

New Data Needed: Improving New Jersey's Enforcement of Employee Misclassification Laws

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Introduction

In the United States, thousands of employees in the private sector are misclassified as independent contractors.¹ Employers have used misclassification to withhold workers' benefits such as well-earned wages, benefits, and sick leave.² This has a deleterious effect on working conditions and a cumulative effect on income inequality.³ The rise of employee misclassification has both federal and state governments scrambling to enforce employee misclassification statutes with mixed results.⁴ Although some states use a broader definition of what constitutes an employee to enforce employee misclassification, the number of misclassifications demonstrates

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¹ *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NATIONAL EMPLOYMENT LAW PROJECT (October 2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Indep>

² Kerri Keohane and David Schap, *Employee Misclassification and Related Damages Claims*, 27 J. LEGAL ECON. 63, 64 (July 2021).

³ See *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* NATIONAL EMPLOYMENT LAW PROJECT, <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/>; See Eric Posner, *How Antitrust Failed Workers*, BOSTON REVIEW (Nov. 23, 2021) <https://bostonreview.net/articles/competition-is-not-the-cure/>.

⁴ Rebecca Rainey and Ian Kullgren *U.S. Labor Agencies Strike Deal to Share Enforcement Information*, BLOOMBERG LAW (Jan. 6, 2022), <https://news.bloomberglaw.com/daily-labor-report/u-s-labor-agencies-strike-deal-to-share-enforcement-information>; Sean Golonka, *State task force sets sights on multimillion-dollar problem of employee misclassification*, The Nevada Independent (Apr. 12, 2021), <https://thenevadaindependent.com/article/state-task-force-sets-sights-on-multimillion-dollar-problem-of-employ>; Françoise Carre, *(In)dependent Contractor Misclassification*, ECONOMIC POLICY INSTITUTE (June 8, 2015), <https://www.epi.org/publication/independent-contractor-misclassification/>.

effective enforcement is still an ongoing issue.⁵ Because of this lack of effective enforcement, employee misclassification persists in the workforce.⁶

Employee misclassification is a practice where an employer classifies a worker as an independent contractor whereas the law would classify them as an employee.⁷ These workers are controlled by the employers like an employee but lack the flexibility and autonomy of independent contractors.⁸ Because of their contractor status, these employees have fewer workplace rights since several federal and state statutes apply to employees and not independent contractors.⁹ When an employer classifies a worker as an independent contractor, the employer is free to terminate the worker, withhold benefits such as sick pay and break time, and make other unilateral changes with no recourse for the worker.¹⁰ This leaves the misclassified worker with the disadvantages of both statuses and none of the benefits.¹¹ The debate of what qualifies a worker as an employee and what metric to use lies at the heart of employee misclassification.

Employee misclassification issues commence when a worker files suit, alleging they have been wrongfully classified as an independent contractor.¹² Seventeen states, including New Jersey, employ the “ABC test” to determine whether to classify a worker as an employee or an independent contractor.¹³ The ABC test presumes workers are employees unless the employer

⁵ See Carre, *supra* at note 1.

⁶ See Louise Esola, *N.J. calls for wider employee misclassification enforcement*, BUSINESS INSURANCE, (July 11, 2019), <https://www.businessinsurance.com/article/20190711/NEWS08/912329545/NJ-calls-for-wider-employee-misclassification-enforcement>.

⁷ Kerri Keohane and David Schap, *Employee Misclassification and Related Damages Claims*, 27 J. LEGAL ECON. 63, 64 (July 2021).

⁸ Treasury Inspector Gen. for Tax Admin., Office of Inspections and Evaluations, 2018-IE-R002, Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success 1 (2018), <https://www.oversight.gov/sites/def>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Julia Weaver, Note, *Two Sides of the Same Coin: Examining the Misclassification of Workers as Independent Contractors*, 55 GA. L. REV. 1355, 1358 (2021).

¹² *Id.*

¹³ *Id.*

proves: A.) the individual has been and will continue to be free from control or direction over the performance of such service, both under the terms of the contract and in actual job performance; and B.) the 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.) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.¹⁴ While states' wording of the ABC test can vary, the ABC test is largely followed by these lines.¹⁵ If the company fails to show its "contractors" fail to meet the three prongs of the ABC test, the company is found to have illegally classified workers and be subject to the state's respective penalties.¹⁶

Recently there have been pushbacks against these attempts to enforce employee misclassification laws in both legislative and judicial forums across states. In 2019 the California legislature passed AB-5, codifying and expanding the scope of the ABC test to apply to gig economy workers such as drivers.¹⁷ Companies like Uber and Lyft retaliated by spending over \$200 million advertising Proposition 22, a statewide ballot that exempted app-based drivers from being deemed as employees under the California statute AB-5.¹⁸ In the 2020 general election, California voters approved Proposition 22.¹⁹ Alameda County Superior Court Judge Frank Roesch ruled Proposition 22 violated the California constitution by using their initiative power to

¹⁴ Robert Sprague, *Using the ABC Test to classify workers: End of the Platform-based Business Model or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733, 749-50 (April 2020).

¹⁵ *Id.* at pg. 749 n. 64, pg. 750 n. 65.

¹⁶ *Id.*

¹⁷ Kaelin Sanders, *Proposition 22 and Workers' Right to Choose: Learning from California's Efforts to Classify Independent Contractors*, 26 ILL. BUS. L.J. 28, 31 (2021).

¹⁸ *Id.* at 28, 32.

¹⁹ Sara Ashley O'Brien, *Prop 22 passes in California, exempting Uber and Lyft from classifying drivers as employees*, CNN (Nov. 4, 2020, 4:02 PM), <https://www.cnn.com/2020/11/04/tech/california-proposition-22/index.html>.

restrict a power granted to the California legislature by an initiative statute, not an initiative constitutional amendment like the California state constitution intended.²⁰ However, as gig workers appeal the superior court's decision, the future of AB-5 is far from certain.²¹ This pushback on employee misclassification enforcement extended to New Jersey where the attempt to amend the ABC test to resemble California statute AB-5 failed.²² This backlash from employers has further slowed the efforts to combat employee misclassification.

These attempts to repeal or undercut employee misclassification statutes combined with other circumstances increase the rate of employee misclassification. One of the circumstances is the gig economy which involves an online platform or phone app that potential clients use to request services and workers interact with to attain short-term “gigs” at the time of their choosing.²³ The rise of the gig economy has allowed employee misclassification to increase as many gig companies label workers they have exclusive control over as independent contractors.²⁴ This increase in the gig economy is reflected in the increase of misclassification lawsuits that workers have launched against employers, citing lost wages and withheld benefits.²⁵

²⁰ Margaret Roosevelt and Suhauna Hussain, *Prop. 22 is ruled unconstitutional, a blow to California gig economy law*, LOS ANGELES TIMES (Aug. 20, 2021, 10:22 AM) <https://www.latimes.com/business/story/2021-08-20/prop-22-unconstitutional>. Judge Roesh further explained that by including the language to prevent gig drivers from unionizing, the ballot measure also violates a constitutional provision that requires laws and initiatives to be limited to a single subject. *Id.*

²¹ Suhauna Hussain, *Prop. 22: California Gig Companies, Workers Get Their Day in Appeals Court*, LOS ANGELES TIMES (Dec. 13, 2022) <https://www.latimes.com/business/story/2022-12-13/california-prop-22-appeals-court-hearing-weighs-gig-workers-fate>; *Prop. 22 Fight Back in Court as California Seeks to Revive Law*, BLOOMBERG LAW (Feb. 25, 2022, 5:44 PM) <https://news.bloomberglaw.com/us-law-week/prop-22-fight-back-in-court-as-california-seeks-to-revive-law>.

