FILED: MAY 5, 2026

LABOR AND WORKFORCE DEVELOPMENT

OFFICE OF THE COMMISSIONER

ABC Test; Independent Contractors

Adopted New Rules: N.J.A.C. 12:11

Proposed: May 5, 2025 at 57 N.J.R. 894(a).

Adopted: _____, 2026 by Kevin D. Jarvis, Acting Commissioner, Department of Labor and Workforce Development

Filed: _____, 2026, as R.2026, d. _____, with non-substantive changes not requiring additional public notice or comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 34:1-20; 34:1A-3.e; 34:11-4.11; 34:11-56a5; 34:11D-11; and 43:21-7g.

Effective Date: _____

Operative Date: October 1, 2026

Expiration Date: _____

Summary of Hearing Officer's Recommendation and Agency's Response:

A public hearing regarding the proposed new rules was held on June 23, 2025 at the Department of Labor and Workforce Development. David Fish, Executive Director, Legal and Regulatory Services, was available to preside at the public hearing and to receive testimony regarding the proposed new rules. After reviewing the testimony presented at the public hearing and the written comments submitted directly to the Office of Legal and Regulatory Services, the hearing officer recommended that the

Department proceed with the new rules with non-substantive changes not requiring additional public notice or comment. The changes on adoption are discussed in detail below.

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals.

Charles Adams.

Joe Affatato.

Fallon Ager-Norman, United Food & Commercial Workers International Union.

Matt Ahman and Todd Buchanan, Transamerica.

Jean Allan.

Christine Amalfe, NJ State Bar Association.

Deborah Carlin.

State Senator Carmen Amato.

Joseph Arite, Guarantee Trust Life Insurance Company.

Marc V. Avelar, Policy Political Consulting.

Alex M. Bailey, PSI, on behalf of the New Jersey Cable and Internet Association.

Thomas Bailey and Rasma Zvaners, American Bakers Association.

Dwight Baker.

Ben Balint, Monroe Moving Pro.

Curt Ball, Fundamental Labor Strategies, Inc.

Jake Barnes, Workplace Justice Lab.

Jeff Beck, Selective Insurance Company of America.

Brian Bianchi, Western Golf Association/Evans Scholars Foundation.

Yarona Boster.

Michael A. Botti, O'Toole Scrivo, on behalf of Lyft, Inc.

Tomothy Boutillier.

Tom Bracken and Michael Egenton, Chamber Alliance, New Jersey Chamber of Commerce (co-signed by local Chambers of Commerce).

Mike Bradley.

State Senator Jon Bramnick.

Chris Briamonte, Nova Wealth.

Micheal Broderick, Teamsters Local Union No. 469.

Melissa Bova and Marc Cadin, Finseca.

State Senator Anthony Bucco.

State Senator John Burziechelli.

Jerry Butler.

Chris Camburn.

David Cannillo, MTI, Inc.

State Assemblywoman Linda Carter.

Robert Castelo, Marine Transport, Inc.

Julianne Pepitone Caughel.

Deb Chadwick.

Annabelle Chan.

David Chavern, ACLI.

Hilary Cherba, Chamber of Commerce Southern New Jersey.

Greta Chinnadurai.

Josh Clarke.

Michael Conk.

John A. Costa, Amalgamated Transit Union, ATU.

Linda M. Czipo, New Jersey Center for Nonprofits.

Jim D’Ambrosio, Cetera Investors.

Sylvia D’Andrea.

State Assemblyman Joe Danielsen.

Sarah Davies, International Franchise Association.

Karen Decker.

Jeannine DeFoe.

Eric DeGesero, Edge Consulting.

State Senator Patrick Degnan.

John F. Deitelbaum, Mass Mutual Life Insurance Company.

Michael D. Deloreto, Gibbons, PC, on behalf of the New Jersey Food Council.

Emily M. Dickens, SHRM.

Judy DiClemente.

State Senator Patrick Diegnan.

Nancy Difazio.

Sophie Difazio.

Chuck DiVencenzo, National Association for Fixed Annuities.

State Assemblywoman Margie Donlon.

Margaret Durkin, TechNet.

State Assemblywoman Dawn Fantasia.

Sally Dworak-Fisher, National Employment Law Project.

David Easton.

Michael Edwards, Assured Partners.

Michael Egenton, New Jersey Chamber of Commerce.

Jarrett M. Farrell, Cedar Risk Management.

Michele Farrell and Alfonse Raffa, New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc.

Bill Feeney.

Howard Feinberg, Insights Association.

Paulo Flor.

State Assemblywoman Vicky Flynn.

Elissa Frank, New Jersey Business and Industry Association.

Marc Freedman, U.S. Chamber of Commerce.

State Assemblyman Roy Freiman.

Jon Fulford.

John Galvin, Tom Weidemann, David Antrilli, and Todd Lebowitz, American Automobile Association Clubs of New Jersey.

Kremena Gancheva, WeLink Transport, LLC.

Tom Gannon, LPL Financial.

Debra Gardner, Public Justice Center.

Jan Gates, PackWise Consulting.

Scott Geibel.

Paulo Giacomoni, Ph.D., Insight Analysis Consulting.

Andrew Gigante.

Philip Gigante.

Jessica R. Giroux, American Securities Association.

Melissa Grace Goldberg.

State Senator Vin Gopal.

Jose Ramon Gonzalez, Equitable.

Staci Grant, National Association of Benefits and Insurance Professionals, New Jersey Chapter.

Chavin Haines.

Mary Hammett.

Lisa Harrah.

LaChan V. Hannon, Ph.D, New Jersey Association of Colleges for Teacher Education.

Scott R. Harrison, National Alliance of Life Companies.

Aaron Hauptman, Gibson Dunn & Crutcher, LLP, on behalf of Uber Technologies, Inc.

Ryan W. Heinemann, Vice President and General Counsel, Northwestern Mutual Life Insurance Company.

Lauren W. Herman, Make the Road New Jersey.

Russell A. Hollrah, Coalition to Promote Independent Entrepreneurs.

John Holub and David French, New Jersey Retail Merchant Association and the National Retail Federation.

Kevin L. Howard, Western and Southern Financial Group.

Kristi M. Howell, Burlington County Regional Chamber of Commerce.

Rebecca Hughes, Advocacy and Management Group on behalf of Instacart.

Pamela J. Hunter and Will Melofchik, National Council of Insurance Legislators.

State Assemblyman Michael Inganamort.

Robby Jackson and Kristin Sharp, Flex Association.

State Senator Gordon Johnson.

Robert Johnson.

Richard Jones, Guardian Life Insurance Company.

Paul P. Josephson, Duane Morris, LLP, on behalf of the Financial Services Institute.

John M. Kaczkowski, Western Golf Association.

Debbie Abrams Kaplan.

Ann M. Kappler, Prudential Financial.

State Assemblyman Robert Karabinchak.

Lyndsey L. Kaufman and Seth A. Miller, Cambridge Investment Research, Inc.

Kim Kavin, Fight for Freelancers.

Dan Kennedy, NAIOP NJ Chapter.

James Kiley and Zoe Gruber, Security Benefit.

Mike Kuczinski.

Kevin Kurdziel.

Bradford J. Lachut, Professional Insurance Agents of New Jersey.

State Senator Joseph Lagana.

Greg Lalevee and Mark Longo, Engineers Labor-Employer Cooperative, the Labor-Management Fund of Operating Engineers Local 825.

Carol Notias Lambos, The Lambos Firm, LLP, on behalf of the Port of New York and New Jersey Sustainable Terminals Services Agreement.

Denise Lanza, Assistant Deputy Director, Morris County Park Commission.

Steve Liberti, Harbor Freight Transport Corp.

Pete Lieb, HCB Distribution.

Lisa (last name illegible), LRG Photography.

Claudine Lombardo.

Jonathan H. Lomurro, New Jersey Association for Justice.

Melanie Stratton Lopez, Workplace Justice Lab.

Stephen Lyman, Maritime Association of the Port of NY and NJ.

Alex MacDonald, Littler Mendelson, Workplace Policy Institute.

Bradley Madsen.

John Madura.

Michael Manginelli, National Association of Insurance and Financial Advisors.

Joshua Marcigliano.

Daniel R. Martin, D.R. Martin and Associates.

Nina Mast, Economic Policy Institute.

Joebeth McDaniel.

Robert McDonald.

Michael McDonnell, New York Life Insurance Company.

Brian McFarland.

State Senator Angela McKnight.

Martin McNees, Madison Avenue Securities.

Roderick McRae III, New Jersey State Golf Association.

John Meetz, Wholesale and Specialty Insurance Association.

John Migueis, NJ21st.

Elizabeth A. Milito, National Federation of Independent Business.

Kevin P. Monaco, NJ Asphalt Pavement Association and the NJ Construction Materials Association.

Brad Montgomery.

State Senator Paul Moriarty.

William Mullen, New Jersey Building and Construction Trades Council.

Cynthia A. Myer, Ridgewood Moving Services, Co.

Christine Myers, Employers Association of New Jersey.

State Assemblyman Gregory Myhre.

Ester Nunez.

Susan Oberlies, The Lincoln Investment Group.

Joseph P. Okaly, New Horizons Wealth Management.

Karen Olanrewaju, Sunny Days Early Childhood Developmental Services, Inc.

Camille A. Olson, Richard B. Lapp and Kyle D. Winnick, of Seyfarth Shaw, LLP, on behalf of Coalition for Workforce Innovation.

James O'Neill.

Patrice Onwuka, Director, Center for Economic Opportunity Independent Women's Forum.

Barbara Opsasnick.

Johnny Ott.

Veronica Ovalles-Taveras.

Dr. Liya Palagashvili and Revana Sharfuddin, Mercatus Center at George Mason University.

Kassandra Perez-Desir, DoorDash.

State Assemblywoman Luane Peterpaul.

Valerie Piacenza.

Mark Quinn, Cetera Financial Group.

Michael L. Razze and Frank A. Jones, Big I New Jersey.

Richard J. Reibstein, Troutman Pepper Locke, LLP.

Ben Reichberg, Blitz Transportation, LLC.

Shannon Reid, Raymond James Financial Services.

Abi Rivenburgh, Allen & Stults Co.

Dr. Bill Rivers, Association of Language Companies.

Mary Kay Roberts, Riker Danzig, on behalf of the American Property Casualty Insurance Association, Insurance Council of New Jersey, the National Association of Mutual Insurance Companies, and the Securities Industry and Financial Markets Association.

John D. Rogers and Kate Ro, New Jersey Manufacturers Insurance Group.

Lisa Rouh.

Pual Rozenberg, Shipping Association of New York and New Jersey.

State Assemblyman Brian Rumpf.

Anthony Russo, Commerce and Industry Association of New Jersey.

Dr. Francine A. Ruzich and Kathy McEwan, Vista Rehabilitation Services.

Wardell Sanders, New Jersey Association of Health Plans.

State Senator Paul Sarlo.

State Assemblyman Gerry Scharfenberger.

State Senator Holly Schepisi.

John Schlip.

Bradley Schurter.

Bruce Shapiro and Douglas M. Tomson, New Jersey Realtors.

Brian R. Shoemaker, State Farm Insurance Companies.

Robin Shreeves.

Ana Sikavica.

Lena Simet, Ph.D., Economic Justice Rights Division, Human Rights Watch.

Jen Singer.

Mandy Sleight.

Chuck Smiley, ASGS/EVOS.

Jonathan Smith, Coalition for Healthy Ports NY/NJ.

Amy Snyder.

Bernie Snyder, IUPAT District Council 21.

Edward Soorikian.

State Senator Parker Space.

Brian Speronello.

State Assemblyman Sterley Stanley.

Amanda Stone, New Jersey Restaurant and Hospitality Association.

Jay D. Strother, International Warehouse Logistics Association.

Mylena S. Sutton.

Keith Talbot, Legal Services of New Jersey.

Keith Thibodeau.

Dina Trunzo.

Brittany VanDerBill.

Jill VanNostrand, National Association of Insurance and Financial Advisors of New Jersey.

Robyn A. Veasey, New Jersey Office of the Public Defender.

Julia Verderosa.

Dana Veronica.

Sam Ward, Sammons Financial Group.

Karon Warren.

Sharon Waters.

John W. Webb, Direct Selling Association.

Eric Weinstein, Mass Mutual.

Nick Wertsch, Demos.

Annmarie Westerfield, Cupo Insurance Agency.

Lisa White.

Ruth Whittaker and Brianna January, Chamber of Progress.

Bill Williams, Ameriprise Franchise Advisors Group.

State Senator Benjie Wimberly.

Connor Womack.

Sarah E. Wood, Insured Retirement Institute.

Charles Wowkanech, Laurel Brennan and Eric Richard, New Jersey State AFL-CIO.

Lisa Yakomin, Association of Bi-State Motor Carriers.

Joy Yagid.

Lorraine Zdeb.

State Senator Andrew Zwicker.

Multiple tranches of identical or near identical form letters were submitted to the Department by the following individuals:

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Adriana Lyp; Adriana Ward; Adriane Balliet; Adriane Medeiros; Adrien Bailey; Adrienne Pfaff; Adrienne Sanders; Afrika Goode; Afzal Sharif; Agnes Zajack; Agus Kong; Agustin Lopez Jr; Ahmed Amety; Ahmed Elmarasy; Ahmed Jindiyah; Ahmed Mohamed; Ahmer Malik; Aida Cedeno; Aida Davis; Aida Edmonds; Ailee Mishkin; Aileen Barrios; Aileen Mishkin; Aime Zapata-Piccirillo; Aimee Gaudian; Aimee Loving; Aimee Newman; Aimee Salapka; Aj Sabath; Ajay Shroff; Ajay Singh; Akash Savaliya; Akeem Brooks; Akhtar Hussain; Akshay Chopra; Al Kincey; Al Molaf; Alan Antonucci; Alan Babbitt; Alan Kramer; Alan Luxardo; Alan Myers; Alan Pace; Alan Soden Sr; Alan Sternberg; Alan Wilkins; Alana Barrett; Alatay Denard; Alba Abbate; Alba Diaz; Alba Linares; Alba Velez; Albanyelska Perez; Albert Bautista; Albert Burgos; Albert Chillemi; Albert Dejesus; Albert Murray; Albert Salmorin; Albert Sorg; Albert Sutton; Albert Wasson; Aldrian Atienza; Aleasha Brown; Alejandro Arce; Alejandro Maria Herrera; Alejandro Rodriguez; Aleksandr Tsvayner; Alena Ciccarelli; Alena Martucci; Alene Odonnell; Alex Arnold; Alex Bonifacio; Alex Brito; Alex Castro; Alex Durand; Alex Grirorieff; Alex K Kigen; Alex Lopez; Alex Lynn; Alex Mercogliano; Alex Michalski; Alex Philip; Alex Vera; Alexa Bogan; Alexander Agor; Alexander Borja; Alexander Garcia; Alexander Golshteyn; Alexander Mason; Alexander Parker-Magyar; Alexander Rowe; Alexandra Anillo; Alexandra Estevez; Alexandra Pino; Alexandra Tabibnia; Alexis Bahamundi; Alexis Bailey; Alexis Diaz; Alexis Doss; Alexis Jaffray; Alexis Jaffray; Alexis Kulinski; Alexis M. Bailey; Alexis Nigro; Alexis Quaglieri; Alexis Smith; Alexis Solomon; Alfatir Short; Alfie Hicks; Alfonso Hipolito Lacayo; Alfred Brouillard; Alfredo Colalillo; Alfredo Ferreira; Alfredo J Abad Jr; Alfredo Mendoza; Alfredo Quebrado; Algenis Perez; Ali Jafri; Ali Nadeem; Ali Remig; Ali Sheikh; Ali Torabi; Alice Ames; Alice Buther; Alice

Chan; Alice Faas; Alice Kirkland; Alice Leblanc; Alice Murphy; Alice Olson; Alice Pfister; Alicia Alicea Lopez; Alicia Harewood; Alicia Holmes; Alicia Irizarry; Alicia John; Alicia Lodato; Alicia Lunarobledo; Alicia M. Pearson; Alicia Motta; Alicia Pimentel; Alicia Taylor; Alicr Horbal; Alison Micucci; Alison Rosato; Aliya Youssoufi; Aliyah Shaw; Aliza Tortosa; Alla Roisenberg; Allah Rakhha; Allan B Rigg; Allan Recarte; Allan Vigil; Allen Brouwer; Allen Chackman; Allen Cullum; Allen Delsordo; Allen Maizes; Allen Peduto; Allen Regan; Allen Roth; Allie Brownlow; Allie Sinex; Allison Brocklebank; Allison Graham; Allison Urspruch; Allison Valenti; Allisyn Abrams; Allyson Machiski; Alma Hedern; Alma Williams; Almenta Foster; Alpesh Rathod; Alphonso Giles; Alssene Saintilus; Althea Welch; Alton Bodie; Alvaro Ramirez; Alvaro Rodriguez; Alvaro Tabares; Alvin Adams; Alvin Ames; Alvin Riley; Alvin Tortoriello; Alysa Katz; Alyssa Lee; Alzh Eime; Amado Santiago; Amal Desai; Amalie Vollenbroek; Amanda Ames; Amanda Bowsky; Amanda C. Hibbler; Amanda Catalano; Amanda Cox; Amanda Fullman; Amanda Garcia; Amanda Harris; Amanda Lipira; Amanda M Lechenet; Amanda Mastropolo; Amanda Mcgill; Amanda Nachman; Amanda Solheim; Amanda Tirone; Amanda Tranchita; Amanda Voetsch; Amando Montoya; Amara Kamara; Amarya Feinberg; Amber Cipriano; Amber Dehaas; Amber Lecras; Amber Rodriguez; Ameidar Ramirez; Amelia Cummings; Amelia Stebner; Amer Mir; Amie Mcconnell; Amir Cartwright; Amir F Khan; Amirah A San Emeterio; Amirah Hussain; Amiran Tchikadze; Amish Rao; Amit Raha; Amit Soni; Amitha Raju; Amoge Isienyi; Amr Mohammed; Amrita Tiwari; Amrutha Rajan; Amtul Noor; Amutha Arumugam; Amy Celento; Amy Fong; Amy Fuller; Amy Gentile; Amy Holcomb; Amy Hu; Amy Kisby; Amy L Herneker; Amy Martinez; Amy Monteiro; Amy Ott; Amy Sakowski; Amy White; Ana Adubato; Ana

Amorim; Ana Barnett; Ana Corro; Ana Dirienzo; Ana Garcia; Ana M Soto; Ana Melgar; Ana Pedraza; Ana Pimenta; Ana Quidgley; Ana Quinones; Ana Rivas; Ana Rodriguez; Ana Silva; Ana Soares Zschoche; Anabella Gatto; Anaisa Santos; Analu Silva; Anand Canchi; Anand Shankaran; Anand Thaker; Anant Sharma; Anas Allan; Anastasiia Petrova; Anatoliy Kamenetskiy; Anderson Anderson; Anderson Rosemarie; Andi Macdonald; Andra Keaton; Andrae Baul; Andre Cabral; Andre Drew; Andre Long; Andre Peart Laney; Andrea Allen; Andrea Arocho; Andrea Barber; Andrea Fox; Andrea Ginnelly; Andrea Handschuh; Andrea Huff; Andrea Jarrar; Andrea Jeter; Andrea Perez; Andrea Pescoran; Andrea Savage; Andrea Smith; Andrea Soleyn; Andrea Tavarez; Andrea Vargas; Andrea Verdier; Andrea Zenglin; Andreia Simoes; Andres Jara; Andres Jaramillo; Andres Rosa; Andrew Anderson; Andrew Buchko; Andrew D'Andrea; Andrew Debkowski; Andrew Fanelli; Andrew Gagliardi; Andrew Greenaway; Andrew Harris; Andrew J Cohen; Andrew Michalchuk; Andrew Morris; Andrew Moss; Andrew Palermo; Andrew Pancoast; Andrew Parris; Andrew Perseghin; Andrew Tietjen; Andrew Tranoris; Andrew Vito; Andrew Woods; Andrianna N Gerolimatos; Andris Taveras; Andy Gonzalez; Andy Guglielmo; Andy Shipe; Andy Skara; Angel Abarca; Angel Amore; Angel Fernandez; Angel Garcia; Angel Rivera Roman; Angel Torres Correa; Angel Verastegui; Angela Abraham; Angela Campbell; Angela Dominguez; Angela Grandberry; Angela Green; Angela Jacobs; Angela Jones; Angela Kahn; Angela M Choo; Angela Mccormick; Angela Peters; Angela Smith; Angela V. Mcknight; Angela Wright; Angelica Pierre; Angelica Tamayo-Sanchez; Angelica Zagar; Angelina Cava; Angelina Gonzalez; Angelique Rose; Angell Robinson; Angelo Colon; Angelo Fergone; Angelo Gonzalez; Angelo Mari; Angelo Pavia Ramirez; Angelo Taormina; Angelo

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Colvin; Ashwini Dhange; Asia Smith; Asihere Battiste; Aston Young; Astromelia Gallegos; Ataisia Lewis; Atakan Ozdemir; Athena Gannon; Atif Aslam; Atilla Seckin; Attilio Quintanilla; Aubrey Jacobs; Audra Brewington; Audrey Golden; Audrey Griffin; Augusta Wellington; Augusto Verissimo; Aurea Carvajal; Autumn Anderson; Avrohom Schwinder; Awilda Esteves; Axel Alonzo; Ayan Chattaraj; Ayden H; Ayoub Ezzoubi; Aysia Luna; Aza Vandright; Azhar Munir; B Deluca; Babacar Diop; Bagualito Lairihoy; Baiyina Smith; Bambi Melnick; Barbara Allen; Barbara Anama; Barbara Barrett; Barbara Bauer; Barbara Bifulco; Barbara Brown; Barbara Burd; Barbara Campbell; Barbara Cannis; Barbara Carroll; Barbara Carsone; Barbara Chirico; Barbara Collins; Barbara Coscarello; Barbara Crone; Barbara Cummings; Barbara D Dickens; Barbara Dillon; Barbara Dolan; Barbara E Johnson; Barbara Elem; Barbara Elliott; Barbara Elsayed; Barbara Falisi; Barbara Farrell; Barbara Fitzgibbon; Barbara Fox; Barbara Goldberg; Barbara Goldstein; Barbara Greenhalgh; Barbara Holiday; Barbara Hotonu; Barbara J. Kiel; Barbara Jackson; Barbara Johnson; Barbara Kaczocha; Barbara Kerner; Barbara Kist; Barbara Kunz; Barbara L Brady; Barbara Lessig; Barbara Lobron; Barbara Long; Barbara Lysenko; Barbara Mackey; Barbara Martinelli Lasaracina; Barbara Mcnair; Barbara Newkirk; Barbara Nokes; Barbara Phillips; Barbara Raymond; Barbara Rudine; Barbara Schofield; Barbara Siegel; Barbara Steiner; Barbara Strothers; Barbara Sweigart; Barbara Tokar; Barbara Trimble; Barbara Walton; Barbara Wells; Barbara Williams; Barbaran Williams; Barnabas Davis; Barney Kent; Baron Ringler; Barrett Pickett; Barrey Danvers; Barry Andrews; Barry Gordon; Barry Ingram; Barry Kaplan; Barry Moore; Bart Fahrner; Bartholomew Petillo; Batbara Cerquitella; Bayron Martinez; Bea Louis; Bea Samol; Beata Unrat; Beatrice Johnson; Beatrice Pollard; Beatrice

Xenos; Beatriz Rodriguez; Beckie Sheppard; Belen Iza; Belinda Rasweiler; Belindamaire Gosner; Bella Asnis; Belleza Corporal; Ben Dossantos; Ben L Quiling; Ben Milgrom; Benedetta Bohi; Benetly Gibbons; Benjamin Burklow; Benjamin Cheslow; Benjamin Gismondi; Benjamin L Rosenthal; Benjamin Neblock; Benjamin Norman; Benjamin Pastor Jr; Benjaminm Gonzalez; Benjie E. Wimberly; Bennie Allen; Benny Tafoya; Benny Tiller; Benvinda Fernandes; Berenice Mejia; Bernadette Grabert; Bernadette Leiby; Bernadette Monari; Bernadine Battle; Bernard Jackson; Bernard Kircher; Bernard Newby; Bernard Stelacone; Bernard Yohanna; Bernarda Nunez; Bernice Mahadeo; Bernice Mulvihill; Bernice Wuttke; Berrisford Burke; Berta I Salazar Mazariegos; Bertha Moran; Bertin Lopez; Beth Anne Mcgrogan; Beth Estomin; Beth Goodenough; Beth Guimes; Beth Leonard; Beth Saunderlin; Beth Wagner; Bethanne Vedro; Betsy DoÃ£Â±Ãƒ©; Betsy Englehart; Bette A Finley; Bettina Carson; Bettina Mcgrath; Betty A Slovick; Betty Baker; Betty Barszczewski; Betty Geraci; Betty Hand; Betty Lockett; Betty Pierce; Betty Scott; Betty Sulton; Betty Tharakan; Betty Thorpe; Betty Wise; Beveran Russell; Beverley Barrett; Beverley Brown; Beverly Altomare; Beverly Archie; Beverly Artis; Beverly Bowen; Beverly Capobianco; Beverly Cieplik; Beverly Fernandez; Beverly Harrison; Beverly Love; Beverly Shannon; Beverly Simpson; Beverly Streater; Beverly White; Bhanmatie Gangaram; Bharat Patel; Bhavesh G Mehta; Bianca Carranza; Bianca Concepcion; Bianca P. Difranco; Bianca Perez; Bill Algokce; Bill Boudwin; Bill Bouffard; Bill Bowler; Bill Clayton; Bill Cuono; Bill Farrell; Bill Fennmore; Bill Groendyke; Bill Kelly; Bill Kish; Bill Koranteng; Bill Lallone; Bill Magna; Bill Swiston; Billy Eells; Billy Hernandez; Bimalendu Kayal; Bin Wang; Binui Rodriguez; Birtha Hall; Bishnu Thapa; Blanca Rosario; Blanca Torres; Blanca Vazquez;

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Douglas Jones; Douglas Kerken; Douglas Mayfield; Douglas Mcdermott; Douglas Perman; Douglas Pickell; Douglas Stevens; Dr Bernard Sabbagh; Dr Ron Silikovitz; Dr. Liya Palagashvili; Draper Sandra; Dre Gonzalez; Drew Doria; Drusilla Davis; Duane Britt; Duane Sunby; Duane Weil; Duliaprima Cowang; Dumar Rivera-Herrera; Duraisingam Henry ; Duval Brown; Duverlan Rene; Dvigesh Patel; Dwaine Mariano; Dwayne Morris; Dylan Boorstein; Dylan Rate; Dylan Sevean; Dyneeka Mcpherson; E Jane Hayden; Earl Boone; Earl Coverdale; Earl Gardner; Earl Geer; Earl Jones; Earline Williams; Eartha Jeter; Ebony Burgos; Ebony Perez; Ebony Reyes; Ebtisam Omran; Ed Egee; Ed Horner; Ed Kedzierski; Ed Lemmo; Ed Mayer; Ed Roberts; Ed Smith; Eddie Jones; Eddie Kortright; Eddie Rivera; Eddie Thomas; Eddy Closeil; Edeltraud Pfannerer; Eden Sonta; Edgar Muniz; Edgar Parker; Edgar Ribon; Edgar Santa Maria; Edgardo Caraballo; Edilson Goncalves; Edith Dickey; Edith Harris; Edith Picano; Edith Yeung; Edmar Ortiz; Edmir Dymleku; Edna Barcenilla; Edna Besta; Edna Harrell; Edna Long; Edna Patrick; Edna Rizzo; Edna Stewart; Edna Vanderhoof; Edward Artis; Edward Babula; Edward Ballard; Edward Bisch; Edward Cenneno; Edward Cook; Edward Doyle; Edward Dzialo; Edward Foster; Edward Goodman; Edward Halicki; Edward J Johnson Jr; Edward Jud; Edward Kaminski; Edward Keebler; Edward Kovac; Edward Magenheimer Magenheimer; Edward Matkowski; Edward May; Edward Mcconnell; Edward Mcnamara; Edward Mulligan; Edward N Sanchez Diaz; Edward Noack; Edward Palmer; Edward Price; Edward Shivers; Edward Steinmetz; Edward Sweeney; Edward Todd; Edward Urbanski; Edward Walsh; Edwardo Nieves; Edwin Garcia; Edwin Malia; Edwin Morales; Edwin Pearson; Edwin Polanco; Edwin Pujols; Edwin Remus; Edwin Walker; Eileen Blum; Eileen Briamonte; Eileen Cilino; Eileen

