



NEW JERSEY STATE BAR ASSOCIATION

**Statement On S4204 (Sweeney)/A5936 (Egan)
Senate Labor Committee
December 5, 2019**

The New Jersey State Bar Association and its members, including thousands of solo and small firm attorneys, appreciate the opportunity to share some thoughts and concerns about S4204, which is intended to end worker misclassification. First, I would like to start by saying the Association supports this laudable goal. The proposed legislation, however, deserves the full attention and thoughtful deliberation of the Legislature and should not be rushed through without considering the sweeping impact and unintentional consequences this bill will have on:

- workers – both employees and independent contractors;
- on employers, especially the small business employers, who are the true engine of the New Jersey state economy and the biggest victims of a misinterpretation or misapplication of this bill;
- and on the State, which stands to face a number of difficult challenges as employers and workers alike seek to ascertain the bill's application, interpretation, and impact on New Jersey's citizens.

The NJSBA has analyzed this bill with attention to the sponsor's purpose and respectfully submits that this bill, in its current form, will have significant consequences well beyond what is intended. Our understanding is that this bill is meant to codify existing case law. If that is the true purpose, we do not believe this bill is necessary. The New Jersey Supreme Court has spoken to this issue and has left those doing business in our state with a clear test and analysis when determining who can be an independent contractor under the laws of this State.

If this bill does move forward, we urge you to reflect the actual existing language of the case law that has been well tested over the past 50 years. The current bill, as amended, does not clearly reflect that case law and will certainly invite new interpretations, a broader reading of the current test, and call into question the very case law you seek to codify.

One section of the bill deserves your careful attention. There is a change in the language used in Prong C of the ABC test, which is one of the three elements that must be met to properly classify a worker as an independent contractor. Specifically, S4204 removes three words which have long been part of the ABC test. These words are "trade, occupation, profession..." The legislation then adds the word "enterprise" to this section, leaving the third prong of the test requiring the worker to be customarily engaged in an independently established business or

enterprise of the same nature as that involved in the work performed. For professionals, this word change is particularly significant.

Ninety-four percent of the law firms in New Jersey are in the solo and small firm category. Fifty-two percent of lawyers practice in firms with less than five attorneys. Like many businesses, the legal field experiences ebbs and flows. Solo and small firms manage those ebbs and flows by using the resources of individuals who are seeking to practice law, or who seek to provide paralegal services, on an as-needed basis. For a variety of reasons, these professionals do not want to practice law or provide services full-time or even part-time. They do not want to work during normal business hours or certain days a week. Many of these workers are women who have chosen to spend time raising children or older workers who have chosen to work on a reduced schedule, often because of health issues or elder care responsibilities.

Many of these small law firm businesses use independent contractors to take on legal work, paralegal work, marketing assignments, social media, and countless other office needs. The cost to bring each of these workers in-house is significant and will result in law firms and small businesses making do with their existing staffing and not taking on other workers to help with an increase in workload. Large companies, rather than individual workers, will be used to provide those services needed to run a small business. The way these small business owners operate their businesses will have to change if S4202 is enacted into law.

In addition, opportunities for workers will be dramatically impacted by the passage of this legislation. Young lawyers, who are working per diem in order to gain experience; new parents who want to spend more time with their children, those transitioning into a full-time career while trying to achieve a work-life balance that fits their needs; and senior lawyers who are transitioning out of the practice and want to wind down their career on their own terms and schedule. All of these workers will be impacted.

The removal of the words “trade, occupation and professional” and replacing those words with “business or enterprise” also strongly suggests the legislative intent of this law is to require any independent contractor to be a “business” or an “enterprise”, not just a professional or someone working in a trade. The suggestion that a worker must incorporate or establish an LLC in order to provide services on an independent basis is inconsistent with the ABC test and the case law of this State. Most importantly, it significantly curtails a lawyer’s ability to work on their own terms. This law would impact that new mother who wants to write a brief from home at night after putting her children to bed. In short, not every professional wants to work a 9-5 job, controlled by the rules and regulations of an employer.

But the NJSBA is not just here today because of the bill’s impact on lawyers; it will impact the clients of those lawyers as well. For some small employers, it is a choice between doing business or closing up shop. For workers, it is a choice between taking on a job that does not quite fit their needs, or having the flexibility of a schedule that accommodates both the employer and the employee.

It's about the hair salon that does not always have the breadth of business for a specific number of stylists every day and every month. It's about the hair stylist who does not want to work the same schedule every week, but knows that the opportunity is there during the busiest times.

It's about the bookkeeper who wants to help out a small business when needed and who has no interest in working for a large accounting firm or payroll company. It is about the IT professional that likes to freelance and who supports law firms, small businesses and sole proprietors of our State.

It's about the public relations specialists who are brought in for a special project that can take weeks, or months, but does not sustain permanent employment. It's about the small business who needs a public relations specialist, but not all of the time.

The notion of worker misclassification began long before the so-called "gig economy." The regulations were drafted when workers were not so mobile, the work was not so widely available outside of a fixed office space, and the technology that offers the workforce flexibility was non-existent. As we approach 2020, we must keep in mind the reality that workers now provide services from coffee shops, home offices and on mobile devices. They manage their own time and take on work when and if it fits their needs and interests.

The evolving case law used to interpret the current ABC Test has stood the test of time. The Department of Labor and the courts have not had difficulty applying the ABC test to this new, evolving workforce. To change the wording of this test through this legislation opens the door to challenges that likely will lead to a misapplication or misinterpretation of the test, and does not further the interests of the state, employers, or workers.

For these reasons, the NJSBA encourages you to reconsider passing this bill and, at the very least, to restore the specific language of the ABC Test, and in particular the language to Part C that has been used by our courts.

Thank you for the opportunity to present our concerns.