



Comments Delivered to the New Jersey Misclassification Task Force

December 5, 2018

Topic: Information and education for employers, including a self-audit program.

On May 3, 2018, Governor Phillip D. Murphy signed Executive Order No. 25 creating the N.J. Misclassification Task Force (Task Force) to provide advice and recommendations to the Governor's Office and Executive Branch departments and agencies on strategies and actions to combat employee misclassifications. Among other things, the Task Force is charged with developing recommendations to foster employer compliance with relevant federal and state laws.

The Employers Association of New Jersey (EANJ) was formed in 1916 and is now comprised of over 3,500 employer-members, in every county of the state. The association is staffed by a practice group of lawyers and experts that help employer-members maintain responsible employment practices and comply with labor standards.

The Task Force is primarily concerned with the misclassification of employees as independent Contractors or "freelancers" that deprive New Jersey workers of important legal rights and protections as well as certain employment-related benefits, including unemployment insurance, workers' compensation, and disability benefits.

According to Labor Commissioner Robert Asaro-Angelo "[m]isclassification adversely affects workers, taxpayers and employers who play by the rules. This illegal practice allows unscrupulous employers to ignore their responsibility for providing safe workplaces and keeps these workers from accessing employee assistance programs."

EANJ is in total agreement with the Commissioner's statement and the adverse consequences to both to workers and the community resulting from the flagrant violation of federal and state law. And the vast majority of employers suffer as well, as they are forced to compete against employers that knowingly violate the law and risk a dangerous "race to the bottom."

But as the Task Force hears from stakeholders and does its work, it is critical to understand the changing nature of work in the 21st Century.

Currently, 1 in 5 workers is a contract worker. According to economists Alan Krueger and Lawrence Katz, the percentage of people engaged in "alternative work arrangements" (freelancers, contractors, on-call workers and temp agency workers) grew from 10.1 percent in

2005 to 15.8 percent in 2015. Their report found that almost all - or 94 percent - of net jobs created from 2005 to 2015 were these sorts of impermanent jobs.

Within a decade, many labor economists believe freelancers will outnumber full timers.

Arun Sundararajan, a management professor at New York University and author of *The Sharing Economy*, says "this is the work arrangement for the future." The new normal will be freelance work. "Twenty years from now, I don't think a typical college graduate is going to expect that full-time employment is their path to building a career," Sundararajan says.

In short, it is not necessarily "unscrupulous employers" that is driving the business model of utilizing contractors but the economy itself, as businesses of all sizes "hire out" as market demands change. This trend is expected to accelerate over the next decade, as both companies and workers seek more flexibility through contract work arrangements.

According to the 2018 Freelancers in America Study conducted by Upwork and the Freelancers Union, more than one in three (35%) Americans freelanced in 2018. The freelance workforce grew from 53 million to 56.7 million, or 7%, in five years. Moreover, during the last five years, people are increasingly starting to freelance by choice. This is driven especially by growth among younger generations and full-time freelancers (as opposed to part-time freelancers). The younger generations are freelancing more than any other generation in the workforce, and full-time freelancers now make up 28% of freelancers (up 11 points since 2014).

Thus, experience and practice demonstrate a supply and demand dynamic to the trend toward contract, freelance and other forms of contingent work. Arguably this accelerating trend is driven more by market forces and free choice rather than employers that play fast-and-loose with worker protections.

Governor-Elect Murphy's Labor and Workforce Development Transition Advisory Committee Report recognized this economic dynamic when it recommended "In light of this shifting landscape, this committee recommends that the Murphy Administration empanel a new task force to conduct a broad overview of the state's current misclassification statutes, regulations, and enforcement, *and to provide recommendations on how best to update the state's regulatory framework to reflect new realities and changes in federal regulations.* (Emphasis added).

Similarly, the Report also recommended exploring "expanding reemployment assistance to job seekers who are currently not covered by UI benefits, including those who are engaged in self-employment or in gig employment (such as drivers for Uber or Lyft)."

Thus, what else the Task Force does, it will have to acknowledge the current economic realities of a flexible labor market and the accelerating trend toward contract and similar work arrangements.

The other reality is the complicated nature of the law. Multiple legal standards apply depending on the work arrangement. Dozens of federal- and state-level tests exist to help businesses determine whether or not a worker is an independent contractor or an employee, but these tests vary from one another and are open to interpretation. This creates confusion and frustration for workers and employers

Questions and concerns around employee misclassification continue to grow as the independent workforce increases. New Jersey courts have long recognized that, in certain settings, exclusive reliance on a traditional right-to-control test to identify who is an employee and who is an independent contractor. See *D'Annunzio v. Prudential Insurance Co.* New Jersey Supreme Court (2005).

The N.J. Department of Labor and Workforce Development (NJLWD) consistently applies the “ABC test” to determine eligibility for unemployment and other statutory benefits which requires proof of the following factors in order for an employer to establish independent contractor status:

- (A) that the individual is free from control or direction by the employer,
- (B) that the service is outside of the employer’s usual course of business or outside of the employer’s place of business, and
- (C) that the individual is customarily engaged in an independently established trade, occupation, profession or business. N.J.S.A. 43:21-19(i)(6)(A)-(C).

On the other hand, the U.S. Department of Labor (USDOL) does not have a single rule or test to determine worker classification under the Fair Labor Standards Act. Generally, the USDOL emphasizes the use of the “economic realities” test developed by a number of courts, and which provides an equally complex scope of employment than the ABC test. The economic realities test focuses on whether a worker is economically dependent on their employer (in which case they would be considered an employee), or whether they are in business for themselves (in which case they would be considered an independent contractor).