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Eunice Sanchez; Ev Moore; Eva Alvarez; Eva Evans; Eva Meyers; Eva Middleton; Evan Hunt; Evan Jakub; Evan Reiner; Evan Walsh; Evangeline Cagas; Evans Amoako; Eve Littles; Eve Nelson-Barry; Evelina Cope; Evelyn Aguayo; Evelyn Allen; Evelyn Ambrose; Evelyn Cancel; Evelyn Cruz; Evelyn Lugo; Evelyn Mcmillian; Evelyn Melendez; Evelyn Sawey; Evelyne Lucien; Evendia Savage; Everett Coleman; Eydie Brandt; Eyup Saydam; Fabian Bazan; Fabian Ray; Fabiane Goncalves; Fabio Duarte; Fabio Trezza; Faiad Aliiev; Faigy Kurtz; Faith Raroha; Falisha Booker; Fangyu Liu; Fantasia Marrow; Farah Delpilar; Farah Mitchell; Farid Habashy; Farkerah Ellis; Farnaz Solomon; Farod Robinson; Farzana Shah; Fatima Harris; Fatimah Leggett; Fatoumata Konate; Fay Minkin; Faye Conway; Fazliddin Naimov; Fe C Planas; Fe Deguzman; Fei Wu; Felicia Bell; Felicia Roch; Felicia Teabout; Felipe Nolasco; Felipe Rebatta; Felix Hassid; Felix Jay; Felix Mendoza; Felix Rivera; Felix Stoliar; Fenton Barnes; Fequiere Jeanbaptiste; Fernanda Valdes; Fernando Ferreira; Fernando Guzman; Fernando Leyva; Fernando Yepez; Feruza Abdunasimova; Fetlor Estiverne; Fidel Cordero; Filippos Zografos; Fiorentino Anillo; Firstname Donald Thomas; Fithgerald Sekyere; Flor Cano; Flor Mcginty; Florence Chen; Florence Evans; Florence Hill; Florence Yusko; Floretta Stryker; Florida Rodrigo; Fonda Mojka; Foram Shah; Fortunato Delaena; Fortunato Iacovelli; Fouad Sarkardei; Fran Rosenbluth; Franca Ryan; Frances Bannon; Frances Derosa; Frances Donohue; Frances Gonzales; Frances Koff; Frances Medico; Frances Nee; Frances Oconnor; Frances Stalb; Frances Strausser; Frances Van Horn; Francesco Toia; Francia Quintana; Francine Bastone; Francis Boardley Iii; Francis Crawford; Francis Evsngelina Cruz; Francis Juliano; Francis Murphy; Francis Rodriguez; Francis Roselli; Francisca Antigua; Francisca Hernandez; Francisca

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Gbenga Akintitan; Ge Dopp; Gedeon Pinedo; Gee Buonocore; Gelin Wilnelson; Gemma Luccioni; Gene Ascolese; Gene Bianowicz; Gene Colacino; Gene Furman; Gene Raffensperger; Gene Reagan; Gene Silvestro; Genesis Cortez; Geneva Carr; Genevieve Maceri; Gennaro Mirabella; Geoffrey Coats; George A. Zelhof; George Ahumada Mendoza; George Bellace; George Brown; George Capertina; George Cary; George Chermark; George Condos; George Cotterell; George Culleny; George Davis; George Espinal; George Fong; George Greene; George Hauck; George Jenik; George Jenkins; George Jr; George Krajeski; George Krajeski ; George Kraynak; George Lista ; George Mccumber; George Mortensen; George Nan; George Nichols; George Prince; George Sabel; George Simonovich; George Speidel; George Stampolis; George Sundown; George Tuller; George Turner; George Vaneman; Georgean Arsons; Georgette Atallah; Georgette Eble; Georgette Lotito; Georgette Oconnell; Georgia Mauro; Georgina Mcglyn; Georgy Elmera; Gerald Louis; Gerald Pflum; Gerald Sainsot; Gerald Simons; Gerald Woodhouse; Gerald Zullo; Geraldine Cuesta; Geraldine Dicostanzo; Geraldine Fede; Geraldine Haskins; Geraldine Robbins; Geraldine Smallwood; Geraldine Sperling; Gerard Alston; Gerard Carlton; Gerard M. St-Cyr; Gerard Perry; Gerardo S Malanga; Gerardo Valverde; Geri Hickman; Germaine Messineo; Geronima Bolante; Gerri Gullace; Gerri Jordan; Gerri Tedesco; Gerry Brahney; Gertrude Mangum; Gia Visconti; Giang Hoang; Gianni Rivera; Gigi Smarra; Gihan Atapattu; Gikmar Franca; Gil Feldman; Gil Meeker; Gilan Abrams; Gilbert Mills; Gilbert Rodriguez; Gina Cobb; Gina Dunko; Gina Gonzalez; Gina Izquierdo; Gina Kidd; Gina Macan; Gina Malanga; Gina Rao; Gina Romero; Gina Rotondo; Gina Sullivan; Ginamarie Tucci; Ginlia Morris; Ginny Moore; Giosue Danna; Giovanna Cruz; Giovanni

Castro; Giovanni Reyes; Girard Carrozza; Giscard Assaad; Gisela Graf; Gisela Velez; Giselle Williams; Giulio Cavallaro; Gizelle Carreira; Gladys Perez; Gladys Rosario; Glen Noyes; Glen Wittersheim; Glenda Piedra; Glenda Skibicki; Glenn Arias; Glenn Cohen; Glenn Hammell; Glenn Jenkins; Glenn K. Coutts; Glenn Noone; Glenn Seidel; Glenn Yanofsky; Gloria Abadiotakis; Gloria Adams; Gloria Birulin; Gloria Crews; Gloria Edwell; Gloria Geathers; Gloria Grubbs; Gloria Illingworth; Gloria Lachenauer; Gloria Lesser; Gloria Macal; Gloria Madolid; Gloria Marin; Gloria Merkent; Gloria Portal; Gloria Provilon; Gloria Songer; Gloria Vega; Godofredo Pampo; Grace Balmann; Grace Beckett; Grace Defillipo; Grace Gold; Grace Kang; Grace Pai-Leonard; Grace Woo; Grant Lucking; Grayson Harris; Grazyna Torbus; Grechely Lopez; Greg Call; Greg Dozier; Greg Ensel; Greg Kubina; Greg Lodato; Greg Marto; Greg Mcpeek; Greg Rosato; Gregg Carey; Gregory A Company; Gregory Amis; Gregory Bernadel; Gregory Carr; Gregory Concepcion; Gregory Fess; Gregory High; Gregory Lembrich; Gregory Maffei; Gregory Molini; Gregory Pilkington; Gregory Pistone; Gregory Pittman; Gregory Richburg; Gregory Robinson; Gregory Scott; Gregory Webster; Greily Marinepena; Gretchen Mendel; Guilda Alvarez; Guillermo Yataco; Guilletma Quintana; Guiseppe Bancheri; Gurpeet Singh; Guy Hembling; Gwendolyn Owens; Gwendolyn Williams; Gyneen Meyers; Gypsee Grey; Haig Gulian; Hakiem Anderson; Hal Soden; Haley Swenson; Halina Dabrowska; Halina Hryckowian; Halle Stradford; Hamaun Persaud; Hanaa Abdelmalek; Hanan Tadros; Hananiah Conrado; Hanna Shin; Hannah Daru; Hans H. Kim; Hansini Jogee; Hardy Mckibben; Harish Karlekar; Harlan Tuckman; Harold Bird; Harold Hill; Harold Menzel; Harold Tillson; Harriet Cook; Harriet Grodberg; Harriet Kyrous; Harriet Morton; Harriet Weber; Harris Suh; Harry Bowers; Harry Clark;

Harry Elmore; Harry Haynicz; Harry Hoffman; Harry Kemple; Harry Patel; Harry Vargas; Harshad Shah; Harvey Cole; Harvey Kinley; Harvey Klein; Hasmig Nazarian; Hasona Randall; Hassan Elsharkawi; Hassan Guyton; Hassan Muhammad; Hassana Senno; Hattie Jonah; Haylee Posso; Hayley Mcateer; Hazel Bates; Haziah Walker; Heather Allen; Heather Benu; Heather Buis; Heather Farrell; Heather Irwin; Heather Pierre; Heather Smith; Heather Stetz; Heather Vanauken; Heather Weimer; Hector Monsalve; Hector Monzon; Hector Morales; Hector Watson; Heidi Lang; Heidi Sumek; Helen Deutsch; Helen Dury; Helen Figueroa; Helen Frazier; Helen Gorospe; Helen Ivey; Helen Lawler; Helen Mastanduno; Helen Mcqueen; Helen Mills; Helen Oneill; Helen Pastrof; Helen Price; Helen Rein; Helen Suchocki; Helen Trabucco; Helen Vandriel; Helena Moskaluk; Helene Marley; Hemal Patel; Hemali Desai; Hemanth Lokesha; Hend Ghattas; Henry Demnis; Henry Espinosa; Henry Fredericks; Henry Gillardon; Henry Goh; Henry Gotlob; Henry Kobelski; Henry Land; Henry Lehmann; Henry Liao; Henry Lopes; Henry Michie; Henry Scheyer; Heonju Pyun; Herbert Brown; Herbert Yarbrough; Heriberto Aquino; Herminia Delrosario; Hernando Ospina; Hersh T; Heshimu Johnson; Hickey Tanya; Hilary Chebra; Hilda Gonzalez; Hilda Mager; Hilliard Turnipseed; Himanshu Sheth; Himansu Desai; Hiram Soto; Hisahn Ballard; Hiu Y Wong; Hoby Gatson; Hollace Peele; Holly Alemany; Holly Blue; Holly Booton; Holly Capille; Holly Jahn; Holly Mitchell; Holly Padderatz; Holly Trinka; Hope Goodell; Hope Vansickle; Horace Montaque; Horace Rojan; Howard Bryan; Howard Fienberg; Howard Mason; Howard Peters; Howard Shinn; Hubert Watson; Hudson Morris; Hudson Ribas; Huey Cheng; Hugh Harris; Hughj Donaghue; Hugo Aguilar; Hugo Bonafede; Hugo Chavez; Humphery Gordon; Hunter E Hughes; Hunter Smith; Huong Dao; Hyresa Lett; Hyunjung

Kim; Hyunsuk Moon; Ian Callahan; Ian Gallagher; Ian Grice; Ian Lovegrove; Iandra Marit; Ibad Ul Haque Siddiqi; Icardson Saint-Jean; Idalia Alvarez; Idalia Arias; Idania Rivera; Idrees Mccrimmon; Ieasha Dispagna; Ignacio Morales; Igor Lavitas; Ikes Shillingford; Ikram Ziyadeh; Ilissa Micciulli; Iluminada Gonzalez; Ilya Bosoy; Ilya Sokolsky; Imani Sumlin; Imani Tho; Imari Marcel; Imtiaz Fazal; Ina Blackweii; Indira Bhowanidin; Indira Grullon; Ingrid Delacruz; Ingrid Esser; Ingrid Salazar; Ingrid Woerner; Inhwan Kim; Inna Lapidus; Inorbelio Carballo; Iovanna Rios; Ira Brooks; Ira Rimer; Iraida Carranza; Irene Daniels; Irene Edelson; Irene Kidd; Irene Stolte; Irene Troland; Irina Arsenieva; Irionne Williams; Iris Banks; Iris Colon; Iris Del; Iris Gutin; Iris Johnson; Iris Lizardi; Iris Mitchell; Iris Rivera; Iris Roda; Iris T Mcmanus; Iris Ward; Irma Brainard; Irma Fernandez; Irma Medina; Irving Hudson; Iryna Nazirbaeva; Isaac Allman; Isaac Amartey-Vondee; Isaac Marmolejos; Isaac Pernell; Isabel Castellar; Isabel Veguilla; Isela Mccrary; Ishan Deva; Isiah Baldwin; Isiah Howell; Isiah Peagler; Israel Mejia; Issam Sayegh; Ivan Chavez; Ivan Huerta; Ivan Pacheco; Ivette Perez; Ivette Rodriguez; Ivonne Webb; Ivonnette Crespo; Ivy Brenner; Ivy Velez; Izetta Roberts; Izmir Bako; J S; J Serrano; J W; J Wess; Jabril Gerald; Jacek Iwinski; Jacek Kaczocha; Jack Beccu; Jack Benintende; Jack Blair; Jack Cliff; Jack Conklin; Jack Desantis; Jack Fields; Jack Helmstetter; Jack Jacobi; Jack Kuiken; Jack Lally; Jack Lutes; Jack Olsen; Jack Reiner; Jack Schaeffner; Jack Spehn; Jackeline Berrios; Jacki Frank; Jackie Becerra; Jackie Cassa; Jackie Lagerquist; Jackie Leale; Jackie Ondimu; Jackie Perez; Jackie Prado; Jackie Rayner; Jackie Scott; Jackie Trinity; Jackie Unangst; Jackie Warfle; Jackie Weilheimer; Jackie Yllescas; Jackson Jack; Jaclyn Applegate; Jaclyn Lafrennie; Jacob Dlallas; Jacob Mor; Jacob Thomas; Jacody Moore; Jacquel Lozada;

Jacqueline Ayala; Jacqueline Barrales; Jacqueline Bess; Jacqueline Bowling; Jacqueline Braxton; Jacqueline Coleman; Jacqueline Davis; Jacqueline Gallman; Jacqueline Gillick; Jacqueline Green; Jacqueline Griggs; Jacqueline Holt; Jacqueline Kelly; Jacqueline L Naughton; Jacqueline Leiva; Jacqueline Marinaro; Jacqueline Martine; Jacqueline Nixon; Jacqueline Pace; Jacqueline Perkins; Jacqueline Pietri; Jacqueline Purdie; Jacqueline Rivera; Jacqueline Smith; Jacquelyn Deluca; Jacquelyn Hennelly; Jacquelynne Rucker; Jacqulynn Tamanini; Jade Harris; Jade Joseph; Jade White; Jadwiga Kubik; Jae Han; Jae Lee; Jaegean Kim; Jagdish Patel; Jahada Kellam; Jai Hood; Jaime Azarcon; Jaime Graves; Jaime Mosquera; Jaime Satterfield; Jaimie Freeman ; Jaipaul Dhanpaul; Jalima Schifino; Jamar Folk; Jamel Holley; James Anderson; James Bagley; James Bates; James Bennett; James Blackburn; James Bohl; James Borgese; James Bradley; James Bryer; James Buckmaster; James Bulvanoski; James Burr; James Caracter; James Currie; James Daily; James Daly; James Dambrosio; James Denman; James Deshields; James Dimitriou; James Dodd; James Dolan; James Donnelly; James Donovan; James Driscoll; James Dunn; James Ellis; James F Gulisano; James Fair; James Finan; James Ganley; James Gruters; James Guido; James Howell; James Ingenito; James Jacobs; James Jaghab; James Jefferson; James Johnson; James Jones; James Knott; James Koerner; James Langenfeld; James Larmour; James Manno; James Mbithi; James Mccartney; James Mccourry; James Mccrary; James Meis; James Mininni; James Monroe; James Moore; James Morgan; James Murphy; James Nesbitt; James Norwood Sr; James Nunziante; James Ohara; James Owen; James Palmer; James Raymond; James Reid; James Reuter; James Rice; James Scafide Iii; James Scanlan; James Scott; James Slevin; James

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Ann Racamato; Jean Bergman; Jean Brown; Jean Dudasik; Jean Eber Crosby; Jean Green; Jean Holmes; Jean Hunt; Jean Kinslow; Jean Logue; Jean Tucker; Jean Wright; Jeana Cowen; Jeana I Loftin; Jeanette Antoniello; Jeanette Cepeda; Jeanette Danna; Jeanette Donzanti; Jeanette Ferri; Jeanette Jackson; Jeanette Jones; Jeanette Kostic; Jeanette Pizzani; Jeanette Stilo; Jeanie Haas; Jeanne Barnes; Jeanne Celestin; Jeanne Dinicola; Jeanne G Raimondi; Jeanne Kolakowski; Jeanne Miller; Jeanne Robichaud; Jeanne Sutton; Jeanne Worrell; Jeannine Cox; Jeannine Puliti; Jeannine Wescoat; Jeetu Rijhsinghani; Jeff Bacon; Jeff Ficarro; Jeff Kolakowski; Jeff Macintyre; Jeff Pattison Jr; Jeff Raub; Jeff Shamah; Jeff Tampier; Jeff Wein; Jeff Zygmunt; Jeffery Egizi; Jeffery F. Beck; Jeffery Robinson; Jeffery Rutledge; Jeffrey Artherholt; Jeffrey Bailey; Jeffrey Boivin; Jeffrey Brown; Jeffrey Butler; Jeffrey Coates; Jeffrey Cohen; Jeffrey Faller; Jeffrey Fields; Jeffrey Grullon; Jeffrey Henry; Jeffrey Johnson; Jeffrey Lewis; Jeffrey Lu; Jeffrey M Zielinski; Jeffrey Matchett; Jeffrey Mcdermott; Jeffrey Mehler; Jeffrey Morgan; Jeffrey Moya; Jeffrey Neihart; Jeffrey Rehfuss; Jeffrey Steed; Jeffrey T Pogue; Jeffrey Trimmer; Jeffrey Vanderbilt; Jeffreye Williamsjr; Jeffs Towing; Jeison Herra; Jen Long; Jen Mendoza; Jen Williamson; Jenifer Tarter; Jenna Staudt; Jennett Harbison; Jennie Ricco; Jennifer Bain; Jennifer Bonsky; Jennifer Brill; Jennifer Burrell; Jennifer Bush; Jennifer Cadwallader; Jennifer Carloni; Jennifer Cisnci; Jennifer Colon; Jennifer Cooper; Jennifer Correa; Jennifer Davidson; Jennifer Davis; Jennifer Dyson; Jennifer Eelman; Jennifer Farr; Jennifer Fernandez; Jennifer Grubecki; Jennifer Haberman; Jennifer Hayducka; Jennifer Johnson; Jennifer Kohn; Jennifer Loesch; Jennifer Luerssen; Jennifer Lynn; Jennifer M Roy; Jennifer Masino; Jennifer Mcneil; Jennifer Mora; Jennifer Morgan; Jennifer Pandis; Jennifer Presburger; Jennifer Price;

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Shirley Porter; Shirley Rosenzweig; Shirley Roussey; Shirley Walker; Shital Hossain; Shivam Salhotra; Shiyang Li; Shonda Rogers; Shonny Teicher; Shreyas Ramesh; Shubha Agarwal; Shweta Kallapur; Siddharth Rajnish; Sidney Johnson; Silva Orlando; Silvana Moscarini; Silvana Saleh; Silvia Moinhos; Simon Koslov; Simon Vassalo; Simone Andrade; Simone Dawson; Simone Lewis; Simone Pringle; Singh Surinder; Sirarpi Armani; Siu Hom; Sm Fides Milwicz; Smita Desai; Soany Montilla; Sody Tejada; Sohaila Azar; Solwazi Nyahuma; Somnath Singh; Sonali Virendra; Sonfonya Clarke; Sonia Chawla; Sonia Monahan; Sonja Wested; Sonny Nothdurft; Sonte Anderson; Sonya Barnes; Sophia Exantus; Sophia Papadopoulos; Sophia Pontano; Sophia Rossi; Soraya Olivero; Spencer Hite; Spencer Robinson; Spyridon Drecolias; Sridevi Sogathur; Srikanth Gattu; Srinath Pamula; Srinivas Appana; Srinivas Ginjupally; Srinivas Halappa; Srinivas Tenjerla; Stacee Smith; Stacey Adams; Stacey Creskoff; Stacey Davis; Stacey Holloway; Stacey Weksler; Staci Graber; Stacy Andersen; Stacy Dutka; Stacy Hoffman; Stacy Holl; Stacy Rafferty; Stacy Stack; Stanley Blanc; Stanley Clark; Stanley Costigan; Stanley Lumpkin; Stanley Michunovich; Stanley Wangrycht; Stanley Yen; Stas Shilman; Stayce Mcneil; Stclair Payne; Stefan Byramji; Stefany Caicedo; Stella Robak; Steph Fredman; Stephanie Bigham; Stephanie Black; Stephanie Brown; Stephanie Burgess; Stephanie Burneyko; Stephanie Cichowski; Stephanie Cummings; Stephanie Evans; Stephanie Ferris; Stephanie Gerena; Stephanie Gonzalez; Stephanie Goode; Stephanie Hevey; Stephanie Howard; Stephanie Liftman; Stephanie Martin; Stephanie Martinez; Stephanie Mcclendon; Stephanie Miksza; Stephanie Phillips; Stephanie Reska; Stephanie Shorey; Stephanie Simpson; Stephanie Thompson; Stephanie Tirado; Stephanie W Luu; Stephanie Whitworth; Stephanie Wilson; Stephany Estacio; Stephen

Burkat; Stephen Caccavella; Stephen Carver; Stephen Dodimead; Stephen Gordon; Stephen Greco; Stephen Harris; Stephen Heller; Stephen Hyman; Stephen Maurer; Stephen Palasciano; Stephen Scheinthal; Stephen Smith; Stephen Tripi; Stephen W Springer; Stephenie Ortiz; Sterling Holloway; Stev Ober; Steve Boschetti; Steve Carty; Steve Cicardo; Steve Corrigan; Steve Deignan; Steve Freudenberger; Steve Hangiaras; Steve Killebrew; Steve Mulligan; Steve Nucum; Steve Powell; Steve Rowack; Steve Sikoryak; Steve Wilson; Steve Zuravner; Steven Aguirre; Steven Austin; Steven Bridges; Steven Bumbera; Steven Carroll; Steven Chrobock; Steven Civalier; Steven Cohen; Steven Costic; Steven Craig; Steven Diamond; Steven Feiss; Steven Gtunwerg; Steven Halfpap; Steven Hazen; Steven Holloway; Steven Kalan; Steven Keller; Steven Kopp; Steven Lapsley; Steven Morales; Steven Moskowitz; Steven Murdock; Steven Nance; Steven Palermo; Steven Ralff; Steven Rivera; Steven Sanders; Steven Santiago; Steven Schoen; Steven Sinisi; Steven Trinidad; Steven Zavidow; Stevenson Pierre; Stewart Appelbaum; Stewart Rosenzweig; Stewart Zemsky; Stone Stone; Stuart Bidgood; Stuart Davis; Stuart Rosenberg; Stuart Van Winkle; Stuti Anand; Subhabrata Chowdhury; Suchaya Abrams; Sudha Purushotham; Sue Ann Fehskens; Sue Ann Midura; Sue Cappery; Sue Henel; Sue Holeman; Sue Migliaccio; Sue Palumbo; Sue Schnaidt; Sue Sherrerd; Sue Stone; Sugeiry Rodriguez; Suhasin Radhakrishnan; Sultan Burch; Suman Poddar; Sumia Shaikh; Suneeta Kak; Sungho Maeng; Sunil Dutt; Sunita Mehta; Suresh Shah; Susan Anowa; Susan Apgar; Susan Bishop; Susan Bodinson; Susan Cole; Susan Contreras; Susan Depetris; Susan Digerolamo; Susan Digiovanne; Susan Dillard; Susan Finley; Susan Finn; Susan Gazzillo; Susan Gotta; Susan Healy; Susan Henel; Susan Hinkley; Susan I Lund; Susan Jackson; Susan Johnson; Susan

Kaye; Susan Kell; Susan Kildosher; Susan Klein; Susan Koller; Susan Lamanna; Susan Lasanta; Susan Lavigne; Susan Manganaro; Susan Mania; Susan Maria; Susan Martusus; Susan Mcveigh; Susan Mowery; Susan Nunez; Susan Pinto; Susan Reilly; Susan Rosenberg; Susan Salzano; Susan Scharenguivel; Susan Sinelnik; Susan Smithrooney; Susan Stebbins; Susan Stranzenbach; Susan Trifiletti; Susan Weber; Susan Williams; Susan Witte; Susan Wood; Susana Rodrguez; Susanne Clarke; Susiep Gillece; Suzanne Cammerano; Suzanne Fish; Suzanne Gazzillo; Suzanne Gravener; Suzanne Helwig; Suzanne R Bologh; Suzanne Remeta; Suzanne Ritter; Suze Marie Nalma Zetrenne; Suzy Calabrese; Swachender Kasarla; Swapnika Budhi; Sweta Shah; Swiyyah Brown; Sydney Nebus; Syed Hussain; Sylvester Ellison; Sylvia Anderson; Sylvia D'Andrea; Sylvia Esposito; T. Scott Carroll; Taasia Evans; Tage Trueblood; Tahir Quraishi; Tahitia Davis; Tahmidul Islam; Tamara Collazo; Tameika Bess; Tameka Brown; Tami Halloran; Tamika Brown; Tammie Carter; Tammy Cook; Tammy Dunbar; Tammy Korski; Tammy Menard; Tammy Salcedo; Tammy Simmons; Tammy Stiles; Tammy Wheeler; Tammy Wilson; Tamu Wilson; Tanaya Cooper; Taneeka Taylor; Taneen Morris; Tangy Prince; Tania Viganola; Tanja Gammon; Tanvir Hossain; Tanya Adeshile; Tanya Bellinger; Tanya Brown; Tanya Green; Tanya Rowe; Tanya Walker; Tara Bonanno; Tara Dennard; Tara Mccarthy; Tardk Olabi; Tariq Smith; Tarra Mosley; Tarun Maheshwari; Tasha Johnson; Tatiana Berezin; Tatyanna Paige; Taureanna Ward; Tawana Roberts; Tawanda Ward; Tayllor Cooper; Taylor Heller; Taylor Olsen; Tayyab Muhammad; Tc Tolliver; Tediae Yaah; Teisha Hackett; Tema L. Steele; Temarra Brown; Temitope Kazah; Tenner Pau; Teousebe Pale; Tercia Smalling; Tere Dace; Terence Johnson; Teresa Albertelli; Teresa Austin; Teresa Campbell; Teresa