²² Ryan T. Warden, *New Jersey Resumes Efforts to Amend ABC Test for Independent Contractor Status, Passes Slate of Laws Targeting Misclassification*, NAT'L L. REV. (Jan. 23, 2020) <https://www.natlawreview.com/article/new-jersey-resumes-efforts-to-amend-abc-test-independent-contractor-status-passes>.

²³ SARAH A. DONOVAN ET AL., CONG. RESEARCH SERV., R44365, WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS? 1-2 (2016).

²⁴ Matt Chodosh, *Employee Misclassification too Big to Ignore*, BLOOMBERG TAX, (July 1, 2021, 4:00 AM) <https://news.bloombergtax.com/daily-tax-report/employee-misclassification-too-big-to-ignore>.

²⁵ Maeve Allsup, Erin Mulvaney & Joyce Cutler, *Gig Economy Companies Brace for Crucial Year as Challenges Mount*, BLOOMBERG LAW (Jan. 4, 2022, 4:45 AM) <https://news.bloomberglaw.com/us-law-week/gig-economy-companies-brace-for-crucial-year-as-challenges-mount> (“App-based giants, including Uber Technologies Inc., Lyft

Further complicating the problem of properly classifying gig workers is the employer's swiftness in moving operations to low enforcement states when challenged on employee misclassification grounds.²⁶ The increase in worker misclassification intensifies the struggle over how to classify certain workers.

This Note will examine New Jersey's recently passed employee misclassification enforcement efforts and how New Jersey can improve it with improved information sharing among other states and improved metrics to measure enforcement success. Section 1 of this Note will examine state-level employee misclassification enforcement in a broader context and how the lack of information has prevented effective enforcement. Section 2 of this note will examine New Jersey's attempt to share information and work with the federal government, failed attempt to amend the New Jersey ABC test, the recent enforcement legislation that was passed, and suggested improvements respectively.²⁷ This Note concludes that New Jersey should focus on gathering more information and establishing new metrics to prove which enforcement tactics are effective and sharing them with other states instead of the federal government.

Inc., and DoorDash Inc., ended 2021 still locked in fierce litigation and lobbying to defend their business models, which rely on independent contractors who don't receive the same job protections and benefits as employees. That jockeying will continue this year as their drivers, deemed essential workers during the Covid-19 pandemic, push for more rights through court action and organizing efforts around the country.”).

²⁶ Mark Elrich and Terri Gerstein, *Confronting Misclassification and Payroll Fraud: A survey of State Labor Standards Enforcement Agencies Harvard Law School Labor and Worklife Program* 11-12, HARV. LAB. & WORKLIFE PROGRAM (June 2019) <https://lwp.law.harvard.edu/files/lwp/files/misclassification.pdf>.

²⁷ Press Release, Gov. Phil Murphy, Governor Murphy Signs Legislation to Protect New Jersey Workers, Employers From Unlawful Misclassification (July 8 2021) (on file with author), available at: <https://www.nj.gov/governor/news/news/562021/20210708a.shtml>.

Section I- State Governments Amend Laws Without Sharing Information Showing Success

Several states moved away from the traditional common law test used by the federal government in favor of their statutes.²⁸ Legislative action limiting the abuse of employee classification has been as varied as the states themselves.²⁹ Each state has tailored its strategy to what it believes should be the priority of the legislation prohibiting employee misclassification.³⁰ Some states focus on redefining the distinction between an employee and an independent contractor to force employers to comply with misclassification statutes. Redefinition can take several different forms such as modifying different parts of the independent contractor and employee definition to recreating a new standard for employers to follow.³¹ Redefining the distinction between an employee and an independent contractor can also be important to singular employee benefits such as worker's compensation or sick leave while other states have drafted their statutes to be universally applicable to employment conditions.³²

Other states instead increase the enforcement powers of existing laws to deter employee classification. Some states enforce employee misclassification statutes by increasing penalties for businesses violating the statute or increasing the investigative powers of relevant agencies.³³ Other states have created agencies, task forces, or other enforcement bodies specifically

²⁸ See Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 65 (2015), Jennifer Pinosof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig Economy*, 22 MICH. TELECOMM. TECH. L. REV. 341, 341, 369 (2016).

²⁹ See *supra*, note 8; CRS Report, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test*, CONGRESSIONAL RESEARCH SERVICE, (Apr. 20, 2021), <https://crsreports.congress.gov/product/pdf/R/R46765>.

³⁰ See Deknatel *supra*, note 28 at 66-67.

³¹ See *id.*

³² See *id.* at 67.

³³ *Id.* at 75.

dedicated to addressing employment misclassification.³⁴ While other states have changed the liability standards and tied criminal penalties for misclassification.³⁵ Many states have introduced these measures either independently or simultaneously to address employee misclassification.

A. Redefining Statutory Language

The ABC test provides an alternative to the traditional economic realities test by determining whether an employer has to control the first of three factors an employer must show so a worker can be classified as an independent contractor.³⁶ By relegating control to one factor out of three, the ABC test removes the importance of the control factor because even if an employer proves they do not control the worker they must prove two other factors as well.³⁷ For the first factor, the employer must prove the worker's job is outside the usual course of the hiring party's business.³⁸ The second factor the employer must prove is whether the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for the hiring party.³⁹ Some states have the ABC test only apply to specific benefits or certain industries to avoid criticisms that the application of the ABC test is overly broad.⁴⁰

Like the common law test, the A prong of the ABC test focuses on the presence of control in the relationship between the employer and the worker. However, while common law tests often look beyond a contract to the practical relationship of the parties, many states have taken the requirement further.⁴¹ Several states such as Washington, New York, and Nebraska

³⁴ Denknatel *supra*, note 28 at 65-6.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See id* at 57.

⁴¹ Deknatel, *supra* note 36 at 68-9.

have adopted the “A prong” with language that requires evidence of both contractual language and employment relationship in practice.⁴² While many states demand the presence of contractual language designating a worker as an independent contractor, other states require the employer to show an actual lack of control in the relationship between the worker and employer.⁴³ These states have given the courts little guidance on whether there is a lack of control in the actual relationship between the worker and the employer.⁴⁴ This lack of clarity regarding whether there is actual control in the relationship between parties has led to complaints by employers that there is little actual guidance on how to follow these statutes.⁴⁵

Under the “B prong” of the ABC test a worker cannot be properly classified as an independent contractor unless the employer proves the service is performed outside the usual course of business or outside the employer’s place of business.⁴⁶ Factors to determine the B prong are: whether the worker's business is a "key component" of the putative employer's business; how the purported employer defines its own business; which of the parties supplies equipment and materials; and whether the service the worker provides is necessary to the business of the putative employer or is merely incidental.⁴⁷ Three states with legislation targeted at the construction industry have eliminated the B prong and instead require a written contract or

⁴² See WASH. REV. CODE ANN. §§50.04.140(1)(a), 50.04.145(1), 51.08.181(1), 51.08.195(1) (West 2021); N.Y. LAB. LAW § 861-c(1)(a) to (c) (McKinney 2022); NEB. REV. STAT. ANN. § 48-2903 (LexisNexis 2022) (referencing Neb. Rev. Stat. Ann. § 48-604(5)(a) (LexisNexis 2022)); MD. CODE ANN., LAB. & EMPL. § 3-903 (Lexis 2022) (Statute requires employer to demonstrate an individual who performs the work is free from control and direction over performance in fact and under contract).

⁴³ See, e.g., DEL. CODE ANN. tit. 19, § 3501 (West 2021).

⁴⁴ See NEB. REV. STAT. ANN. § 48-604(5) (LexisNexis 2021) (“The provisions of this subdivision are not intended to be a codification of the common law and shall be considered complete as written”).

