

# Employee Misclassification Update: 2019 was a Busy Year

by Ravi Sattiraju

Last year had some major developments regarding employee misclassification. These developments occurred in all three branches of state government. In July, the executive branch released the *Report of Gov. Murphy's Task Force on Employee Misclassification (Task Force Report)*; the Legislature's labor committees have approved at least six bills addressing employee misclassification; and the appellate courts have issued some important opinions addressing misclassification under New Jersey's so-called ABC test.

## Executive and Legislative Developments

The July *Task Force Report* defined misclassification as “the practice of illegally and improperly classifying workers as independent contractors, rather than employees.”<sup>1</sup> According to the *Task Force Report*, “[m]isclassification not only hurts workers and law-abiding businesses, it also hurts the State.”<sup>2</sup>

In an effort “to combat misclassification in New Jersey and deter bad actors,” the *Task Force Report* identified nine broad recommendations:

- (1) targeted education and public outreach;
- (2) strengthening State contracting;
- (3) interagency coordinated enforcement;
- (4) data sharing;
- (5) cooperation with neighboring states;
- (6) cross-training;
- (7) criminal referrals;
- (8) utilizing existing workers' compensation laws to bolster misclassification enforcement; and
- (9) utilizing the Department of Labor and Workforce Development's (DOLWD) power to revoke or suspend licenses.<sup>3</sup>

These recommendations are discussed in some detail within the *Task Force Report* with the intention of implementation. The *Task Force Report* also identified a number of potential legislative recommendations to combat employee misclassification and encourage employer compliance.<sup>4</sup>

The Legislature was also very active in the area of worker misclassification. As of the date of this article, the Senate and Assembly labor committees have already approved at least six bills specifically addressing employee misclassification. First, S4229<sup>5</sup> and A5838<sup>6</sup> permit the commissioner of DOLWD to issue a stop-work order against any employer who the commissioner determines is in violation of any state wage, benefit and tax law. Second, S4230<sup>7</sup> and A5839<sup>8</sup> authorize the commissioner, in the case of a violation of a state wage, benefit and tax law in connection with failing to properly classify employees, to impose certain penalties in addition to any other remedies or penalties authorized by law. Third, S4225<sup>9</sup> and A5840<sup>10</sup> make any client-employer and any labor contractor providing workers to the client-employer subject to joint and several liability and shared civil legal responsibility for any violations of the provisions of state employer tax laws, including provisions of those laws concerning the misclassification of workers.

Fourth, S4226<sup>11</sup> and A5841<sup>12</sup> permit, notwithstanding any federal or state law to the contrary, the DOLWD to post to a list on its website the name for any person who is found to be violation of any state wage, benefit, or tax law, and against whom a final order has been issued by the commissioner of the DOLWD or other appropriate agency head for any violation of state wage, benefit and tax laws. Fifth, S4228<sup>13</sup> and A5842<sup>14</sup> permit the Division of Taxation within the Department of the Treasury to share with the DOLWD any information including, but not limited to, tax information statements, reports, audit files, returns, or reports of any investigation. Finally, S4227<sup>15</sup> and A5843<sup>16</sup> require employers to post a notice for their employees regarding employee misclassification. The Assembly bills were all voted out of committee in November, while the Senate bills were voted out of committee in December.

## Codification of the ABC Test

It has now been five years since the Supreme Court of

New Jersey issued the seminal *Hargrove v. Sleepy's, LLC*<sup>17</sup> opinion, which adopted the so-called ABC test as the test to be used by state and federal courts to determine whether, for purposes of the New Jersey Wage Payment Law (WPL)<sup>18</sup> and Wage and Hour Law (WHL),<sup>19</sup> a person retained to provide services to an employer is an employee or independent contractor.<sup>20</sup> The state Legislature has now taken up the task of codifying that holding into statutory law.