Culhane; Teresa F Cracknell; Teresa Lagattuta; Teresa Miragliotta; Teresa Petkos; Teresa Pollin; Teresa Stefanelli; Teresa Weldon; Teresa Williams; Teriah Hall; Terica Chatman; Terrance Bailey; Terrance Knight; Terrance Witt; Terrell Rourk; Terri Fretz; Terri Hueston; Terri Yuhas; Terry Audino; Terry Darden; Terry Dimedio; Terry Gibson; Terry Kim; Terry Lott; Terry Merritt; Terry Porchea; Terry Potter; Terry Thompson; Terry Travers; Tessy Ninan; Tessy Punnose; Thaddeus Rios; Thai Pham; Thal Kim; Theadora Banks; Thelma Brantley; Thelma Earle; Theodore Dilello; Theodore Evans; Theodore Lee; Theodore Sconions; Theodore Snyder; Theodore W. Keller; Theresa Braswell; Theresa Cormier; Theresa Darmi; Theresa Dirocco; Theresa Edmonds; Theresa Howard; Theresa Leo; Theresa Loehnert; Theresa Marino; Theresa Merrell; Theresa Mulero; Theresa Prempeh; Theresa Sullivan; Theresa Williams; Theresa Willis; Theresia Kerr; Thiago Leite; Thomas A Hendry; Thomas A. Messina; Thomas Bartle; Thomas Baxter; Thomas Besold; Thomas Bodrogi; Thomas Bryski; Thomas Carr Jr; Thomas Ciszek; Thomas Connery; Thomas Crossan; Thomas D Meko; Thomas Deacon; Thomas Denny; Thomas Fallon; Thomas Fowles; Thomas Fox; Thomas Goetke; Thomas Gorski; Thomas Green; Thomas Gyumolcs; Thomas Haslacher; Thomas Holden; Thomas Humbert; Thomas Iurato; Thomas James; Thomas Jauch; Thomas Kantlehner; Thomas Klock; Thomas Kolkiewicz; Thomas Lehmann; Thomas Major Ii; Thomas Mcbriarty; Thomas Mcguinness; Thomas Mcneil; Thomas Nastarowicz; Thomas Noel Ryan; Thomas Obrien; Thomas P Coughlin; Thomas Portway; Thomas Price; Thomas Reddick; Thomas Rivera; Thomas Saccomanno; Thomas Schur; Thomas Spingler; Thomas Steed; Thomas Strehle; Thomas Stremme; Thomas Szemere; Thomas Trafidlo; Thomas Traina; Thomas Ur; Thomas Urbanek;

Thomas Ventriglia; Thomas Watts; Thomas Weber; Thomas Wilson; Thomas Winans; Thor Nilsen; Tia Smith; Tiago Reyes; Tiana Brooks; Tieasha Lewis; Tiffaney Harris; Tiffani Tita; Tiffany Chamenko; Tiffany Chan; Tiffany Hood Penderghest; Tiffany Merrill; Tiffany Pearson; Tiffany Ramirez; Tim Bedrose; Tim Crouse; Tim Davis; Tim Hale; Tim Mouzone; Tim White; Tim Wilson; Timea Oloughlin; Timothy A Florin; Timothy Albro; Timothy Chambers; Timothy Graham; Timothy Lavino; Timothy Mulholland; Timothy Poley; Timothy Reader; Timothy Reasoner; Timothy S Brand; Timothy Salas; Timothy Sanders; Timothy Scott; Timothy Thorpe; Timothy Vantrieste; Tina Clickener; Tina Diver; Tina Jackson; Tina Johnson; Tina M Rudnick; Tina Podurgiel; Tina Pogach; Tina Toole; Tisha Burgess; Tisha Williams; Tj Molyneaux; Tobyas Washington; Tod Mitchinson; Todd A Warner; Todd Ferrie; Todd Higby; Todd Higby ; Todd Kemp; Todd Stratford; Tom Barney; Tom Becker; Tom Biland; Tom Brugger; Tom Dyer; Tom Fox; Tom Governale; Tom Grygiel; Tom Holdsworth; Tom Konikowski; Tom Lettieri; Tom Mclaughin; Tom Murgio; Tom Tanger; Tom Walsh; Tom Walter; Tom Wiedemann; Tom Will; Tomas Pena; Tomasz Gawel; Tomasz Telewiak; Tomeka Devine; Tommaso Troia; Tommy Petersen; Tonaya Walker; Tonette Lee; Toni Roesch; Tonia Rahim; Toniann Marmora; Tonja Hall; Tony Albano; Tony D. Fields; Tony Medrozo; Tony Misner; Tony Zappulla; Tonya Conway; Tonya Pittman; Torain Jackson; Tori Clemens; Tori Schmidt; Torie Santana; Torillo Flores; Tory Principe; Toshia Laberth; Tracey Boston; Tracey Coralluzzo; Tracey Di Vilio; Tracey M Hughes; Tracey Smith; Tracey Wheeler; Tracie Bonneau; Tracy Brokenboro; Tracy Chavez; Tracy Edwards; Tracy Foster; Tracy Gaines; Tracy Kopp; Tracy Palmer; Tracy Ross; Tracy Young; Trenise Sullivan; Tressa Placer-Bruce; Trever Huel; Trever Tyler; Trevor M Parr; Tricia Vaughn; Trina Lehman;

Trina Schappert; Trisha Diaz; Trisha Longnecker; Tristan Coates; Tristan Kellet; Trudy Brian; Trudy Caputo; Trudy Ward; Trudy Weinacker; Trulianna Tamba; Truong Nguyen; Tun Tun; Tung Yu Hsieh; Tunis Johny; Turtle Gordon; Tuvoya Gunn; Twanda Hall; Ty R Kleffman; Tye Gomez; Tyesha Haggins; Tyler Eckel; Tyler Komey; Tymberly Thackray; Tyrah Hopkins; Tyrell Laws; Tyrese Daniels; Tyrin Hammie; Tyrome Langston; Tyron Lindsay; Tyrone Johnson; Tyrone Reid; Uday Jorigala; Uday Kumar Edara; Udayan Parikh; Umar Zulfiqar; Unity Murrell; Urie Ridgeway; Urmila Patel; Ursula Gebert; Ushir Dave; Usman Akologo; Uthmar Williams; Vadim Shulman; Vaishali Pradhan; Valarie Martin; Valarie Relucio; Valentina Orozco; Valentine Rivera; Valentino Crosland; Valeria Barros; Valerie Covington; Valerie Goodson; Valerie Laws; Valerie Lewis; Valerie Passman; Valerie Schaefer; Valeriya M. Kolesnikova; Valinda Grant; Valquiria Chaves; Van Eric Layton; Vandra Mcbride; Vanessa Bailey; Vanessa Epps; Vanessa Haskins; Vanessa Perez; Vanessa Williford; Vasco Dill; Vaseem Ayubi; Vasso Rokkos; Veda Macklin; Veena Shetty; Venkat Karlapudi; Venkat Venugopal; Venus Epifanio; Vera Lafferty; Vera Otto; Verna Hazell; Vernon Douglas; Vernon Lewis; Verona Wedderburn; Veronica D Wright; Veronica Jones; Veronica Lark; Veronica Mcgowan; Veronica Pace; Veronica Revell; Veronica Thompson; Veronique Hirt; Vic Filosa; Vicenta Ratke; Vicente Chiquito; Vicki Kuli; Vicki Peters; Vicki Stewart; Vicki Tsiamtsiouris; Vickie Gonzales; Vickie Gracey; Vicky Bardsley; Vicky Hollenbaugh; Vicky Vergara; Victor Calkins; Victor Camacho; Victor Delduca Sr; Victor Gonzalez; Victor Langston; Victor Laurenzo; Victor Reynolds; Victoria A. Flynn; Victoria Banko; Victoria Betesh; Victoria Brois; Victoria Maddox; Victoria Martin; Victoria Robinson; Victoria Sola; Victoria White; Victoria Wint; Vignesh Mathialagan; Vijay Rana; Vikki Dangelo; Vilma Erskine; Vince

Bonaduce; Vincent Bonassisa; Vincent Bramble; Vincent Candela; Vincent Canoro; Vincent Dangelis; Vincent J. Ryan; Vincent Jr. Canoro; Vincent Nestorovski; Vincent Sgro; Vincenzo Dilauro; Vincenzo Palmiero; Vino Darwin Lawrence; Vinod Bojja; Viola Pressley; Violet Korczak; Vip Jain; Virgil Maddox; Virginia Atkens; Virginia Clemmons; Virginia Gallo; Virginia Glover; Virginia Hodson; Virginia Jackson; Virginia Kindig; Virginia Lorde; Virginia Mikolajczak; Virginia Werner; Vishal Garg; Vishal Shah; Vishnukumar Avanasiappan; Vitali Drobzhevi; Vito Rossi; Vivek Rana; Vivian Armstrong; Vivian Cantillo; Vivian Dimino; Vivian Morton; Vivian Price; Vivian Roberts West; Vivian Rohrsetzer; Viviane Eudszer; Vivien Newkirk; Vivienne Thomas; Volker Marquardt; Volvie Berkovic; Wade L Davis; Wafik Fakhouri; Wai Poon; Walberto Rodriguez; Waldine Davis; Waldo Gonzalez; Wallace Gunning; Walt Barkman; Walter Conover; Walter Gayton; Walter Mautino; Walter Menna; Walter Priestley; Walter Royack; Walter Shaw; Walter Zennario; Wanda Briscoe; Wanda Cruz Mendez; Wanda Garcia; Wanda Hofbauer; Wanda Jones; Wanda Kauffman; Wanda Martinez; Wanda Ramos; Wanda Russell; Wanda Schwankert; Wanda Wilson; Wandalis Moronta; Ward Sherrer; Wayne Brengel; Wayne Dabney; Wayne Drew; Wayne Huffert; Wayne Jennings; Wayne Leino; Wayne Pynckels; Wayne Ramos; Wayne Robertson; Wayne Taylor; Webster Hemby; Wei Guan; Wei Ping; Wei Wang; Wei Wu; Wendell Rogers; Wendy Alfano; Wendy Battiato; Wendy Brokenbough; Wendy Kelly; Wendy Luvert; Wendy Meyers; Wendy Stone; Wendy Vroom; Wesley Gettis; Westley Pamphile; Wgchen Eyj; Whitney Liu; Whitney Malcolm; Wieslaw Rutkiewicz; Wieslaw Waszkiewicz; Wilbert Den Ouden; Wilbert Johnson; Wilbert Lozzi; Wilberto Olivera; Wilbur Travis; Wilfred Aberin; Wilfredo Teron; Will Colon; Will Marker; Willem Frankfort;

Willet Hilton; William Accinni; William Adair; William Almanzar; William Ayimadu; William Bell; William Blades; William Blanche; William Bogan; William Bonilla; William Boyd; William Brown; William Burgess; William Burns; William Butler; William C. Smalls Jr.; William Cashin; William Cimilluca; William Cladek; William Connors; William Cornett; William Dameshek; William Davis; William Deats; William Deitz; William Demola; William Dengler; William Ellman; William Flores; William Fretz; William Giordano; William Graves; William Gross; William Healy; William Hendricks; William Horan; William Horton; William J. Ludlum; William Johnson; William Kaufmann; William Kirby; William Kurtz; William Lewellen; William Marin; William Mason; William Melofchik; William Miller; William Minervini; William Moore; William Mount; William Murray; William Nacht; William Omalley; William Pittman; William Pollock; William Press; William Rivers; William Rogers; William Seals; William Shreeves; William Simonitis; William Smith; William Stepler; William Styskal; William Sze; William Taylor; William Thesing; William Van Winkle; William Vicente; William Whartenby; William Wisneski; William Witt; William Wright; William Zink; Williams Trania; Willie Evans; Willie Prall; Willie Priester; Willie Veiksans; Wilma Mchale; Wilman Hernandez Sr.; Window Lebron; Winifred Ash; Winston A Mclaughlin; Wistha Desir; Wojciech Fedoruk; Woody Dressner; Wordwaggler Wordwaggler; Wu Qu; Wuandalin Elsayed; Xander Richards; Xavier Grange; Xiaolan Gao; Xiaolong Yang; Xiomara Gonzalez; Xiuyue Wang; Yahaira Cordero; Yahaira Laboy; Yairaniz Figueroa Ruiz; Yaitza Rivera; Yakkala Venu; Yanira Aguirre; Yanira Azcona; Yaritza Pineda; Yasmin Cortes; Yasmine B Ibrahim; Yasmine Motley; Yasser Hussain; Yatian Li; Yaw Agyei Mensah; Yeisi Zelaya; Yelena Leykind; Yen Chen; Yennifer Gonzalez; Yesenia Diaz; Yesenia Fuentes; Yesenia Parada; Yesenia Taveras;

Yesenia Valencia; Yesica Ubiles; Yessika Pichardo; Yevgeniy Dekhtyar; Yihuang Li; Yisneyri De Jesus; Yitzchok Scharf; Ymani Gjato; Yogesh Chouhan; Yolanda Freeman; Yolanda Louis; Yolanda Munoz Vaquez; Yolanda Ponce; Yolanda Velez; Yolonda Tyre; Yong Li; Yoobin Oh; Yorgos Kyriakou; Youjian Hu; Yousef Alsmadi; Youwha Lee; Yssenia Barreto; Yufeng Liu; Yugaswaroopini Kumaraswamy; Yuliia Krun; Yury Agulnick; Yuxing Yang; Yvette Collazo; Yvette Hunter; Yvette Petway; Yvonne Adams; Yvonne Buchanan; Yvonne Camacho; Yvonne Clemons; Yvonne Flowers; Yvonne Johnson; Yvonne Peguero; Yvonne Preaster; Yvonne Walsh; Zachariah Fitch; Zachary Alexander; Zachary Boyce; Zachary Gurick; Zachary Rosenfelt; Zafar Iqbal; Zahirah Miranda Perez; Zahra Broadway; Zaka Ahmad; Zameera Banu; Zella Rubin; Zelma Banks; Zerlina Jackson; Zhamil Seidaliev; Zhanna Lehka; Zigurds Jakovics; Zina Zina; Zinaida Wydra; Zofia Falkowskq; Zohra Hafizi; Zoila Fesnco; Zoila Mejia; Zoraida Rodriguez; Zyiah Vega.

1. COMMENT: Commenters object to use of “an ABC test” for the purpose of defining independent contractor status. They characterize the ABC test as a “job killer,” that “would threaten the livelihoods of hundreds of thousands of people across the state.” They claim that through N.J.A.C. 12:11, the Department is imposing or “codifying” an ABC test “for independent workers, freelancers and contractors,” adding, “[w]e don’t need to guess at the consequences of passing such a rule [since] they have already played out in California under [that] state’s AB5 law, which implements a similar ABC test.” Commenters also liken N.J.A.C. 12:11 to a 2019 bill in the New Jersey Legislature (S4204), which would have altered New Jersey’s statutory ABC test. The

commenters claim that the Department is seeking to achieve through N.J.A.C. 12:11, what the Legislature proposed in S4204.

2. COMMENT: Commenters state that, “the ABC test is too general and rigid to apply to every independent business in NJ outside of these certain classes,” adding, “the ABC test will misclassify some independent workers and business owners as employees.”

3. COMMENT: Commenters state that although they “strongly support fair labor practices and oppose worker misclassification,” they, “believe that one-size-fits-all frameworks like the ABC test are not suitable for complex industries.” Commenters urge the Department to instead consider adopting “more balanced and time-tested standards,” such as the common law or economic realities tests that are used by the Internal Revenue Service and other federal agencies, adding, “[t]hese frameworks provide flexibility, protect workers, and account for the true nature of the working relationship, rather than categorically banning entire forms of contract work.”

4. COMMENT: Commenters state that the proposed rule would “adopt” the ABC test; what commenters characterize as an “overly restrictive standard” that presumes all workers are employees unless the hiring party can satisfy “three stringent conditions.” Commenters state that applying the ABC test to the question of independent contractor status fails to reflect the “realities of modern operations,” disqualifying many legitimate, long-standing independent contractor relationships.

RESPONSE TO COMMENTS 1. THROUGH 4: The Department is not, through this rulemaking, “adopting” or “codifying” an ABC test for independent contractor status in New Jersey. New Jersey’s ABC test has been the test for independent contractor

status under the State's Unemployment Compensation Law (UCL) since 1936. That is, the ABC test became the test for independent contractor status under the UCL when, 89 years ago, the Legislature passed and then Governor Harold Giles Hoffman signed into law P.L. 1936, c. 270. See Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 580 (1991) ("L.1936, c. 270, included the ABC test, as does the present statute"). Thus, for nearly a century, the term "employment" has been defined under the UCL broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(i)(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the Department that:

> (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; and
>
> (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
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> N.J.S.A. 43:21-19(i)(6).

Furthermore, 10 years ago, in 2015, the New Jersey Supreme Court in Hargrove v. Sleepy's, LLC, 220 N.J. 289, 303 (2015), held that the ABC test set forth in the UCL

also governs whether an individual is an independent contractor under both the New Jersey Wage and Hour Law (WHL) and the New Jersey Wage Payment Law (WPL). In other words, in New Jersey, the ABC test is already the law. N.J.A.C. 12:11 provides guidance to the regulated community as to the Department's interpretation of that law; an interpretation that is consistent with both statute and binding case law, and which is reflected in final administrative determinations (FADs) of Department Commissioners issued over decades and through multiple administrations. As explained in the Notice of Proposal, this "bring[s] to bear [the Department's] expertise as the administrative agency tasked by statute with enforcing" the affected laws, e.g., the UCL, N.J.S.A. 43:21-1 et seq., the Temporary Disability Benefits Law (TDBL), N.J.S.A. 43:21-25 et seq., the Wage Payment Law (WPL), N.J.S.A. 34:11-4.1 et seq., the Wage and Hour Law (WHL), N.J.S.A. 34:11-56a et seq., the Earned Sick Leave Law (ESLL), N.J.S.A. 34:11D-1 et seq., and the Call Center Jobs Act (CCJA), N.J.S.A. 34:21-8 et seq., among others. See 57 N.J.R. 894(a).

As to the commenters' assertion that the Department is seeking through N.J.A.C 12:11 to replicate the 2019 California law that implemented an ABC test for independent contractor status in *that* state (commonly referred to by its bill number: "AB5"), this is simply false. New Jersey's statutory ABC test at N.J.S.A. 43:21-19(i)(6), which is unaltered by the new rule (N.J.A.C. 12:11), predates AB5 by some 80 years. New Jersey's statutory ABC test also differs materially from California AB5; most notably as to Prong B.

As to the 2019 New Jersey bill (S4204), as introduced, it would have altered New Jersey's statutory ABC test in ways that made it virtually identical to the ABC test in

California AB5. N.J.A.C. 12:11 has nothing whatsoever to do with either California AB5 or S4204. N.J.A.C. 12:11 does not adopt, impose, or codify a new test for independent contractor status in New Jersey. As explained earlier, New Jersey's statutory ABC test for independent contractor status at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), has been the law in New Jersey for almost 90 years. Nothing in N.J.A.C. 12:11 alters any part of N.J.S.A. 43:21-19(i)(6)(A), (B), or (C), nor could it. Rather, the new rules at N.J.A.C. 12:11, as explained in the Notice of Proposal, simply memorialize the Department's interpretation of the statutory ABC test in a manner consistent with statute, binding case law, and Departmental policy, as reflected in FADs of Department Commissioners over the course of decades, through multiple administrations, both Democratic and Republican.

5. COMMENT: Commenters assert that application of the ABC test to the question of independent contractor status in the context of various settings would be disruptive to their business models or operations. Those commenters describe services that are currently being provided by individuals in specific types of jobs who they treat as independent contractors and argue that those individuals should not be classified as employees under the statutory ABC test. This includes insurance agents, financial advisors, owner-operator truck drivers, and so-called "gig" workers. It also includes yoga instructors who hold classes at a local community center, pool attorneys who perform services for the State Office of the Public Defender, tow truck operators who provide roadside assistance, "cooperating teachers" who provide mentorship to teacher candidates, research subjects who receive incentives for participating in market research, and more.

6. COMMENT: Commenters assert that the new rules "threaten [the] flexibility" of workers, including so-called "gig" workers. They maintain that the new rules would interfere with such workers' ability to earn "extra income" when they need it; "whether it's a few hours a week or more." They argue that the new rules would "force" such workers into a "job under rigid employment rules that don't work for [them], making it harder to get the extra income [they] rely on."

7. COMMENT: Commenters suggest that "[r]ather than forcing app-based drivers into rigid employment through the ABC test," the Department should adopt something that the commenters refer to as "The Independent Worker Fairness, Safety and Protection Act," which the commenters describe as an "alternative that protects flexibility, ensures fair pay, introduces vital safety reforms and strengthens New Jersey's economic infrastructure."

8. COMMENT: Commenters who work in the securities, financial services, and insurance industries maintain that the new rules would reclassify them as employees; would, "force [them] to become employees, forfeiting the independence that [they] value and that is essential to [their] business and [their] clients, which would interfere with their ability to tailor services to their clients' needs, operate efficiently as small business owners, and maintain "flexibility."

9. COMMENT: Commenters claim that "[t]he Department appears to believe that independent contracting is detrimental to workers," and suggest that the Department should either entirely withdraw the rule proposal or "amend the proposed rule to broaden the definition of 'independent contractor' to align with the flexibility and innovation of the modern labor market."

RESPONSE TO COMMENTS 5. THROUGH 9: Nothing in N.J.A.C. 12:11 will "force" anyone to "become an employee" or "force" anyone into a job under "rigid employment rules." Furthermore, nothing in any of the laws or rules administered by the Department, including the UCL, TDBL, WHL, WPL, ESLL, or CCJA prohibits an employer from providing flexibility to its employees; and no law, rule or regulation prohibits an employer from providing flexibility to its employees in the hours that they work. That is, an employer may, without running afoul of **any** law, rule, or regulation, permit an employee the flexibility to work at the employee's discretion for only days, hours, or even minutes per week. Any claim to the contrary is simply false.

The Department is responsible for administering the UCL and the TDBL, and for enforcing the WHL, WPL, ESLL and CCJA. Under the UCL and TDBL employees are entitled to file claims with the Department for benefits when they are, for example, separated from employment through no fault of their own (unemployment compensation), when they cannot work due to a non-work-related injury or illness (temporary disability insurance), or when they must miss work to care for a seriously ill family member or bond with a newborn or newly adopted child (family leave insurance). Under the WHL and WPL, employees are entitled to file complaints with the Department when they have not been paid the required minimum hourly wage or the required hourly rate for overtime, or when illegal deductions have been taken from their paychecks. Under the ESLL, employees may file complaints with the Department when they have not been given or permitted to use the required amount of earned sick leave (up to forty hours per year). Under the CCJA, a complaint may be filed with the Department that an employer has, for example, violated the notification requirements of the Act when a triggering event occurs,

such as when the staffing of a New Jersey call center falls below a specified threshold. Every day, workers file claims for benefits under the UCL and the TDBL, and workers file complaints under the WHL, WPL, ESLL, or CCJA. Each time a worker files such a claim or complaint, the Department must, as a threshold matter, determine whether a worker is or is not a covered "employee" under the relevant law. When the putative employer asserts that the worker is not covered under the relevant law because the worker is an independent contractor, the law requires that the Department determine the individual's status as either an independent contractor or an employee by applying the ABC test to the facts of the work relationship. When those agency decisions are appealed to the Superior Court, Appellate Division, or are reviewed by the NJ Supreme Court, judges and Justices must also apply the ABC test to the question of independent contractor status. Prior to the issuance of final agency decisions by the Commissioner, administrative law judges who conduct hearings for the Commissioner must also apply the ABC test to the assertion of independent contractor status.

In 2022, the NJ Supreme Court, in East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477 (2022), suggested to the Department (in a unanimous Opinion) that it exercise its statutory authority, and bring to bear its experience and expertise to promulgate rules that would provide guidance on application of the ABC test. This is what the Department is doing with its adoption of N.J.A.C. 12:11; nothing more. The Department is ***not*** eliminating independent contractors in the State, as has been claimed. Rather, the Department is providing meaningful guidance to, among others, businesses (large and small) that may not be aware of the ABC test and/or how it is applied; that is, to provide guidance to better inform such businesses regarding the

principles that govern application of the ABC test to the question of independent contractor status; thus, enabling them to make appropriate decisions regarding the classification of workers. Ideally, if everyone understood the ABC test and the principles that guide its application, then every decision regarding the classification of workers in New Jersey would be a correct one. If that were so, it would guarantee 100 percent compliance with the law; that is, worker misclassification would no longer be an impediment to employees receiving the benefits to which they are entitled under the UCL and TDBL; worker misclassification would no longer be an impediment to employees' pursuit of their rights under the WPL, WHL, ESLL and CCJA; and worker misclassification would also no longer prevent the Unemployment Compensation Fund and State Disability Benefits Fund from receiving statutorily required contributions needed to ensure the payment of unemployment compensation, temporary disability insurance, and family leave insurance benefits to claimants who are entitled by law to such benefits during times of need. Further, if everyone understood the ABC test and the principles that guide its application, that would also protect bona fide independent contractors who wish to remain independent from clients who seek to exercise control or direction over performance of their services. The Department understands that 100 percent compliance is unlikely; however, it is committed to using every means at its disposal, including agency rulemaking, to see that New Jersey gets as close as possible to achieving that goal.

To the commenters who describe specific work relationships and seek to advocate for the independent contractor status of the individuals performing services within those relationships, it would be inappropriate within the context of this rulemaking for the Department to address each individual type of service, and each related set of facts, that

the commenters argue should result in a finding under the ABC test that the individual providing the service is an independent contractor, rather than an employee. Those are the types determinations that are made in contested matters on a case-by-case basis; applying the law and the rules to a particular set of facts; facts which may (and often do) differ from relationship to relationship, even within the same industry.

Finally, to the commenters who claim that "app-based drivers" are being "forc[ed] into rigid employment through the ABC test," and offer an alternative "policy proposal" for "app-based drivers," this is not the forum for such a proposal. That is, the Department has no discretion through rulemaking to replace N.J.S.A. 43:21-19(i)(6), with any suggested "alternative."

10. COMMENT: Commenters assert that N.J.A.C. 12:11 exceeds the Department's statutory authority and is "arbitrary and capricious." They maintain that the new rules intrude on the province of the Legislature "by attempting to rewrite the ABC test." Specifically, according to the commenters, "[b]y embedding new factors to 'consider' and illustrative 'examples' of how the ABC test supposedly applies into purportedly binding regulations, the Department is not merely interpreting the ABC test – it is rewriting it, at times in direct contravention of the prevailing judicial construction." The commenters assert that N.J.A.C. 12:11 would also "intrude on the province of the Judiciary by attempting to predetermine how the ABC test applies in specific factual scenarios," adding, "[t]he New Jersey Supreme Court has emphasized that the ABC test requires a fact-sensitive, case-by-case inquiry that considers all of the circumstances surrounding a worker's relationship with a putative employer." The commenters state, "the 'cleaning person' who is in the 'dental office;' the 'musician' playing at the

‘restaurant;’ [t]hese examples do not merely illustrate the test – they dictate its application in particular scenarios,” adding, “[t]hat approach is incompatible with the fact-sensitive nature of the ABC test and renders the proposal invalid.” Finally, the commenters maintain that the Department’s new rules violate “well-established principles of administrative law,” which according to the commenter, require that agencies “must overcome a presumption against changes in current policy that are not justified by the rulemaking record.” In support of the latter statement, the commenter cites to the decision of a federal court, adding that “New Jersey courts look to federal decisions for guidance applying the State Administrative Procedures Act.”

