# The PRO Act's 'ABC' Test is a Not a Legitimate Test for Determining Worker Status But is a Blunt Instrument to Deny Individuals their Right to Independent Entrepreneurship

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## Executive Summary

This paper addresses only one aspect of the *Protecting the Right to Organize Act of 2021*, S. 420 and H.R. 842, (the "PRO Act"), namely, its proposed adoption of an "ABC" test for determining worker status for purposes of the National Labor Relations Act ("NLRA").[2] **The Coalition respectfully urges that an "ABC" test not be adopted for purposes of any federal statute.**

An "ABC" test[3] for determining worker status is explicitly designed to deny independent-contractor status to a subset of common-law independent contractors. This is necessarily so, because the "A" factor of the test *is* a common-law test. It follows that a common-law independent contractor whose relationship with a client fails to satisfy the "B" factor or the "C" factor is deemed an employee of the client – without regard to any other aspect of the relationship.

Any characterization of an "ABC" test as simply a clearer or more objective test for determining worker status is disingenuous. An "ABC" test denies independent-contractor status to a subset of common-law independent contractors, and it does so on a massive scale.

This was quickly recognized in California, after its enactment of AB 5, which adopted an "ABC" test for purposes of most California employment laws, supplanting a common-law test.[4] California independent contractors loudly complained about being denied, against their will, the right to work independently. The California Legislature found itself flooded with requests for special carve-outs from the test.

But instead of admitting its mistake and repealing its "ABC" test, the California Legislature doubled down on its strategy by enacting AB 2257, which retains an "ABC" test but also includes an embarrassingly long list of special carve-outs for nearly 100 specific groups. The California Legislature decided – on an independent-contractor-sector by independent-contractor-sector basis – which specific groups it would grant relief from an "ABC" test, and which it would not. And the process of granting carve-outs for specific independent-contractor-sectors is likely not over yet. The Coalition respectfully submits that this is not something Congress should want to replicate at the federal level.

The fundamental flaw in an "ABC" test is its rigidity. This rigidity is due to its "B" and "C" factors being mandatory factors. By contrast, one of the reasons why the common-law test has withstood the test of time and been so effective in appropriately distinguishing between employees and independent contractors, is that it is guided by the bedrock concept of "right of control" and consists of a flexible multi-factor test that can adapt to the specific nature of each relationship being examined. To be sure, courts have emphasized that under the common-law test, no one factor is determinative. This multi-factor approach, with no factor being determinative, imbues the test with reliable protection against absurd outcomes.

In addition to this fundamental flaw in an "ABC" test, the two mandatory factors, themselves, are problematic. First, the mandatory "B" factor summarily denies independent-contractor status to any individual engaged by a firm to provide services deemed to be within the "usual course" of the firm's business – without regard to any other aspect of the relationship. To make matters worse, this factor requires a court to engage in an oftentimes metaphysical, and unpredictable, inquiry to ascertain the specific contours of a firm's "usual course of business."

Second, the mandatory "C" factor analysis turns on facts generally unknown to the company that has the burden of demonstrating the factor is satisfied. A client that contracts with an independent contractor seldom has a business need to know the extent to which the individual is "customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed" – and an individual might not want to share this type of information with a potential client. This produces the anomalous effect of a client seldom knowing whether its independent-contractor relationship with an individual will be defensible.

An aspect of the "C" factor that can be vexing to independent entrepreneurs is its requirement that an individual take the same types of prescribed actions to demonstrate an independent business, regardless of type of business the individual operates, i.e., whether it be website developer, computer programmer, freelance writer, insurance agent, mystery shopper, actor, musician, electrician, cabinet maker, truck driver, attorney, or physician. The prescribed actions often create no value to the individual's business.

Because both the "B" and "C" factors are mandatory, a failure to satisfy either will deny independent-contractor status to an individual – without regard to any other consideration. For an example of how the "B" factor can produce an absurd outcome, consider an individual who is a leading expert in the individual's field with a substantial income, who operates out of leased office space with several full-time assistants, and performs project-based work for a wide array of different clients. This individual – who unquestionably is self-employed under any reasonable test – would nonetheless be deemed an employee of a client if the individual's services were deemed to be within the "usual course" of that client's business. An important question to consider is: precisely what legitimate policy objective is accomplished by this outcome?