⁴⁵ Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J. 111, 120-26 (2009) (analyzing in detail five recent statutes that directly penalize for misclassification and discussing the consequences for states without such statutes).

⁴⁶ See Sprague, *supra*, note 14 at 752.

⁴⁷ See *Great N. Constr., Inc. v. Dep't of Labor*, 161 A.3d 1207, 1216 (Vt. 2016); see also *Q.D.A., Inc. v. Ind. Dep't of Workforce Dev.*, 96 N.E.3d 620, 627 (Ind. Ct. App. 2018).

license.⁴⁸ In Oregon, New Mexico, and Pennsylvania, the B prong is replaced with the requirement the employer shows a written contract or license to show the worker is an independent contractor.⁴⁹ In Pennsylvania specifically, the statute provides additional factors such as the maintenance of a separate place of business by the independent contractor.⁵⁰ In contrast, other states allow the B prong to be proven by merely showing that work is performed outside the physical places of the employer's business.⁵¹ This prong is the most variable because several states have a unique modification for it.

Finally, states have subjectively interpreted prong C which requires the employer to prove the worker is customarily engaged in an independently established trade, occupation, profession, or business.⁵² Factors a court can consider when determining whether prong C is proven include but are not limited to: "the putative employee maintained a home office, that he was independently licensed by the state, that he had business cards, that he sought similar work from third parties, that he maintained his own liability insurance, and that he advertised his services to third parties."⁵³ Massachusetts and Maryland require that the work that worker is customarily engaged in is also "of the same nature as that involved" in the service performed.⁵⁴ For example in *Weiss v. Loomis, Sayles & Company Inc.*, the Massachusetts Appeals Court held

⁴⁸ See 43 PA. STAT. ANN. § 933.3(a)(1) (West 2022); N.M. STAT. ANN. § 60-13-3.1(A)(2) (West 2022); OR. REV. STAT. ANN. § 670.600(2)(c) (West 2022) (referencing licensing requirements for architects, landscapers, and construction workers).

⁴⁹ 43 PA. STAT. ANN. § 933.3(a)(1) (West 2022); N.M. STAT. ANN. § 60-13-3.1(A)(2) (West 2022); OR. REV. STAT. ANN. § 670.600(2)(c) (West 2022) (referencing licensing requirements for architects, landscapers, and construction workers).

⁵⁰ 43 PA. STAT. ANN. § 933.3(b) (West 2021).

⁵¹ See Laura Stevens, *Court Says FedEx Drivers Were Employees, Not Contractors*, WALL STREET JOURNAL, (Oct. 3, 2014), <http://www.wsj.com/articles/court-says-fedex-drivers-were-employees-not-contractors-1412382296>.

⁵² See Sprague, *supra*, note 14 at 757-58.

⁵³ COLO. REV. STAT. ANN. § 8-70-115(1)(c) (West 2022) (listing nine conjunctive elements that can be used to establish part C); *Sw. Appraisal Grp., LLC v. Adm'r, Unemployment Comp. Act*, 155 A.3d 738, 749 (Conn. 2017) (listing ten factors to consider).

⁵⁴ MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(3) (West 2022) (defining work outside the usual course of business of the employer as, inter alia, work performed that is unrelated to the employer's business); MD. CODE ANN., LAB. & EMPL. § 3-903(c)(1)(ii)(2) (LexisNexis 2022).

that because the plaintiff's contract stated that the plaintiff could not provide similar services to anyone of his choice meant the plaintiff did not engage in an independently established business.⁵⁵ Other states such as Maine replaced prong C with unique mandatory criteria to satisfy the third prong.⁵⁶ Other states replace prong C with the maintenance of a separate business location, evidence of other business relations, and indications of the worker's supposed financial responsibility.⁵⁷ While these rules lack the simplicity of the prong C, they still strive to distinguish an independent business from an employee.

B. Enforcement Strategies

Nineteen states have passed legislation enforcing employee classification in addition to or alternative modifying existing statutes.⁵⁸ In contrast to the definitional model of the ABC test legislation concerning enforcement does not have a dominant model for the states to follow.⁵⁹ Many states only increase or institute civil penalties for misclassification or add criminal

⁵⁵ See *Weiss v. Loomis, Sayles & Co., Inc.*, 141 N.E.3d 122, 130 (2022).

⁵⁶ ME. REV. STAT. ANN. tit. 26, § 1043(11)(E) (2)(a)-(g) (2022) (Maine requires 3 of the following criteria must be met: (a) The individual has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the individual to complete the work;

(b) The individual is not required to work exclusively for the other individual or entity;

(c) The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;

(d) The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work;

(e) Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual;

(f) The work is outside the usual course of business for which the service is performed; or

(g) The individual has been determined to be an independent contractor by the federal Internal Revenue Service.).

⁵⁷ See N.M. STAT. ANN. § 60-13-3.1(A)(6) (West 2022); OR. REV. STAT. ANN. § 670.600(3)(a), (c) (West 2022); 43 PA. STAT. ANN. § 933.3(b)(4), (b)(5)(ii) (West 2022).

⁵⁸ CAL. LAB. CODE § 226.8 (West 2022); COLO. REV. STAT. § 8-72-114 (West 2022); CONN. GEN. STAT. ANN. §§31-69, 31-69a, 31-288 (West 2022); DEL. CODE ANN. tit. 19, § 3505 (West 2022); 820 ILL. COMP. STAT. ANN. 185/25, /40, /45, /60 (West 2022); IND. CODE ANN. § 22-2-15-2 (West 2022); KAN. STAT. ANN. § 44-719 (West 2022); MD. CODE ANN., LAB. & EMPL. §§3-908, 3-909, 3-911 (LexisNexis 2022); MASS. GEN. LAWS ANN. ch. 149, § 27C (West 2022); MINN. STAT. ANN. §§181.722, 181.723, 326B.701 (West 2022); NEB. REV. STAT. ANN. § 48-2907 (LexisNexis 2022); N.J. STAT. ANN. § 34:20-5 (West 2022); N.M. STAT. ANN. § 60-13-3.1(C) (West 2022); N.Y. LAB. LAW § 861-e (West 2021); OR. REV. STAT. ANN. § 670.700 (West 2022); 43 PA. STAT. ANN. §§933.5, 933.6 (West 2022); UTAH CODE ANN. § 34A-2-110 (LexisNexis 2022); VT. STAT. ANN. tit. 21, §§692, 708, 1314a (West 2022); WISC. STAT. ANN. § 103.06 (West 2022).

⁵⁹ See Daknatel, *supra* note 28 at 75.

liability.⁶⁰ Other states have included the power to issue stop-work orders and create new agencies to specifically address employee misclassification.⁶¹ Measuring the effectiveness of each enforcement tool is challenging since many of these states lack the data to show how effective this enforcement is. Nevertheless, these statutes have guided states in devising certain strategies to reduce employment misclassification.

Most states start their enforcement of employment misclassification by creating and implementing limited task forces.⁶² These task forces are either created by statute or by executive order, with legislature-created task forces having a longer duration and clearly stated goals.⁶³ These task forces research the employee misclassification problems in their respective states and recommend legislative solutions.⁶⁴ Some states have incorporated resources and restructured agencies to facilitate better information.⁶⁵ Illinois for example has made its independent contracting investigative task force self-sustainable by allocating all information on collected civil fines to the statute's administration and its resulting investigations.⁶⁶ Indiana passed a statute mandating the sharing of information between agencies and task forces about businesses found to misclassify employees.⁶⁷ However, in a growing number of states, task force reports have been sporadic or have been discontinued: Connecticut (no reports since 2012); Indiana (no reports since 2010); Iowa (no reports since 2010); Maine (task force abolished, no reports since 2010); Michigan (no reports in recent years but the new unit formed in 2019 might change that);

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *Public Task Forces Take on Employee Misclassification: Best Practices*, NAT'L EMP'T LAW PROJECT 4-5 (Aug. 2020), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification-Updated-August-2020.pdf>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

Minnesota (no reports); and Ohio (no reports since 2009).⁶⁸ The discontinuation of task forces demonstrates that while states use these task forces to diagnose employee misclassification, any resulting information is not followed up on by the task force or any other information-gathering agency.