11. COMMENT: Commenters maintain that N.J.A.C. 12:11-1.3(c), which lists factors to be considered when evaluating whether an individual has been and will continue to be free from control or direction pursuant to Prong A of the ABC test, “lacks clarity and provides inadequate guidance for those parties who wish to enter into independent contractor relationships.” Specifically, the commenters assert that “several factors listed in the proposed rule as evidence of ‘control’ for purposes of the Prong A analysis could be equally consistent with independent contractor status as with employee status and provide no clarity as to the circumstances under which the Department would consider them indicative of employee status.” For example, the commenters state that “a company clearly should be able to require individuals whom they are paying to perform services on its behalf to report on the progress of their work at ‘prescribed times’ prior to paying the individual, even when the company otherwise exercises little or no control over the work.” The commenters also state that “negotiations between the company and the individual for the performance of services

could just as easily take place whether the individual is being retained as an employee or an independent contractor and regardless of the amount of control over the work," adding, "paying for services on a fixed commission basis, e.g., to sales persons, may be a perfectly legitimate business model even when control over the work is minimal." The commenters specifically list the following factors that appear within N.J.A.C. 12:11-1.3(c) as examples of those that it believes "provide no clarity" and "could be equally consistent with independent contractor status as with employee status:"

1. Whether the putative employer requires the individual to report on any aspect of the individual's services at prescribed times or intervals;

2. Whether the putative employer negotiates for and acquires the services performed by the individual;

3. Whether the individual's rate of pay is fixed by the putative employer; and

4. Whether the services must be rendered by the individual personally.

12. COMMENT: Commenters object to N.J.A.C. 12:11-1.3(c)(2)(i)(3), which states that among the sub-factors to be considered when evaluating whether the putative employer has exercised control over the details and means by which the services are performed, is whether the putative employer requires the individual to use a digital application or software in the course of performing the services that is primarily or unilaterally controlled by the putative employer. The reason for the commenters' objections is: "the rule states that a company controls a worker when the worker uses a digital application or software 'primarily or unilaterally controlled' by the company," which the commenter states, "is unsupported by text, case law or common sense."

13. COMMENT: Commenters object to N.J.A.C. 12:11-1.3(c)4, which states that among the factors to be considered when evaluating whether an individual has been and will continue to be free from control or direction under Prong A of the ABC test is whether the putative employer negotiates for and acquires the services performed. The commenters maintain that this is inconsistent with the holding in Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super 135 (App. Div. 1990).

14. COMMENT: Commenters take issue with N.J.A.C. 12:11-1.3(d) and (e), which state the following regarding the factors listed at N.J.A.C. 12:11-1.3(c) for consideration when evaluating whether an individual has been and will continue to be free from control or direction pursuant to Prong A of the ABC test:

> (d) The factors listed at (c) above are not exhaustive and additional factors may be considered.
>
> (e) The factors listed at (c) above shall not be used as a checklist; that is, a conclusion that the putative employer has met Prong A of the ABC test shall not be based on whether a majority of the factors listed at (c) above have been met. There is no set number of factors that will, in every instance, result in a finding that the putative employer either has or has not met its burden pursuant to Prong A of the ABC test. Some factors may be relevant in one situation and may not be relevant in another. What is required pursuant to Prong A of the ABC test is to evaluate the entire relationship between the individual and the putative employer and to determine whether the individual has been, and will continue to be, free from control or direction by the putative employer.

Commenters also object to N.J.A.C. 12:11-1.5(c) and (d), which state the following regarding the factors listed at N.J.A.C. 12:11-1.5(b) for consideration when evaluating whether an individual is customarily engaged in an independently established trade, occupation, profession, or business, pursuant to Prong C of the ABC test:

> (c) The factors listed at (b) above are not exhaustive and additional factors may be considered.
>
> (d) The factors listed at (b) above shall not be used as a checklist; that is, a conclusion that the putative employer has met Prong C of the ABC test shall not be based on whether a majority of the factors listed at (b) above have been met. There is no set number of factors that will, in every instance, result in a finding that the putative employer either has or has not met its burden pursuant to Prong C of the ABC test. Some factors may be relevant in one situation and may not be relevant in another. What is required pursuant to Prong C of the ABC test is to evaluate the entire relationship between the individual and the putative employer and to determine whether the individual is customarily engaged in an independently established trade, occupation, or business.

Specifically, the commenters characterize N.J.A.C. 12:11-1.3(d) and (e), and N.J.A.C. 12:11-1.5(c) and (d), as "hedging" by the Department, and maintain that these subsections will make it "difficult, if not impossible, for businesses or individuals to predict with any degree of confidence whether their independent contractor arrangements will pass muster under the proposed rule." The commenters also allege

that these subsections give “unfettered discretion [to] the Department to ignore or consider some factors and not others in a given situation.”

15. COMMENT: Commenters take issue with N.J.A.C. 12:11-1.3(f), which states that, “[w]hen evaluating under Prong A of the ABC test whether an individual has been and will continue to be free from control or direction over the performance of services, any control or direction that the putative employer has exercised, or has reserved the right to exercise, in order to be in compliance with a law or rule shall be considered; that is, it shall be given equal weight to what would be given any other control or direction that the putative employer has exercised or has reserved the right to exercise.” Specifically, the commenters state that “[t]he Department’s conclusion that regulatory mandated supervision is indicative of “control” for the purpose of determining an employment relationship puts long established independent contractor relationships in those professions unnecessarily and dangerously at risk.”

16. COMMENT: Commenters object to N.J.A.C. 12:11-1.3(c)9., which includes among the factors to be considered when determining whether under Prong A of the ABC test an individual has been and will continue to be free from control or direction, “[w]hether the putative employer provides training to the individual.” The commenters characterize this as “an overbroad approach to training,” and argue that it could result in “guidance” that a business provides to suppliers or partners being considered “evidence of misclassification, which would discourage businesses from providing it.”

17. COMMENT: Commenters object to N.J.A.C. 12:11-1.3(a), which states that “[i]n order for the putative employer to meet its burden pursuant to Prong A of the ABC test, the putative employer must establish that it does not exercise control or direction

over the individual's work in fact, and that it does not reserve the right to control or direct the individual's work." The commenters maintain that N.J.A.C. 12:11-1.3(a) is unclear as to whether the control or direction exercised by the putative employer to which the rule refers is limited to control or direction exercised in connection with the individual's performance of services for the putative employer. That is, the commenters claim that the rule could be read to mean that under Prong A of the ABC test one should consider whether the putative employer has exercised control or direction over the individual *outside* of the work relationship.

18. COMMENT: Commenters object to N.J.A.C. 12:11-1.3(c)(2)(i)(4), which states that among the factors to consider when evaluating whether the putative employer has the right to control the details and means by which the service are performed by the individual, is whether the putative employer requires the individual to report on any aspect of the individual's services at prescribed times or intervals. The commenters characterize this as "an overbroad approach to reporting," adding, "[t]hat formulation threatens to upset thousands of common and uncontroversial reporting requirements in commercial contracts."

19. COMMENT: Commenters maintain that N.J.A.C. 12:11-1.4 "conflates" the two parts of Prong B and "diverges from the statutory text," adding that N.J.A.C. 12:11-1.4 "would make it practically impossible to satisfy" the second part of Prong B – outside of all the putative employer's places of business. The commenters argue that this is "inconsistent with the Legislature's decision to provide two independent, alternative paths for complying with Prong B."

20. COMMENT: Commenters maintain that N.J.A.C. 12:11-1.4 would "effectively eliminate the 'places of business' option" under Prong B of the ABC test.

21. COMMENT: Commenters object to Prong B of the ABC test, asserting that Prong B is "[m]ost problematic, [because it] requires that a contractor perform work 'outside the usual course of business' of the hiring entity," adding, "[f]or 3PL warehouses, nearly all contracted services – including unloading, equipment repair, packaging, sanitation, transportation, and seasonal order fulfillment – are central to operations. That means even experienced, independently operated businesses providing these services would no longer qualify as contractors, even if they prefer to remain independent and meet all other criteria."

22. COMMENT: Commenters state that although the definition of "places of business" that appears in N.J.A.C. 12:11-1.4(e) is taken directly from the Opinion in Carpet Remnant, supra, "the expansion of that definition at subsections (f) and (g), as well as the accompanying examples, are unfounded," adding, "[e]xpanding the interpretation of a company's 'places of business' to effectively include any location where the individual performs services fails to account for common business practices." Specifically, regarding the inclusion of examples at N.J.A.C. 12:11-1.4(g), and elsewhere within N.J.A.C. 12:11-1.4, including examples of (1) services that are typically outside of the putative employer's usual course of business, (2) services that are typically not outside of the putative employer's usual course of business, (3) locations where a putative employer typically conducts an "integral part of its business," and, therefore, are *not* likely outside of all of the putative employer's places of business, and (4) locations where a putative employer typically does *not* conduct an "integral part of its

business," the commenters believe that the Department's use of these examples unfairly "targets" certain industries and types of services.

23. COMMENT: Commenters state that "several Prong C factors under the proposed rule…fail to provide any clarity as to when and how the Department would consider the information indicative of employee status." Specifically, the commenters take issue with the following factors, which are listed at N.J.A.C. 12:11-1.5(b)2., (b)3., and (b)4., and which are used to evaluate whether an individual is customarily engaged in an independently established trade, occupation, profession or business:

1. The number of customers of the individual's business and the volume of business from each respective customer,

2. 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, and

3. The number of employees of the individual's business.

Regarding N.J.A.C. 12:11-1.5(c)(3), which includes among the factors to be considered when evaluating whether an individual is customarily engaged in an independently established trade, occupation, profession or business under Prong C of the ABC test, '[t]he 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, the commenters maintain:

"This interpretation is unsupported, unduly burdensome, and at odds with the flexible nature of independent work."

24. COMMENT: Commenters object to N.J.A.C. 12:11-1.5, generally; and N.J.A.C. 12:11-1.5(e), in particular, which states in pertinent part: "[p]ursuant to Prong C, what is relevant is not whether an individual was free to work for others, but rather, whether the individual did perform services for, and receive remuneration for the performance of such services from others during the relevant period." The commenters maintain:

> "[T]he proposed rule attempts to change existing New Jersey law by adding a host of rigid, inapposite factors [to the Prong C analysis]. Most concerning is the portion of the proposal that states that it is no longer sufficient for a person to be free to work for other clients. Under the proposal, a person must be performing other work for other clients at the same time to be considered 'independently established.' This is inconsistent with New Jersey binding precedent, and it ignores practical realities – especially the reality that an independent contractor has the right to refuse or accept work at will, which itself is evidence of operating an independent business."

25. COMMENT: Commenters object to N.J.A.C. 12:11-1.5(f)1., through 3., which state the following:

> 1. An individual having multiple employers does not equate to an individual having an independently established trade, occupation, profession or business sufficient to meet Prong C.

2. Working full-time or part-time for an entity or other individual other than the putative employer does not alone equate to an individual being customarily engaged in an independently established trade, occupation, profession or business sufficient to meet Prong C.

3. Licensure in an occupation or profession, such as a nurse or attorney, is not alone sufficient to meet Prong C.

In support of their opposition to these provisions, the commenters cite to two unpublished Superior Court, Appellate Division, Opinions: Garden State Fireworks, Inc. v. New Jersey Department of Labor and Workforce Development, Docket No. A-1581-15T2, 2017 N.J. Super. Unpub. LEXIS 2468 (App. Div. 2017), and Feinsot v. Board of Review, Docket No. A-1982-04T2, 2007 N.J. Super. Unpub. LEXIS 2922 (App. Div. 2007).

26. COMMENT: Commenters maintain that N.J.A.C. 12:11-1.5(g) and (h) should be deleted from the new rules, because they "deem insurance and business registration irrelevant."

27. COMMENT: Commenters maintain that N.J.A.C. 12:11-1.5 "enacts an unworkable version of Prong C." That is, according to commenters, "the proposed rule would state that a worker has an independent business, profession or trade only when she in fact has other clients," adding, "[i]t would not be enough that she can provide services to other clients, or even that she has tried to provide services elsewhere." The commenters maintain that this "would ask not whether she is independent, but whether she is successful," adding that under N.J.A.C. 12:11-1.5, "only successful workers could remain independent contractors [and] others would have to work as employees."

28. COMMENT: Commenters object to N.J.A.C. 12:11-1.5(b), which lists factors to be considered when evaluating whether an individual is customarily engaged in an independently established trade, occupation, profession, or business, under Prong C of the ABC test, maintaining the following:

> "To start, the first factor is vague – what, indeed, is a durable, strong and viable business, and how is another business who contracts with it to make that judgment? The same goes for many of the other factors. What number of customers would make a business sufficiently 'independently established'? What percentage of remuneration coming from which sources would meet this threshold? How many employees does it take – keeping in mind that many small businesses…have zero or even just one employee – to make a business 'independent' under the rule?"

29. COMMENT: Commenters object to N.J.A.C. 12:11-1.6, "Additional principles governing application of the ABC test," maintaining: "The add-on 'principles' in N.J.A.C. 12:11-1.6 appear aimed at practices the Department disfavors well beyond the scope of the ABC test," adding, "[t]hese practices are not prohibited by any statute and are prudent measures in business engagements and/or required by law."

30. COMMENT: Commenters object to N.J.A.C. 12:11-1.6(c)(1), which lists factors that may be used when determining the weight to be given to an alleged independent contractor agreement. The commenters state, "the provisions about contract drafting (whether the agreement is negotiable or modifiable) are not part of the ABC test as set forth in statute and well-established New Jersey law," adding, "[t]he ABC test does not ask whether the contract is subject to change; it asks whether the

individual is free from control, performing work outside the hiring entity's course/places of business, and engaged in an independent business."

31. COMMENT: Commenters object to N.J.A.C. 12:11-1.6(d), which states that "[t]he fact that an individual would not qualify for receipt of unemployment compensation benefits based on their earnings is not relevant to the question of whether such individual is an independent contractor pursuant to the ABC test," and that, "[l]ikewise, that an individual would not qualify for receipt of unemployment compensation benefits based on their earnings solely from the putative employer also does not impact whether such individual is an independent contractor pursuant to the ABC test." The commenters maintain that this "contradicts case law and simple logic."

32. COMMENT: Commenters maintain that the new rules "downplay probative evidence found in contracts and official filings, which should be critical in determining independent contractor status under Prongs A and C."

33. COMMENT: Commenters maintain that "[t]he Department's proposed rules tip the scales against contractor relationships by favoring evidence that is vague and gravitates towards an employer-employee relationship, and devaluing evidence that is more objective and thus would more clearly support independent contractor status," adding, "[t]his is arbitrary, capricious, and violates the ABC statute."

34. COMMENT: Commenters maintain that N.J.A.C. 12:11 is "a confusing amalgamation of factors from cases that span decades, and do not take into consideration the realities of the current workforce which seeks flexibility and work life balance." The commenters add that N.J.A.C. 12:11 uses "outdated factors interpreted in a context that no longer exists; fail[s] to consider the misapplication of the ABC test

on professionals, such as attorneys, financial services workers, accountants, insurance agents and nurses, who have specific training and licensure requirements and are subject to regulatory supervision." The commenters state that N.J.A.C. 12:11 will "subject even short-term, low-dollar-value engagements to the full weight of the ABC test," which the commenters maintain "will deter small firms from bringing in limited-scope assistance to the detriment of their clients."

35. COMMENT: Commenters state that the UCL "historically has recognized the unique nature of the independent contractor relationship between an insurer and a commissioned insurance agent by statutorily excluding that relationship from application of the ABC test," citing N.J.S.A. 43:21-19(i)(7)(J), and add, "[y]et, this exception for commissioned insurance agents in the UCL is not acknowledged nor recognized in the Proposed Rule." The commenters, who engage the services of insurance agents and financial service professionals, maintain that use of the statutory ABC test to determine the independent contractor status of those individuals would interfere with negotiated contracts that confirm the independent agency's independent contractor status, would disrupt contractual compensation arrangements, would create legal and regulatory contradictions, and would disrupt the flexibility and market solutions that the "independent agency system" provides.

36. COMMENT: Commenters assert that "direct sellers are not employees; they are independent contractors," adding that "direct sellers have consistently been recognized as independent contractors under the ABC test for purposes of unemployment compensation and wage and hour laws." In support of this assertion, the commenters cite to N.J.S.A .43:21-19(i)(7)(O), which is a stand-alone exemption

from UCL-covered employment for "[s]ervices performed in the sale or distribution of merchandise by home-to-home salespersons or in-the-home demonstrators whose remuneration consists wholly of commissions or commissions and bonuses," and N.J.A.C. 12:56-7.1, which exempts the following from the WHL's overtime pay requirements: "[a]ny individual employed in a bona fide executive, administrative, professional or outside sales capacity."

37. COMMENT: Commenters maintain that "the trucking industry is exempt from the ABC test pursuant to N.J.S.A. 43:21-19(i)(7)(X)."

38. COMMENT: Commenters assert that the new rules "could result in an untenable conflict" between the UCL and the WPL. Specifically, they maintain:

> "The UCL contains a specific exemption for insurance producers compensated on a commission basis. If the proposed rules result in an insurance producer being deemed an employee for the purpose of the WPL, how can that conflict be reconciled? How can an individual be treated as an independent contractor or otherwise exempt under one law and as an employee under a different law?"

39. COMMENT: Commenters assert that the stand-alone exemptions from covered "employment" under the UCL "should be extended to all statutes within the Department's jurisdiction." In support of this claim, the commenters cite the holding in Walfish v. Northwestern Mutual Life Insurance Company and Northwestern Mutual Investment Services, LLC, Civ. No. 2:16-cv-4981, 2019 U.S. Dist. LEXIS 75574 (D.N.J. 2019).

40. COMMENT: Commenters request that N.J.A.C. 12:11 include exemptions or "carve outs" from the ABC test for those who perform certain services, such as for "insurance producers" and financial advisers.

RESPONSE TO COMMENTS 10. THROUGH 40: By statute, the Commissioner of the Department of Labor and Workforce Development possesses the authority to promulgate rules that effectuate the purposes of the statutes that are his responsibility and the responsibility of the agency he leads to enforce, including but not limited to, the UCL, TDBL, WPL, WHL, ESLL, and CCJA. See, e.g., N.J.S.A. 34:1-20; 34:1A-3(e); 43:21-7g; 43:21-65; 34:11-4.11; 34:11-56a5; 34:11D-11; and 34:21-15.

Furthermore, there is more than sufficient New Jersey case law describing the standard of review for agency rulemaking, such that we need not look to federal courts or elsewhere for guidance, as suggested by the commenters. That is, according to the New Jersey Supreme Court in New Jersey Association of School Administrators, et al. v. Bret Schundler, et al., 211 N.J. 535, 548 (2012):

> "Judicial review of agency regulations **begins with a presumption that the regulations are both 'valid and reasonable**.' New Jersey Society For Prevention of Cruelty to Animals v. New Jersey Department of Agriculture., 196 N.J. 366, 385, 955 A.2d 886 (2008) (NJSPCA) (citation omitted). As a result, **the party challenging a regulation has the burden of proving that the agency's action was 'arbitrary, capricious or unreasonable**.' Henry v. Rahway State Prison, 81 N.J. 571, 579-80, 410 A.2d 686 (1980). That inquiry focuses on three things:

(1) whether the agency's action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors

[In re Petitions for Rulemaking, N.J.A.C. 10:82-1.2 & 19:85-4.1, 117 N.J. 311, 325, 566 A.2d 1154 (1989).]

Absent one of those circumstances, appellate courts ordinarily will not reverse an agency's decision, including its adoption of regulations. NJSPCA, supra, 196 N.J. at 385, 955 A.2d 866.

Courts afford an agency 'great deference' in reviewing its 'interpretation of statutes within its scope of authority and its adoption of rules implementing' the laws for which it is responsible. Ibid. (citing In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489, 852 A.2d 1083 (2004)). That approach reflects the specialized expertise agencies possess to enact technical regulations and evaluate issues that rulemaking invites. New Jersey State League of Municipalities v. Department of Community Affairs, 158 N.J. 211, 222, 729 A.2d 21 (1999). New Jersey Association of School Administrators, et al. v. Bret Schundler, et al., 211 N.J. 535, 548 (2012)" (emphasis added).

New Jersey case law also makes clear that, "[w]hen it establishes an administrative agency, the Legislature 'delegate[s] the primary authority of **implementing policy** in a specialized area to governmental bodies with the staff, resources, and **expertise** to understand and solve those specialized problems.'" Communications Workers of America, AFL-CIO v. New Jersey Civil Service Commission, 234 N.J. 483, 514 (2018), quoting, Bergen Cty. Pines Hosp. v. Department of Human Services, 96 N.J. 456, 474, 476 A.2d 784 (1984) (emphasis added). The Court in Communications Workers of America, supra, added, "[w]e 'defer to an agency's interpretation of both a statute and implementing regulation, within the sphere of the agency's authority, unless the interpretation is 'plainly unreasonable.'" Id. at 515, quoting, In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262, 989 A.2d 1254 (2010). Thus, an administrative agency's authority to engage in rulemaking is not limited to repeating statutory text or codifying case law. An administrative agency may through rulemaking implement policy and it may interpret a statute within the agency's sphere of authority, so long as the interpretation is not "plainly unreasonable;" provided, of course, that neither the agency policy, nor its statutory interpretation, is in conflict with the law.

Each of the "enabling acts" at issue here; that is, the UCL, TDBL, WPL, WHL, ESLL, and CCJA, is a remedial statute that the courts have instructed should be liberally construed in favor of coverage. For example, as it relates to the question of covered employment under the UCL, the New Jersey Supreme Court in Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor, 125 N.J. 567, 581 (1991), instructed:

> "[T]he primary objective of the UCL is to provide a cushion for the workers of New Jersey 'against the shocks and rigors of unemployment.' **Because the statute is remedial, its provisions have been construed liberally**, permitting a statutory employer-employee relationship to be found even though that relationship may not satisfy common-law principles."
>
> Ibid. (emphasis added).

Regarding the WPL, the Court in Hargrove v. Sleepy's, LLC, 220 N.J. 289, 303 (2015), explained that its purpose is to govern the time and mode of payment of wages due to employees and instructed that, "**[a]s a remedial statute**, the WPL should be **liberally construed**," adding, "[w]e, therefore, approach **any** question regarding the scope and application of the WPL mindful of the need to further its **remedial purpose**." Id. (emphasis added). As to the WHL, the Court in Hargrove, supra, recognized that it is designed to "protect employees from unfair wages and excessive hours," and the Court instructed that "[t]he statute should be **construed liberally** to effectuate its purpose." Id. at 304 (emphasis added).

In light of the foregoing; that is, given (1) the presumption under New Jersey law that an agency's regulatory action is both valid and reasonable; (2) that in order to rebut this presumption, a party challenging a regulation has the burden of proving that the agency's action was "arbitrary, capricious or unreasonable;" (3) the remedial purposes of the statutes at issue; and (4) the courts' instruction that because of those remedial purposes the statutes at issue should be liberally construed in favor of coverage, what follows is a description of the reasonable basis for each paragraph of the proposed new

rules. This description also includes an explanation of and reasonable basis for several changes the Department is making on adoption.

N.J.A.C. 12:11-1.1 Purpose and scope

Subsections (a) and (b) of this section announce that the purpose of N.J.A.C. 12:11 is to delineate the manner in which the statutory ABC test is applied to the question of independent contractor status under the statutes that the Department enforces. This is an entirely appropriate purpose, in that the Department is empowered to engage in such rulemaking under the afore-cited statutes, i.e., N.J.S.A. 34:1-20; 34:1A-3(e); 43:21-7g; 43:21-65; 34:11-4.11; 34:11-56a5; 34:11D-11 and 34:21-15.

As indicated above, some commenters assert that the proposed new rules are either inconsistent with or fail to acknowledge statutory exemptions from UCL-covered "employment" within N.J.S.A. 43:21-19(i)(7); for example, the exemption at N.J.S.A. 43:21-19(i)(7)(J) from covered "employment" under the UCL for "services performed by agents of mutual fund brokers or dealers in the sale of mutual funds or other securities, by agents of insurance companies, exclusive of industrial insurance agents or by agents of investment companies, if the compensation to such agents for such services is wholly on a commission basis;" or the exemption at N.J.S.A. 43:21-19(i)(7)(X) from covered "employment" under the UCL for "services performed by operators of motor vehicles weighing 18,000 pounds or more, licensed for commercial use and used for the highway movement of motor freight, who own their equipment or who lease or finance the purchase of their equipment through an entity which is not owned or controlled directly or indirectly by the entity for which the services were performed and who were

compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move."

Each of the exemptions from covered "employment" under the UCL which appear at N.J.S.A. 43:21-19(i)(7), including each of the afore-mentioned exemptions, is a stand-alone exemption from UCL coverage that does ***not*** equate to independent contractor status. That is, none of the stand-alone exemptions at N.J.S.A. 43:21-19(i)(7) confer independent contractor status. Instead, each simply means, *without any regard whatsoever to the question of independent contractor status*, that the employer is not liable for contributions to the Unemployment Compensation and State Disability Benefits funds on behalf of the individuals covered by the exemption and that those individuals are not eligible for benefits under the UCL or TDBL. Nothing in N.J.A.C. 12:11 alters or eliminates (nor could it) any one of those stand-alone exemptions from UCL-covered "employment" that appear within N.J.S.A. 43:21-19(i)(7). Neither, incidentally, does anything in N.J.A.C. 12:11 alter or eliminate exemptions from the requirements of other laws, such as the exemptions from the WHL's overtime requirements at N.J.S.A. 34:11-56a4(b)(1) for an individual employed in a bona fide executive, administrative or professional capacity; or an employee engaged to labor on a farm or employed in a hotel; or an employee of a common carrier of passengers by motor bus; or a limousine driver who is employed by an employer engaged in the business of operating limousines; or an employee engaged in labor relative to the raising or care of livestock. Nor does anything in N.J.A.C. 12:11 alter or eliminate exemptions from the minimum hourly wage requirements at N.J.S.A. 34:11-56a4(a) for persons under the age of 18 not

possessing a special vocational school graduate permit issued pursuant to N.J.S.A. 34:2-21.15, or to persons employed as salesmen of motor vehicles, or to persons employed as outside salespeople, or to persons employed in a volunteer capacity and receiving only incidental benefits at a county or other agricultural fair by a nonprofit or religious corporation or nonprofit or religious association which conducts or participates in that fair. Nor does anything in N.J.A.C. 12:11 alter or eliminate exclusions from the definition of "employee" under the ESLL at N.J.S.A. 34:11D-1 for an employee performing a service in the construction industry that is under contract pursuant to a collective bargaining agreement, or for a public employee who is provided with sick leave with full pay pursuant to any other law or rule of the State. Finally, since it was mentioned specifically by one of the commenters, the Departmental rule at N.J.A.C. 12:56-7.1, which exempts the following from the WHL's overtime pay requirements: "[a]ny individual employed in a bona fide executive, administrative, professional or outside sales capacity," also does not confer independent contractor status. Instead, it simply means, *without any regard whatsoever to the question of independent contractor status*, that the individual who is employed in an executive, administrative, professional or outside sales capacity is exempt from the overtime requirements of the WHL. As with each of the statutory exemptions mentioned above, nothing in N.J.A.C. 12:11 alters or eliminates N.J.A.C. 12:56-7.1.