On Nov. 7, S4204 was introduced and referred to the Senate Labor Committee.<sup>21</sup> On Nov. 14, A5936 was introduced and referred to the Assembly Labor Committee.<sup>22</sup> These bills seek to codify the ABC test, with slight variations, adopted by the Supreme Court in *Hargrove*. Both bills rearticulate the third prong from “[s]uch individual is customarily engaged in an independently established trade, occupation, profession or business,”<sup>23</sup> to “[t]he individual is customarily engaged in an independently established business or enterprise of the same nature as that involved in the work performed.”<sup>24</sup> Both bills, as written, would exempt certified public accountants, agents of mutual fund brokers, agents of insurance companies and real estate salesmen or brokers compensated wholly on a commission basis from analysis under the ABC test.<sup>25</sup>

The bills have received vociferous opposition, especially from freelance writers. On Dec. 5, this author testified before the Senate Labor Committee in favor of the bill with certain amendments. The author explained to the committee the harms caused to individuals by misclassification and the need to strengthen the bill to ensure income security to all workers in New Jersey. This bill was not signed into law and will need to be introduced in the next legislative session.

## Judicial Developments

Important questions regarding how the lower courts would apply the *Hargrove* holding were also recently answered by the Appellate Division. In late 2018, the Appellate Division held that regardless of the plaintiff's truck driver's incorporation as a separate business entity, the individual plaintiff had his own standing to pursue WPL and WHL claims against his putative employer and that the question of his employment status would be determined by the ABC test.<sup>26</sup> Central to the court's holding was the recognition that “[i]n undertaking the ABC test's analysis, a court is not limited to the terms of the contract between the parties.”<sup>27</sup> Rather, courts must

undertake “a ‘fact-sensitive’ analysis where the substance, not the form of the relationship, is reviewed.”<sup>28</sup>

In July, the Appellate Division affirmed a trial court's ruling that the plaintiff truck drivers were employees, for purposes of their unlawful deductions claims under the WPL.<sup>29</sup> The court determined as a matter of law that the defendant, putative employer, failed to establish prongs A (control) and B (course of business or location of work) of the ABC test.<sup>30</sup> Significantly, the court held under its prong B analysis that “the places of defendants' business enterprise not only included its facility, but also extended to the various locations the truck drivers - both those designated as employees and independent contractors - were required to travel to perform services on defendants' behalf.”<sup>31</sup>

July also saw the issuance of an opinion that offered putative employers a sigh of relief by limiting the breadth of *Hargrove*.<sup>32</sup> In *Perez*, the Appellate Division held in an unreported opinion that “contrary to plaintiffs' arguments, the Court did not make its holding in *Hargrove* applicable to all employment status disputes under the WHL and WPL, but rather focused on the distinction between an employee and an independent contractor.”<sup>33</sup> Because another group of defendants “never denied that they were plaintiffs' employer, nor did plaintiffs argue that they were incorrectly treated as independent contractors,” the appellate court determined the issue was whether the defendant was a “joint employer” of the plaintiffs.<sup>34</sup> The court, therefore, rejected application of *Hargrove* and the ABC test to a joint employment analysis. It is worth noting that the *Perez* holding is in accord with California law. California also utilizes a similar, but not identical, ABC test adopted by its Supreme Court to determine whether a worker is an employee or independent contractor for purposes of claims brought under state wage orders.<sup>35</sup> However, the U.S. Ninth Circuit Court of Appeals has likewise held that the California ABC test adopted in *Dynamex* “has no bearing” in the joint employment context.<sup>36</sup>

However, the state Legislature effectively abrogated *Perez* by passing Public Law 2019, Chapter 212 on Aug. 6. That law established a new statutory provision which provides that “[a] client employer and a labor contractor providing workers to the client employer shall be subject to joint and several liability and shall share civil legal responsibility for any violations of the provisions of State wage and hour laws ... including provisions



regarding retaliatory actions against employees for exercising their rights under any of those laws, and both may be subject to any remedy provided for violations of those laws.”<sup>37</sup> As used in that statute:

‘Client employer’ means a business entity, regardless of its form, that obtains or is provided workers, directly from a labor contractor or indirectly from a subcontractor, to perform labor or services within its usual course of business.

