



MEMORANDUM

TO: Senate Labor Committee
FROM: Alida Kass, President & Chief Counsel
SUBJECT: S4204
DATE: November 14, 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. And because it is so important, it is critical that we take the time to do this right.

The law on worker classification in New Jersey is something of a mess. In 2015, a state Supreme Court decision replaced the economic realities test of wage and hour law with an ABC test meant for unemployment insurance. Even as applied in the UI context, the legislature had amended that legislation some 45 times to exempt a wide array of industries. Now applied more broadly to wage and hour, the ABC test has proven uneven and unpredictable, both in Department of Labor adjudication and the courts.

New Jersey is not the only state struggling to update its worker classification framework. California recently adopted the highly restrictive ABC test of S4204, even as it recognized the test would be unworkable for a wide array of industries. Some 25 industries were instead subject to the more nuanced 11 factor "Borello" test, and the list of industries to be governed by the alternative test is not yet complete. As legislators work to bring more into the *Borello* fold, the alternative rule is fast becoming the true default rule in California.

The process playing out in California reflects the reality that the world has moved beyond the existing employment framework. Some number of individuals have always preferred to work for themselves. The gig economy makes that sort of independence, flexibility and entrepreneurship possible in way that just wasn't feasible even 20 years ago. Our legislators should be encouraging this innovation, not crushing it.

For many women currently in the workforce, for example, there were not a lot of options when their children were born. It was often a binary decision: continue as a full-time employee or quit the job and stay home.

Many women in the workforce today are still feeling the wage ramifications of having exited the workforce for some period of time. The first job back often involves a significant pay cut. And subsequent raises build on that lowered floor.

Young women today have more options. The expansion of the gig economy and the relative ease of contracting on a piecemeal basis has given young mothers the flexibility to stay in the workforce on their own terms. As drafted, S-4204, would strip women of that flexibility. Effectively eliminating the option to work as an independent contractor, it would force women back into the old binary choice: W-2 employee or nothing.

Advocates of the legislation talk up the value of the employee model but they fail to appreciate the flip side of these supposed advantages. S-4204 puts onerous conditions on the Independent Contractor relationship that makes the position effectively unworkable.

And it's not just mothers of young children whose freedom to work will be harmed by this bill. The contractor model provides a low-risk way for a variety of people to re-enter the work force. Workforce participation among men has been dropping, for a host of reasons. Contract work can bridge the gap between full time jobs and help people from dropping entirely out of workforce.

It's also an effective way to improve the lives and skill set of marginalized populations. The gig economy gives marginal workers the dignity and purpose of a job, along with the flexibility and freedom to try and fail and try again.

S4204 would impose a plainly unworkable default rule on the New Jersey business community that would produce massive economic dislocation, as evidenced by events playing out in California. We can do better than merely reducing active harm to the economy by limiting the application of a bad test. The legislature has the opportunity establish a rule that provides clarity and flexibility. That actually encourages innovation, and supports working moms, entrepreneurs, and employees. We oppose the legislation in its current form.