The new rules simply provide guidance to workers and those who engage their services regarding the Department's interpretation and the proper application of the statutory ABC test for independent contractor status. Again, neither N.J.S.A. 43:21-19(i)(6), nor N.J.A.C. 12:11, affect the above-described stand-alone exemptions. This is

evident from the law itself. Nevertheless, in order to allay the commenters' concerns, the Department is on adoption adding a new subsection (c) to N.J.A.C. 12:11-1.1, which states explicitly that nothing in N.J.A.C. 12:11 shall be construed to alter or eliminate statutory exemptions from coverage under, or exemptions from the requirements of, the individual statutes listed in N.J.A.C. 12:11-1.1(b), i.e., the UCL, TDBL, WPL, WHL, ESLL, or CCJA. Within new subsection (c), the Department also provides examples of such statutory exemptions, such as the exemptions at N.J.S.A. 43:21-19(i)(7), 43:21-19(i)(9) and 43:21-19(i)(10), from covered employment under the UCL and TDBL; the above-described exemptions at N.J.S.A. 34:11-56a4 from WHL's overtime and minimum wage requirements; and the exemptions at N.J.S.A. 34:11D-1 from the definition of covered "employee" under the Earned Sick Leave Law for an employee performing a service in the construction industry that is under contract pursuant to a collective bargaining agreement, or for a public employee who is provided with sick leave with full pay pursuant to any other law or rule of the State. Since the addition of new N.J.A.C. 12:11-1.1(c), as described above, does not significantly enlarge or curtail who and what will be affected by this rulemaking; change what is being prescribed, proscribed or otherwise mandated by the rulemaking; or enlarge or curtail the scope of the proposed rulemaking and its burden on those affected by it, it is not a substantial change and may, therefore, be made on adoption.

Regarding the commenters' assertion that the stand-alone exemptions from covered "employment" under the UCL "should be extended to all statutes within the Department's jurisdiction," as indicated above, the exemptions from UCL-covered "employment" at N.J.S.A. 43:21-19(i)(7) are entirely unrelated to the question of

independent contractor status and, consequently, have nothing whatsoever to do with the subject matter of this rulemaking. The Department has no authority through rulemaking to create new exemptions from coverage under any statute, including under the WHL, WPL, ESLL or CCJA.

Even if the Department had such authority, which, it does not, it would make no more sense to import exemptions from UCL-covered employment to the Wage and Hour Law, than it would to apply any of the Wage and Hour Law's exemptions, such as the exemption from the overtime requirement for individuals employed in a bona fide executive, administrative or professional capacity, to the UCL. There is nothing in the law that would support such action. Furthermore, as indicated above, to do something like this through agency rulemaking would clearly be beyond the Department's statutory authority.

As to the commenters' claim that the holding in Walfish v. Northwestern Mut. Life Ins. Co., supra, supports the notion that the exemptions from UCL-covered employment at N.J.S.A. 43:21-19(i)(7); and in particular, the exemption from UCL-covered employment at N.J.S.A. 43:21-19(i)(7)(J) for those engaged in the sale of insurance when paid wholly on a commissioner basis, should be incorporated into the WPL (or any other law), the District Court in Walfish, supra, expressly refrained from reaching that issue, stating, "[b]ecause the Court holds that the undisputed facts support a finding that Defendants have met their burden on each of the three requirements of the ABC test, the Court need not address Defendants' statutory argument regarding the incorporation of the NJUCA [aka, UCL] into the NJWPL." Thus, the District Court's holding was limited to its application of the ABC test to the facts of the work relationship between

Fred Walfish and Defendants, Northwestern Mutual Life Insurance Company and Northwestern Mutual Investment Services. Having engaged in the required individualized case-by-case analysis of the work relationship between Mr. Walfish and Defendants, under the ABC test, the District Court concluded that Defendants had met their burden to establish that *Mr. Walfish* was an independent contractor; not that all insurance agents are independent contractors. The District Court decision was appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit certified two questions to the New Jersey Supreme Court:

1. Whether insurance agents are employees or independent contractors under New Jersey's Wage Payment Law as determined by application of the ABC test, and
2. Whether the statutory exception to the New Jersey Unemployment Compensation Act's definition of 'employment' for '[s]ervice performed…by agents of insurance companies…wholly on a commission basis,' N.J.S.A. 43:21-19(i)(7)(J), applies to determinations of whether workers are employees or independent contractors under New Jersey's Wage Payment Law. Walfish v. Northwestern Mut. Life Ins. Co., 2020 U.S. App. LEXIS 42191, at 19.

Before those questions were answered by the New Jersey Supreme Court, the parties reached a settlement and the case was dismissed. Thus, the holding in Walfish, supra, does not support the notion that the exemptions from UCL-covered employment at N.J.S.A. 43:21-19(i)(7) should be applied to the WPL (or to any other law, including the WHL and the ESLL), nor does it provide any support for the idea that an administrative

agency or a court may confer independent contractor status on an entire class of workers, such as insurance agents, based on the facts of the work relationship between a single such worker and that individual's putative employer.

As to the commenters' request that the Department through rulemaking create exemptions or "carve outs" from the statutory ABC test at N.J.S.A. 43:21-19(i)(6), this too would be beyond the Department's statutory authority.

N.J.A.C. 12:11-1.2 Burden of proof

This section, consisting of two subsections – (a) and (b) – states that the burden of proof to establish independent contractor status under the ABC test is on the putative employer and that because the ABC test is written in the conjunctive, in order for the putative employer to meet its burden under the ABC test, the putative employer must establish that the services at issue and the individual providing those services meet all three prongs of the ABC test. As indicated in the Notice of Proposal, this is consistent with both N.J.S.A. 43:21-19(i)(6), which states that "[s]ervices performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S. 43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that" each of the three prongs of the ABC test have been met; and the Court's opinion in Carpet Remnant Warehouse, supra, which states the following:

> "If the Department determines that the relationship falls within that definition [of employment; that is service performed for remuneration], and is not statutorily excluded, see N.J.S.A. 43:21-19(i)(7), then the party challenging the Department's classification must establish the existence of

all three criteria of the ABC test. Conversely, the failure to satisfy any one of the three criteria results in an 'employment' classification." Carpet Remnant Warehouse, supra, at 581 (internal citations omitted) See also, Schomp v. Fuller Brush Co., 124 N.J.L. 487, 489 (Sup. Ct. 1940); Philadelphia Newspapers, Inc. v. Board of Review, 397 N.J. Super. 309, 325 (App. Div. 2007); Hargrove v. Sleepy's, LLC, 220 N.J. 289, 305 (2015); and East Bay Drywall, LLC v. Dep't of Labor and Workforce Development, 251 N.J. 477, 495 (2022).

N.J.A.C. 12:11-1.3 Prong A of the ABC test

Under N.J.S.A. 43:21-19(i)(6)(A), a putative employer seeking to establish that an individual who has performed services for remuneration is an independent contractor, rather than an employee, must show to the satisfaction of the Department that "[s]uch 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."

N.J.A.C. 12:11-1.3(a) states that for the putative employer to meet its burden under Prong A of the ABC test, it must establish that it does not exercise control or direction over the individual's work in fact, and that it does not reserve the right to control or direct the individual's work. This is taken almost verbatim from the holding in Carpet Remnant Warehouse, supra, where the Court stated regarding Prong A, "[t]he person must establish not only that the employer has not exercised control in fact, but also that the employer has not reserved the right to control the individual's

performance." Id. at 582. See also Schomp, supra, at 491 (noting that the employer retained the right to control in its contract).

N.J.A.C. 12:11-1.3(b) states that the putative employer need not control every facet of a person's work for that person to be an employee. This, too, is taken almost verbatim from the holding in Carpet Remnant Warehouse, supra, where the Court stated, "[a]n employer need not control every facet of a person's responsibilities, however, for that person to be deemed an employee." Id. at 582.

N.J.A.C. 12:11-1.3(c) states that the following factors are among those that shall be considered when evaluating whether an individual has and will continue to be free from control or direction under Prong A:

1. Whether the individual is required to work any set hours or jobs,

2. Whether the putative employer has the right to control the details and means by which the services are performed,

3. Whether the services must be rendered by the individual personally,

4. Whether the putative employer negotiates for and acquires the services performed by the individual,

5. Whether the individual's rate of pay is fixed by the putative employer,

6. Whether the individual bears any risk of loss for services performed,

7. Whether the individual is required to be on call, on standby, or otherwise available to perform services at set times determined by the putative employer, even if the individual does not actually perform services at such times,

8. Whether the putative employer limits the individual's performance of services for other parties such as by limiting the individual's geographic area or potential clientele, and

9. Whether the putative employer provides training to the individual.

The Department and its Commissioner are authorized by law to interpret and implement the UCL, TDBL, WHL, WPL, and ESLL, and to implement Departmental policy under those laws, through both the adjudication of contested cases and rulemaking. The Department has also recently been empowered by law to bring action on behalf of workers in Superior Court. The Department and Commissioners, past and present, have consistently exercised that authority to interpret and implement the statutory ABC test at N.J.S.A. 43:21-19(i)(6) through the issuance of FADs in contested cases. It is the Department's aim now, to exercise that authority in the rulemaking realm; that is, to codify in rule not only the relevant principles announced in published opinions of the New Jersey Supreme Court and Superior Court, Appellate Division, but also to codify the Department's interpretation of, and Departmental policy regarding, the statutory ABC test as reflected in Commissioner FADs, through which the Department has consistently, over decades, during multiple administrations, applied the ABC test to the question of independent contractor status; FADs that have either been upheld in the courts or have been unchallenged, and that are consistent with statute and binding precedent.

As the Court in Carpet Remnant Warehouse, supra, instructs, "[v]arious factors should be considered in determining whether a person is 'free from control' under the A standard," adding, "[a]lthough isolated factors [in any one record] may suggest a

modicum of control, [one must evaluate] the entire relationship between [the putative employer and the individual performing services].” Id. at 590. Thus, when the commenter objects to the “various factors” enumerated within proposed N.J.A.C. 12:11-1.3(c) based on its assertion that any single factor “could be equally consistent with independent contractor status as with employee status,” the commenter is missing the point. The analysis under Prong A does not call for an evaluation *individually* on a factor-by-factor basis of whether *each* is indicative of independent contractor or employee status. What *is* required under Prong A, as explained by the Court in Carpet Remnant Warehouse, supra, is an evaluation of “the entire relationship” between the enterprise and the worker. The first step in this process under Prong A is to identify any indicia of control or direction, applying the “various factors.” If indicia of control or direction are identified, one must then evaluate whether, taken as a whole, they suggest a degree of control or direction that is consistent with employee status. It is in this regard that N.J.A.C. 12:11-1.3(c) is intended to be helpful; that is, in precisely the same way as the Court in Carpet Remnant Warehouse, supra, intended when it listed “specific factors indicative of control” that should be considered. Id.

Factors 1., through 3., above are taken directly from the holding in Carpet Remnant Warehouse, supra, in which the Court stated regarding Prong A, “[s]pecific factors indicative of control include whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and means by which the services are performed, and whether the services must be rendered personally.” Id, at 590.

Regarding the four subfactors listed under N.J.A.C. 12:11-1.3(c)2., as indicated earlier, "[w]hether the putative employer has the right to control the details and means by which the services are performed by the individual," is one of those Prong A factors *expressly* enumerated by the Court in Carpet Remnant Warehouse, supra., and the Department's objective in providing the four sub-factors within N.J.A.C. 12:11-1.3(c)(2)(i) is to provide clarity for the benefit of businesses and workers what it means to "control the details and means by which the services are performed." That is, N.J.A.C. 12:11-1.3(c)2(i), states that "[t]he following sub-factors may be considered when determining whether the putative employer has exercised control over the details and means by which the services are performed by the individual," adding that, the list of sub-factors "is intended to be illustrative and is not exhaustive:"

1. Whether the putative employer requires the individual to use specific tools, supplies or materials;
2. Whether the putative employer requires the individual to wear a uniform or to don or display a specific logo, color(s), or other insignia;
3. Whether the putative employer requires the individual to use a digital application or software in the course of performing the services that are primarily or unilaterally controlled by the putative employer; and
4. Whether the putative employer requires the individual to report on any aspect of the individual's services at prescribed times or intervals.

Regarding each of these four sub-factors, not only is it simply intuitive that *requiring* someone to do something, whether to use specific tools, supplies or materials; to wear a uniform or to display a specific logo, color(s), or other insignia; to use a

particular digital application or software; or to report on any aspect of the individual's services at prescribed times or intervals, is indicative of some degree of control, but it is also worth noting that the inclusion of each of these sub-factors was informed by case law and by Commissioner FADs that memorialize years of Departmental policy and past practice in applying Prong A of the ABC test. Specifically, regarding the first sub-factor (requiring the use of specific tools, supplies or materials), the Court in Carpet Remnant Warehouse, supra, listed among the factors that have traditionally been used to determine the degree of control exercised by an employer over the means, methods and details of operation, "whether the employer or the workman **supplies the instrumentalities, tools** and the place of work for the person doing the work." Id. at 579-80 (emphasis added). Also, in Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135 (App. Div. 1990), among the bases for the court's finding that Trauma Nurses, Inc. had met its burden under Prong A of the ABC test, was that "Trauma Nurses, Inc., did not furnish **any supplies, equipment** or uniforms to its nurses." Trauma Nurses., at 145 (emphasis added). The reasonable inference to be drawn from the court's reasoning in Trauma Nurses, supra, is that whether the putative employer *does* furnish any supplies, equipment or uniforms to its workers is relevant to the question of whether the putative employer has exercised control over the details and means by which the services are performed. Finally, Commissioners have traditionally considered whether the putative employer requires the individual to use specific tools, supplies or materials when evaluating whether the putative employer has exercised control over the details and means by which the services are performed by the individual. For example, in East Bay Drywall, LLC v. NJDOL (Commissioner FAD,

issued January 13, 2020), among the factors cited by the Commissioner in support of his finding that the drywall installers engaged by East Bay were not free from control or direction over the performance of their work, was that, "East Bay [had] provided all of the **materials** for the job, such as sheetrock, screws, nails, corner bead, spackle and level lines." Id. at p. 10. (emphasis added).

Regarding the second sub-factor (requiring the individual to wear a uniform or to don or display a specific logo, color(s) or other insignia), as indicated above, the court in Trauma Nurses, supra, included among the bases for the court's finding that Trauma Nurses, Inc. had met its burden under Prong A of the ABC test, was that "Trauma Nurses, Inc., did not furnish any supplies, equipment **or uniforms** to its nurses." Trauma Nurses, at 145 (emphasis added). As above, the inference is that whether the putative employer *does* require the individual to wear a uniform is relevant to the question of whether the putative employer has exercised control over the details and means by which the services are performed. Commissioners have also traditionally considered whether the putative employer requires the individual to wear a uniform or to don or display a specific logo, color(s) or other insignia, when evaluating whether the putative employer has exercised control over the details and means by which the services are performed, as in Kismet International, Inc. v. NJDOL (FAD, December 3, 2021), affirmed Kismet Int'l v. NJ Department of Labor and Workforce Development, Docket No. A-1424-21, 2023 N.J. Super. Unpub. LEXIS 1323 (App. Div. 2023), cert. denied, 256 N.J. 194 (2024), which involved drivers who had been engaged by Kismet to transport passengers identified through Kismet's web application. In that case, the Administrative Law Judge found, and the Commissioner affirmed, that there had been

multiple indicia of control or direction exercised by Kismet over the performance of the drivers' duties, including that Kismet had required its drivers to wear "professional attire."

In support of the third sub-factor (requiring the individual to use a digital application or software that is primarily or unilaterally controlled by the putative employer), there is at least one Commissioner FAD; Kismet, supra, where the ALJ concluded, and the Commissioner affirmed, that among the indicia of control or direction exercised by Kismet over the performance of its drivers resulting in a finding that Kismet had failed to meet its burden under Prong A of the ABC test was that the drivers had been required to log on to Kismet's own web application (app) and transport passengers who were identified by Kismet's app as in the driver's zone.

Notwithstanding the foregoing, in light of concerns raised by the commenters, the Department has decided on adoption to remove sub-factor "(3)" of N.J.A.C. 12:11-1.3(c)(2)(i). This is merely a sub-factor, subordinate to the root factor - "whether the putative employer has exercised control over the details and means by which the services are performed by the individual." The sub-factors are also preceded within N.J.A.C. 12:11-1.3(c)(2)(i) by the phrase, "[t]he following sub-factors **may** be considered" (emphasis added), as opposed to N.J.A.C. 12:11-1.3(c), for example, which says that the factors listed thereafter "are among those that **shall** be considered" (emphasis added). Consequently, removal of the single permissive sub-factor on adoption does not significantly enlarge or curtail who and what will be affected by the rulemaking, change what is being prescribed, proscribed or otherwise mandated by the rulemaking, or enlarge or curtail the scope of the proposed rulemaking and its burden

on those affected by it. Therefore, it is a non-substantial change that may be made on adoption.

Regarding the fourth sub-factor (whether the putative employer requires the individual to report on any aspect of the individual's services at prescribed times or intervals), its inclusion was informed by the New Jersey Supreme Court's opinion in Superior Life v. Board of Review, 127 N.J.L. 537 (1942), in which among the various factors that contributed to the Court's ultimate conclusion that Superior had failed to meet its burden under Prong A relative to the individual who had performed work for them in the collection and sale of insurance was that the salesperson "was obliged to report to [his superior] periodically and to account for his collections." Id. at 538.

Regarding N.J.A.C. 12:11-1.3(c)(4) and (5), which include among the various Prong A factors, "[w]hether the putative employer negotiates for and acquires the services performed by the individual" and "[w]hether the individual's rate of pay is fixed by the putative employer," these are factors that have been considered by the Commissioner in past FADs and have been cited by the courts. For example, in East Bay Drywall, LLC v. NJDOL (FAD, January 13, 2020), affirmed, East Bay Drywall , LLC v. Department of Labor and Workforce Development, 251 N.J. 477 (2022), the Commissioner found the following:

> "Turning to the ABC test, I agree with respondent that East Bay has failed to meet its burden under Prong 'A.' That is, I agree that the overwhelming weight of the evidence in the record supports the conclusion that the 'drywall subcontractors' engaged by East Bay during the audit period were not free from control or direction over the performance of their work.

> Specifically, as observed by respondent, the testimony of [the managing member of East Bay] reveals that **East Bay bid on, negotiated for and acquired all of the work performed by the 'drywall subcontractors**;" the amount paid by East Bay to the 'drywall subcontractors' **was a fixed amount set by East Bay** and not negotiated with the 'drywall subcontractors;" East Bay provided all of the materials for the job, such as sheetrock, screws, nails, corner bead, spackle and level lines; and East Bay, not the 'drywall subcontractors,' bore the risk of loss on each job. [The managing member's] testimony confirms the practices of East Bay reflect a degree of control over the 'drywall subcontractors' that is consistent with an employment relationship and belies petitioner's assertion that these individuals were free from control or direction by East Bay."
>
> Id. at 10 (emphasis added)

Similarly, in MKI Associates, LLC v. NJDOL (FAD, April 25, 2018), affirmed, MKI Associates, LLC v. N.J. Department of Labor and Workforce Development, Docket No. A-4508-17T3, 2019 N.J. Super. Unpub. LEXIS 2088 (App. Div. 2019), cert. denied, MKI Assocs., LLC v. N.J. Dep't of Labor and Workforce Development, 241 N.J. 51 (2020), the Commissioner found the following:

> "Regarding Prong 'A' of the ABC test, I agree with respondent that MKI has failed to meet its burden. That is, I agree that the documents governing the relationships between MKI and the therapists and between MKI and its clients, as well as the testimony of witnesses confirming the

> practices of MKI, reflect a degree of control over the therapists that is consistent with an employment relationship and belies petitioner's assertion that these individuals were free from direction or control by MKI. Specifically, the 'staffing contract' between MKI and its clients contains a 'Rate Schedule' listing the hourly rates to be charged for the services of [MKI's therapists]. Testimony offered during the hearing confirms that the **hourly rate charged to MKI's clients for the services of therapists and the hourly rate paid by MKI to its therapists are both set by MKI**. The therapists are **not free to negotiate** their hourly rate of pay with clients." Id. at 10 (emphasis added)

In affirming the Commissioner's FAD in MKI, the court also listed as among the various factors *it* considered under Prong A, that the "[t]herapists were **not permitted to contact or negotiate their wages** directly with the facilities," adding, "[i]nstead, the therapists' **wages were negotiated with MKI and it separately negotiated the rates the facilities would pay**." MKI Associates, LLC v. N.J. Department of Labor and Workforce Development, Docket No. A-4508-17T3, 2019 N.J. Super. Unpub. LEXIS 2088, at p.14 (App. Div. 2019).[1]

In Pennsauken Diagnostic Center, LLC v. NJDOL (FAD, March 16, 2023), affirmed, Pennsauken Diagnostic Ctr, LLC v. NJ Department of Labor and Workforce

[1] The Department understands that unpublished Opinions of the Superior Court, Appellate Division, have no precedential value. However, where an unpublished Opinion of the Appellate Division supports a statutory interpretation or policy determination reflected in an FAD; one that is the basis for a new rule being adopted, as here, it is appropriate and, in fact, instructive, to include such Opinions in the Departmental responses to comments.

Development, Docket No. A-2150-22, 2024 N.J. Super. Unpub. LEXIS 1232 (App. Div. 2024), which involved radiologists who were providing services to a diagnostic imaging center, the Commissioner included among the factors contributing to his finding that the radiologists had not been free of control or direction by Pennsauken Diagnostic Center, LLC, that "[t]he radiologists rate of pay was set by Pennsauken Diagnostic Center, LLC." Id. at p. 9. Furthermore, in affirming the Commissioner's FAD in Pennsauken Diagnostic Center, LLC v. NJDOL; and in particular, regarding the Commissioner's conclusion that Pennsauken Diagnostic Center, LLC, had failed to meet its burden under Prong A, the court stated, "**This case is distinct from the putative employer in Trauma Nurses v. Board of Review.** There…[e]ach of those nurses negotiated their own hourly rate, and the putative employer acted as a broker for nurses placing them with hospitals on a temporary basis. Here, the radiologists' pay rate was set forth in the agreement without their own negotiation." Pennsauken Diagnostic, supra, at 17 (emphasis added). There is also the Commissioner's FAD in Yeamon Music, Inc. v. NJDOL (FAD, January 19, 2023), which involved musicians and a sound technician who were engaged to perform services by Yeamon Music, Inc., the business arm of a Jimmy Buffet cover band. In that case, regarding Prong A of the ABC test, the Commissioner found:

> "Yeamon exercised direction or control over the musicians and sound technician when Yeamon **unilaterally negotiated** a single price for each 'gig' with the venue owner, and when [the co-owner of Yeamon] decided how much to pay each individual for the gig from that check. That is, I agree with respondent that, '[u]nlike an independent contractor, these

individuals **are not free to negotiate their compensation** and must accept the amount offered to them for the services they provide to Yeamon.'"

Id. at 8. (emphasis added).

Regarding N.J.A.C. 12:11-1.3(c)(6), which includes among the various Prong A factors, "[w]hether the individual bears any risk of loss for services performed," this factor has been considered by the Commissioner in at least two past FADs, each of which was ultimately affirmed by the courts. In East Bay Drywall. LLC v. NJDOL, supra, which involved drywall installers who performed services for a drywall installation company, the Commissioner found that among the factors that mitigated toward a finding that the putative employer had failed to meet its burden under Prong A of the ABC test was that "East Bay, not the 'drywall subcontractors,' bore the risk of loss on each job." Id, at p. 10. Also, in Pennsauken Diagnostic, supra, the Commissioner found that Pennsauken Diagnostic Center, LLC, had failed to meet its burden under Prong A to establish that the radiologists who had provided services to Pennsauken Diagnostic Center, LLC, were free from direction and control based, in part, on the fact that "Pennsauken Diagnostic Center, LLC, bore the risk of loss for the services performed for its diagnostic-imaging patients, including for the services performed by the radiologists." Id. at 9. Both FADs were later affirmed by the courts: East Bay Drywall (on other grounds) by the N.J. Supreme Court and Pennsauken Diagnostic Center by the Superior Court, Appellate Division.

Regarding N.J.A.C. 12:11-1.3(c)(7), which includes among the various Prong A factors, "[w]hether the individual is required to be on call, on standby, or otherwise

available to perform services at set times determined by the putative employer, even if the individual does not actually perform services at such times," the Court in Carpet Remnant Warehouse, supra, announced regarding Prong A: "[t]he person must establish not only that the employer has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance." See also Schomp, supra, 124 N.J.L. at 491 (noting that employer retained right to control in its contract). With that principle in mind, a putative employer who ***requires*** a worker during hours he or she would otherwise be unattached to remain on call or standby, would appear to be an indication that the putative employer has exercised control in fact, or has reserved the right to control the individual's performance.

Regarding N.J.A.C. 12:11-1.3(c)(8), which includes among the various Prong A factors, "[w]hether the putative employer limits the individual's performance of services for other parties, such as by limiting the individual's geographic area or potential clientele," in Superior Life, supra, the Court found among the factors that contributed to its conclusion that Superior Life had failed to meet its burden under Prong A relative to the individual who had performed work for them in the collection and sale of insurance was, "[h]e was employed to make collection of premiums due from certain policy holders **located within an area consisting of several municipalities** within this state and to sell insurance to any one he could within that area." Id. at 538 (emphasis added). Another example, is MKI, supra, in which the Commissioner found that "non-competition" and "non-solicitation" clauses, which appeared within the "Independent Contractor Consulting Agreement" that the therapists engaged by MKI were required to sign, were among the factors that led to the conclusion that the therapists had not been

free of control or direction by MKI and that, therefore, MKI had failed to meet its burden under Prong A of the ABC test. That is, the Commissioner stated, "[t]rue independent contractors are not required to sign agreements containing clauses like this as a condition to being engaged for the performance of services. This clause [the 'non-competition' clause] and the others described above reflect a substantial degree of control by MKI over its therapists." The Commissioner described the relevant clauses as follows:

> "[T]he 'Independent Contractor Consulting Agreement' between MKI and its therapists contains two corresponding clauses: one entitled, "non-competition' and the other entitled, 'non-solicitation.' The 'non-competition' clause states that 'other than with the express written consent of the Customers (MKI and the client), which will not be unreasonably withheld, the Consultant will not, during the continuance of this Agreement or within 1 year after the termination of this Agreement, be directly or indirectly involved with a business which is in direct competition with the particular business line of the Customers, divert or attempt to divert from the Customers any business the Customers [have] enjoyed, solicited, or attempted to solicit, from other individuals or corporations, prior to termination of this Agreement." The 'non-solicitation' clause states that '[t]he Consultant understands and agrees that any attempt on the part of the Consultant to induce other employees or consultants to leave the Customers' employ, or any effort by the Consultant to interfere with the

Customers' relationship with its other employees and consultants would be harmful and damaging to the Customers, adding the following:

> Customer #2 (client) may not solicit the direct services of the Consultant without knowledge of Customer #1 (MKI) and a formal written request to Customer #1 (MKI). Customer #2 (client) may buy-out the contract of the Consultant only if agreed upon to a set price by Customer #1 (MKI). Customer #1 (MKI) reserves the right to refuse buy-out of this Consultant contract.