Similarly, for an example of how the "C" factor can produce an absurd outcome, consider an individual who is an exceptional writer and works for a newspaper as a senior editor. The individual also travels widely. This individual and the editor of a travel magazine have a common friend who urges the editor to consider engaging the individual to write for the travel magazine about the individual's travels. The editor contacts the individual and offers to engage the individual to write about the individual's next trip, in exchange for a fixed sum. The individual does so, the editor publishes the article in the travel magazine and discovers that readers enjoyed it.

The editor then engages the individual under a flexible arrangement in which the individual can write about any trip, in exchange for a fixed sum per article. The individual continues to travel widely and writes about some trips and is paid for the articles but does not write about other trips. This individual – who unquestionably would be deemed to be writing the articles as an independent contractor under any reasonable test – would nonetheless be deemed an employee of the travel magazine, because the individual takes no actions to demonstrate being customarily engaged in an independently established business. Once again, an important question to consider is: precisely what legitimate policy objective is accomplished by this outcome?

Finally, while at this time consideration is being given, in the context of the PRO Act, to adopting an "ABC" test solely for purposes of the NLRA, the ramifications of such a change would extend far beyond the NLRA. The reason is that once a common-law independent contractor is deemed an employee of a client for purposes of the NLRA, the individual becomes susceptible to being represented by a union. And once represented by a union, the union would negotiate a collective bargaining agreement with the client.

It is highly likely that a collective bargaining agreement would establish terms and conditions governing the work relationship that would be incompatible with an independent-contractor relationship under any applicable test, including the common-law test. Thus, once a common-law independent contractor is included in a union-negotiated collective bargaining agreement with a client, that individual would likely be deemed an employee of that client for purposes of all applicable laws.

Because of the numerous flaws and defects of an "'ABC" test, the Coalition respectfully urges that such a test not be adopted for purposes of any federal statute.

## I. The Multi-Factor Common-Law Test is a Demanding Test that is Adaptable to Any Type of Service Relationship and Thereby Avoids Absurd Outcomes

The traditional determination of an individual's status, as an employee or independent contractor, turns on the concept of "control," namely, the right of control over the means or methods of an individual's performance.[5] A company that retains the requisite right of control is the individual's employer. Only if a company is willing to abdicate this right with respect to an individual can the individual qualify as an independent contractor. The right-of-control test has its origins in English common law[6] and has survived the test of time as a reliable determiner of worker status. It is commonly referred to as the common-law test.

The common-law test has been highly effective in policing independent-contractor relationships. The price of having to relinquish control over the means or methods of performance is sufficiently steep to readily expose instances of worker misclassification. The test is premised on the recognition that an independent

entrepreneur already knows how to provide the service the individual is in the business of providing. If a company instructs or trains an individual on how to perform the contracted services, this is viewed as a key indicator that the individual is not actually independent and is, instead, a misclassified employee.

A critically important feature of the common-law test is that it is a multi-factor test. It attaches different weights to its different factors, *depending on the circumstances*, and no single factor is determinative.[7] This protects against undue weight being given to any specific factor and thereby protects against absurd outcomes.

The common-law test has never been characterized as a business-friendly test. In fact, it is a demanding test. It is the test the Internal Revenue Service applies when determining worker status for purposes of federal employment taxes.[8] And it is the test the U.S. Supreme Court held Congress intended to apply for distinguishing between employees and independent contractors for purposes of a statute that either does not define the term "employee" or defines the term with a definition that is circular.[9] To be sure the common-law test is the predominant test courts use to determine worker status for purposes of federal statutes[10] – and it has been highly effective and reliable in making these determinations.

