 12:11-1.6(d).
[24] 251 N.J. 477, 500 (2022) (quoting N.J.S.A. § 43:21- 2) (emphasis added).
[25] N.J.S.A. 43:21-19(i)(6)(A).
[26] Proposed 12:11-1.6(c).
[27] Proposed 12:11-1.6(c)(1).

primarily drafts the contract. Practically speaking, this is unworkable and unnecessarily interferes with both parties' freedom to contract.

The same diminishing of relevant evidence is applied to Prong C. Proposed 12:11-1.6 establishes that a business's use of a Federal Form 1099 for a particular worker does not satisfy the ABC test.[28] Additionally, "[p]roof of business registration . . . is not alone sufficient to meet Prong C."[29] Though the filing of a 1099 and proof of business registration are not *dispositive* even under the current test, they are and should be considered *relevant* evidence. Indeed, the existence of a separate business entity or the filing of a 1099 are not even included on the lists of factors the Department will use to meet Prong C.[30] In other words, the Department will consider the evidence gleaned from the proposed rules' countless lists, but will disregard evidence of a contractor owning his or her own business and the practice of the parties via the filing of a 1099.[31]

Though the Department leans on the New Jersey Supreme Court's decision in *CRW* for support, it does so by making much of a short comment. As the court in that case had it, a classification determination "is fact-sensitive, requiring an evaluation in each case of the substance, not the form, of the relationship[.]"[32] But it does not go further than this. To support this statement, the court cites *Provident Inst. for Sav. In Jersey City v. Div. of Emp. Sec., Dep't of Lab. & Indus.*, where the court never said that it would disregard form, but rather would "look *through* the form to the substance."[33] To look through the form is not to disregard or downplay its importance, but to get a full picture in context. This merely means that the form itself should not be the end of the inquiry. Instead, if the substance of the relationship (i.e. the practice of the parties) lines up with the form (e.g., contracts, 1099s, the filing of business registration documents), both should be considered as beneficial evidence. Anything less cuts the statutory Prong A in half, severely distorting the text of the statute.

The Department's proposed rules tip the scales against contractor relationships by favoring evidence that is vague and gravitates towards an employer-employee relationship, and devaluing evidence that is more objective and thus would more clearly support independent contractor status. This is arbitrary, capricious, and violates the ABC statute.

---

[28] Proposed 12:11-1.6(b).
[29] Proposed 12:11-1.5(g).
[30] See Proposed 12:11-1.5(b).
[31] *See* 57 N.J.R. 896-97.
[32] *CRW*, 125 N.J. at 581.
[33] 32 N.J. 585, 591 (1960) (emphasis added). See also *Trauma Nurses, Inc. v. Bd. of Rev., New Jersey Dep't of Lab.*, 242 N.J. Super. 135, 142 (App. Div. 1990) ("[W]e are obliged to look *behind* the contractual language to the actual situation.") (emphasis added).

NFIB's Recommendation

Though the Department claims that the proposed rules will mitigate confusion for businesses, with economic benefits flowing from this new clarity, they actually will result in significantly more confusion with the introduction of unnecessary (and non-exhaustive) lists.[34] The Department states that its goal is "workers being properly classified," without prejudice to whether that results in more employees or independent contractors,[35] yet, the confusion sown by the new rules will end in the pervasive misclassification of independent contractors as employees to avoid potential liability. To avoid this result, NFIB recommends that the proposed rules be withdrawn in their entirety.

Conclusion

NFIB appreciates the opportunity to comment upon the proposed rules and hopes that the Department will take seriously its obligation to provide clarity and stability for New Jersey's small businesses. Withdrawing the proposed rules will be a strong step towards that goal.

Sincerely,

Elizabeth A. Milito

Elizabeth A. Milito, Esq.
Vice President and Executive Director,
NFIB Small Business Legal Center

cc: Eileen Kean, New Jersey State Director, NFIB

[34] *See* 57 N.J.R. 897.
[35] *See Id.*