In affirming the Commissioner's FAD in MKI, the court noted among the factors contributing to its conclusion that MKI had failed to meet its burden under Prong A of the ABC test that, "[MKI's] consultant agreements and staffing contracts contained provisions reserving MKI's right to control the place and manner in which the therapists conducted their business," adding, "[t]he means of control were expressly set forth in the non-compete and non-solicitation clauses, the buy-out provision, and clauses restricting the ability of the facility and a therapist to engaged in full-time employment without MKI's written approval." MKI, supra, at 13-14.

The fact that MKI thought that it could include such clauses in their so-called "Independent Contractor Consulting Agreement," without jeopardizing the independent contractor status of the therapists is precisely why N.J.A.C. 12:11-1.3(c)(8), in particular, and N.J.A.C. 12:11, in general, are needed.

Finally, regarding N.J.A.C. 12:11-1.3(c)(9), which includes among the various Prong A factors, "[w]hether the putative employer provides training to the individual," it is axiomatic that if exercising control over the details and means by which the services are performed by the individual is a factor to be considered under Prong A of the ABC test, as the Court in Carpet Remnant Warehouse, supra, suggests, then providing training during which the individual is instructed as to the acceptable manner of performance (for, what else is training, but instruction in how to perform a function(s)), should be considered among the various factors under Prong A when evaluating whether a putative employer has exercised control or direction.

Regarding all of the commenters' objections to N.J.A.C. 12:11-1.3, these are, and have been for decades, among the various factors (no one factor dispositive, but each potentially relevant) that are considered by the Department and by the courts, under Prong A of the ABC test when evaluating whether an individual has been and will continue to be free from control or direction. As explained in the Notice of Proposal, among the Department's objectives with this rulemaking is to help employers so that they are better informed regarding the principles that govern application of the ABC test. Thus, businesses will be more likely to make appropriate decisions regarding the classification of workers. That is, the Department believes that it is preferable for businesses to be aware of the proper interpretation of the statutory ABC test *before*, rather than *after*, an individual who may have been misclassified as an independent contractor files a claim for unemployment compensation with the Department's Division of Unemployment Insurance, a claim for temporary disability insurance benefits or for family leave insurance benefits with the Department's Division of Temporary Disability

Insurance; or before that individual files a complaint with the Department's Division of Wage and Hour Compliance for unpaid wages or for violation(s) of the ESLL. For, *after* such a claim or complaint has been filed, the Department is statutorily obligated to conduct an audit (by the Department's Division of Employer Accounts under the UCL and TDBL) or an investigation (by the Department's Division of Wage and Hour Compliance under the WHL, WPL or ESLL) to determine whether benefits (UCL/TDBL) or unpaid wages (WPL/WHL/ESLL) are due and, relatedly (as to the UCL/TDBL), whether any unpaid contributions to the Unemployment Compensation and State Disability Benefits Funds are due; including, as a threshold matter, whether the individual who filed the claim or complaint, and any other similarly situated individuals, are either employees or independent contractors. As can be seen in FADs and court opinions issued over decades, when such an employer (one who has been misclassifying an employee as an independent contractor) learns of the proper interpretation of the statutory ABC test only *after* a claim or complaint has been filed and after an audit or investigation has been conducted, that employer is now faced with unexpected liability for unpaid contributions to the Unemployment Compensation and State Disability Benefits Funds, or for unpaid wages, *and* for associated interest and penalties; not to mention the amounts that such an employer must often pay in fees to their attorneys to pursue these cases administratively or in the courts. This *potentially unexpected* liability for employers is what the Department is seeking to avoid through the current rulemaking.

Following is a link to the Department's website where each Commissioner FAD issued since 2014 is posted in its entirety: https://www.nj.gov/labor/research-

info/legalnotices.shtml. The Department encourages the commenters to visit the website and read the FADs in order to get a full understanding of the facts of each case and to examine the Department's application of each prong of the ABC test, including Prong A, to those facts in a manner that is wholly consistent with statute and binding case law, as reflected in each of the principles contained within N.J.A.C. 12:11.

N.J.A.C. 12:11-1.3(d) and (e) state the following regarding the factors listed at N.J.A.C. 12:11-1.3(c) for consideration when evaluating whether an individual has been and will continue to be free from control or direction pursuant to Prong A of the ABC test:

> (d) The factors listed at (c) above are not exhaustive and additional factors may be considered.
>
> (e) The factors listed at (c) above shall not be used as a checklist; that is, a conclusion that the putative employer has met Prong A of the ABC test shall not be based on whether a majority of the factors listed at (c) above have been met. There is no set number of factors that will, in every instance, result in a finding that the putative employer either has or has not met its burden pursuant to Prong A of the ABC test. Some factors may be relevant in one situation and may not be relevant in another. What is required pursuant to Prong A of the ABC test is to evaluate the entire relationship between the individual and the putative employer and to determine whether the individual has been, and will continue to be, free from control or direction by the putative employer.

Similarly, N.J.A.C. 12:11-1.5(c) and (d), state the following regarding the factors listed at N.J.A.C. 12:11-1.5(b) for consideration when evaluating whether an individual is customarily engaged in an independently established trade, occupation, profession, or business, pursuant to Prong C of the ABC test:

> (c) The factors listed at (b) above are not exhaustive and additional factors may be considered.
>
> (d) The factors listed at (b) above shall not be used as a checklist; that is, a conclusion that the putative employer has met Prong C of the ABC test shall not be based on whether a majority of the factors listed at (b) above have been met. There is no set number of factors that will, in every instance, result in a finding that the putative employer either has or has not met its burden pursuant to Prong C of the ABC test. Some factors may be relevant in one situation and may not be relevant in another. What is required pursuant to Prong C of the ABC test is to evaluate the entire relationship between the individual and the putative employer and to determine whether the individual is customarily engaged in an independently established trade, occupation, or business.

The commenters characterize N.J.A.C. 12:11-1.3(d) and (e), and N.J.A.C. 12:11-1.5(c) and (d), as "hedging" by the Department, and maintain that these subsections will make it "difficult, if not impossible, for businesses or individuals to predict with any

degree of confidence whether their independent contractor arrangements will pass muster under the proposed rule." The commenters also say these subsections give "unfettered discretion [to] the Department to ignore or consider some factors and not others in a given situation."

Because the Department's underlying premise is the same for N.J.A.C. 12:11-1.3(d) and (e), regarding the Prong A factors enumerated at N.J.A.C. 12:11-1.3(c), and N.J.A.C. 12:11-1.5(c) and (d), regarding the Prong C factors enumerated at N.J.A.C. 12:11-1.5(b), and since the commenter's objection to both is also the same, the Department will respond to both the Prong A-related and Prong C-related comments together. The language within N.J.A.C. 12:11-1.3(d) and (e), and N.J.A.C. 12:11-1.5(c) and (d), to which the commenters object is commonly used when describing how to apply a list of factors to a test for employee versus independent contractor status. In fact, within guidance provided by the Internal Revenue Service (IRS) regarding application of that federal agency's test for independent contractor status, the IRS instructs the following:

> "Businesses must weigh all of these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. **There is no 'magic' or set number of factors that 'makes' the worker an employee or an independent contractor and no one factor stands alone in making this determination**. Also, factors which are relevant in one situation may not be relevant in another.

> The keys are to look at the **entire relationship** and consider the extent of the right to direct and control the worker."
>
> https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee.

One cannot possibly foresee every factual scenario that might arise in a potential employment relationship. Therefore, it would be unwise for the Department to characterize as exhaustive any list of factors used to evaluate under Prong A whether an individual providing services is free from control or direction by the enterprise for which those services are being performed, or under Prong C whether the individual providing those services is customarily engaged in an independently established trade, occupation, profession, or business; just as it would be unwise for the IRS to characterize as exhaustive the factors that it lists for evaluation under its test for independent contractor status. In fact, the NJ Supreme Court, in East Bay Drywall, supra, stated the following regarding the Prong C factors that are enumerated in Carpet Remnant Warehouse, supra:

> "Those Prong C factors themselves [that is, the factors enumerated in Carpet Remnant Warehouse, supra] are just pieces of the puzzle, factors that can illuminate whether a worker has a truly independent business. Further, New Jersey courts have looked to other factors to determine a

worker's independence under Prong C. In Gilchrist, for instance, the Appellate Division considered whether door-to-door salesmen operated business establishments; whether they maintained telephone listings or business stationary; who possessed the inventory; who bore the risk of loss; and who benefited from the goodwill that the company generated. 48 N.J. Super. at 158-59, 137 A.2d 29. In Trauma Nurses, the Appellate Division considered whether nurses assigned to temporary positions were required to maintain their own educational and licensure requirements, whether they could obtain other full-or part-time positions, and whether they worked for other agencies or hospitals. 242 N.J. Super. at 137, 148 576 A.2d 285."

[East Bay Drywall, supra, at 498.]

One commenter's suggestion that the Department seeks "unfettered discretion…to ignore or consider some factors and not others," is mistaken. The provisions within N.J.A.C. 12:11-1.3 (regarding Prong A of the ABC test) and N.J.A.C. 12:11-1.5 (regarding Prong C of the ABC test) allow businesses to consider factors under Prongs A and C that are not listed in the rules and which might be unique to a particular business or industry; or to assert that one factor or another that is enumerated in the rules should not apply within the commenter's industry or to its particular business. The Department's intention is to provide the maximum amount of guidance based on governing law and bringing to bear the Department's experience and expertise in applying the ABC test, while acknowledging that some of the factors that it

lists for evaluation under Prongs A and C "may be relevant in one situation and not…relevant in another," and also not foreclosing the possibility that there may be unforeseen factors that should be evaluated that are unique to a particular industry, business, or set of facts.

The Commissioner's FAD in Your Hometown Title, LLC v. NJDOL (FAD, November 8, 2021), affirmed, Your Hometown Title, LLC v. N.J. Department of Labor and Workforce Development, Docket No. A-1168-21, 2024 N.J. Sper Unpub. LEXIS 148 (App. Div. 2024), illustrates the importance *to businesses* of the flexibility that the principles memorialized in N.J.A.C. 12:11-1.3(d) and (e), and N.J.A.C. 12:11-1.5(c) and (d) afford. In that FAD, the Commissioner found the following with regard to whether Your Hometown Title, LLC, met its burden under Prong C of the ABC test as to the Title Closers, Notary Signing Agents and Title Abstractors whose services it had engaged:

> "In the instant matter, I find that petitioner has met its burden under Prong "C" with regard to all of the Closers, Notary Signing Agents and Title Abstractors at issue. I believe it must be acknowledged that there are legitimate independent business enterprises conducted by individuals, without employees and without much in the way of "tools, equipment, vehicles and similar resources." One must evaluate the totality of the circumstances when applying the Prong "C" factors. Thus, for example, I do not fault petitioner for failing to provide evidence of the number of employees that the Closers, Notary Signing Agents and Title Abstractors have, since in order to sustain a business as a freelancer in one of these fields, one would not necessarily require employees, but rather, could

conceivably sustain such a business with one's own services alone. Of course, if the provider of the services at issue were to *have* employees, that would certainly, under Carpet Remnant, be a factor mitigating in favor of a finding that Prong "C" had been satisfied, but I don't believe it is absolutely necessary in every case. Similarly, there are services which can be performed and business enterprises based on the performance of those services, which require little or no "tools" or "similar resources." Thus, where the "tools" of a freelancer's trade legitimately consist of his or her personal laptop computer, printer, cable and Wi Fi connection, cell phone, and automobile, that alone should not disqualify the individual provider of the service from being considered engaged in an independently established business enterprise. That said, I agree with the ALJ that applying *all* of the Prong "C" factors enumerated in Carpet Remnant to the facts of this particular case petitioner has satisfied its burden under Prong "C" relative to the services provided to YHT by the Closers, Notary Signing Agents and Title Abstractors. It has been stated in prior final administrative determinations that among the most important of the "C" Prong factors to consider is the amount of remuneration the alleged contractor received from the putative employer relative to the amount of remuneration received by the alleged contractor from others for performance of the same services. As reflected in the ALJ's findings of fact, the record in this case reveals that each of the Closers, Notary Signing Agents and Title Abstractors at relevant times earned between 1%

and 28% of their Schedule C income as Closers, Notary Signing Agents and Title Abstractors from YHT and the balance of their Schedule C income from other clients. These individuals held themselves out as being available to perform the subject services on a fee-for-service basis and performed those services for multiple clients over the course of multiple years during the audit period."

[Id. at 18 (individual names deleted).]

In light of the foregoing, one can see why the principles memorialized in N.J.A.C. 12:11-1.3(d) and (e), and N.J.A.C. 12:11-1.5(c) and (d), like the guidance provided by the IRS regarding use of the factors for determining "degree of control and independence" under that federal agency's test for independent contractor status, are not only advisable, but necessary, and why the flexibility that they afford inures to the benefit of all affected parties, including the businesses and industries that currently object to their inclusion in N.J.A.C. 12:11.

Regarding N.J.A.C. 12:11-1.3(f), on adoption, the Department is replacing the proposed language with the following: "Actions taken by a putative employer solely to comply with federal, state, or local, laws or regulations shall not, standing alone, be considered evidence of control or direction under Prong A." The new language, especially with the inclusion of the phrases "solely," and "standing alone," is not inconsistent with what was originally proposed. Rather, it provides clarity. As such, the change does not significantly enlarge or curtail who and what will be affected by the proposed rulemaking, it does not change what is being prescribed, proscribed or

otherwise mandated by the rulemaking, nor does it enlarge or curtail the scope of the rulemaking and its burden on those affected by it.

N.J.A.C. 12:11-1.4 Prong B of the ABC test

Under N.J.S.A. 43:21-19(i)(6)(B), a putative employer seeking to establish that an individual who has performed services for remuneration is an independent contractor, rather than an employee, must show to the satisfaction of the Department that "[s]uch 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."

Comments received by the Department in opposition to N.J.A.C. 12:11-1.4 focus almost entirely on the examples provided by the Department of (1) services that are typically outside of the putative employer's usual course of business, (2) services that are typically not outside of the putative employer's usual course of business, (3) locations where a putative employer typically conducts an "integral part of its business," and, therefore, are *not* likely outside of all of the putative employer's places of business, and (4) locations where the putative employer typically does *not* conduct an "integral part of its business," and, therefore, are likely outside of all the putative employer's places of business. These examples appear within the following subsections and paragraphs of proposed N.J.A.C. 12:11-1.4:

1. Proposed N.J.A.C. 12:11-1.4(c) in its entirety;

2. Proposed N.J.A.C. 12:11-1.4(d) in its entirety;

3. The last sentence of proposed N.J.A.C. 12:11-1.4(g), which states, "This includes the residence or place of business of the putative employer's client or customer when the services performed by the individual at such location are an essential component of, rather than ancillary to, the putative employer's business;" and

4. Proposed N.J.A.C. 12:11-1.4(g)i. through (g)iv., in their entirety.

The Department's purpose in including these examples was to provide clarity to employers who are seeking to comply with the law, to workers who are seeking to protect their rights under the law, to Departmental employees who enforce the law, and to judges and Justices, who must adjudicate disputes under the law. Much of the impetus for inclusion of the examples came from Footnote 3 of the unanimous Opinion in East Bay Drywall, supra, in which the Court expressly suggested that the Department "exercise its statutory authority and expertise, particularly in light of remote work today, to promulgate regulations clarifying where an enterprise 'conducts an integral part of its business' and what constitutes the 'usual course of the business.'" Nevertheless, a substantial number of commenters object to the inclusion of the examples contained in the above-cited subsections and paragraphs of proposed N.J.A.C. 12:11-1.4, expressing the opinion that they do not provide clarity regarding proper application of Prong B of the ABC test, but instead create confusion. One commenter also asserts that inclusion of the examples "is incompatible with the fact-sensitive nature of the ABC test." Anticipating the latter concern, the Department had included in each example, the words "likely" and "typically." It was the Department's belief that including the examples with these qualifying words (that is, "likely" and "typically") would strike the appropriate

balance. However, a substantial number of commenters disagree. Consequently, the Department has decided to eliminate the above-cited sections and paragraphs of N.J.A.C. 12:11-1.4 on adoption. This should address all of the concerns that have been expressed by commenters regarding the examples that appear within proposed N.J.A.C. 12:11-1.4. Because the eliminated text contains examples and, because the root principles within N.J.A.C. 12:11-1.4 that those examples were intended to illustrate remain within the body of N.J.A.C. 12:11-1.4, these are changes that the Department may make on adoption. That is, because the root principles are still in place and only the examples are being eliminated, the changes do not significantly enlarge or curtail who and what will be affected by the proposed rulemaking, alter what is being prescribed, proscribed or otherwise mandated by the rulemaking, or enlarge or curtail the scope of the proposed rulemaking and its burden on those affected by it.

The Department is also eliminating the language introductory to the examples within proposed N.J.A.C. 12:11-1.4(g). The eliminated language indicates that locations where the putative employer conducts an "integral part of its business," includes but is not limited to locations outside of the putative employer's physical plan, where the services performed by the individual are an essential component of, rather than ancillary to, the putative employer's business. N.J.S.A. 43:21-19(i)(6)(B) states that in order to satisfy Prong B of the ABC test with regard to a particular service, the putative employer has the burden of establishing that "[s]uch 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." The NJ Supreme Court, in Carpet Remnant Warehouse, supra, announced

in 1991 that the phrase “places of business,” refers to “those locations where the enterprise has a physical plant **or conducts an integral part of its business**.” Id, at 592 (emphasis added). That is, the NJ Supreme Court ruled that under Prong B of the ABC test a putative employer’s “places of business” includes more than just the putative employer’s physical plant; it also includes those locations where the putative employer “conducts an integral part of its business.” The purpose of the now eliminated language within N.J.A.C. 12:11-1.4(g) was to provide clarity by supplementing the Court’s use of the word “integral,” with a more commonly used and perhaps more easily understood synonym, “essential,” and by adding the descriptive detail of an opposing antonym, “ancillary,” to describe the type of services that are *not* “an integral part of,” or “an essential component of” the putative employer’s business. Nevertheless, there were a substantial number of commenters who indicated that the addition of a descriptive synonym, and opposing descriptive antonym, does not provide clarity, but instead, creates confusion. Consequently, the Department has chosen to eliminate the above-described clarifying language from the new rule on adoption. Because N.J.A.C. 12:11-1.4(e) (recodified on adoption as N.J.A.C. 12:11-1.4(c)), still contains the defining root principle taken from the holding in Carpet Remnant Warehouse, supra; namely, that when evaluating whether services are performed outside of all the places of business of the enterprise for which such service was performed, the phrase “places of business” refers to locations where the enterprise has a physical plant **or conducts an integral part of its business**, the change on adoption, which eliminates the descriptive synonym and opposing descriptive antonym, does not significantly enlarge or curtail who and what will be affected by the proposed rulemaking, alter what is being

prescribed, proscribed or otherwise mandated by the rulemaking, or enlarge or curtail the scope of the proposed rulemaking and its burden on those affected by it. Thus, it is a non-substantial change, which may be made on adoption.

Following is a description of the reasonable basis for each of the remaining subsections of N.J.A.C. 12:11-1.4:

N.J.A.C. 12:11-1.4(a) indicates that, "[i]n order to meet its burden under Prong B of the ABC test, the putative employer must establish either that an individual's services are outside of the putative employer's usual course of business or that such services are performed outside of all of the putative employer's places of business." This is simply a restatement of N.J.S.A. 43:21-19(i)(6)(B).

N.J.A.C. 12:11-1.4(b) provides that, "[t]he putative employer's usual course of business may include activities that the putative employer regularly engages in to generate revenue or develop, produce, sell, market, or provide goods or services. An entity may have more than one usual course of business." This language is not taken directly from any court decision or Commissioner FAD. However, it is responsive to the NJ Supreme Court's express suggestion in East Bay Drywall, supra, that the Department exercise its statutory authority and expertise to promulgate regulations clarifying, among other things, what constitutes the "usual course of the business." That is, N.J.A.C. 12:11-1.4(b) reflects the Department's understanding of what constitutes a putative employer's usual course of business, based on expertise developed through decades of experience applying Prong B to facts surrounding potential employment relationships in innumerable contexts.

As indicated above, the Department is eliminating proposed N.J.A.C. 12:11-1.4(c) and (d) on adoption.

N.J.A.C. 12:11-1.4(e), which, due to the elimination of proposed N.J.A.C. 12:11-1.4(c) and (d), becomes N.J.A.C. 12:11-1.4(c) on adoption, states that, "[w]hen evaluating whether services are performed outside of all the places of business of the enterprise for which such services was performed, the phrase 'places of business' refers to locations where the enterprise has a physical plant or conducts an integral part of its business." This is taken directly from the opinion in Carpet Remnant Warehouse, supra, where the Court found that the phrase, "places of business," refers to "locations where the enterprise has a physical plant or conducts an integral part of its business." Id, at 592.

N.J.A.C. 12:11-1.4(f), which becomes N.J.A.C. 12:11-1.4(d) on adoption, states that, "[t]he locations where the putative employer has a physical plant include, but are not limited to, a physical office, store, or factory, where a substantial amount of the putative employer's work is performed." Like with N.J.A.C. 12:11-1.4(b), discussed above, the language in N.J.A.C. 12:11-1.4(d) is not taken directly from any court decision or Commissioner FAD. Also, like N.J.A.C. 12:11-1.4(b), N.J.A.C. 12:11-1.4(d) is intended to be responsive to the NJ Supreme Court's suggestion that the Department promulgate regulations that provide clarification on the application of Prong B of the ABC test. The Department believes that both N.J.A.C. 12:11-1.4(b) and (d) are reasonable and that both provide meaningful guidance.

As indicated above, the Department is eliminating proposed N.J.A.C. 12:11-1.4(g), on adoption. This includes elimination of both the examples contained within

proposed N.J.A.C. 12:11-1.4(g) and the introductory clarifying language contained in the proposed subsection.

Finally, on adoption the Department is adding a new N.J.A.C. 12:11-1.4(e). It expresses the same principle as had been expressed in proposed N.J.A.C. 12:11-1.4(g)iv.b, which is being eliminated on adoption. The Department believes that this principle is an important one to codify; especially, in light of the East Bay Drywall Court's suggestion that the Department "exercise its statutory authority and expertise, particularly in light of the prevalence of remote work today, to promulgate regulations clarifying" application of Prong B of the ABC test. The Department agrees with the Court that given the prevalence of remote work, guidance from the Department is needed. Accordingly, an individual's personal residence where they perform remote work will not typically be among the putative employer's places of business. This is especially true where the putative employer has a physical office, plant, or other location from which the individual also works and from which the putative employer conducts an integral part of their business. As indicated above, this is a principle that was included in the original rule proposal. On adoption it is simply being re-worded and moved from proposed N.J.A.C. 12:11-1.4(g)iv.b. to N.J.A.C. 12:11-1.4(e). Because this change is technical and does not enlarge or curtail who and what will be affected by the proposed rulemaking, change what is being prescribed, proscribed or otherwise mandated by the rulemaking, or enlarge or curtail the scope of the proposed rulemaking and its burden on those affected by it, it is not a substantial change and may, therefore, be made on adoption.

N.J.A.C. 12:11-1.5 Prong C of the ABC test

Under N.J.S.A. 43:21-19(i)(6)(C), a putative employer seeking to establish that an individual who has performed services for remuneration is an independent contractor, rather than an employee, must show to the satisfaction of the Department that "[s]uch individual is customarily engaged in an independently established trade, occupation, profession or business."

N.J.A.C. 12:11-1.5(a) states that, "[i]n order to meet its burden under Prong C of the ABC test, the putative employer must establish that an individual is customarily engaged in an independently established trade, occupation, profession or business." This is taken directly from N.J.S.A. 43:21-19(i)(6)(C), which states that in order to satisfy Prong C of the ABC test, the putative employer must establish that the "individual is customarily engaged in an independently established trade, occupation, profession or business."

N.J.A.C. 12:11-1.5(b)1. through (b)5., indicate that among the factors to be considered when evaluating whether an individual is customarily engaged in an independently established trade, occupation, profession, or business, under Prong C of the ABC test are the following:

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; and

5. The extent of the individual's investment in their own tools, equipment, vehicles, buildings, infrastructure, and other resources.

Each of these factors is taken directly from the Opinion in Carpet Remnant Warehouse, supra, where the Court instructs:

> "That determination [whether Prong C has been satisfied] should take into account various factors relating to the installers' ability to maintain an independent business or trade, including the duration and strength of the installers' businesses, the number of customers and their respective volume of businesses, the number of employees, and the extent of the installers' tools, equipment, vehicles, and similar resources.
>
> The Department should consider the amount of remuneration each installer received from Carpet Remnant Warehouse compared to that received from other retailers. Those who received a small proportion of compensation from Carpet Remnant Warehouse are more likely to be able to withstanding losing Carpet Remnant Warehouse's business."
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> Id, at 592-93.

Regarding the remaining two factors listed within N.J.A.C. 12:11-1.5(b)6., and (b)7.; whether the individual sets their own rate of pay; and whether the individual advertises, maintains a visible business location, and is available to work in the relevant market, respectively, the Department believes that it is relevant to the question of whether one is truly in business for themselves if they set their own rate of pay (as opposed to that rate of pay being set by the putative employer) and if they advertise and are available to work in the market providing the same type of service that is being performed for the putative employer (rather than being obligated to work for the putative employer alone). To include these two factors within its list of seven at N.J.A.C. 12:11-1.5(b), in addition to the five factors that are expressly enumerated in Carpet Remnant Warehouse, supra, is well within the Department's rulemaking authority. In this regard, it is worth repeating the following from the Opinion in East Bay Drywall, supra:

> "Those Prong C factors themselves [the factors enumerated in Carpet Remnant Warehouse, supra] are just pieces of the puzzle, factors that can illuminate whether a worker has a truly independent business. Further, New Jersey courts have looked to other factors to determine a worker's independence under Prong C. In Gilchrist, for instance, the Appellate Division considered whether door-to-door salesmen operated business establishments; whether they maintained telephone listings or business stationary; who possessed the inventory; who bore the risk of loss; and who benefited from the goodwill that the company generated. 48 N.J. Super. at 158-59, 137 A.2d 29. In Trauma Nurses, the Appellate Division

considered whether nurses assigned to temporary positions were required to maintain their own educational and licensure requirements, whether they could obtain other full-or part-time positions, and whether they worked for other agencies or hospitals. 242 N.J. Super. at 137, 148 576 A.2d 285."

[East Bay Drywall, supra, at 498.]

The Department addressed N.J.A.C. 12:11-1.5(c) and (d) earlier within its discussion of N.J.A.C. 12:11-1.3.

The Department is eliminating proposed N.J.A.C. 12:11-1.5(e) on adoption, because it is superfluous, in that it expresses a virtually identical principle to that contained in proposed N.J.A.C. 12:11-1.5(f) and derives from the same body of case law. That is, both proposed N.J.A.C. 12:11-1.5(e) and (f) express the principle that in order to satisfy Prong C of the ABC test, the putative employer must establish that an individual's trade, occupation, profession or business exists independent of and apart from the particular service relationship with the putative employer; which necessarily means that at all times, including during the time the individual is performing work for and receiving remuneration from the putative employer, the individual is not dependent on that work and that remuneration for the survival of the individual's independently established enterprise.