The most common enforcement tactic by state legislatures has been civil penalties for misclassification.⁶⁹ In contrast to regimes where the only incentive against misclassifying a worker was the assessment of back taxes or benefits, civil penalties do more than "place[] the employer in the same position where he would have been had he properly classified the worker in the first instance."⁷⁰ Seven states have created or increased civil penalties for any business that violates their respective employee misclassification statute.⁷¹ Eight states deliver civil penalties to businesses whose violations are intentional, either "willful" or "knowing," depending on the statute.⁷² Many of these statutes arrange fines in two tiers, with a lower fine for the first offense and higher fines for every subsequent offense. Yet, the price of the fines varies widely.⁷³ A first violation costs only \$500 in Nebraska but as much as \$ 15,000 in Massachusetts.⁷⁴ A second violation can cost \$2,500 in Pennsylvania or \$25,000 in Colorado.⁷⁵ Fines between \$1,000 and \$5,000 appear in Colorado, Delaware, Illinois, New Jersey, Pennsylvania, and Vermont.⁷⁶ States

⁶⁸ *Public Task Forces Take on Employee Misclassification: Best Practices*, *supra* note 60 at 11.

⁶⁹ Deknatel, *supra* note 28 at 75.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Deknatel *supra*, note 36 at 76.

⁷⁴ NEB. REV. STAT. ANN. § 48-2907 (LexisNexis 2022); MASS. ANN. LAWS ch 149, §27C(b)(2) (LexisNexis 2022).

⁷⁵ 43 PA. STAT. ANN. §933.6 (LexisNexis 2022); COLO. REV. STAT. §8-72-114(3)(e)(III)(A)(LexisNexis).

⁷⁶ COLO. REV. STAT. § 8-72-114(3)(e)(III)(A) (2022) (providing minimum fine of \$ 5,000); DEL. CODE ANN. tit. 19, § 3505(a) (LexisNexis. 2022) (providing fines ranging from \$ 1,000 to \$ 5,000); 820 ILL. COMP. STAT. ANN. 185/40(a) (LexisNexis 2022) (providing maximum fine of \$ 1,000 for first violation, \$ 2,000 for second); N.J. STAT. ANN. § 34:20-5 (LexisNexis 2022) (providing fines of \$ 100 to \$ 1,000 and administrative penalties up to \$ 5,000); 43 PA. STAT. ANN. § 933.6 (LexisNexis 2022) (providing maximum administrative penalty of \$ 1,000 for the first violation and \$ 2,500 for the second); VT. STAT. ANN. tit. 21 § 1314a(f)(B) (LexisNexis 2022) (providing maximum fine of \$ 5,000).

also include distinct features, such as an explicit indication in Colorado that investigations will assess interest in addition to back taxes and, in Delaware, an additional \$500 per day fine against a business under investigation that fails to provide books and records to the relevant agency.⁷⁷

Many states have also added criminal liability in addition to civil penalties for misclassification to their statutes.⁷⁸ Liability often requires intent and tends to be registered as a misdemeanor that is subject to prosecution by the state attorney general, as in New Mexico and New York.⁷⁹ However, Connecticut, New Jersey, Illinois, and Utah have made employee misclassification subject to low-level felonies; in Illinois, misclassification is a felony solely when the crime is a repeat violation.⁸⁰ Many states provide for a greater penalty for intentional misclassification: for example, both New York and Massachusetts' dramatic laws allow up to \$50,000 fines.⁸¹ Although the use of criminal liability appears on paper to be an aggressive tactic, the actual assessment of criminal penalties is hard to track, as investigations appear to typically be private.⁸²

In addition to civil and criminal penalties described above, other states have created the ability to issue stop-work orders against businesses failing to comply with the law.⁸³ Often these stop-work orders were issued and do not afford businesses a hearing before the order takes effect.⁸⁴ These aspects of the stop work order have been particularly controversial since

⁷⁷ COLO. REV. STAT. § 8-72-114(3)(e)(II) (LexisNexis 2022); DEL. CODE ANN. tit. 19, § 3505 (LexisNexis 2022).

⁷⁸ CONN. GEN. STAT. ANN. §§31-69, 31-288(g) (West 2021); 820 ILL. COMP. STAT. ANN. 185/45(d) (West 2021); KAN. STAT. ANN. § 44-719 (West 2021); MASS. GEN. LAWS ANN. ch. 149, § 27C(a) (West 2021); N.J. STAT. ANN. § 34:20-5(a)(2) (West 2021); N.M. STAT. ANN. § 60-13-3.1(C) (West 2021); N.Y. LAB. LAW § 861-e(4) (McKinney 2021); 43 PA. STAT. ANN. § 933.5 (West 2021); UTAH CODE ANN. § 34A-2-110 (LexisNexis 2021); VT. STAT. ANN. tit. 21, § 692(c) (West 2021) (violation of stop-work order).

⁷⁹ See N.M. STAT. ANN. § 60-13-3.1(C) (LexisNexis 2021); N.Y. LAB. LAW § 861-e(4) (LexisNexis 2021).

⁸⁰ CONN. GEN. STAT. ANN. § 31-288(g) (West 2021); N.J. STAT. ANN. § 34:20-5(a)(2) (West 2021); 820 ILL. COMP. STAT. ANN. 185/45(d) (West 2021); UTAH CODE ANN. § 34A-2-110(3)(c)(ii)(B), (C) (LexisNexis 2021).

⁸¹ MASS. GEN. LAWS ANN. ch. 149, § 27C(a)(1) (West 2021); N.Y. LAB. LAW § 861-e (McKinney 2021).

⁸² See Deknatel *supra*, note 36 at 87.

⁸³ *Id.*

⁸⁴ See Conn. Joint Enforcement Comm'n on Emp. Misclassification, *supra* note 23, at 2.

employers argue they have not been given a fair chance to argue their case.⁸⁵ Many states have reported the orders as more effective in incentivizing businesses against misclassification than previous penalties.⁸⁶ However, without more exact information on whether the employers stop work orders issued, the exact effectiveness of this tactic remains unclear.

Finally, six states - Delaware, Illinois, Massachusetts, Maryland, New Jersey, and Washington - have additionally established private rights of action, empowering aggrieved workers to initiate suits against an employer violating the independent contracting statute.⁸⁷ In Delaware, a worker may initiate an action only after he has filed a complaint to the state and ninety days have passed without state investigation.⁸⁸ Explicit anti-retaliation provisions in four states - Delaware, Illinois, New York, and Vermont - protect workers who complain of misclassification to an agency or file a lawsuit complaining of misclassification.⁸⁹ Illinois also allows for "any interested party" to either sue the employer themselves or to file a complaint with the state's civil division to sue on the worker's behalf if that party has a "reasonable belief" that the employer is violating the statute.⁹⁰ These states attempt to enforce employee misclassification by opening the right to file suit to private citizens.

