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Via Email: david.fish@dol.nj.gov

David Fish, Executive Director
Legal and Regulatory Services
Department of Labor and Workforce Development
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Re: Proposal Number: PRN 2025-051; ABC Test; Independent Contractors
Proposed New Rules: N.J.A.C. 12:11

Dear Mr. Fish:

The Employers Association of New Jersey (“EANJ”) supports the New Jersey Department of Labor’s (NJDOLE) mission to protect workers and promote clarity in employment standards. To that end, we appreciate the opportunity to submit this collection of comments in response to the NJDOLE’s notice of proposed rulemaking on the ABC Test for Independent Contractors Proposed New Rules: N.J.A.C. 12-11 (hereafter “the ABC Test Rule” or “Rule”). See 57 N.J.R. 894(a) (PRN 2025-051). Founded in 1916, EANJ is a trade association consisting of approximately 500 small and large private businesses, nonprofits, and municipalities which employ over 92,000 individuals throughout New Jersey. At EANJ we not only counsel businesses on compliance with existing rules, we also encourage those businesses to dialogue directly with their legislators about the impact of current and proposed legislation on their respective businesses.

On July 24, 2025, EANJ met with over 23 NJ businesses spanning of varying sizes and industries, including the arts, media, transportation, manufacturing, recreation, consulting, financial services, landscaping and real estate. The major concerns of those businesses, whose comments are attached in full, can be summarized as follows:

1. Misalignment of the ABC Test with Modern Business Models

- **The Prong ‘B’ Problem:** The requirement that independent contractors operate “outside the usual course of business” does not capture or reflect modern freelance and service models. Journalists, consultants, creative

professionals, licensed professionals, coaches and educators often provide core services independently but would appear to be unfairly disqualified under this definition. Additionally, the definitions of the ‘usual course of business’ remain as “elusive” and “confusingly vague” as when described by New Jersey’s Supreme Court in *Carpet Remnant Warehouse v. Dept. of Labor*, 125 N.J. 567, 584 (1991) (citations omitted). “Usual course of business” includes “activities... to generate revenue or... provide goods or services” (N.J.A.C. 12:11-1.4(b)); “Places of business” can include residences of customers if services are “essential” (N.J.A.C. 12:11-1.4(g)). Finally, the Rule’s effort to clarify these factors by giving examples (at N.J.A.C. 12:11-1.4(c) – (g)) rather than a consistent standard makes planning for – or advising on – compliance difficult. The resulting confusion leaves the businesses uncertain and at risk.

2. Threat to Entrepreneurship and Public Access to Products and Services

- **Loss of Flexible Opportunity:** Many sole proprietors, including coaches, consultants, and artists, rely on flexible contracting arrangements to sustain income and pursue small business growth. The Rule as written would restrict their ability to build client networks independently. Additionally, it would all but eliminate those “foot-in-the-door” opportunities for young people, other new entrants to the job market, would-be entrepreneurs (including stay-at-home parents and retired individuals) and those requiring flexibility to launch businesses in NJ.
- **Impact on Underserved Areas:** The proposal could unintentionally limit access to services such as financial counseling, performing arts, and youth coaching by narrowing the pathways for independent service providers to operate locally in areas to which existing businesses do not extend.

3. Economic and Operational Burdens

- **Increased Compliance Costs:** Businesses estimate substantial financial strain if contractors are reclassified. Administrative setup and overhead costs, benefit contributions, and legal reviews could threaten viability for small firms and nonprofits, many of which rely on contract-based talent for project delivery.
- **Market Competitiveness Risks:** Freelancers offer affordability and efficiency. Reclassification requirements would force businesses to absorb new costs or reduce services, undermining their ability to compete and deliver in a fast-paced economy.

4. Industry-Specific Disruptions

- **Port Trucking Vulnerability:** Over 75% of port truck drivers are owner-operators. Reclassifying them risks destabilizing supply chains, eliminating flexible surge capacity, and jeopardizing thousands of jobs.

- **Impact on Arts, Sports, and Education:** Independent performers, instructors, and recreational staff often work episodically. The proposed rule could force formal employment for temporary arrangements, resulting in reduced programming and loss of community engagement.