‘Labor contractor’ means any individual or entity that supplies, either with or without a contract, directly or indirectly, a client employer with workers to perform labor or services within the client employer’s usual course of business, except that ‘labor contractor’ does not include a bona fide labor organization or apprenticeship program, or a hiring hall operated pursuant to a collective bargaining agreement.<sup>38</sup>

This new statute therefore renders staffing agencies and their corporate clients to be joint employers as a matter of law, without the need to resort to a separate joint employment legal test. The effects of this law could be profound as wage-and-hour practitioners will certainly attempt to broaden its scope.

A pair of unemployment compensation appeals last year also provided illustrative ABC test analyses worth reviewing by wage-and-hour practitioners. In one case, a panel applied the ABC test and determined that the appellant, a company that placed therapists at certain facilities, was their employer.<sup>39</sup> Another panel reached

the opposite conclusion. It applied the ABC test and determined as a matter of law that the appellant law firm was *not* the employer of a certified paralegal.<sup>40</sup>

Finally, the U.S. Third Circuit Court of Appeals issued a very significant misclassification opinion in 2019.<sup>41</sup> On a motion to dismiss, the court held that the ABC test was not preempted by the Federal Aviation Authorization Administration Act of 1994 (FAAAA) because “any effect the New Jersey ABC classification test has on prices, routes, or services with respect to the transportation of property is tenuous and insignificant.”<sup>42</sup>

In sum, appellate courts this past year have determined that (a) the ABC test is not preempted by the FAAAA; (b) incorporation by a putative employee-plaintiff does not preclude applicability of the ABC test; (c) a finding of employment status against the defendant-putative employer can be rendered and upheld as a matter of law; (d) the places of the defendant’s business under prong B are not limited solely to its facility but include all places where the employee performs services on the employer’s behalf; and (e) like in California, the ABC test may not be applicable to the joint employment context. There are still many questions left to be answered and 2020 is sure to present cases that will further enlighten the misclassification analysis. Practitioners should also continue to monitor legal developments including the impact any new laws will have on judicial opinions. ■

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## Endnotes

1. *Report of Gov. Murphy’s Task Force on Emp. Misclassification*, p. 1, July 2019, available at <https://www.nj.gov/labor/assets/PDFs/Misclassification%20Report%202019.pdf>.
2. *Id.*
3. *Id.* at 9-13.
4. *Id.* at 13-18.
5. Senate Bill No. 4229, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/S4500/4229\\_R1.PDF](https://www.njleg.state.nj.us/2018/Bills/S4500/4229_R1.PDF).
6. Assembly Bill No. 5838, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/A9999/5838\\_R1.PDF](https://www.njleg.state.nj.us/2018/Bills/A9999/5838_R1.PDF).
7. Senate Bill No. 4230, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/S4500/4230\\_I1.PDF](https://www.njleg.state.nj.us/2018/Bills/S4500/4230_I1.PDF).
8. Assembly Bill No. 5839, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/A9999/5839\\_I1.PDF](https://www.njleg.state.nj.us/2018/Bills/A9999/5839_I1.PDF).