⁸⁵ See Stacy Landau & Jill Turner Lever, *Employers Beware New Jersey is Signaling That the state is ready for the enforcement of its new worker classification laws*, NATIONAL LAW REVIEW (July 12, 2021) <https://www.natlawreview.com/article/employers-beware-new-jersey-signaling-state-ready-enforcement-its-new-worker>

⁸⁶ Mark Elrich and Terri Gerstein, *Confronting Misclassification and Payroll Fraud: A survey of State Labor Standards Enforcement Agencies*, Harvard Law School Labor and Worklife Program, 11-12 (June 2019) <https://lwp.law.harvard.edu/files/lwp/files/misclassification.pdf>

⁸⁷ DEL. CODE ANN. tit. 19, § 3508 (West 2021); 820 ILL. COMP. STAT. ANN. 185/60 (West 2021); MASS. GEN. LAWS ANN. ch. 149, § 150 (West 2021); MD. CODE ANN., LAB. & EMPL. § 3-911 (LexisNexis 2021); N.J. STAT. ANN. § 34:20-8(b) (West 2021); WASH. REV. CODE ANN. § 49.44.170(3) (LexisNexis 2021).

⁸⁸ DEL. CODE ANN. tit. 19 § 3508(a) (West 2022).

⁸⁹ 820 ILL. COMP. STAT. ANN. 185/55 (West 2022); DEL. CODE ANN. tit. 19, § 3509 (West 2022); VT. STAT. ANN. tit. 21, § 710(d) (LexisNexis 2022); N.Y. Lab. Law § 861-f (LexisNexis 2022).

⁹⁰ 820 ILL. COMP. STAT. ANN. 185/25 (West 2022).

However, states have not moved to share misclassification information extensively with each other because many of the states are more concerned about the violations that happen in their jurisdiction.⁹¹ When states have used the tactic, it has proven to be effective in reducing the clashes between intra-agencies and more effectively utilizing the agency's time to enforce the misclassification statutes.⁹² New Jersey Department of Labor lawyer Ron Marino has gone on the record to say "If an individual employer is misclassifying workers in Pennsylvania and they also come across the border, we really should be aware of that so we can evaluate to see whether or not that individual is also misclassifying employees in the state of New Jersey."⁹³ This is especially an advantage for industries such as the so-called gig economy which can move their operations more easily if they feel they are being challenged by a particular state government.⁹⁴ In effect, state agencies have improved measures to enforce their employment misclassification laws without actually cooperating to ensure enforcement is successful.⁹⁵

Section II New Jersey's Recent Attempt to Crack Down on Employee Misclassification

New Jersey is among the states that have noticed the influx of employee misclassification and have recently passed legislation to curb it. On January 2021, New Jersey Governor Phil Murphy declared that employee misclassification was a significant obstacle to New Jersey and that legislation was needed to pass it.⁹⁶ In July 2021, the New Jersey legislature passed a series of laws strengthening state power to enforce employee misclassification laws.⁹⁷ Not only do

⁹¹ See Elrich and Gerstein, *supra*, note 105 at page 15.

⁹² *Id.* at 14-15.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See INTER-AGENCY TASKFORCE ON MISCLASSIFICATION & PAYROLL FRAUD, REPORT FOR EXECUTIVE ORDER THIRTY-EIGHT page 11 (2019) (Multistate agreements are being developed between and among neighboring states to crackdown on offenders).

⁹⁶ Ryan T Warden, *New Jersey Resumes Efforts to Amend ABC Test for Independent Contractor Status, Passes Slate of Laws Targeting Misclassification*, (Jan. 23, 2020); Nikita Biryukov, *Murphy signs employee misclassification bill package*, NEW JERSEY GLOBE (July 8, 2021).

⁹⁷ Nikita Biryukov, *supra*, note 93.

these laws allow workers to sue employers but they give the state more power to enforce these statutes.⁹⁸ These employee misclassification enforcement statutes passed but the attempt to amend New Jersey's ABC test was voted down by the New Jersey legislature.⁹⁹ While the statutes are a promising improvement in enforcement, improvements should be made to ensure misclassification is reduced.

A. Partisan divide has blocked New Jersey's attempt to work with the federal government.

New Jersey began its fight against employee misclassification by reaching out to the federal government. On May 3, 2018, Governor Murphy issued Executive Order No. 25, establishing a Misclassification Task Force to “promote fairness, fight against discrimination, and work to end unfair labor practices... that create an unfair advantage over companies that play by the rules and hurt our working families.”¹⁰⁰ One of the main areas the task force focused on was data sharing on employee misclassification between the state and federal governments.¹⁰¹ In comparison, the section addressing cooperating with other states on employee misclassification was relatively brief.¹⁰² The recommendation pushed New Jersey to sign a memorandum of understanding with federal agencies to enhance data sharing and cooperation.¹⁰³ However, New Jersey's focus on cooperating with the federal government is misplaced because of two reasons.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, REPORT OF GOV. MURPHY'S TASK FORCE ON EMPLOYEE MISCLASSIFICATION (JULY 2019).

¹⁰¹ *Id.* at 11.

¹⁰² *Id.*

¹⁰³ *See* PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, JOINT TASK FORCE ON MISCLASSIFICATION OF EMPLOYEES 14 (DEC. 1, 2022).

The first reason is the federal government utilizes the “economic realities” test to distinguish employees from independent contractors.¹⁰⁴ The economic realities test uses the following six factors: (1) the degree of the alleged employer's right to control how the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered required a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business.¹⁰⁵ Labor advocates have argued that these factors are so fact-dependent that enforcing the economic realities test relies more on changing circumstances than actual law.¹⁰⁶ Instead, the federal government relies on an older test that leaves some workers out of the employee definition.

The second reason is the attempts to crack down on employee misclassification on a federal level are hampered by partisan shifts in the federal government. Departing from long-standing precedent, the Trump administration’s Department of Labor proposed a federal independent contractor rule by revising the agency’s interpretation of the FLSA.¹⁰⁷ The proposed regulation would emphasize two “core factors” that focused on the control an employer had over an individual’s work and the opportunity for profit and loss.¹⁰⁸ The Biden administration withdrew the proposed rule and proposed its own rule that a worker would be

¹⁰⁴ Ben Penn, *Biden Axes Trump Gig- Worker Rule, Favoring Employee Model*, BLOOMBERG LAW (May 5, 2021), <https://news.bloomberglaw.com/daily-labor-report/biden-axes-trump-gig-worker-rule-backs-broader-employee-model>

¹⁰⁵ Robert Sprague, *Updating Legal Norms for a Precarious Workforce*, 35 ABA JOURNAL LAB. & EMP. LAW 85, 96 n. 59 (2020).

¹⁰⁶ Richard Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 306-352 (2001).

¹⁰⁷ U.S. Dep't of Labor, *Working For You: U.S. Department of Labor 2009- 2016* page 6 (2016).

¹⁰⁸ *Id.*

considered an employee when they are “economically dependent” on a company.¹⁰⁹ The U.S. Department of Labor received more than 50,000 comments on this proposed regulation both in support and in opposition.¹¹⁰ While the Biden administration returned to the FLSA’s original definition of an employee, there is no guarantee a future Republican administration can be successful in an attempt to change the rule.¹¹¹ This leaves the future of employee classification in labor statutes uncertain as actual guidance depends on the political leanings of the current administration instead of codified law.

This partisan divide in defining an employee extends to future legislation amending federal labor statutes. Currently pending in Congress is the PRO Act which seeks to amend the National Labor Relation Act to include the ABC test to determine independent contractor status.¹¹² If the PRO Act is passed, then the ABC test would be used to determine which workers could unionize under the NLRA and other federal statutes related to employment.¹¹³ While the PRO Act passed the House, Republicans blocked the bill from the Senate.¹¹⁴ Overall, Congress is locked in a partisan divide, preventing future legislation from settling the distinction between an employee and an independent contractor.

