

Governor Murphy Signs Legislative Package Designed to Curb Gig Economy; Omits Controversial Bill Proposing Revision of “ABC Test”

Maja M. Obradovic and Brooke Emery
Greenbaum, Rowe, Smith & Davis LLP Client Alert
January 29, 2020

On January 20, 2020, New Jersey Governor Phil Murphy, in yet another strongly pro-employee move, signed a sweeping legislative package to curb worker misclassification and control the gig economy. Dubbed the “Misclassification Package,” the bills aim to protect self-employed workers by requiring the companies that hire them to pay their share of payroll taxes, however it does so at an ever-increasing cost for employers. Consequently, this enactment will most likely result in employers becoming reluctant to engage certain categories of independent contractors out of fear of being saddled by additional expenses they may not be able to afford.

As an overview, the package of six new laws will penalize employers in the state who are intentionally misclassifying employees (A5389); allow stop-work orders to be issued against employers violating state wage, benefit and tax laws (A5838); permit the Department of Labor (DOL) to post information identifying individuals in violation of state wage, benefit and tax laws (S4226); require employers to post notices describing misclassification (A5843); allow tax data sharing between the New Jersey Department of Treasury and the DOL (S4228); and, hold labor contractors and employers in the state equally liable for evading tax laws (A5840).

As with any new employment-related legislation, there are inevitable questions regarding employer compliance. Employers should closely review the following noteworthy aspects of each newly-enacted law:

- **A5839:** Provides for the assessment of penalties for violations of state wage, benefit and tax laws in connection with the misclassification of employees. The law authorizes the Commissioner of Labor and Workforce Development, in the case of a violation, to impose an

Attorneys

Maja M. Obradovic

administrative penalty up to a maximum of \$250 per misclassified employee for a first violation, and up to a maximum of \$1,000 per misclassified employee for each subsequent violation. Additionally, the Commissioner is authorized to assess and collect a penalty of not more than 5% of each misclassified worker's gross earnings over the past 12 months from the employer who failed to properly classify them.

- **A5838:** Authorizes the Commissioner, upon receipt of a complaint or through routine investigation for a violation of any state wage, benefit and tax law, to enter, during usual business hours, the place of business or employment of any employer of the individual to determine compliance with those laws. The law also allows the Commissioner to examine payroll and other records, and interview employees in the course of the investigation. If the Commissioner determines the employer has violated any state wage, benefit and tax law, the Commissioner may issue a stop-work order against the employer requiring cessation of all business operations of the employer at the specific place of business or employment in which the violation exists.
- **S4226:** Authorizes the DOL to post to a list on its website the name of any person found to be in violation of the state wage, benefit and tax laws and against whom a final order has been issued by the Commissioner or other appropriate agency officer.
- **A5843:** Requires New Jersey employers to conspicuously post notification, in a place accessible to all employees in each of the employer's workplaces, in a form issued by the Commissioner, explaining the prohibition against employers misclassifying employees, remedies under New Jersey law to which workers affected by misclassification may be entitled, and more.
- **S4228:** Permits the Division of Taxation to share with the DOL any information including, but not limited to, tax information statements, reports, audit files, returns, or reports of any investigation.
- **A5840:** Subjects client employers and labor contractors providing workers to the client employer to joint and several liability for any violations of the provisions of state wage and hour laws or state employer tax laws.

Interestingly, the most controversial bill, S4204, never made it to the governor's desk. This legislation would have redefined the "ABC test" endorsed by the New Jersey Supreme Court to distinguish between employees and independent contractors in a way that would vastly expand the definition of "employee" in New Jersey.

The current ABC test states that a worker can be an independent contractor only if he or she:

1. Is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
2. Performs work that is outside the usual course of the hiring entity's business, or work that is performed out of all places of business of the entity for which it is performed; and

3. Is customarily engaged in an independently established trade, occupation, or business.

The proposed bill would eliminate the second part of “B” and would also add a requirement to “C” that would require an individual to provide the company the same type of services that he or she provides in the profession or trade. The proposed changes would make it much harder to qualify individuals as independent contractors. Although the bill provided limited exceptions for groups traditionally deemed independent contractors, it left categories such as independent truckers, freelancers, and real estate brokers vulnerable to employee classification.

S4204 has become a hot-button topic, as concern is widespread that the practical impacts of this legislation would be adverse to “gig economy workers” who may not be hired by employers who are weary of the additional taxes and extra benefits they would be obliged to offer. Indeed, California saw a chilling effect on the hiring of certain categories of employees, namely freelancers, when similar legislation was passed in September 2019. In response, the American Society of Journalists and Authors sued the state, claiming the law restricts its members’ professional speech and prevents them from making a living as freelancers.

New Jersey employers are cautioned to familiarize themselves with these new laws to ensure compliance with notice requirements. Further, employers who retain the services of independent contractors who may be deemed employees under the proposed revisions to the ABC test should evaluate the impact of this potential legislation on their business and make adjustments proactively

We will continue to monitor these issues on behalf of our employer clients and will advise on further developments in a timely manner. In the meantime, please contact the authors of this Alert, **Maja M. Obradovic** and **Brooke Emery**, with any questions or for additional information.