

	What the law says	How NJDOL interprets (and will enforce) key terms under the proposed rule
Prong A: the worker may be deemed to be an employee unless the employer can prove that it does not control the worker's performance of the required tasks.	(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;	<p>Under the NJDOL's interpretation of the ABC test, a business cannot actually control the worker does the job or even <i>reserve the right</i> to do so. When assessing whether a worker is free from control, the NJDOL will look at several factors, including but not limited to:</p> <ol style="list-style-type: none"> 1. Whether the person works set hours or specific jobs; 2. Whether the employer can control how the work is done; 3. Whether the work must be done personally by the individual; 4. Whether the employer negotiates or secures the work; 5. Whether the employer sets the pay rate; 6. Whether the individual bears any financial risk; 7. Whether the person must be on call or available at set times; 8. Whether the employer restricts the person's ability to work for others; 9. Whether the employer provides training to the individual. <p><i>An employer that engages in any of the foregoing activities might be considered to have controlled the employee.</i></p>
Prong B:	(B) Such 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	<p>When considering whether the worker is outside the employer's "usual course of business," the NJDOL defines the scope of the employer's business broadly to include all of its revenue-generating activities as well as its provision of goods or services. By way of example, the NJDOL interprets a dentist hiring a cleaner, or a restaurant hiring a musician, to be outside the usual course of business; however, the NJDOL interprets a transport company hiring a driver, or a drywall company hiring an installer to be within the business's usual course of business.</p> <p>Similarly, the NJDOL interprets the "places of business" as locations where the employer has a physical presence or conducts essential operations. Under the NJDOL's interpretation, a client's location can count as the employer's place of business if the service performed there is essential to the business.</p>

		<ul style="list-style-type: none"> • Examples: A drywall company's work at a client's home is considered within its business location; carpet installation by a carpet retailer is not. • Airplanes (for airlines) or trucks (for trucking companies) are places of business; unrelated locations are not. <p><i>If the worker's service is similar to work your employees do or they perform the work at your location, the NJDOL may consider that evidence that they're your employee.</i></p>
Prong C:	(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.	<p>When considering whether a worker is independently engaged in a trade, occupation, profession, or business, the NJDOL will consider, among other things, the longevity of the worker's business, as well as the worker's customer base, business location, income sources, employees, investment, rate-setting, and advertising. The NJDOL's commentary further indicates that the agency is not swayed by contract designations; worker's business must exist and be viable independent of the employer. Simply having multiple clients, a license, business registration, insurance, or a 1099 form does not automatically establish independent contractor status.</p> <p>Specifically, the NJDOL will consider among other things:</p> <p>1. The duration, strength, and viability of the individual's business (independent of the putative employer); 2. The number of customers of the individual's business and the volume of business from each respective customer; 3. The amount of remuneration the individual receives from the putative employer compared to the amount of remuneration the individual receives from others in the same industry; 4. The number of employees of the individual's business; 5. The extent of the individual's investment in their own tools, equipment, vehicles, buildings, infrastructure, and other resources; 6. Whether the individual sets their own rate of pay; and 7. Whether the individual advertises, maintains a visible business location, and is available to work in the relevant market."</p> <p>No single factor will be decisive; the NJDOL will consider the total relationship and interaction between the worker and the business to determine whether the worker's trade, occupation, profession or business stands on it own.</p> <p><i>How many of your independent contractors can satisfy these factors?</i></p>