¹⁰⁹ Daniel Wiessner, *Biz Groups Say Biden Independent Contractor Rule Clashes With Federal Law*, REUTERS (Dec. 14, 2022), <https://www.reuters.com/legal/biz-groups-say-biden-independent-contractor-rule-clashes-with-federal-law-2022-12-14/>.

¹¹⁰ *Id.*

¹¹¹ See David Sheppardson & Nandita Bose, *U.S. government back and forth on ‘gig’ workers, contractors*, REUTERS (Oct. 11, 2022), <https://www.reuters.com/world/us/us-government-back-forth-gig-workers-contractors-2022-10-11/>.

¹¹² Lynn Rhinehart, Celine McNicholas, Margaret Poydock, and Ihna Mangundayao, *Misclassification, the ABC test, and employee status*, ECONOMIC POLICY INSTITUTE (June 16, 2021), <https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/>

¹¹³ *Id.*

¹¹⁴ Karl Evers-Hillstrom, *Gig companies launch lobbying group to counter PRO Act push*, THE HILL (March 8, 2022), <https://thehill.com/business-a-lobbying/business-a-lobbying/597404-gig-companies-launch-lobbying-group-to-counter-pro>.

The partisan back and forth has even affected the decisions under the employee definition of the NLRA. During President Obama's term, the Board ruled in *Fed Ex Home Delivery* the key factor to determine whether there was an independent contractor was whether the worker was rendering services as part of an independent business.¹¹⁵ In *SuperShuttle DFW*, the then Republican-majority Board held that a key factor in the independent contractor test should focus on whether a worker has an "entrepreneurial opportunity" for profit or loss and not on whether the worker was rendering services as part of an independent business, as the Board under President Obama had decided in *FedEx Home Delivery*.¹¹⁶ By reversing the Obama Board's decision, *SuperShuttle DFW* returned to the independent contractor test it used without changes since the Supreme Court decided *NLRB v. United Insurance Co. of America* in 1968.¹¹⁷

The NLRB ultimately decided to stick with the traditional test of defining an employee although with a more pro-worker slant. In November 2021, the case of *The Atlanta Opera, Inc.*, was brought before the Board; the case involved a determination of whether the makeup artists are independent contractors or employees of The Atlanta Opera, Inc.¹¹⁸ On December 27, 2021, the NLRB invited public comment on whether it should replace the standard for determining whether a worker is properly classified as an employee under the NLRA.¹¹⁹ The NLRB Regional Director issued a decision that relied on the common factors test to determine whether a worker was an employee or an independent contractor.¹²⁰ While the Board decision did not indicate a new stance in the definition of the employee, many legal commenters noted the NLRB's decision

¹¹⁵ *Fed Ex. Board Decision*, 361 NLRB 610, 619 (2014).

¹¹⁶ *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*, 2019 NLRB Lexis 15, *42 (2019).

¹¹⁷ *Id.*

¹¹⁸ Robert Iafolla, *NLRB Reconsidering Trump-Era Independent Contractor Test*, BLOOMBERG LAW (Dec. 27, 2021) <https://news.bloomberglaw.com/daily-labor-report/nlr-reconsidering-trump-era-independent-contractor-test>

¹¹⁹ *Id.*

¹²⁰ 2021 NLRB REG. DIR. DEC. Lexis 108.

leaned towards a pro-employee slant.¹²¹ Employers are uncertain what direction the Board will take in terms of employment definition, but it seems to be an about-face from the Trump administration's previous definition.

These recent shifts illustrate that effective enforcement of employee misclassification on a federal level has limited application. Much depends on the partisan makeup of Congress and executive agencies such as the Department of Labor and the NLRB to expect consistent effective enforcement. Even in an employee-friendly context, the decisions of the federal government's agencies could be undone by the entrance of another administration. Thus, any actual enforcement towards an employer would be lessened by the expectation that the rules would be reversed by a subsequent administration. Unless there is a significant shift in how both parties view how employee misclassification hurts workers and the country, the back and forth between enforcement policies will continue.

B. New Jersey's Failed Attempt to Amend the ABC Test.

New Jersey's current version of the ABC test is codified in the Unemployment Compensation Law.¹²² Under New Jersey's version of the ABC test a worker is presumed to be an employee unless the employer can prove each of the following: (A) [the] individual has been and will continue to be free from control or direction over the performance of [the] service, both under his contract of service and in fact; and (B) [the] service is either outside the usual course of the business for which [the] service is performed, or that [the] service is performed outside of all the places of business of the enterprise for which [the] service is performed; and (C) [the] individual is customarily engaged in an independently established trade, occupation, profession

¹²¹ See Mark Gruenberg, *Labor Board uses Atlanta case vs. independent contractor dodge*, PEOPLE'S WORLD, (July 29, 2022) <https://www.peoplesworld.org/article/labor-board-uses-atlanta-case-vs-independent-contractor-dodge/>

¹²² See N.J. STAT § 43:21-19 (i)(6) (LexisNexis 2021).

or business.¹²³ New Jersey has used the ABC test in the New Jersey Wage and Hour Law and New Jersey Wage Payment Law which was approved by the Supreme Court of New Jersey in *Hargrove v. Sleepy's, LLC* on January 2015.¹²⁴

On January 2020, the New Jersey legislature attempted to amend the ABC test to broaden the category of workers who could be considered independent contractors.¹²⁵ The proposed bill would have amended prong C to read: The individual is customarily engaged in an independently established business or *enterprise of the same nature as that involved in the work performed*.¹²⁶ (Emphasis added) Prong C would read more similar to Massachusetts' and California's versions of the ABC test to address gig economy employee misclassification.¹²⁷ Second, the revised version of the ABC test would apply to the Wage and Hour Law Wage Payment Law, New Jersey Collection Law, and New Jersey Building Service Contract.¹²⁸ Finally, the amended statute would require the employer to prove all three prongs of the ABC test "to the satisfaction of the Commissioner of the New Jersey of the Department of Labor."¹²⁹ This amended version of the ABC test would encompass more workers from the gig economy as well as apply to more aspects of employment than the Wage and Hour Act.¹³⁰

¹²³ *Id.*

¹²⁴ *Hargrove v. Sleepy's LLC*, 70 A.3d 592, 592 (2013).

¹²⁵ See Ryan T Warden, *New Jersey Resumes Efforts to Amend ABC Test for Independent Contractor Status, Passes Slate of Laws Targeting Misclassification*, NATIONAL LAW REVIEW (2020), <https://www.natlawreview.com/article/new-jersey-resumes-efforts-to-amend-abc-test-independent-contractor-status-passes>

¹²⁶ *Id.*

¹²⁷ See MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(1)-(3) (West 2021); CAL. LAB. CODE §2775 (1)(C) (West 2021).

¹²⁸ S. B. S863, 2020 Leg., Reg. Sess. (N.J. 2020).