5. Lack of Legal Clarity

- **Federal vs. state frameworks:** With the recent US Department of Labor's decision to withdraw the 2024 independent contractor rule and return to the "economic realities" test, the federal standard provides greater latitude. Businesses may mistakenly assume federal compliance suffices under New Jersey law, increasing the risk of misclassification and enforcement exposure.
- **No clear state guidance to aid compliance:** The ABC Test Rule equips businesses and those who seek to help them comply with non-exhaustive lists of factors that provide no prioritization or weighting. The businesses are required to guess at relevant current or additional factors and how much weight any factor should receive. **Examples:** *"The factors listed... shall not be used as a checklist... There is no set number of factors that will, in every instance, result in a finding"* (N.J.A.C. 12:11-1.3(e), 1.5(d)); *"The factors... are not exhaustive and additional factors may be considered"* (N.J.A.C. 12:11-1.3(d), 1.5(c)); *"Proof of business registration... is not alone sufficient to meet Prong C"* (N.J.A.C. 12:11-1.5(g)); *"Proof... of liability insurance and/or workers' compensation insurance... is not alone sufficient"* (N.J.A.C. 12:11-1.5(h)).

Accordingly, although appreciative of NJDOL's intent to protect vulnerable workers and ensure fair labor practices, EANJ respectfully requests that NJDOL radically modify the ABC Test Rules to provide a more transparent, balanced, and nuanced framework that supports legitimate independent businesses and the broader New Jersey economy. The foregoing businesses uniformly spoke of a need for a "modernized" rule that reflects the evolving nature of work and offers clearer guidance.

Finally, once the ABC Test Rule is improved, we urge the NJDOL to implement a "safe harbor" or "amnesty program" and an ongoing implementation plan to promote education, encourage voluntary compliance, reduce confusion, and empower responsible businesses to correct mistakes. A safe harbor program would allow businesses to reclassify workers without immediate penalties, provided they act in good faith within a defined time window. A NJDOL-administered self-audit program could also empower businesses to examine classifications without triggering punitive action. Outreach efforts could be scaled alongside such an initiative to educate businesses and increase voluntary participation.

Such an approach would offer multiple benefits, such as encouraging self-correction ahead of enforcement, facilitating prompt resolution and back wage

payments to workers, reducing the administrative burden on NJDOL's enforcement, and incentivizing businesses cooperation and transparency. By incorporating flexible compliance pathways like a safe harbor program, NJDOL can foster a culture of accountability and education rather than fear and avoidance. EANJ urges the NJDOL to revisit the proposed rule with these considerations in mind.

We thank you for your ongoing efforts in this regard.

Respectfully,

/APL/

Andrée Peart Laney, Esq.
Director, Compliance and Training

EANJ Independent Contractor Roundtable – July 24, 2025

- **Recreational Facility Owner**

- The facility provides attendees with access to athletic instruction, but it is not their main business. It engages the instructors as independent contractors. The facility has no control over the content the instructors provide, which is specific to the sport and the facility would not be able to correct the content or otherwise provide 'control'.
- Revenue to the facility generated from the lessons is ancillary. It is not profitable for the facility. 90% of instruction fees go directly to the instructors.
- If the instructors were classified as employees, the only people to lose would be the individuals giving the lessons as we would have to eliminate this popular service from our business.
- **Question:** would the instructors need to be covered by our Workers' Compensation insurance?

- **Lifestyle Media Representative**

- The organization contracts with freelance writers to write articles for them about the specific industry. Last year, they were targeted by an audit in California that determined that the freelancers were employees because writing is a core part of the organization's revenue stream. The determination disregarded that freelance writing is its own independently established trade and that freelancers often approach media outlets to pitch their own ideas.
- When they put on events, they will sometimes bring in photographers.
Questions: are the photographers outside of the usual course of business? Does the analysis turn on whether the person is a professional or amateur photographer?

- **Financial Advisor**

- **Question:** Does a determination that a business is an employer then oblige the business to provide a 401k and other benefit plans? That would be significant - the Advisor has small clients that do not know how they could possibly extend these benefits.

- **Trucking Industry Representative**

- We have been dealing with this a long time in NJ and this version is worse.

- The current trucker exemption eliminates significant numbers of independent contractors, leaving them vulnerable to reclassification and thereby jeopardizing their livelihoods. It is hard to see how the average truck drivers would qualify under the ABC Test Rule as an independent business; most drivers do not have a website. The examples under the Rule suggest that the NJDOL would get rid of all the current exemptions.
- **Recreational Facility Owner**
 - Youth sports have grown tremendously. Many organizations pay coaches or sports officials through the 1099 process, yet according to the ABC Test it appears they are being “controlled” if their schedules are being set.
Question: Would their having a business registration certificate help us to make the determination if this is a separate business or should it be our employee?
- **Performing Arts Facility**
 - **Questions:** would a performing artist who is hired for a one-off show be impacted by this? Will the exclusions to the ABC Test in the unemployment insurance benefits law continue to apply after the ABC Test is passed? What about a visual artist who exhibits their work for a period of time – would they be an employee? What if someone buys their artwork? If it arguably enriches both the artist and the facility, does the facility become the artist’s employer?
- **Financial Services Representative**
 - **Question:** When I render services to a business, should I ask it to provide both a 1099 and a W2?
 - As a financial services agent, I’m an entrepreneur. I run my own business, serve my clients independently, and chose this path for its flexibility and control. This rule would jeopardize that.
 - I work with a large life insurance company, which is owned by its policyholders -- not shareholders. It has a large presence in New Jersey with 195,000 policyholders, 1700 employees, and 850 agents. In 2024, it paid out \$183 million in benefits to New Jersey families.
 - This Rule would:
 - Undermine small businesses like mine. My independence is central to how I serve my community.
 - Reduce consumer access to life insurance and financial advice, especially in underserved areas.