## II. The 'ABC' Test is a Rigid, Blunt Test that Routinely Produces Absurd Outcomes

What has become known as an "ABC" test first emerged in the context of state unemployment tax statutes.[11] An "ABC" test has been adopted by certain state legislatures that made the affirmative policy decision to expand coverage for a specific purpose to include certain common-law independent contractors.[12] Under this test, as proposed in the Pro Act, an individual performing any service shall be considered an employee … and not an independent contractor, unless all three of the following "ABC" factors are satisfied:

(A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
(B) the service is performed outside the usual course of the business of the employer; and
(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

The "A" factor of an "ABC" test is, in substance, a common-law right of control test. It follows that an "ABC" test – by its nature – treats as employees a subset of common-law independent contractors. More precisely, it treats as employees any common-law independent contractor who fails to satisfy either the "B" factor or the "C" factor of the test. Somewhat ironically, an "ABC" test creates precisely what the

multi-factor common-law test was designed to avoid, namely, a single factor being determinative.

Importantly, an "ABC" test permits a single factor to be determinative only in one direction, namely, in the direction of employment. No one factor of an "ABC" test can be determinative in the direction of independent-contractor status. This feature exposes the absence of any neutrality in the test.

By designating the "B" and "C" factors as mandatory conditions – in all cases, an "ABC" test, not surprisingly, creates absurd outcomes. Consequently, an "ABC" test is not a legitimate test. A stark indication of the test's illegitimacy is the fact that California's "ABC" test, ultimately enacted by AB 2257, contains special exemptions for nearly 100 different specific industries.[13] And these 100 exempted industries represent only a portion of the industries for which an "ABC" test is ill-suited.

California's enactment of this test created a regulatory environment in which the California Legislature picks and chooses specific industries, one at a time, that are accorded a statutory exemption from its "ABC" test and implicitly allowed to do business with independent contractors in the state. The enactment of such a test at the federal level would require Congress to engage in a similar process of picking the specific types of independent-contractor relationships to grant an exemption.

The following discusses the inherent illegitimacy of an "ABC" test and the economically destructive consequences of its application.

## III. The Mandatory "B" Factor Creates Absurd Outcomes with No Discernable Policy Justification

To satisfy the "B" factor, the burden is on a client company to establish that the services an individual provides are outside the "usual course" of the company's business. This factor is problematic for two reasons. First, it flatly denies independent-contractor status to an individual – regardless of any other indicia of self-employment – if the individual performs a service deemed to be within the "usual course" of a client company's business. Second, the concept of a company's "usual course" of business is amorphous and not readily ascertainable, which introduces significant uncertainty as to whether the factor is satisfied in a specific relationship.

As to the threshold issue of denying an individual independent-contractor status solely because the individual's services are within the "usual course" of a client's business, the absurdity of this concept is illustrated by the long list of exemptions in California's AB 2257. A close inspection of the exemptions reveals that many effectively retain the "A" and "C" factors of an "ABC" test but replace the "B" factor with a new set of conjunctive factors.[14] This is a glaring acknowledgement that the mandatory "B" factor summarily denies individuals in certain sectors any possibility of qualifying as an independent contractor.

One illustration of the devastating effect of the "B" factor is its complete abolishment of a business model designed to add efficiencies to the marketplace by offering independent contractors access to a wide array of client opportunities with many different clients – thereby allowing the independent contractors to devote more time to billable client services and less time to nonbillable sales and marketing. The court in *Sanchez v. Lasership, Inc.*, 937 F. Supp. 2d 730, 741-42 (E.D. Va. 2013), characterized "B" factor as:

> unique … [and] unlike any other statute in the country, as it is the only statute that requires independent contractors to perform services outside an entity's "usual course of business." … other independent contractor statutes only account for an employer's usual course of business as one of many factors, if at all, in determining independent-contractor status

The court in *Sanchez* provided the following explanation of how this factor effectively abolishes this type of business model:

> As applied to motor carriers …, the effect of [the "B" factor] is to bind carriers to utilize a certain type of employment relationship to carry out their operations. Specifically, [the "B" factor] commands [a motor carrier] to convert its independent contractors to employees because its independent contractors perform services within [its] course of business. In other words, [a motor carrier] which is in the business of providing package delivery services, is precluded from utilizing independent contractors also in the business of package delivery services…. Plaintiffs readily concede that, "[the motor carrier] cannot possibly satisfy the ["B" factor] because [it] is in the delivery business, and Plaintiffs performed delivery services for [it]."[15]

While admittedly these types of businesses can be structured in different ways such that in some cases the business will create common-law employment relationships with motor carriers and in other cases the business will create common-law independent-contractor relationships, the mandatory "B" factor obviates any need for analysis by simply banning the business model entirely. A question to consider in this regard is: why should independent entrepreneurs be denied access to businesses that have provided them enormous efficiencies in finding new client opportunities?