¹²⁹ *Id.*

¹³⁰ Oagle Deakins, *Blog New Jersey Resumes Efforts to Amend ABC Test for Independent Contractor Status, Passes Slate of Laws Targeting Misclassification*, OGLETREE DEAKINS, <https://ogletree.com/insights/new-jersey-resumes-efforts-to-amend-abc-test-for-independ>

But this attempt to amend New Jersey's ABC test to apply to gig economy workers failed.¹³¹ The failure of the amendment to pass is attributed in large part to the protests of the respective companies to change the ABC test to apply to them.¹³² Many employers argued that the ABC test would only be satisfied to the satisfaction of the New Jersey Commissioner of Labor and there was no actual metric to show misclassification was happening.¹³³ While there have been recent attempts to try again to pass the amendment to the ABC test, there is no guarantee it would not fall to the same obstacles.¹³⁴

C. New Jersey Recent Enforcement Strategies

Although the New Jersey legislature failed to modify the ABC test to address the growing gig economy, the legislature did pass a series of enforcement measures to strengthen current misclassification statutes.¹³⁵ The enforcement powers range from creating new penalties and offices of the executive department to creating new ways of liability for employers who misclassify.¹³⁶ These enforcement measures would allow the state government to take a more affirmative stance in enforcing employee misclassification laws.¹³⁷ The bill package was signed by Governor Phil Murphy and went into effect on January 1, 2022.¹³⁸

Under A-5890/S3920, the Commissioner of the NJDOL is authorized to shut down a business when the employer commits even just a single violation of a state wage, benefit, or tax law.¹³⁹ These stop-work orders may remain in effect until the employer has come into

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *See id.*

¹³⁵ *New Jersey Government, Governor Murphy Signs Sweeping Legislative Package to Combat Worker Misclassification and Exploitation*, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT (Jan. 20, 2020) https://www.nj.gov/labor/lwdhome/press/2020/20200120_missclass.sht

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ N.J. STAT. § 34:11-56.35.

compliance and paid all assessed penalties.¹⁴⁰ Notably, workers affected by such stop-work orders must be paid by the employer for the first ten days of missed work because of the stop-work order.¹⁴¹ This is a marked difference from many stop-work statutes in other states which lack a provision protecting affected workers.¹⁴² This legislation represents an increase in the severity of the punishments New Jersey is willing to enforce to ensure compliance with the employee misclassification statutes.

The New Jersey legislature took enforcement a step further by creating a new unit to enforce the law.¹⁴³ The new unit within the NJDOL, the Office of Strategic Enforcement and Compliance (“OSEC”), was created under A-5891/S3921 to oversee and coordinate across the divisions of the NJDOL, other state agencies and entities, for the strategic enforcement of state wage, benefit, and tax laws.¹⁴⁴ Further, the bill provides that in order to receive a business assistance award from the NJDOL, or for the NJDOL to report to an inquiring state agency or entity that an employer is in good standing, the NJDOL will first assess whether the business has any outstanding liability to the NJDOL, including for unpaid contributions to the unemployment compensation or state disability benefits funds.¹⁴⁵ This office will be able to further the compliance of New Jersey employers to make sure workers are being included in their deserved benefits.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See 43 PA. STAT. ANN. § 933.7; WISC. STAT. ANN. § 103.06; CONN. GEN. STAT. ANN. §§31-69a, 31-76a; VT. STAT. ANN. tit. 21, § 692(b) (contains provision “the employer shall be assessed an administrative penalty of not more than \$250.00 for every day that the employer fails to secure workers’ compensation coverage after the Commissioner issues an order to obtain insurance and may also be assessed an administrative penalty of not more than \$250.00 for each employee for every day that the employer fails to secure workers’ compensation coverage as required in section 687 of this title.”); DEL. CODE ANN. tit. 19, § 3505(b), (f) (statute does not include provision that workers must compensated for work); ME. REV. STAT. ANN. tit. 39-A, § 105-A(5) (2021) (does not contain provision requiring employers to pay employees from the missed days due to the stop-work order).

¹⁴³ N.J. Stat. ANN. § 34:15D-34 (LexisNexis 2021).

¹⁴⁴ *Id.*

¹⁴⁵ See *id.*

Additionally, the New Jersey legislature created new criminal liabilities when the employer is found to have been willfully misclassifying employees. Under A-5892/S-3922, the legislature of New Jersey makes it a violation of the New Jersey Insurance Fraud Prevention Act to misclassify employees to evade insurance premium payments.¹⁴⁶ An employer who misclassifies employees as independent contractors to evade insurance premium payments is a violation of the New Jersey Insurance Fraud Prevention Act (NJIFA).¹⁴⁷ Employers who "purposely" or "knowingly" misclassify employees under the NJIFPA may be subject to penalties for fraud that include fines starting at \$5,000 for the first violation, \$10,000 for the second violation, and \$15,000 for each subsequent violation.¹⁴⁸ The law went into effect on Jan. 1, 2022.¹⁴⁹

The New Jersey legislature finally created a method of information gathering by creating a database that the public can view.¹⁵⁰ Under A-1171/S-1260, the legislature created a statewide database of payroll information for public works projects.¹⁵¹ The law authorizes statewide database containing the certified payroll information for public works projects.¹⁵² The database must be accessible to the public on the Department of Labor and Workforce Development's website.¹⁵³ So far there has been no discussion on reaching out to other states to use this database

¹⁴⁶ Press Release, New Jersey Department of Labor & Workforce Development, Governor Murphy Signs Sweeping Legislative Package to Combat Worker Misclassification and Exploitation (Jan. 20, 2020), https://www.nj.gov/labor/lwdhome/press/2020/20200120_missclass.shtml.

¹⁴⁷ *Id.*

¹⁴⁸ Fallon, Kaitlyn, Davis Wright Tremaine LLP, Changes to New Jersey Laws Target Independent Contractor Misclassification and Mass Layoffs, JD Supra (Feb. 10, 2020), <https://www.jdsupra.com/legalnews/changes-to-new-jersey-laws-target-41210/>.

¹⁴⁹ *Id.*

¹⁵⁰ N.J. Stat. ANN. § 34:11-56.33 (LexisNexis 2022).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

to file charges on employers who have misclassified employees in multiple states.¹⁵⁴ This law went into effect on Jan. 1, 2022.¹⁵⁵

The laws that were recently passed in the last year have caused unrest among New Jersey employers although the data used to argue against the laws is scarce. Some employers have accused the New Jersey government of giving strict punishments based on the impossible standards of the ABC test.¹⁵⁶ Other employers complain that the new laws threaten the livelihood of independent contractors, especially industries such as truck drivers, bakers, and wedding photographers.¹⁵⁷ Finally, employers complain that this recent batch of legislation creates powers of enforcement that are beyond the state's government's power to enforce.¹⁵⁸ In the end, the employers were unsuccessful in preventing the New Jersey legislation from passing.

However, the opposition to amending New Jersey's ABC test to encompass more employers succeeded. The most aggressive opposition was the modification to the ABC test to make prong B broader.¹⁵⁹ Trucking groups specifically argued that the definitional change would severely reduce the size of the drayage fleet operating out of the Port of New York and New Jersey, with 77% of the approximately 9,000 or so active drayage drivers serving the port being owner-operators that might have a hard time proving they are not employees under the proposal.¹⁶⁰ While the opposition to modifying the ABC test succeeded, the attempt to thwart the

¹⁵⁴ *See id.*

¹⁵⁵ Kim Kavin, Jen Singer, and Debbie Abrams Kaplan, Legislators need to protect the smallest of New Jersey's small businesses, NJ.com (Mar. 26, 2022), <https://www.nj.com/opinion/2022/03/legislators-need-to-protect-the-smallest-of-new-jerseys-small-businesses-l-opinion.html>; Sophie Miento-Munoz, Murphy signs gig economy worker bills to revamp N.J. labor laws, NJ.com (Jan. 20, 2020), <https://www.nj.com/business/2020/01/njs-self-employed-gig-workers-protected-under-new-laws-signed-by-murphy.html>.

¹⁵⁶ *See* Kavin *supra*, note 153.

¹⁵⁷ Miento-Munoz, *supra* note 153.

¹⁵⁸ *See id.*

¹⁵⁹ Deborah LockBridge, *New Jersey Cracks Down on Independent Contractor Misclassification*, TRUCKING INFO (Jan. 22, 2020), <https://www.truckinginfo.com/349407/new-jersey-cracks-down-on-independent-contractor-misclassification>.

¹⁶⁰ *Id.*

newest provisions was successfully passed by the New Jersey legislature. However, the lack of metrics used to measure success does not guarantee whether the concern caused by employers is warranted.