In Philadelphia Newspapers, Inc. v. Board of Review, 397 N.J. Super. 309 (App. Div. 2007), a case involving individuals who were providing newspaper delivery services

for a newspaper publisher, the court found that the putative employer had failed to meet its burden under Prong C of the ABC test, explaining:

> "Prong (C) or the 'Independent-Business Test' provision of the statute requires that the party challenging the employer-employee relationship prove that '[s]uch [claimant] is customarily engaged in an independently established trade, occupation, profession or business." N.J.S.A. 43:21-19(i)(6)(C). PNI argues that claimant 'maintained an independent business as required by [Prong (C)] of the test' because claimant 'was free to contract with other newspapers to perform delivery services both during the term of his contract with PNI and afterwards.' We disagree.
>
> Prong (C) of the statute has been construed to mean that the 'trade, occupation, profession or business' of the claimant 'was established independently of the employer or the rendering of the personal service forming the basis of the claim. Gilchrist v. Div. of Empl. Sec., 48 N.J. Super. 147, 158, 137 A.2d 29 (App.Div.1957). '[T]he employee must be engaged in such independently established activity at the time of rendering the service involved.' Ibid. The requirement that the claimant be customarily engaged in an independently established trade, occupation, profession or business 'calls for an enterprise that exists and can continue to exist independently of and apart from the particular service relationship. The enterprise must be one that is stable and lasting one that will survive the termination of a relationship.' Carpet Remnant, supra, 125

N.J. at 585, 593 A.2d 1177 (quoting Gilchrist, supra, 48 N.J. Super. at 158, 137 A.2d 29). If the claimant is 'dependent on the employer, and on termination of that relationship would join the ranks of the unemployed, the [Prong (C)] standard is not satisfied.' Id. at 585-86, 593 A.2d 1177. Stated another way, Prong (C) has been proven 'when a person has a business, trade, occupation, or profession that will clearly continue despite termination of the challenged relationship.' Id. at 586, 593 A.2d 1177.

In applying the above principles, we conclude that the record is devoid of evidence demonstrating that claimant was customarily engaged in an independently established trade or activity from the mere delivery of PNI's newspapers 'at the time of rendering the service involved.' Gilchrist, supra, 48 N.J. Super. at 158, 137 A.2d 29. Claimant never engaged in delivery services prior to commencing his delivery of newspapers for PNI, nor has he engaged in similar services since his termination from employment. Moreover, on termination from employment, claimant joined the ranks of the unemployed. Accordingly, Prong (C) was not satisfied. Carpet Remnant, supra, 125 N.J. at 585-86, 593 A.2d 1177.

[Id. at 322-23.]

In Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147 (App. Div. 1957), a case involving individuals who sold baby furniture for a furniture distributor, the court found that the putative employer had failed to meet its burden under Prong C of the ABC test, explaining:

"Test C requires that 'such individual is customarily engaged in an independently established trade, occupation, profession or business.' As was pointed out in Fuller Brush Co. v. Industrial Commission of Utah, above, 99 Utah 97, 104 *P.2d* 201, 129 *A.L.R.* 511 (*Sup. Ct.* 1940), 'independently' clearly modifies the word 'established.' It therefore carries the meaning that the 'trade, occupation, profession or business' was established independently of the employer or the rendering of the personal service forming the basis of the claim. The present tense of the verb, 'is,' indicates that the employee must be engaged in such independently established activity at the time of rendering the service involved. And 'customarily' means usually; habitually; according to the custom, general practice or usual order of things; regularly.

The fact that a salesman who works on commission must rely on his efforts and ability to secure orders to make a livelihood does not necessarily mean that he is working for himself as an entrepreneur or businessman, within the intendment of test C. The double requirement that an individual must be 'customarily engaged' and 'independently established' calls for an enterprise that exists and can continue to exist independently of and apart from the particular service relationship. The enterprise must be one that is stable and lasting – one that will survive the termination of the relationship.

[Id. at 158-59.]

In State Shorthand Reporting Servs. V. New Jersey Department of Labor and Workforce Development, Docket No. A-1500-21, A-1710-21, 2024 N.J. Super. Unpub. LEXIS 211 (App. Div. 2024), the court found that the putative employer in that case, a court reporting service, had failed to meet its burden under Prong C of the ABC test to establish that the court reporters whose services it engaged had been customarily engaged in an independently established trade, occupation, profession or business. In so finding, the court explained:

> "[T]he Trauma Nurses Court's analysis under prong C is distinguishable because there was no indication that broker failed to provide the Commissioner sufficient information to evaluate prong C. Rather, the Court noted those nurses did not work exclusively through the agency and demonstrated they worked 'simultaneously for other brokers, hospitals and health institutions.' Trauma Nurses, 242 N.J. at 148. Here [regarding the court reporters engaged by State Shorthand Reporting Services] the Commissioner was not satisfied [that] petitioners [had] established the reporters were 'customarily engaged' in an independent trade at the time of the audits while rendering services for petitioners due to the insufficient proofs provided. See Gilchrist, 48 N.J. Super. at 158.
>
> [Id. at 36.]

In East Bay Drywall, supra, a case involving drywall installers (characterized by the putative employer as “drywall subcontractors”) performing work for a drywall installation company, the court found that the putative employer failed to meet its burden under Prong C of the ABC test, and in so doing, expressly rejected the probative value of an individual being free to work for others; free to refuse to accept or complete work, and relatedly, rejected multiple employment as evidence of being customarily engaged in an independently established business enterprise, explaining in pertinent part:

> “In the instant case, East Bay asserts [its owner’s] testimony is “[t]he best evidence supporting” prong C. [The owner] testified that he believed the subcontractors worked for other contractors, that sometimes a subcontractor would leave the job before it was completed, and that the subcontractors were free to accept or decline work.
>
> . . .
>
> First, generally speaking and subject to personal contractual obligations, even wholly dependent employees may choose to work for more than one employer or abruptly resign from their position. See Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 65-66, 417 A.2d 505 (1980). But the probative value of refusal to accept or complete work is limited because, like an employee, even a bona-fide independent contractor is not free from the

pressure to accept a job. Logic dictates that a subcontractor who consistently declines the call to work would soon have a silent phone.

[Id. at 498-99.]

Because proposed N.J.A.C. 12:11-1.5(e) and (f) express virtually identical principles, and because the Department is, therefore, eliminating proposed N.J.A.C. 12:11-1.5(e) on adoption as duplicative of proposed N.J.A.C. 12:11-1.5(f), this change does not enlarge or curtail who and what will be affected by the proposed rulemaking, change what is being prescribed, proscribed or otherwise mandated by the rulemaking, or enlarge or curtail the scope of the proposed rulemaking and its burden on those affected by it. Thus, it is a non-substantial change, which may be made on adoption.

N.J.A.C. 12:11-1.5(f)1., and (f)2., which, due to the elimination of proposed N.J.A.C. 12:11-1.5(e), becomes N.J.A.C. 12:11-1.5(e)1., and (e)2., express related principles. Specifically, N.J.A.C. 12:11-1.5(f)1., states that "[a]n individual having multiple employers does not equate to an individual having an independently established trade, occupation, profession, or business sufficient to meet Prong C." N.J.A.C. 12:11-1.5(f)2., states that, "[w]orking full-time or part-time for an entity or individual other than the putative employer does not alone equate to an individual being customarily engaged in an independently established trade, occupation, profession or business sufficient to meet Prong C." Support for these principles may be found in Gilchrist, supra, quoted above, where the court explained that the requirement that a person be customarily engaged in an independently established trade, occupation, profession or business calls for an "enterprise" or "business" that exists and can continue to exist independently of and apart from the particular service relationship with

the putative employer, ***not multiple employment***. Support may also be found in the holding in Bloom v. Division of Employment Sec, 69 N.J. Super. 175 (App. Div. 1961), which involved telephone solicitors who sold advertising for the owner and publisher of several newspapers. In that case, the court rejected the putative employer's claim that it had met Prong C of the ABC test relative to the solicitors, explaining:

> "On this appeal petitioner contends that the requirements of (C) were met because (1) the telephone solicitors were continually engaged in an independently established trade, occupation or business, namely, the trade or occupation of telephone solicitors; (2) all of his solicitors were housewives and performed their service for petitioner as incident to their housework, so that they were continually engaged in the independently established occupation of housewife; and (3) the Unemployment Compensation Act was never intended to cover the relationship between petitioner and his solicitors who are only housewives earning "pin money" in their spare time and who would not be eligible for benefits under the law since they would not earn enough to qualify them for benefits.
>
> . . .
>
> Petitioner's arguments are not persuasive. It is a play on words to say that these women are customarily engaged in the independently established trade, occupation or business of telephone soliciting. The provisions of (C) call for a trade, occupation, profession or business that exists

independently of the particular service relationship and will survive the termination of the particular relationship. Such is not the case here. [Id. at 179.]

There are also Commissioner FADs that illustrate the application of this principle; that is, the principle that multiple employment does not equate to independent contractor status, and that characterization of the service being performed as a "side gig" (in the parlance of the court in Bloom, a job to earn "pin money") is of no consequence. For example, in ZJN, LLC v. NJDOL (FAD, July 12, 2024), which involved Disc Jockeys (DJs) who were engaged by a Limited Liability Company (ZJN) to provide DJ services for weddings, proms and other events, the Commissioner found that ZJN failed to meet its burden under Prong C to establish that two of the DJs – TG and KC – were each customarily engaged in an independently established trade, occupation, profession or business, explaining the following:

> "I agree with respondent that the testimony of TG that he has a 'full-time job' as a Home Inspector and the testimony of KC that he works full time for PARX Casino as a Pit Manager, in addition to the work that they perform for ZJN, is not evidence that either man was customarily engaged in an independently established business enterprise during the audit period, but rather, is evidence of multiple covered employment.
>
> . . .

I feel compelled to add, with specific regard to the ALJ's observation that, '[t]hrough his testimony, TG established that his reliable income is from his home inspection full-time employment and performing is something he does on the side as his schedule permits,' the status of work as 'part-time' or a 'side gig,' has no bearing whatsoever on the question of whether it is covered 'employment' under the UCL. That is, for example, an individual who works full-time with the State as an Investigator earning $45,000 per year, and who also occasionally works, as his schedule permits, for a retail establishment as a salesperson earning on average $2,000 per year, is no less an employee of the retail establishment, nor is the retail establishment any less responsible to remit UI/DI contributions on behalf of its part-time employee, simply because the individual holds full-time employment with the State. Each is employment under the UCL (one full-time and the other part-time) and each carries with it an obligation on the part of the employer to remit UI/DI contributions on behalf of its employee based on wages earned."

[Id. at 8-9.]

Similarly, in Pilates by Meghan, LLC v. NJDOL (FAD, August 23, 2016), a case involving Pilates instructors who performed work for a Pilates studio, the Commissioner found that Pilates by Meghan had failed to meet its burden under

Prong C to establish that the Pilates instructors were customarily engaged in an independently established trade, occupation, profession or business, explaining:

> "[T]he ALJ incorrectly concluded that because the Pilates instructors engaged by petitioner were also employed full-time and part-time in other industries and professions unrelated to Pilates instruction, such as, bartender at a country club, high school biology teacher, and engineer at Lockheed Martin, or were 'just stay at home moms,' they were customarily engaged in an independently established trade, occupation, profession or business, as that phrase is used within N.J.S.A. 43:21-19(i)(6)(C). I also disagree with the following conclusion of the ALJ contained within the body of the initial decision:
>
> > The Department focuses on the fact that all of the subcontractors do not maintain independent businesses. However, the absence of other business [sic] is not dispositive, and it is not by any means indicative of an employee relationship in this case.
>
> As reflected in the opinions in both Carpet Remnant and Gilchrist, the requirement that a person be customarily engaged in an independently established trade, occupation, profession or business calls for an "enterprise" or "business" that exists and can continue to exist

independent of and apart from the particular service relationship. Multiple employment, such as that relied upon by the ALJ in support of her conclusion relative to Prong 'C' of the ABC test, does not equate to an independently established enterprise or business.

[Id. at 11.]

N.J.A.C. 12:11-1.5(f)3., which, due to the elimination of proposed N.J.A.C. 12:11-1.5(e), becomes N.J.A.C. 12:11-1.5(e)3., states that "[l]icensure in an occupation or profession, such as a nurse or attorney, is not alone sufficient to meet Prong C." This principle is supported by the text of N.J.S.A. 43:21-19(i)(6)(C), itself, which requires that in order to satisfy prong C the individual in question must be "**customarily engaged** in an **independently established** trade, occupation, profession or business" (emphasis added). It is also supported by the holding in Gilchrist, supra, where the court stated that, "[t]he double requirement that an individual must be 'customarily engaged' and 'independently established' calls for an **enterprise** that exists and can continue to exist independently of and apart from the particular services relationship [with the putative employer]," adding, "[t]he **enterprise** must be one that is stable and lasting – one that will survive the termination of the relationship." Id. at 158 (emphasis added); and by the holding in Superior Life v. Bd. Of Review, supra, where the NJ Supreme Court concluded that Superior Life had failed to meet its burden under Prong C to establish that its insurance salesman had been customarily engaged in an independently established trade, occupation, profession or business, explaining, "[w]e think this so despite the fact that he [the salesman] was obliged to obtain a license from the state to qualify him to sell insurance," adding, **"[t]hat fact alone does not establish his status**

as one engaged in an independently established business any more than one employed as a driver of an automobile with a license to drive would be." Id. at 540 (emphasis added). Indeed, even the court in Trauma Nurses, supra, which found that Trauma Nurses, Inc., had met its burden under Prong C of the ABC test to establish that the nurses whose services it had engaged were customarily engaged in an independently established trade, occupation, profession or business, did not rely *entirely* on the nurses' possession of professional licenses to reach that conclusion. Rather, the nurses' possession of a professional license was but one factor considered by the court. That is, the court also considered that the nurses "[did] not work exclusively through Trauma Nurses, Inc.," and that "most work[ed] simultaneously for other brokers, hospitals and health care institutions." Id., at 148. Thus, under the above-cited case law, although the possession of such a license, e.g., as a salesman, as a lawyer, as a nurse, may certainly be ***a*** factor to consider when evaluating whether one is customarily engaged in an independently established trade, occupation, profession or business, it is not the ***only*** factor; which is to say, possession of such a license is not alone sufficient to meet the putative employer's burden under Prong C of the ABC test. Rather, one must, as the Court in East Bay Drywall, supra, instructed, treat any one factor as just a "piece of the puzzle," a single factor that taken together with other relevant factors, may illuminate whether a worker has a truly independent business.

Regarding the holdings in Garden State Fireworks, Inc. v. N.J. Department of Labor and Workforce Development, supra, and Feinsot v. Board of Review, supra, which are cited by the commenters in support of their opposition to N.J.A.C. 12:11-

1.5(f)1., through (f)3., these Opinions are unpublished and, therefore, have no precedential value (See Court Rule 1:36-3); which is to say, the Department is bound by each of these determinations *only* as it applies to the parties in each respective case, but is not bound by either with regard to the final outcome in any other case, and is not bound by either with regard to agency rulemaking. Each is also an outlier that is inconsistent with statute, binding case law, and Departmental policy. Specifically, Feinsot, supra, where the court found that Assigned Counsel, Inc., for which Ms. Feinsot worked as an attorney, had satisfied Prong C of the ABC test based on Ms. Feinsot's professional licensure alone, is inconsistent with N.J.S.A. 43:21-19(i)(6)(C), which requires that in order to satisfy Prong C of the ABC test, the putative employer must establish that the individual is **customarily engaged** in an **independently established** trade, occupation, profession or business; is inconsistent with the published Opinion in Gilchrist, supra, which states that "[t]he double requirement that an individual must be 'customarily engaged' and 'independently established' calls for an **enterprise** that exists and can continue to exist independently of and apart from the particular services relationship [with the putative employer]," adding, "[t]he **enterprise** must be one that is stable and lasting – one that will survive the termination of the relationship;" and is inconsistent with the published Opinion in Superior Life v. Bd. Of Review, supra, which states that possession of a professional license alone, does not establish that one is engaged in an independently established enterprise.

Garden State Fireworks, supra, where the court found that Garden State had met its burden under Prong C because each individual who was hired by Garden State to conduct and shoot fireworks at shows and displays was also employed in another job,

one as a police officer and two as landscapers, is also inconsistent with N.J.S.A. 43:21-19(i)(C); with the published Opinion in Gilchrist, supra; and with the published Opinion in Bloom, supra. Because the Opinions in Feinsot, supra, and Garden State Fireworks, supra, do not constitute binding precedent, neither is an impediment to the adoption of N.J.A.C. 12:11-1.5(e)1., (e)2., or (e)3.

N.J.A.C. 12:11-1.5(g) and (h), which, due to the elimination of proposed N.J.A.C. 12:11-1.5(e), become N.J.A.C. 12:11-1.5(f) and (g), state the following:

> (f) Proof of business registration, including the establishment of a sole proprietorship, a limited liability company, or a corporation, by the individual performing the service for the putative employer, is not alone sufficient to meet Prong C.
>
> 1. The existence of a business entity, without more, may suggest a business in name only and does not suggest independent contractor status.
>
> 2. Where the putative employer requires or encourages the individual to establish a business entity, this may suggest a business in name only and does not suggest independent contactor status.
>
> (g) Proof that the individual performing services for the putative employer has their own liability insurance and/or workers' compensation insurance is not alone sufficient to meet Prong C. Where the putative employer requires or encourages the individual to obtain such insurance,

the existence of such insurance does not suggest independent contractor status.

Each of the principles expressed in N.J.A.C. 12:11-1.5(f) and (g) are both supported by and enumerated in the Court's Opinion in East Bay Drywall, supra. That is, in East Bay Drywall, supra, the putative employer relied *entirely* upon so-called "business entity information" (specifically, business registrations, liability insurance, and/or workers' compensation insurance) for each of the drywall installers in support of its assertion that the installers were viable entities that existed independently of and apart from their business relationships with East Bay Drywall. The Court rejected East Bay Drywall's assertion that this "business entity information" for each drywall installer was sufficient to meet the putative employer's burden under Prong C of the ABC test, explaining:

> "[T]hese documents do not elucidate whether the disputed entities were engaged in independent businesses separate and apart from East Bay. For most entities, insurance certificates were provided showing coverage for only one year of the audit period. Further, all but one of the business registrations reveal a sole individual in the ownership structure of each entity, and nearly all the registrations were revoked prior to the audit due to a failure to file the required reports for at least two consecutive years.
>
> . . .

The Commissioner found that DeScala's testimony, the business registration information, and the certificates of insurance were insufficient to prove independence. The Commissioner specifically noted that

> [t]he "business entity information" relied on so heavily by petitioner and the ALJ falls woefully short of meeting the standard enumerated in Carpet Remnant . . . . That is, it does not address the following factors with regard to each "drywall subcontractor": the duration and strength of the business, the number of customers and their respective volume of business, or the number of employees; nor does it address the amount of remuneration each "drywall subcontractor" received from East Bay compared to that received from others for the same services.

. . .

The Legislature made clear that the public policy underpinning the UCL must be considered when determining its application.

> As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: economic insecurity due to unemployment is a

> serious menace to the health, morals, and welfare of the people of this state. . . . The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance.
>
> [N.J.S.A. 43:21-2 (emphasis added).]

A business practice that requires workers to assume the appearance of an independent business entity -- a company in name only -- could give rise to an inference that such a practice was intended to obscure the employer's responsibility to remit its fund contributions as mandated by the State's employee protections statutes. That type of subterfuge is particularly damaging in the construction context, where workers may be less likely to be familiar with the public policy protections afforded by the ABC test and consequently particularly vulnerable to the manipulation of the laws intended to protect all employees. Such a business practice also undermines the public policy codified in the UCL.

[Id. at 499-501.]

As to the commenter's assertion that N.J.A.C. 12:11-1.5(f) and (g) should be deleted, because they "deem insurance and business registration irrelevant," that assertion is simply incorrect. Instead, N.J.A.C. 12:11-1.5(f) and (g) indicate that neither business registration nor insurance, *alone*, is sufficient to meet Prong C. That is entirely consistent with the holding in East Bay Drywall, supra, where the putative employer sought to rely on such business information to establish that each drywall installer was engaged in an independently established enterprise, and where the Court ruled that although business registration and insurance are relevant, neither is dispositive.

N.J.A.C. 12:11-1.6 Additional principles governing application of the ABC test

N.J.A.C. 12:11-1.6(a) states that "[t]he question of independent contractor status is determined based on an evaluation of the facts surrounding the relationship between the putative employer and the individual providing the services and the application of the ABC test to those facts." The Court in Carpet Remnant Warehouse, supra, stated, "[t]hat determination [whether a putative employer has met its burden under the ABC test to establish that an individual is an independent contractor] is fact-sensitive, requiring an evaluation in each case of the substance, not the form, of the relationship." This same principle is expressed in Trauma Nurses, supra; Schomp, supra, Philadelphia Newspapers, supra, and East Bay Drywall, supra, and other Opinions.

N.J.A.C. 12:11-1.6(b) states that "[o]ne cannot transform an individual into an independent contractor who would otherwise be considered an employee, by reporting the earnings of that individual using a Federal Form 1099, as opposed to a Federal Form W-2." In Philadelphia Newspapers, supra, the court found that a newspaper salesman was an employee, rather than an independent contractor, even though the agreement between the putative employer and the salesman explicitly classified him as an independent contractor, and even though he had received an IRS Form 1099. See Id. at 314, 320-23.

N.J.A.C. 12:11-1.6(c) states that, "[a] written or oral contract or agreement labeling an individual as an independent contractor is not dispositive of whether an individual is an independent contractor pursuant to the ABC test." In Electrolux Corp. v. Board of Review, 129 N.J.L. 154 (1942), which involved a business that manufactured, sold and serviced electric vacuum cleaners, and the "local sales representatives" who sold them directly to the business' customers, the court found under the ABC test that the "local sales representatives" were employees, rather than independent contractors. The court explained:

> "The Board of Review considered not alone the written contract, but also the course of practice between the parties, and concluded that, under the contract and in point of fact, the claimants were subject to appellant's "direction and control" as regards the service bargained for, and were not "customarily engaged in an independently established trade, occupation, profession or business," and therefore the services rendered by them are to be deemed "employment" under the statute. The case

of Schomp v. Fuller Brush Co., 124 N.J.L. 487; affirmed, 126 N.J.L. 368, was found to be analogous. The Supreme Court on *certiorari* concurred in these conclusions of law and fact.

It is conceded that the writing was designed to remove appellant's salesmen from the category of employees governed by the Unemployment Compensation Act, supra. But it was ineffectual as such. Both by the written expression and in fact, the claimants were not free of appellant's 'control or direction' as respects the performance of the stipulated service. Under the writing, salesmen theretofore admittedly in the employee category were termed 'sales representatives.' There were provisions obviously intended to invest them with the status of independent contractors. Yet the change was of the form rather than the substance so far as control was concerned -- one whose sole motivation was evasion of the cited statute without an alteration of the essence of the relationship."
[Id. at 154-55.]

In Philadelphia Newspapers, supra, the court stated:
"We acknowledge that the issue of whether PNI proved Prong (A) should not be determined under the Agreement alone, but rather on all facts surrounding claimant's relationship with PNI, including the Agreement. To consider only the Agreement, and not the totality of the facts surrounding

the parties' relationship, would be to place form over substance. Electrolux Corp. v. Bd. of Review, 129 N.J.L. 154, 155, 28 A.2d 207 (E. & A.1942)."
[Id. at 321.]

In East Bay Drywall, supra, the Court stated:

"Whether a worker is an employee under the ABC test 'is fact-sensitive, requiring an evaluation in each case of the substance, not the form, of the relationship.' Carpet Remnant 125 N.J. at 581.The factfinder must look beyond the employment contract and the payment method to determine the true nature of the relationship. See Phila. Newspapers Inc. v. Bd. of Rev., 397 N.J. Super. 309, 320, 937 A.2d 318 (App. Div. 2007) (finding that a newspaper salesman was an employee even though his employment contract explicitly classified him as an independent contractor and he received an IRS Form 1099)."
[Id. at 496.]

Regarding paragraphs 1.(i), through 1.(iv), of N.J.A.C. 12:11-1.6(c), which list factors that may be considered when determining the weight given to an alleged independent contractor agreement, each is a commonly recognized principle of contract law. For example, it is commonly understood that one is less likely to be held to a disputed contract term if there is an inherent imbalance in the parties' bargaining power that inures to the detriment of the party challenging the term, such as might exist if the

non-challenging party was the primary or unilateral drafter of the agreement; if the material terms of the agreement were not negotiable or the agreement was one of adhesion; if the non-challenging party reserves the right to unilaterally modify any terms; or if the non-challenging party may terminate the agreement at any time. Additionally, the introductory sentence within paragraph 1., uses the permissive, "may," and also includes the phrase "among others." This is to say that the list of factors is not exhaustive, and that use of the factors is not required. Through the inclusion of these permissive factors, the Department is seeking to assist those who may consult the rules seeking guidance as to the types of factors that are ordinarily considered when determining how much weight is given to a contract or one of its terms.

N.J.A.C. 12:11-1.6(d) states the following:

> "The fact that an individual would not qualify for receipt of unemployment compensation benefits based on their earnings is not relevant to the question of whether such individual is an independent contractor pursuant to the ABC test. Likewise, that an individual would not qualify for receipt of unemployment compensation benefits is based on their earnings solely from the putative employer also does not impact whether such individual is an independent contractor pursuant to the ABC test."

This principle is explained most succinctly in Yeamon Music, Inc. v. NJDOL (FAD, January 19, 2023), which predated the FAD in ZJN, supra, quoted earlier:

> "With specific regard to petitioner's assertion that among the reasons the services in question are exempt from UCL coverage is that the individuals who performed the services would not have been eligible for benefits under the UCL based on payments from petitioner alone; under N.J.S.A. 43:21-4(e), an individual's wages from all employment are combined to establish a valid claim for benefits under the UCL. Thus, for example, an individual who works full-time with the State as an Investigator earning $45,000 per year, and who also works on a seasonal basis (during November and December) as a salesperson for a retail establishment earning $2,000 per year, is no less an employee of the retail establishment, nor is the retail establishment any less responsible to remit UI/DI contributions on behalf of its seasonal employee, simply because the individual holds full-time employment with the State, or because the individual would be unable to file a valid claim for benefits based on the $2,000 in earnings from the retail establishment alone. Each is employment under the UCL (one full-time and the other part-time/seasonal) and each carries with it an obligation on the part of the employer to remit UI/DI contributions on behalf of its employee based on wages earned."
>
> [Id. at 8.]

This is consistent with the Opinion in McKnight v. Bd. of Review, Dep't. of Labor, 476 N.J. Super. 154 (App. Div. 2023). In that case, the issue was "whether a claimant, who is otherwise separated from full-time employment, may include wages received from a part-

time position, which they continue to maintain, in the calculation of their average weekly wage for the purposes of unemployment benefits." Id. at 164. The court concluded that ***all*** of the claimant's base-year earnings, that is all base year earnings from the claimant's full-time position ***and all base year earnings from the claimant's part-time position***, should be included in the calculation of their average weekly wage for the purpose of unemployment benefits, without regard to whether the claimant's earnings from either position alone would be sufficient to qualify the claimant for benefits. See id. at 169.