- Impose a test that doesn't fit the nature of our industry.
 - At the life insurance company, agents like me already have access to benefits such as health care and retirement plans while keeping our independence. Reclassifying us as employees would take away that independence without providing meaningful gains.
- **Regional Trade Organization Representative**
 - Many of their members are consultants (they have consulting businesses) and they may have contracts with organizations to provide services such as coaching – they are contracting with registered businesses and sometimes hire subcontractors. **Question:** are those consulting businesses themselves the clients' employees?
- **Consulting Business Owner**
 - The individual employs one employee and works with 10 independent contractors. While the owner drafts the independent contractor agreement, the contractors (who are all professionals) negotiate certain items. The ABC Test Rule suggests that the contracts might be invalid because the owner did the first draft. The business model would fail if those professionals cannot be independent contractors.
 - My business is a project-based consulting business. Clients seek my services, and I find the appropriate professionals to assist me with work delivery. Once the project is done, so is the independent contractor's pay and our working relationship. Nearly all my independent contractors have their own LLCs and work with other clients and businesses. None work solely with consulting business.
 - Reclassifying my independent contractors as employees will have the following impact:
 - Potential Revenue loss of \$25,000
 - Costs to reclassify: biweekly expense of \$200, one-time fee of approximately \$2,000
 - Admin Time/Effort: estimated at 40 hours or \$7,000
 - Increased costs passed on to employees: \$30,000
 - The cumulative effect of all of the above impacts is the potential for me to lose my strong working relationship with my independent contractors that could result in my entire business enterprise being compromised.

- [Referring to another attendee, a landscaper] That business owner could potentially have the contractor contract directly with the customer, but that's no way to run a business.
- **Commercial Real Estate Representative**
 - **Question:** how does the ABC Test Rule impact real estate brokers who all sign an independent contractor agreement? They offer voluntary training to these brokers; is that "control"?
- **Landscaping Business Owner**
 - The owner sees some gray areas. The business contracts with plumbers, electricians, but also tree removal and fertilizer guys. **Question:** which of those individuals or businesses are in "the course of his business" under the Prong B? The Rule is not clear on that.
- **Non-Profit Arts Organization**
 - Assigning independent contractors as employees could create unnecessary burdens for non-profit arts organizations by creating liabilities for the organizations regarding unemployment. The requirement of benefits like mandatory NJ sick leave for these workers would also increase the financial burden to the organizations. Organizations would experience an increase in HR and administrative costs.
 - Increased costs would require raising prices for classes which support the objectives of the organization and the intent of funders like the New Jersey State Council on the Arts.
 - Under the ABC Test, our allowing artists to sell their work through a commission-based sale in our galleries (on which we must pay tax) would be to make them our "employees". Non-profit, community arts organizations do not generally have the capacity to run the number of instructional programs that can support significant income for individual artists. As a community-based non-profit, the significant increase in the tax burden imposed on the organization would challenge our financial stability as we already function at break-even levels.
 - When onboarding employees, an organization takes on not only the financial burden, but an additional administrative and human resources burden. And with many programs that run only one time or for a few days or weeks, it is not possible for us to establish a suitable review period for such "new employees." Without a review period, organizations would be less likely to

take on many new instructors classified as employees (because of the administrative cost), which would ultimately reduce the ability of the organization to provide opportunities to a greater number of artists and reduce the income those individuals can put back into the economy.

- Additionally, with arts funding in South Jersey disproportionately lower than in North Jersey, the ABC Test Rule could have a significantly negative impact on arts organizations throughout the region. A study in 2001 revealed that contributed income sources in NJ favor the northern part of the state by as much as 25:1 (foundations, corporations, etc.). While the governor approved a budgetary mandate that traditionally allocates 25% of the state arts budget to the eight southern counties it is not guaranteed. Meanwhile, the southern county populations continue to increase and are now over 27% of the state's population and growing.
- As a result of the foregoing issues, the ABC Test Rule could significantly reduce the number of artists with whom an organization could work, thus stifling artistic creativity and innovation and rendering unsustainable our organization's ability to evolve and support the community.