D. Improving Information Sharing and Metrics of Success

While these statutes have improved how New Jersey approaches employee misclassification, one important component missing is the metrics on how the states measure success in effective enforcement.¹⁶¹ The Office of Strategic Enforcement and Compliance needs reliable metrics to determine whether the enforcement measures are showing success.¹⁶² Part of the trouble states have in enforcing misclassification is the dilemma of finding a solid metric to determine whether the deterrent effects are working.¹⁶³ The most common way to measure the results of enforcing employee misclassification is by seeing the lost wages recovered.¹⁶⁴ Twenty-three of the state agencies surveyed measured back wages collected, while a significant number also measured the unemployment taxes and workers' compensation penalties collected.¹⁶⁵ Using these two metrics alone is problematic for two reasons.

First, both measurements do not prove or reliably indicate whether the enforcement is a successful deterrent to ensure compliance with the misclassification statute.¹⁶⁶ Indeed it could indicate that enforcement strategies are not enough to get repeat offenders to comply with the misclassification statute.¹⁶⁷ To promote an atmosphere of compliance New Jersey needs measurements to show enforcement is a success.¹⁶⁸ Consistent collections will only show the

¹⁶¹ See Elrich and Gerstein, *supra*, note 26 at 25-26.

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ *Id.* at 23.

¹⁶⁵ *Id.*

¹⁶⁶ Elrich and Gerstein, *supra*, note 26 at 25.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

employers indicated are violating the employment classification statute – not that the enforcement is having an effect.¹⁶⁹ This presents the dilemma where the legislature is offering solutions to problems when we do not have a clear answer of where the data is meant to be showing.

Second, paying lower wages to employees is only one reason employers misclassify their employees.¹⁷⁰ Employers misclassify their workers to avoid unemployment insurance premiums, avoid paying taxes for employees and restrict unionization efforts by workers, evade complying with overtime and minimum wage obligations, or avoid paying for unemployment insurance.¹⁷¹ Using other indications such as a drop in insurance or restrictions on unionizations could illustrate a more complete picture of which companies are unionizing.¹⁷² When New Jersey agencies only use back wages or unemployment insurance to determine whether employee misclassification is still ongoing, it ignores other metrics that could provide a fuller understanding of how effective their enforcement strategies are.

Other legal experts have offered different metrics to demonstrate whether employee misclassification statutes are being effectively enforced.¹⁷³ David Weil theorized the impacts of prior investigations affected the workplace behavior of other employers in that same geographic area.¹⁷⁴ He examined, for example, whether a fast food outlet behaves differently if many other

¹⁶⁹ *Id.*

¹⁷⁰ See D. Paul Holdsworth, *Employment Law*, 55 U. RICH. L. REV. 113, 130 (2020); see generally David Bauer, *Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138 (2015).

¹⁷¹ See Holdsworth, *supra*, note 168 at page 130.

¹⁷² See *id.*

¹⁷³ *Id.*

¹⁷⁴ David Weil, *Improving Workplace Conditions Through Strategic Enforcement*, BOSTON UNIVERSITY (May 2010) <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/strategicEnforcement.pdf>.

nearby fast food restaurants were investigated than if that were not the case, and found that prior investigations had a significant deterrent impact.¹⁷⁵ Weil explains

“[a] market is defined by an industry and by geography. A company sets its competitive policies—the goods and services it provides, the prices it sets for them, and decisions related to the costs of producing those products or services—according to conditions in its market. Deterrence should be thought of in similar terms. A company’s decision to comply with laws should depend on the “threat” it feels from investigations given the perceived likelihood of investigations in its relevant markets.”¹⁷⁶

The same method can be used to observe whether employers located in the same geographic area in New Jersey as an employer disciplined for employee misclassification showed more compliance with New Jersey’s misclassification statutes. By observing the other employers’ reactions when employment misclassification is enforced, New Jersey can adequately assess whether the new enforcement mechanisms are effective or not.

Another method of determining successful enforcement is to cite and record a violating employer’s unemployment tax filings.¹⁷⁷ The theory being if an employer has improperly classified its employees as independent contractors, often employers will let them go without paying for their benefits.¹⁷⁸ The increase in employees will result in a greater number of filings for unemployment insurance.¹⁷⁹ For example, if there is a concerted effort to enforce in each industry that does not result in a noticeably larger amount of employees on tax reporting forms

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at page 49.

¹⁷⁷ *Id.*

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

for employment insurance, the task force can assume that the methods of enforcement are unsuccessful.¹⁸⁰ By showing whether more employers have listed unemployment tax filings, New Jersey officials could more easily determine which industries are following the New Jersey employment misclassification statutes.

New Jersey could also use existing statutes in a more routine way to determine whether an employer is complying with state regulations.¹⁸¹ New Jersey has a law allowing the Labor Commissioner to do a repeat audit a year after an initial violation and order a license suspension or revocation if the conduct persists¹⁸²; the agency is currently exploring making use of this statute.¹⁸³ By using the audits more effectively, New Jersey agencies could easily determine whether their enforcement efforts are influencing the employers.¹⁸⁴ While recent efforts by the Commissioner of New Jersey indicate a willingness to use audits to see employee misclassification there are indications that Commissioner primarily uses it for other employment issues.¹⁸⁵ Therefore, more information on enforcement success and continuing compliance will be available to the agency if they use their existing powers more effectively against violating employers.

New Jersey has passed stricter enforcement measures that make it easier to punish employers who misclassify their employees. However, this should only be the first step in

¹⁸⁰ Mark Elrich and Teri Gerstein, *Confronting Misclassification and Payroll Fraud: A Survey of State Labor Standards Enforcement Agencies*, page 25-26 <https://lwp.law.harvard.edu/files/lwp/files/misclassification.pdf>; N.J. Stat. § 34:1A-1.12 (LexisNexis, Lexis Advance through New Jersey 219th Second Annual Session, L. 2021, c. 360, and J.R. 9).

¹⁸¹ N.J.S.A. § 34:1A-1.12(b)(1).

¹⁸² *Id.*

¹⁸³ *See* Elrich *supra*, note 26 at 25.

¹⁸⁴ *Id.*

¹⁸⁵ NJDOL Cites PA Subcontractor for Wage Violations on NJ Public Works Project (Sept. 21, 2021) <https://www.insidernj.com/njdol-cites-pa-subcontractor-wage-violations-nj-public-works-project/> (The investigation resulted from a complaint alleging that custom fabrication work performed at Men of Steel's New Jersey location was subject to the New Jersey Prevailing Wage Act. New Jersey Commissioner then found the employer misclassified several of its workers.).

enforcing employee misclassification statutes. Without the proper information sharing between states and the proper metrics to measure enforcement success, the problems that have currently plagued the states will continue in the known future. Only when New Jersey has established a stronger baseline for employee misclassification will enforcement be able to further be combatted.

Conclusion

While the recent legislation notably improves on enforcing employee misclassification laws, there is still uncertainty on whether these measures will be effective. State governments have tried a variety of measures to combat the increasing problem of employee misclassification. These efforts include redefining statutory definitions of an employee and adding new punishments for employers who misclassify their workers. New Jersey has attempted to work with the federal government but the partisan divide between the parties makes negotiation difficult. New Jersey agencies should improve metrics for measuring employee misclassification to determine whether enforcement efforts are having a deterrent effect on the targeted industries. This can be achieved by a combination of looking at the geographic area to determine whether compliance is having a ripple effect in other industries and looking at unemployment insurance to determine whether employers are complying with the new standards. By using a variety of factors to use as metrics of employee misclassification, New Jersey agencies can arrive at more effective strategies to enforce employee misclassification laws.