41. COMMENT: Commenters maintain that the impact statements contained within the Notice of Proposal, including those that address the social impact, economic impact and jobs impact of the proposed new rules are deficient. For example, they assert that the statements fail to "account for the broader economic consequences [of the proposed new rules] – particularly the chilling effect [they] would have on job creation, entrepreneurship, and flexible work arrangements that support the modern economy." The commenters further assert that the impact statements "[do] not address whether the proposed rule could jeopardize the long-term financial security of New Jersey residents." They assert that the statements "fail to describe [the impact of the proposed new rules] on jobs or acknowledge any potential job loss," adding that statements "[do] not address or even discuss individuals who prefer to work as independent contractors and the potential impact on their livelihoods because putative employers may be less likely to utilize their services because of the uncertainties created by the proposed rule." The commenters maintain that the impact statements "fail to engage" a "body of economic research," that suggests that "stricter worker classification rules reduce labor market participation and eliminate jobs." They state

that “[t]he Department must perform an actual analysis [within the impact statements] that considers the economic studies about the effects of the ABC test.”

RESPONSE: The Department is not obligated to address economic research on the impact of “the ABC test,” because, as detailed above, the new rule does not alter the ABC test. The ABC test at N.J.S.A. 43:21-19(i)(6), has been the test for independent contractor status in New Jersey for 89 years. N.J.A.C. 12:11 simply memorializes in rules the principles that have for years guided the Department’s application of the ABC test. Accordingly, because the new rules represent no change to the ABC test, or how the ABC test is applied, the impact statements focus on the anticipated impact of the added clarity that the proposed new rules achieve. Thus, in the Notice of Proposal, the Department anticipates, for example, that the new rules would have a positive social impact in that they would mitigate or eliminate confusion among employers and employees; that the added clarity stemming from the new rules would result in more workers being properly classified as employees or independent contractors and that those who become properly classified as employees (and their families) would be impacted positively by the availability to them, as the law intended, of vital assistance in times of need in the form of unemployment compensation, temporary disability benefits, family leave insurance benefits, and earned sick leave; that the new rules would have a positive economic impact on employers who might otherwise misunderstand the ABC test and, thereby, run the risk of incurring unnecessary expenses related to assessments for unpaid contributions, unpaid wages, and penalties levied by the Department for violations of the law and rules; and that the new rules would have no

impact on the generation or loss of jobs. Each impact statement is accurate and none is in any way deficient under the law.

Additionally, in Farruggio's Bristol & Phila. Auto Express v. N.J. Department of Labor and Workforce Development In re Repeal of N.J.A.C. 12:16-23.2(a)(4), Docket Nos. A-4932-18, A-0226-19, 2021 N.J Super. Unpub. LEXIS 2835 (App. Div. 2021), cert. denied, 251 N.J. 18 (2022), petitioners seeking to invalidate the Department's repeal of N.J.A.C. 12:16-23.2(a)(4)—a rule related to exemptions from UCL coverage found at N.J.S.A. 43:21-19(i)(7), (9) and (10)—made a similar argument. In that case, petitioners, who were from the trucking and securities sales industries, respectively, predicted dire economic consequences from the Department's regulatory action, including whole industries shutting down or leaving the State, and argued that the Department's economic impact statement was insufficient, because it was "superficial" and did not address their concerns. Following is an excerpt from that Economic Impact statement:

> "The proposed amendment would have a positive economic impact on employers in that having a better understanding of the Department's policy regarding evidence of a FUTA [Federal Unemployment Tax Act] exemption for the purpose of asserting a specialized exemption from UCL coverage under N.J.S.A. 43:21-19(i)(7), (9) or (10), should help them avoid running afoul of the UCL and their responsibility thereunder to remit contributions on behalf of employees to the Unemployment Compensation Trust Fund, thereby incurring fewer administrative penalties for failure to remit."

The court rejected petitioners' challenge to that regulatory action and petitioners' assertion that the Department's economic impact statement was insufficient under the Administrative Procedures Act.

42. COMMENT: Commenters maintain that the new rules "conflict with Federal unemployment compensation standards." That is, they maintain that under federal law, "states may not distribute unemployment benefits to workers who are not 'employees' under federal definitions."

RESPONSE: With regard to the commenters' assertion that "[u]nder Federal law, states may not distribute unemployment benefits to workers who are not 'employees' under Federal definitions," this simply is not true. As was explained in Special Care of New Jersey, Inc. v. Board of Review, 327 N.J. Super. 197, 208-09 (App. Div. 2000):

> "Although they are complementary, FUTA (the Federal Unemployment Tax Act) and New Jersey's unemployment tax law are distinct and separate, representing "independent acts of two distinct legislative bodies." Quality Coal Co. v. United States, 66 F. Supp. 105, 107 (W.D. Ark. 1946). They, of course, may coexist, but each can exist without the other. Ibid. State programs need not mirror the provisions under FUTA in all respects; they are empowered to vary their programs so long as they meet the requirements for certification under § 3304. Macias v. New Mexico Dep't of Labor, 21 F.3d 366, 368 (10th Cir. 1994). Therefore, the fact that FUTA

excludes certain persons or entities from its payroll tax "does not preclude a state from including those [persons or entities] in its definition." In re Forrence Orchards, Inc., 85 A.D. 2d 44, 448 N.Y.S.2d 803, 804 (App. Div. 1982). A state legislature is thus empowered to determine what is exempt "without regard to existing definitions, and is not required to conform in every respect to the federal scheme." Ibid. See also Equitable Life Ins. Co. v. Iowa Employment Sec. Comm'n, 231 Iowa 889, 2 N.W. 2d 262, 265 (1942) ('That the [state] legislature may determine what shall constitute employment subject to taxation without regard to existing definitions or categories and that it is not required to conform in every respect to the national ideology upon the subject as expressed in the Acts of Congress, is well settled.').

Indeed, the United States Supreme Court has expressly held that the existence of an exemption under FUTA does not mandate the same exemption under state law. Standard Dredging Corp. v. Murphy, 319 U.S. 306, 310, 63 S. Ct. 1067, 1069, 87 L. Ed. 1416, 1420 (1943). In Standard Dredging Corp., New York collected unemployment insurance taxes from employers of maritime workers. The employers challenged the tax, arguing that since FUTA exempted employers of maritime workers from federal unemployment taxes, Congress had declared expressly or by implication that no such tax should be imposed by the state. Id. at 307, 63 S. Ct. at 1068, 87 L. Ed. at 1418-19. The Supreme Court rejected the

employers' preemption claim, reasoning that the federal exemption had been created because of certain administrative difficulties regarding coverage. The Court found no evidence that Congress intended to prevent states from tackling those difficulties, if they so choose.

The United States Department of Labor guidance document entitled "Unemployment Compensation; Federal-State Partnership, May 2024," also explains:

> "[E]ach state is, with a single exception, free to determine the employers who are liable for taxes and the workers who accrue rights under the laws. The exception is the Federal requirement that states provide coverage for employees of nonprofit organizations, services performed for federally-recognized Indian tribes, and employees of state and local governments, even though such employment is exempt from FUTA.
>
> [Id. at 11.]

43. COMMENT: Commenters assert that "App-based 'gig' workers have been deemed ineligible for traditional unemployment and were only eligible for Pandemic Unemployment Assistance (PUA) due to their status as independent contractors," adding, "[b]y classifying such workers as employees and allowing them access to unemployment benefits, the proposed regulations violate Federal standards." According

to the commenters, “[t]his could jeopardize New Jersey’s Federal funding and employer tax credits – potentially costing the state and its businesses millions of dollars.”

RESPONSE: On April 15, 2020, at the beginning of the COVID pandemic, the Department adopted a new rule, N.J.A.C. 12:17-12.8, entitled “Pandemic Unemployment Assistance (PUA) for self-employed individuals.” Under N.J.A.C. 12:17-12.8(a), the Department accepted for the purpose of determining PUA eligibility the “self-certification” of each claimant that the claimant was self-employed. Regarding such self-certification, N.J.A.C. 12:17-12.8(b) states the following:

> “Acceptance by the Department under (a) above of an individual’s self-certification as to his or her status as self-employed, and any determination by the Department based on that self-certification that an individual is not eligible for regular compensation or extended benefits for the sole purpose of, and as a pre-requisite to, establishing that the individual is eligible for PUA, **shall not constitute a determination of the status of that individual as an independent contractor under N.J.S.A. 43:21-19(i)(6)(A), (B), and (C) (the “ABC test”), nor shall it foreclose the Department or any tribunal or court of competent jurisdiction from determining at any time with regard to such services that those services constitute “employment” as that term is defined at N.J.S.A. 43:21-19(i) or elsewhere**.”
>
> [(emphasis added).]

N.J.A.C. 12:17-12.8(b) negates the commenter’s claim regarding the supposed impact of individual Departmental decisions during the COVID pandemic regarding PUA

eligibility on current and future determinations regarding independent contractor status under the ABC test. There is also no basis for the commenter's assertion that N.J.A.C. 12:11, "could jeopardize New Jersey's Federal funding and employer tax credits – potentially costing the state and its businesses millions of dollars."

44. COMMENT: Commenters assert that Prong B of the ABC test "should be dropped entirely," adding, "[i]t fails to reflect the reality of project-based consulting and how professional services are delivered." The commenters maintain, "the 'location' test seems short-sighted given the prevalence of remote work."

45. COMMENT: The commenter states that she is a pharmaceutical copywriter. During her career, she has worked as "both a full-time employee and independent contractor." She states, "I have been told by potential employers that because I live in NJ, I am not preferred due to the need to offer W-2 related status and benefits," adding, "[t]hey will hire other remote workers in other states instead of me." The commenter says that the new rules "impose an even stricter definition and thus will hurt more NJ workers than it helps."

RESPONSE TO COMMENTS 44. AND 45: The Department does not have authority through rulemaking to "drop" Prong B from the statutory ABC test. Regarding the Department's responsiveness to the prevalence of remote work, N.J.A.C. 12:11-1.4(f), which prior to the change on adoption was proposed N.J.A.C. 12:11-1.4(g)(vi)(b), states that an individual's personal residence where they perform remote work will not typically be among the putative employer's places of business. This means that under N.J.A.C. 12:11 when a freelancer like the commenter is working remotely out of his or her personal residence, that is work that is being performed **outside of all of the**

putative employer's places of business. This helps, not hinders, those that engage the services of freelancers who work remotely out of their homes. The freelancers who have submitted comments, and who testified during the public hearing, assert that they are entirely free from control and direction by those who engage their services and that they are in business for themselves, serving and generating revenue from multiple clients. If this is so, then the adoption of N.J.A.C. 12:11, including N.J.A.C. 12:11-1.4(f), should make New Jersey ***more*** hospitable, not less hospitable, to freelance workers and those who engage their services.

46. COMMENT: The commenter asserts the following:

"[A]n interpretation of the B prong that renders it impossible for a motor carrier to treat an owner-operator as an independent contractor is likely pre-empted [by the Federal Aviation Authorization Administration Act of 1994, also known as the FAAAA] as repeatedly found in the U.S. Court of Appeals for the First Circuit. See Mass. Delivery Ass'n v. Coakley, 769 F.3d 11, 17-21 (1st Cir. 2014); Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429, 432, 436-37 (1st Cir. 2016); Mass. Delivery Ass'n v. Healey, 821 F.3d 187, 189, 192 (1st Cir. 2016)."

RESPONSE: In Bedoya v. Am. Eagle Express, 914 F.3d 812 (3rd Cir. 2019), the U.S. Court of Appeals for the Third Circuit, which is the Circuit that includes the District of New Jersey, found that New Jersey's ABC test for independent contractor status at N.J.S.A. 43:21-19(i)(6) is not preempted by the FAAAA. As N.J.A.C. 12:11 does not alter New Jersey's ABC test, it is not preempted by the FAAAA.

47. COMMENT: The commenter states that the NJ Supreme Court Opinion in Kennedy v. Weichert, 257 N.J. 290 (2024) was "not mentioned in the rules summary or addressed in the rules." In that Opinion, the Court found that under the Real Estate Brokers Act; specifically, under N.J.S.A. 45:15-3.2, the relationship designated in a written agreement between a real estate broker and a real estate salesperson must be enforced, notwithstanding any other law, rule or regulation to the contrary.

RESPONSE: The holding in Kennedy, supra, hinges on the Court's reading of the Real Estate Brokers Act, not on any law that Department administers or enforces. The Court's holding speaks for itself and need not be addressed within N.J.A.C. 12:11.

48. COMMENT: The commenter "requests that the 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," and that the new rule be "modernized" in a way that "reflects the evolving nature of work and offers clearer guidance." The commenter also suggests that "once the ABC Test Rule is improved," the Department should implement a "safe harbor" or "amnesty program."

RESPONSE: N.J.A.C. 12:11 *does* provide a transparent, balanced and nuanced framework that supports legitimate independent businesses and the broader economy. The Department also believes that N.J.A.C. 12:11 reflects the evolving nature of work. As to the commenter's suggestion that the Department implement a "safe harbor" or "amnesty program," that is outside the scope of this rulemaking and, even if it were within the scope of this rulemaking, a "safe harbor" or "amnesty program" would be inappropriate here, since, as detailed above, N.J.A.C. 12:11 does nothing more than

memorialize in rule the principles that have for many years guided application of the ABC test to work relationships.

49. COMMENT: The commenter criticizes the 2019 Report of Governor Murphy's Task Force on Employee Misclassification at length. The commenter takes issue with the premise, participants, substance, accuracy of related press releases, and transparency of the process that resulted in issuance of the Report.

RESPONSE: The commenter's critique of the work of 2019 Misclassification Task Force Report is not relevant to this rulemaking.

50. COMMENT: Commenters state that (1) misclassification is a serious problem nationally and in New Jersey, stripping underpaid workers of essential protections, degrading working conditions, undermining law-abiding businesses, and depleting state revenue, (2) New Jersey's well-established "ABC test" provides a strong bulwark against worker misclassification; and (3) the proposed rules help clarify the analysis, thereby ensuring better compliance and limiting harmful misclassification.

51. COMMENT: Commenters state that by relying on and amplifying factors relied on by New Jersey courts, N.J.A.C. 12:11 provides "meaningful clarity for each part of the ABC test," adding, "[i]mportantly, the Department clarifies that listed factors are not to be confused with a checklist, and that additional relevant factors may be considered."

52. COMMENT: Commenters state with specific regard to N.J.A.C. 12:11-1.3, which addresses Prong A of the ABC test, that the Department's description and suggested factors are consistent with court interpretations and the Department's expertise, adding that in today's economy, corporations purport to offer "flexibility" to

workers that they insist are “independent contractors,” but those corporations then rely on hidden algorithms and electronic surveillance to control virtually every aspect of the work, including who can work and when, whether they will be disciplined through termination or suspension, to which customers they will provide services while displaying the corporate logo, and how much they will be paid.

53. COMMENT: Commenters state that N.J.A.C. 12:11-1.5, which addresses Prong C of the ABC test, “helpfully establishes a number of guardrails, explaining that certain facts, standing alone, do not indicate an independent business.” The commenters also state that the rule “reflects an understanding of the power dynamics between hiring entities and individual workers.” For example, according to the commenters, the rule recognizes that where a hiring entity suggests that or encourages workers to obtain insurance, such insurance does not necessarily suggest that the worker is an independent contractor. The commenters also state that the rule recognizes that a hiring entity cannot transform an employee into an independent contactor simply by choosing to report earnings using a Federal IRS Form 1099. Finally, the commenters approve of the rule’s suggestion that examination of any independent contractor agreement take into consideration who drafted it, whether it was negotiated, whether one entity could unilaterally modify it and whether either party could terminate the relationship at any time.

54. COMMENT: Commenters request that the Department adopt N.J.A.C. 12:11, because “[c]lear guidance will deter misclassification, protect wages and unemployment coverage, and level the playing field for compliant businesses.”

55. COMMENT: Commenters state that, “the ABC test is firmly rooted in New Jersey statute and affirmed by the state’s highest courts,” adding, “[y]et in practice, its application has often been uneven and misclassification persists, and technology has reshaped work relationships.” The commenters continue, “[b]y translating legal standards into a clear and accessible regulatory framework, the Department’s proposed rule would fill this gap and help ensure proper classification under the law.”

56. COMMENT: The commenter states the following:

“In the Preamble accompanying the proposed regulations (the ‘Preamble’), the Department of Labor and Workforce Development (the ‘Department’) states that one aspect of the proposed regulations’ interpretation of Prong ‘B’ of the ‘ABC’ test:

> ‘is directly responsive to the New Jersey Supreme Court’s suggestion that ‘the Department exercise its statutory authority and expertise, <u>particularly in light of the prevalence of remote work today,</u> to promulgate regulations clarifying where an enterprise ‘conducts an integral part of its business and what constitutes the ‘usual course of the business.’ (emphasis added).

[The commenter] submits that the Department’s guidance in response to this request adds clarity and is helpful.”

RESPONSE TO COMMENTS 50 THROUGH 56: The Department thanks the commenters for their support.

The following individuals testified at the June 23, 2025 public hearing:

Abby Adams, Associated Construction Contractors.

Stephanie Albanese, Grubhub.

Tim Avanzato, Lanca Sales, Inc.

Jake Barnes, Workplace Justice Lab at Rutgers University.

David Bellaire, Financial Services Institute.

Pai-Yen Chung, Finesca.

Michael Broderick, Teamsters.

Hilary Cherba, Chamber of Commerce Southern New Jersey.

Bernard Corrigan, IBEW, Local 102.

John Cronin, LPL Financial.

Dennis Cuccinelli, NAIFA.

Eric DeGesero, NJ Motor Truck Association.

Marc Del Gaudio.

Shane Derris, Uber Technologies.

Margaret Durkin, TechNet.

Michael Egenton, New Jersey Chamber of Commerce.

Brandon Fishbaum, Carpenter Contract Trust.

Elissa Frank, NJBIA.

Petra Gaskins, State Senator Cryan.

Jeff Hascom, International Franchise Association.

Virginia Harriet, Harriett Financial Group.

John Holub, NJ Retail Merchants Association.

Kyle Innes, Securities Industry and Financial Markets Assoc.

Robert Jackson, Flex Association.

Brianna January, Chamber of Progress.

Kim Kavin, Fight for Freelancers in NJ.

Gary LaSpisa, Insurance Council of New Jersey.

Jennifer Mancuso, NJ LECET-LIUNA.

Thomas McNeil, Instacart.

Lauren Paterno, AAA Clubs.

Aaron Nostrand, International Franchise Association.

Jim Perks, LPL Financial.

Joseph Niver.

Kassandra Perez-Desir, DoorDash.

Maya Pinto, National Employment Law Project.

Paul Pendergast, Industry and Labor Compliance.

Mark Quinn, Cetera Financial Group.

Michael Razze, Big I NJ.

Delaney Redford, New Jesey Food Council.

Eric Richard, AFL-CIO.

Paul Rozenberg, Shipping Assoc. of NY and NJ.

Vincent Ryan, American Council of Life Insurers.

Alan Schoor, Schoor and Associates.

Stephanie Sherman, Prudential Insurance Company.

Megan Sirjane-Samples, Lyft, Inc.

Matthew Spring, Shipt, Inc.

Tema Steele, Steele Financial Solutions.

Jordan Thomsen, Prudential.

Sharon Walters.

Debbie White, HPAE.

Lisa Yakomin, Intermodal trucking industry at the Port of NY and NY.

Jonathan Wilt.

Eileen Kean, NFIB.

COMMENT: Most of those who testified submitted written comments, either individually or through the organizations they represent, that are identical or substantially similar to their testimony during the public hearing. Those written comments are summarized above. The testimony of the few who did not submit written comments are substantially similar to the written comments submitted by others, which are also summarized above.

RESPONSE: The Department's responses to the comments received during the public hearing are identical to its responses to the written comments summarized above.

Federal Standards Statement

The adopted new rules do not exceed standards or requirements imposed by federal law. Specifically, the adopted new rules are no inconsistent with the Federal

Unemployment Tax Act, 26 U.S.C. §§ 3301 et seq. Consequently, a federal standards analysis is not required.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*:

12:11-1.1 Purpose and scope

(a) through (b) (No change from proposal.)

***(c) Nothing in this Chapter should be construed to alter or eliminate statutory exemptions from coverage under, or exemptions from the requirements of, the individual statutes listed in (b) above. Following are examples of such statutory exemptions:**

1. The exemptions at N.J.S.A. 43:21-19(i)(7), 43:21-19(i)(9), and 43:21-19(i)(10), from covered "employment" under the Unemployment Compensation Law and Temporary Disability Benefits Law;

2. The exemptions at N.J.S.A. 34:11-56a4 from the requirement under the Wage and Hour Law that an employer pay each employee not less than 1 ½ times an employee's regular hourly rate for each our worked in excess of 40 in a workweek, for any individual employed in a bona fide executive, administrative, or professional capacity; employees engaged to labor on a farm or employed in a hotel; or to an employee of a common carrier of passengers by motor bus; or to a limousine driver who is an employee of

an employer engaged in the business of operating limousines; or to employees engaged in labor relative to the raising or care of livestock;

3. The exemptions at N.J.S.A. 34:11-56a4 from the requirement under the Wage and Hour Law that each employer pay to each of its employees no less than the required minimum hourly wage, for persons under the age of 18 not possessing a special vocational school graduate permit issued pursuant to N.J.S.A. 34:2-21.15, or to persons employed in the sales of motor vehicles, or to persons employed in outside sales, or to persons employed in a volunteer capacity and receiving only incidental benefits at a county or other agricultural fair by a nonprofit or religious corporation or a nonprofit or religious association which conducts or participates in that fair; and

4. The exemptions at N.J.S.A. 34:11D-1 from the definition of covered "employee" under the Earned Sick Leave Law for an employee performing a service in the construction industry that is under contract pursuant to a collective bargaining agreement, or for a public employee who is provided with sick leave with full pay pursuant to any other law or rule of the State.*

12:11-1.3 Prong A of the ABC test

(a) through (b) (No change from proposal.)

(c) The following factors are among those that shall be considered when evaluating whether an individual has been and will continue to be free from control or direction under Prong A of the ABC test:

1. (No change from proposal.)

2. Whether the putative employer has the right to control the details and means by which the services are performed by the individual,

i. The following sub-factors may be considered when determining whether the putative employer has exercised control over the details and means by which the services are performed by the individual. It is intended to be illustrative and is not exhaustive.

a. Whether the putative employer requires the individual to use specific tools, supplies, or materials,

b. Whether the putative employer requires the individual to wear a uniform or to don or display a specific logo, color(s), or other insignia, ***and***

[c. Whether the putative employer requires the individual to use a digital application or software in the course of performing the services that is primarily or unilaterally controlled by the putative employer, and]

[d] ***c***. Whether the putative employer requires the individual to report on any aspect of the individual's services at prescribed times or intervals.

3. through 9. (No change from proposal.)

(d) through (e) (No change from proposal.)

(f) *[When evaluating under Prong A of the ABC test whether an individual has been and will continue to be free from control or direction over the performance of

services, any control or direction that the putative employer has exercised, or has reserved the right to exercise, in order to be in compliance with a law or rule shall be considered; that is, it shall be given equal weight to what would be given any other control or direction that the putative employer has exercised or has reserved the right to exercise.]* ***Actions taken by a putative employer solely to comply with federal, state, or local, laws or regulations shall not, standing alone, be considered evidence of control or direction under Prong A.***

12:11-1.4 Prong B of the ABC test

(a) through (b) (No change from proposal.)

*[(c) The following are examples of services that will typically be outside of the putative employer's usual course of business:

1. A dentist engages the services of a cleaning person to clean the dental office. The services performed by the cleaning person are likely outside of the dentist's usual course of business.

2. A restaurant engages the services of a musician to perform on a given night for the restaurant's patrons. The services performed by the musician are likely outside of the restaurant's usual course of business.

3. A law firm engages the services of a landscaper to mow the lawn and trim hedges on the grounds of its building. The services performed by the landscaper are likely outside of the law firm's usual course of business.

(d) The following are examples of services that will typically <u>not</u> be outside of the putative employer's usual course of business:

1. A transportation network company, as defined at N.J.S.A. 39:5H-2, engages the services of a driver to transport riders (customers) of the transportation network company from one location to another. The services performed by the driver are likely not outside of the transportation network company's usual course of business.

2. A drywall installation company engages the services of a drywall installer to install drywall at sites where the drywall installation company's customers are constructing or renovating homes or commercial buildings. The services performed by the drywall installer are likely not outside of the drywall installation company's usual course of business.

3. A country club engages the services of a caddie to assist the country club's members on the country club's golf course. The services performed by the caddie are likely not outside of the country club's usual course of business.]*

Recodify subsections (e) and (f) as (c) and (d).

*[(g) The locations where the putative employer conducts an "integral part of its business," include but are not limited to, locations outside of the putative employer's physical plant, where the services performed by the individual are an essential component of, rather than ancillary to, the putative employer's business. This includes the residence or place of business of the putative employer's client or customer, when the services performed by the individual at such location are an essential component of, rather than ancillary to, the putative employer's business.

i. For example, when an individual is engaged by a carpet sales business to install carpet at the residences of the carpet sales business' customers;

customers who have purchased carpet from the carpet sales business and who have opted to avail themselves of the carpet sales business' offer to have the carpet installed at the customer's residence, the service being performed by the carpet installer at the residences of the carpet sales business' customers has not been performed at among the carpet sales business' places of business, because although the service was performed at the residence or place of business of a customer of the carpet sales business, the service of carpet installation was not an essential component of the carpet sales business. That is, the showroom where the carpet sales business displayed and sold carpet was its physical plant, the optional service of carpet installation was ancillary to, rather than an essential component of, the putative employer's business of carpet sales, and, therefore, the residences of the carpet sales business' customers were not among the carpet sales business' places of business.

ii. For example, and by way of contrast to the example in i., above, when an individual is engaged by a drywall installation business to install drywall at the residences of the drywall installation business' customers, the service being performed by the drywall installer at the residences of the drywall installation business' customers has been performed at among the drywall installation business' places of business, because the service was performed at the residences of customers of the drywall installation business and the service of drywall installation was an essential component of, rather than ancillary to, the drywall installation business. That is, the focus of the drywall installation business' enterprise is the installation of drywall (not the sale of drywall).

Therefore, drywall installation is an essential component of, rather than ancillary to, the putative employer's business, and the residences of the drywall installation business' customers were among the drywall installation business' places of business.

iii. Other examples of locations that are outside of the putative employer's physical plant, but remain among the putative employer's places of business, because they are locations where the putative employer conducts an integral part of its business, include, but are not limited to, the following:

a. An airplane, for an airline business;

b. A truck, for a trucking company; and

c. A vehicle operated by a driver, whether for a limousine, taxi, transportation network company or delivery service, the purpose of which is to transport people or goods.

iv. Other examples of locations that are outside of the putative employer's physical plant, and are also not included among the putative employer's places of business, because they are not locations where the putative employer conducts an integral part of its business, include, but are not limited to, the following:

a. Public buildings such as the County Clerk's office, where a Title Abstractor performs abstracting services, or a public library or archive, where a Title Abstractor performs research;

b An individual's personal residence where they perform remote work, i.e., performing services from a location other than a location operated by the putative employer.]*

(e) An individual's personal residence where they perform remote work, i.e., performing services from a location other than a location operated by the putative employer, shall not be considered among the putative employer's places of business.

12:11-1.5 Prong C of the ABC test

(a) through (d) (No change from proposal.)

[(e) Under Prong C, what is relevant is not whether an individual was free to work for others, but rather, whether the individual did perform services for, and receive remuneration for the performance of such services from, others during the relevant period; for example, regarding coverage under the Unemployment Compensation Law within the context of an audit to determine contribution liability, during the audit period.]

Recodify subsections (f) through (h) as (e) through (g).