Similarly, the Internal Revenue Service (IRS) is involved in independent contractor classification because they must provide guidelines for employers’ tax liability. Depending on the type of business relationship an employer has with their workers, they may or may not be responsible for withholding income taxes, withholding and paying Social Security and Medicare taxes, and paying unemployment tax on wages.

In order to determine if a worker is an independent contractor or an employee, the IRS applies common law rules - facts that provide evidence of the degree of control and independence in the relationship between a worker and a business.

Accordingly, determining worker classification remains a complex undertaking requiring predictability – the idea that like cases should be treated alike, which is a fundamental concept of the definition of justice. The social benefits predictability in the law is so obvious that it should hardly be necessary to list them, but, aside from issues of fundamental fairness, predictability has other advantages. If a result is predictable, compliance is easier: there’s little point in continuing to litigate on either side of a wage or unemployment insurance dispute, because additional money spent on lawyers cannot change the result. If a result is predictable, one can more easily conform to conduct that is law-abiding

Unscrupulous employers that abuse and exploit workers should be subject to vigorous enforcement by NJLWD. And the vast majority of employers must have accurate information and education to comply with predictable legal standards.

Accordingly, EANJ asks that the Task Force recommend to the NJLWD that it initiate a voluntary employer self-audit program. The purpose of such a program would be to provide a framework for employers to self-assess compliance with New Jersey's classification laws, including various Wage Hour and Wage Payments laws; to allow for the voluntary reporting of discrepancies and/or violations in order to facilitate prompt resolution; and to provide for the expedited payment of back-wages to employees and benefits without the assessment of penalties.

Based on EANJ's experience with its employer-members, an opportunity exists for DLWD to more efficiently allocate its resources by proactively encouraging employers within the state to resolve potential classification issue before an employee makes a complaint or a company is selected for a targeted audit.

Our experience with self-audits has shown that the process is a less adversarial method for employers to achieve compliance and to provide restitution to employees who are determined to be owed wages and other benefits, a vital goal of NJLWD, while simultaneously allowing employers to attain compliance without fear of costly fees and penalties associated with the existing system of NJLWD initiated audits. In short, such a process is more likely to facilitate efficient and expeditious compliance.

It has been our continued experience that employers want to "do the right thing" when it comes to classifying and paying employees. However, when mistakes are realized, often employers are at a loss on how to move forward – they want to make the employee whole, but don't want to face fines and penalties by involving NJLWD. A self-audit program, overseen by NJLWD, would encourage employers to proactively examine their internal classification and wage-hour practices rather than respond to charges after an employee files a complaint.

Often referred to as "wage theft" a recent report indicates that underpayment of owed wages due to misclassifications can reduce affected workers' income by 50 percent or more. In New York and California alone, the affected employees lost weekly wages averaged 37–49 percent of their income. This wage theft drove between 15,000 and 67,000 families below the poverty line. Another 50,000–100,000 already impoverished families were driven deeper into poverty.¹

The USDOL recently rolled out a nationwide pilot program, the Payroll Audit Independent Determination (PAID) program, with the objective to "resolve claims expeditiously and without litigation, to improve employers' compliance with overtime and minimum wage applications, and to ensure that more employees receive the back wages they are owed, faster."² The idea

¹ See Economic Policy Institute, Wage Theft by Employers is Costing U.S. Workers Billions of Dollars a Year (2015) <https://www.epi.org/blog/wage-theft-by-employers-is-costing-u-s-workers-billions-of-dollars-a-year/>

² United States Department of Labor, Wage and Hour Division. PAID Program. <https://www.dol.gov/whd/paid/> Retrieved on 4/9/18.

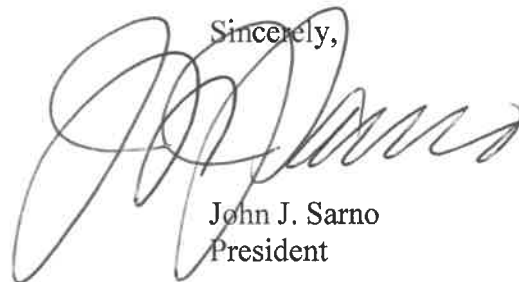
behind a program aimed at NJ employers would be similar – to allow for the resolution of claims and make employees whole under NJ’s classification, wage-hour and wage payment laws.³

There is also a great need to focus education initiatives on the employer community – to remediate problems to make employees whole when violations are discovered. The overall goal of such a program would be to achieve increased compliance through education, training and self-audit measures to ensure employer “buy-in” and cooperation.

Because of its focus on labor and employment issues, EANJ has long partnered with NJLWD in providing accurate compliance information to employers, who after all, are major stakeholders of the Department. For example, from 1996 – 2006, EANJ and Department HR Support staff collaborated on over 300 live seminars around the state to deliver compliance information to employers.

EANJ staff meets with employer-members on a regular and ongoing basis for feedback on various aspects of workplace policy and we are in a position to quickly facilitate the process of bringing employers to the table. Most recently, we have worked with the United States Department of Labor Women’s Bureau in soliciting employer input regarding paid family leave.

We would be willing to discuss these ideas further.

Sincerely,

John J. Sarno
President

³ Self-reporting programs are not new to New Jersey. The New Jersey Department of Environmental Protection and New Jersey Office of the State Comptroller – Medicare Fraud Division both utilize similar self-disclosure programs to promote early discovery and correction of errors. These programs are successful because they allow the agencies to partner with businesses to achieve the mutually shared goal of compliance and, at the same time, permits the departments to allocate their limited resources to more effectively remediate serious violations.