



MEMORANDUM

TO: Senate Labor Committee
FROM: Alida Kass, President & Chief Counsel
SUBJECT: S4204
DATE: December 5, 2019

The New Jersey Civil Justice Institute is a statewide, nonpartisan coalition of the state's largest employers, small businesses, and leading trade associations advocating for a fair and predictable civil justice system in New Jersey. On behalf of our members, **we respectfully oppose S4204.**

We appreciate the sponsors' desire to clarify standards on worker classification. It is an important and timely question - especially in light of the significant new civil and criminal penalties adopted earlier this year for wage and hour violations. Business owners and workers deserve clear, consistent and workable rules of the road.

But as this bill has moved through the legislative process - as the original "California-style" ABC test, or as the revised legislation adopted in the assembly, which *appears* to restore the original "B Prong" language, while making new, different changes to the "C Prong" - it has been asserted at each stage that the legislation would merely "codifying existing law."

In *neither* instance was that an accurate statement.

Changes to B Prong Language:

As codified for Unemployment Insurance, and extended to Wage and Hour law in *Sleepy's*, contractors have two paths to meeting the B Prong. The work can be "outside the usual course of the business for which such service is performed" OR it can be "performed outside of all the places of business *of the enterprise* for which such service is performed."

The legislation first considered by this committee eliminated the second alternative: contract workers could meet the B prong only if work is "outside usual course of business." In response to widespread expression of concern, second half of "B Prong" was restored, but with a change. Instead of "outside places of business of the *enterprise*" it now reads "outside places of business of the *employer*."

But there is significant disagreement over meaning of "places of business." The NJ Department of Labor argues that anywhere the *worker* goes is a "place of business" for the enterprise. While the courts have found that to exceed the DOL's regulatory authority, when premised on a statute in existence since 1937. The Court in *Carpet Remnant* went so far as to point out that "under that definition – for a person to satisfy the B standard's second alternative would be practically impossible."

So change from places of the *enterprise* to places of the *employer* is significant in two ways. First, the language itself undercuts the existing interpretation of the phrase, which means “those locations where the enterprise has a physical plant or conducts an integral part of its business.” And moves the text towards the losing argument of DOL.

But second and perhaps more importantly, it’s a fresh bite at the apple for DOL – an opportunity for the DOL to issue regulations on the new language adopting that rejected interpretation.

And note: such a change would move the law in precisely the wrong direction. The B Prong already operates as a filter that is not especially well calibrated to task of catching worker misclassification. The location, on its own, does not say much about the legitimacy of contract work arrangements – especially now, when even many W-2 have flexibility to work off-site.

On-site location can be a back-door way of exercising control, so it might *correlate* with instances of misclassification. But more often, on-site work just means there is some essential element of the work requires that it be performed on site.

The Stone Pony has bands that play on site. Does anyone think a band that plays a few nights a year should be considered *employees* of The Stone Pony? But even DJ’s have faced enforcement actions, with the DOL arguing they fail the ABC test.

Changes to the C prong:

The C Prong currently permits contract work where the individual is “customarily engaged in an independently established trade, occupation, profession or business. The revised S4204 strikes “*trade, profession and occupation*” – and replaces it with “**established business or enterprise.**”

But the implications of “established business or enterprise” are significantly different from a trade, occupation or profession.

Who would be hurt? First: entrepreneurs. How many successful businesses started as a side gig? It crushes the start-ups and the innovation economy. But it also hurts the young mom who wants to stay involved in her industry while staying home with young children, as her schedule permits. We hear a lot about the gender pay gap and this bill will make it worse. It also hurts the family struggling with the high cost of living looking to make extra money off-hours, but who is not “an established business or *enterprise.*”

The popular reaction against this legislation reflects the simple reality that everything is trade-offs. The rigid W-2 employment model comes with a set of trade-offs that *many people do not want.*

Not only is the entire business community is opposing the bill. The *workers themselves* see their livelihood, their life-work balance, their entrepreneurship being taken away. A choice of W-2 employment or nothing means many of these workers get nothing.

That’s not a choice anyone should have to make. We oppose S4204 as drafted.