9. Senate Bill No. 4225, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/S4500/4225\\_R1.PDF](https://www.njleg.state.nj.us/2018/Bills/S4500/4225_R1.PDF).
10. Assembly Bill 5840, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/A9999/5840\\_R1.PDF](https://www.njleg.state.nj.us/2018/Bills/A9999/5840_R1.PDF).
11. Senate Bill No. 4226, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/S4500/4226\\_I1.PDF](https://www.njleg.state.nj.us/2018/Bills/S4500/4226_I1.PDF).
12. Assembly Bill No. 5841, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/A9999/5841\\_I1.PDF](https://www.njleg.state.nj.us/2018/Bills/A9999/5841_I1.PDF).
13. Senate Bill No. 4228, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/S4500/4228\\_I1.PDF](https://www.njleg.state.nj.us/2018/Bills/S4500/4228_I1.PDF).
14. Assembly Bill No. 5842, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/A9999/5842\\_I1.PDF](https://www.njleg.state.nj.us/2018/Bills/A9999/5842_I1.PDF).
15. Senate Bill No. 4227, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/S4500/4227\\_I1.PDF](https://www.njleg.state.nj.us/2018/Bills/S4500/4227_I1.PDF).
16. Assembly Bill No. 4227, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/A9999/5843\\_I1.PDF](https://www.njleg.state.nj.us/2018/Bills/A9999/5843_I1.PDF).
17. *Hargrove v. Sleepy's, LLC*, 220 N.J. 289 (2015).
18. N.J.S.A. 34:11-4.1, et al.
19. N.J.S.A. 34:11-56a, et al.
20. *Hargrove*, 220 N.J. at 295, 316.
21. Senate Bill No. 4204, Nov. 7, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/S4500/4204\\_I1.HTM](https://www.njleg.state.nj.us/2018/Bills/S4500/4204_I1.HTM).
22. Assembly Bill No. 5936, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/A9999/5936\\_I1.HTM](https://www.njleg.state.nj.us/2018/Bills/A9999/5936_I1.HTM).
23. *Hargrove*, 220 N.J. at 305 (quoting N.J.S.A. 43:21-19(i)(6)).
24. Senate Bill No. 4204, Nov. 7, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/S4500/4204\\_I1.HTM](https://www.njleg.state.nj.us/2018/Bills/S4500/4204_I1.HTM) and Assembly Bill No. 5936, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/A9999/5936\\_I1.HTM](https://www.njleg.state.nj.us/2018/Bills/A9999/5936_I1.HTM).
25. Senate Bill No. 4204, Nov. 7, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/S4500/4204\\_I1.HTM](https://www.njleg.state.nj.us/2018/Bills/S4500/4204_I1.HTM) and Assembly Bill No. 5936, Nov. 14, 2019, available at [https://www.njleg.state.nj.us/2018/Bills/A9999/5936\\_I1.HTM](https://www.njleg.state.nj.us/2018/Bills/A9999/5936_I1.HTM).
26. *Veras v. Interglobo N. Am., Inc.*, No. A-3313-16T1, 2018 WL 5316459, \*2-4 (App. Div. Oct. 29, 2018).
27. *Id.* at \*5 (emphasis in original).
28. *Id.*
29. *Morales v. V.M. Trucking, LLC*, No. A-2898-16T4, 2019 WL 2932649, \*10 (App. Div. July 9, 2019).
30. *Id.* at \*5-6.
31. *Id.* at \*6.
32. *Perez v. Access Bio, Inc.*, No. A-3071-16T4, 2019 WL 3297297 (App. Div. July 23, 2019).
33. *Id.* at \*6.
34. *Id.*
35. See *Dynamex Operations W., Inc. v. Superior Court*, 4 Cal.5th 903, 964 (Cal. 2018). Note that the states' prong Bs are different. In California, the putative employer must prove "that the worker performs work that is outside the usual course of the hiring entity's business". *Id.* In New Jersey, the putative employer must prove that the services provided were "either outside the usual course of the business ... or that such service is performed outside of all the places of business of the enterprise." *Hargrove*, 220 N.J. at 305 (quoting N.J.S.A. 43:21-19(i)(6)(B)). Prong B in New Jersey is a two-part disjunctive, "alternative test." *Koza v. New Jersey Dep't of Labor*, 282 N.J. Super. 560, 567 (App. Div. 1995).
36. *Salazar v. McDonald's Corp.*, 939 F.3d 1051, 1058 (9th Cir. 2019).
37. N.J.S.A. 34:11-58.2(a).
38. N.J.S.A. 34:11-58.2(c).
39. *MKI Assocs., LLC v. New Jersey Dep't of Labor & Workforce Dev.*, No. A-4508-17T3, 2019 WL 5078715 (App. Div. Oct. 10, 2019).
40. *Law Office of Gerard C. Vince, LLC v. Board of Review*, No. A-5441-17T2, 2019 WL 4165066 (App. Div. Sept. 3, 2019); see also *Walfish v. Northwestern Mut. Life Ins. Co.*, Civ. No. 2:16-cv-4981 (WJM), 2019 WL 1987013 (D.N.J. May 6, 2019) (district court employed an "ABC" test analysis and determined an insurance agent was not an employee as a matter of law).
41. *Bedoya v. American Eagle Express Inc.*, 914 F.3d 812 (3d Cir. 2019).
42. *Id.* at 826.