The "B" factor also can require a court to conduct an oftentimes metaphysical inquiry to ascertain the specific contours of the "usual course" of a company's business. And this is exacerbated by courts having held that a company can have more than one. The court in *Carey v. Gatehouse Media Massachusetts I, Inc.*, 92 Mass. App. Ct. 801, 808, 94 N.E.3d 420, 426 (2018), explained that a "service need

not be the sole, principal, or core product that a business offers its customers, or inherently essential to the economic survival of that type of business, in order to be furnished in the usual course of that business." Similarly broad interpretations of this factor have resulted in a company being deemed the employer of an individual who contracts with the company to provide a type of service that the company, itself, has never provided.

For example, in *Vogue v. Adm'r, Unemployment Comp. Act*, 2019 Conn. Super. LEXIS 637 (Super. Ct. Apr. 4, 2019), the court held that the "B" factor was not satisfied when a retailer of body jewelry who operated out of a leased store location endeavored to create synergy by entering into an arrangement with a tattoo artist to offer its store customers access to tattoo services. The court made the arguably counterintuitive determination that tattoo services are within the "usual course" of business of the body jewelry retailer – which means that the tattoo artist could not avoid being deemed an employee of the retailer. It follows that the "B" factor can prohibit entrepreneurs from experimenting with other entrepreneurs to create synergy for their respective businesses.

Similarly, art instructor services have been determined to be within the course of business of an art museum,[16] and musicians have been determined to be within the course of business of a bar.[17] By virtue of the "B" factor being mandatory, a musician could not avoid being deemed an employee of such a bar even if the musician was touring the country at the time and employed several band members. The Coalition submits that these outcomes advance no discernable policy objective – other than to severely restrict an individual's right to work as an independent entrepreneur.

The denial of independent-contractor status to otherwise patently legitimate independent entrepreneurs can inflict severe damage on traditional business relationships – with ramifications extending far beyond worker status. For example, consider a psychiatric hospital that asks a renowned psychiatrist with a special expertise and a thriving private practice to consult with the hospital on few difficult cases within that special expertise. If the psychiatrist were to insist on being engaged as an independent contractor, and not as an employee of the hospital, the hospital would be powerless to meet the psychiatrist's request, because there is no question that psychiatric services are within the "usual course" of business of a psychiatric hospital. The policy objective being achieved by this outcome is elusive. One implication is that it will discourage highly specialized professionals – of any type – from sharing their expertise with institutions. Once again, a question to consider is: why would the government want to discourage this?

## IV. The Mandatory "C" Factor Requires a Company to Make Worker Classification Decisions Based on Information Known Only to the Individuals Being Classified

The "C" factor is especially vexing to companies that do business with independent contractors, because a company typically is concerned only with an independent contractor's professional competence. It has no business need to know the extent to which an independent contractor markets the contractor's services to others or to the public generally or the extent to which the individual actually performs services for others. Also, an independent contractor, when asked about his or her dealings with other clients, might reasonably respond "none of your business." Such a contractor might have business or even legal reasons for not answering the question. Furthermore, an individual who is not successful as an independent entrepreneur could unilaterally place himself or herself within the definition of "employee" by intentionally failing the "C" factor, e.g., by choosing to forgo other business opportunities.

As the foregoing reveals, a company typically does not know whether an independent contractor satisfies the "C" factor until such time as the company is compelled to defend the individual's independent-contractor status.

