

New Jersey's New 'ABC Test' Rules Leave Room for Further Clarification, Litigators Say

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May 12, 2026 at 03:13 PM By **Nicholas Malfitano**



Scott A. Sears of Archer & Greiner, left, and Thomas F. Doherty of McCarter & English, right. Courtesy photos

On the heels of New Jersey [releasing new regulations](#) to determine whether a worker is an employee or an independent contractor, some New Jersey litigators are saying the new guidelines leave unanswered questions.

On May 5, the state's Department of Labor and Workforce Development adopted new guidelines for the state's so-called "ABC Test," which is used to determine a worker's status. In announcing the changes, which go into effect Oct. 1, the department said they would "provide New Jersey businesses with clarity and guidance, to be able to compete fairly and comply with the state's labor laws by classifying workers correctly."

However, according to attorneys in the Garden State, the regulations still leave room for further clarity in worker classification cases.

"I would hope that [the regulations] clarify the way these cases are handled," Scott A. Sears, an associate of Archer & Greiner's Hackensack, New Jersey office, said. "In general, it's very difficult to properly classify

someone as an independent contractor in New Jersey, unless they really have their own business that's servicing multiple clients."

The ABC test has been in play in the Garden State since a 2015 state Supreme Court ruling adopting it. Ambiguities remained, and with the new regulations, the state department law says the test should apply to the full range of employment claims, such as those brought under the state's Unemployment Compensation Law, Wage and Hour Law, and Wage Payment Law. Prior to these new regulations, different statutes may have used various methods of differentiating between an employee and an independent contractor.

To be classified as an independent contractor under the newly adopted rules, an employer has to show that A) the worker has been and will continue to be free from control or direction over the performance of services; B) the work performed is either outside the usual course of the business for which the work is being performed, or the work is performed outside of all the places of business of the enterprise; and C) the worker is customarily engaged in an independently established trade, occupation, profession or business.

Sears said he had hoped the new guidelines would help clear up grey areas in the criteria of determining a worker's status, such as how many clients a worker sees and how independent they really are. But that hasn't been the case.

"It's still not perfectly clear, even with the further explanations, how much of their own business someone truly must have to be classified as an independent contractor," Sears said.

However, lawmakers could provide additional clarity without need for litigation, according to Sears.

"I think the government or a legislator can clarify it on their own without it getting to the courts. I hope they'll be able to. They've been trying for the last few years to do that," Sears said. "But as it stands right now, it's going to be up to the courts to work that out."

Thomas F. Doherty, a partner at McCarter & English's Newark, New Jersey office, said the new regulations do not substantially change the way such employment cases will be handled in the courts. But, he said, they may make it tougher for a business to justify independent contractor classifications in certain circumstances.

"It still makes a litigator's job, at least defending a misclassification claim, a little bit harder. Because there are some provisions in the new regulations, for example, that take away some of the importance of the contractual terms," Doherty said.

Doherty explained the new regulations now consider whether agreements were unilaterally drafted by the business or the worker, whether the terms of the agreement are negotiable and if the agreement contains a clause allowing the business to terminate the agreement at any time.

If an agreement is found to be unilaterally drafted by the business, contains nonnegotiable terms and could be ended by the business at any time, Doherty said those qualities may count against finding an independent contractor relationship with a business.

Doherty said one open question remaining concerns a federal standards statement, which reads the new regulations "do not exceed standards or requirements imposed by federal law."

But Doherty said that may not actually be the case for the new guidelines.

“Technically speaking, these regulations exceed what’s required by federal law, in terms of determining whether a worker is an employee for purposes of the federal wage-and-hour laws, which are found in the Fair Labor Standards Act,” Doherty said.

“That federal standards statement, to me, is a little bit questionable because there is a different standard under the FLSA for determining whether a worker is a contractor versus an employee. In these proposed regulations, the NJDOL kind of ignores that there is a different federal standard, at least for wage-and-hour purposes,” Doherty continued.

Whether anyone will attempt a legal challenge on those grounds remains to be seen, Doherty said, but said he generally did not think the inconsistency would necessarily lead to extensive litigation.

“In many ways, the new regulations clarify what was already out there,” Doherty said.

However, according to litigators, much of how the ABC test works in New Jersey will be familiar to attorneys.

Doherty noted the NJDOL had previously argued the ABC Test must be used to determine independent contractor status under New Jersey’s wage-and-hour laws. The New Jersey Supreme Court agreed, in its January 2015 ruling for the case of *Hargrove v. Sleepy’s*. Since that ruling, the ABC Test has been the standard by which an independent contractor is defined.

“In other words, in New Jersey, the ABC Test is already the law,” the NJDOL said on Page 90 of its [formal adoption](#) of the new regulations.

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