An example of a counterintuitive outcome, as a consequence of this factor being a mandatory condition, is provided by the decision in *RN Plus Inc. v. Unemployment Comp. Bd. of Rev.*, 242 A.3d 992 (Pa. Commw. Ct. 2020), *appeal denied*, 2021 WL 1745981 (Pa. May 4, 2021). This case considered a registered nurse who contracted with a nurse referral agency to gain access to client opportunities. Applying a two-factor "AB" test, the individual was determined to have been free from control but to have failed the "B" factor (which is the "C" factor in an "ABC" test), based on a determination that the individual was not "customarily engaged in an independently established trade, occupation, profession or business."

The court reasoned that "the agency did not meet its burden of establishing that the nurse worked for others, had his own nursing business, or took affirmative steps toward starting such a business." The very nature of the business in *RN Plus Inc.* is to inform self-employed individuals about client opportunities, and to inform clients about self-employed individuals who possess the professional credentials the client specifies. But when an individual registers with the business, it is impossible for the business to predict the extent to which the individual will rely on it for gaining access to client opportunities, or the extent to which the individual will take other actions toward establishing the individual's business. Thus, the mandatory "C" factor exposes a business to a permanent immutable uncertainty with respect to each and every independent contractor.[18]

The "C" factor also can be vexing to independent entrepreneurs. This factor requires an individual seeking recognition as an independent contractor to take

actions and incur expenses that do not necessarily advance the individual's business objectives. For example, in *Boston Bicycle Couriers v. Deputy Director of the Division of Employment & Training*, 778 N.E.2d 964, 971 (2002), a business was determined to fail the "C" factor relative to a bicycle courier, because it did not present evidence that the courier held himself out as an independent businessman performing courier services; had his own clientele; utilized his own business cards or invoices; advertised his services; or maintained a separate place of business and telephone listing.[19] But what if a self-employed bicycle courier earned sufficient income while achieving the individual's preferred work-life balance without taking any of these actions?

The Coalition respectfully submits that the outcomes in the foregoing cases achieve no discernable policy objective – other than to severely restrict an individual's right to independent entrepreneurship. Thus, the Coalition urges that any proposal that would adopt an "ABC" test for purposes of any federal statute be rejected.

## V. Adopting an 'ABC' Test for Purposes of the NLRA Would Effectively Convert Unionized ICs – Throughout the Nation – to Employees for Purposes of All Applicable Laws

If an "ABC" test were expanded to federal law, the common-law independent contractors – throughout the nation – who cannot satisfy the mandatory "B" and "C" factors could be denied their right to entrepreneurship.

If the PRO Act were enacted, common-law independent contractors who cannot satisfy an "ABC" test would be deemed employees for purposes of the NLRA. These individuals would then be susceptible to union organization. If they were to become part of a union, the union would negotiate a collective bargaining agreement governing terms and conditions of their "employment." Once this occurs, the client company would need to comply with the terms and conditions of the union-negotiated collective bargaining agreement. Those terms and conditions would likely cover such items as pay rates, health and retirement benefits, paid time off, work hours, break time, and policies governing termination. The collective bargaining agreement would almost certainly be incompatible with an independent-contractor relationship under any applicable test. The ultimate consequence would be for the affected individuals to be deemed employees of the "employer" for all purposes.

## VI. Conclusion: An 'ABC' Test is Not a Legitimate Test and its Adoption at the Federal Level Would Create Incalculable Damage to the Economy and Economic Freedom

As the foregoing demonstrates, an "ABC" test functions as a blunt instrument that denies the right of independent entrepreneurship to broad swaths of legitimate independent contractors. And its inherent uncertainty creates a powerful disincentive for any company to do business with independent contractors.

It follows that the adoption of an "ABC" test would be unfair to independent entrepreneurs and their clients, as it would deny them the right to enter into the contractual relationship of their choice. But it also would be harmful to the economy overall. According to a 2010 study by Ph.D. economist Jeffrey A. Eisenach, "[p]olicy changes that curtail independent contracting … would result in higher unemployment, slower economic growth and reduced economic welfare."[20] The study also notes that curtailing independent contracting would:

(i) reduce job creation and small business formation,
(ii) reduce competition and increase prices,
(iii) create sector specific disruptions, and
(iv) produce a less flexible and dynamic work force.[21]

The study also observes that "one of the most powerful economic explanations for the widespread use of independent contractor relationships is the well-documented fact that independent contractors prefer their jobs to an employment arrangement."[22] It follows that the adoption of an "ABC" test would deny large numbers of independent entrepreneurs the right to offer their services in the manner they prefer.

The entire fallout from the California experiment of imposing an "ABC" test on a broad basis is not yet fully known. But its impact thus far is not encouraging. To impose this test at the federal level, especially at this time, would produce incalculable economic disruption. The right of entrepreneurship in this country would be severely restricted at a time when entrepreneurship is already in decline.[23]

While the Coalition unqualifiedly supports proper worker classification, it steadfastly opposes the adoption an "ABC" test. This test has nothing to do with achieving proper worker classification. It is designed explicitly to deny independent contractor status to a large subset of legitimate independent contractors.

The Coalition respectfully submits that the multi-factor common-law test is best equipped to adapt to evolving work relationships. We strongly urge that any proposal which would adopt an "ABC" test at the national level be rejected.

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[1] The Coalition consists of organizations, companies, and individuals dedicated to informing the public and elected representatives about the importance of an individual's right to work as a self-employed individual, and to defending the right of self-employed individuals and their respective clients to do business with each other.

[2] See section 101(b) of the PRO Act.

[3] Under the "ABC" test, as proposed in the Pro Act, an individual performing any service shall be considered an employee … and not an independent contractor, unless—
(A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
(B) the service is performed outside the usual course of the business of the employer; and
(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

[4] The common-law test that AB 5 replaced with an "ABC" test was established by the Supreme Court of California more than 30 years ago in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399 (1989)).

[5] The two most prevalent iterations of the common-law test are the test used for purposes of the Internal Revenue Code and the Restatement (Second) of Agency § 220(2).For purposes of the Internal Revenue Code, The Internal Revenue Manual, 4600 Employment Tax Procedures, Exhibit 4640-1, provides that workers are generally employees if they: (1) must comply with employer's instructions about the work; (2) receive training from or at the direction of the employer; (3) provide services that are integrated into the business; (4) provide services that must be rendered personally; (5) hire, supervise, and pay assistants for the employer; (6) have a continuing working relationship with the employer; (7) must follow set hours of work; (8) work full time for an employer; (9) do their work on the employer's premises; (10) must do their work in a sequence set by the employer; (11) must submit regular reports to the employer; (12) receive payments of regular amounts at set intervals; (13) receive payments for business and/or traveling expenses; (14) rely on the employer to furnish tools and materials; (15) lack a major investment in facilities used to perform the service; (16) cannot make a profit or suffer a loss from their services; (17) work for one employer at a time; (18) do not offer their services to the general public; (19) can be fired at any time by the employer; (20) may quit work at any time without incurring liability. To determine whether a worker qualifies as an independent contractor, the relationship between the worker and a business is analyzed with the aid of the twenty common-law factors. No one factor is decisive, however, the degree of importance of each depends on the occupation and factual context in which services are being performed. *American Consulting Corp. v. United Policymakers*, 454 F.2d 473, 477 (3d Cir. 1971); Rev. Rul. 87-41, 1987-1 C.B. 296. Factors which may be considered in the Restatement (Second) of Agency in determining employee status include: whether the purported employee is engaged in a distinct occupation or business; whether the work involved is usually done under an employer's direction or by an unsupervised specialist; the skill involved; who supplies the instrumentalities and place of performance; the length of employment; the method of payment (by the time or by the job); whether the work is part of the employer's regular business and/or necessary to it; and the intent of the parties creating the relationship. No single factor is determinative. E.g., *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 320-21 (2d Cir. 1982).

[6] E.g., Matthew T. Bodie PARTICIPATION AS A THEORY OF EMPLOYMENT, 89 Notre Dame L. Rev. 661, 675 (Dec. 2013), "The 'control' test is the dominant standard for employment, both nationally and internationally. The test finds its historical roots in the definition of 'servant' in English common law."

[7] E.g., *Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256, 260 (4th Cir. 1997) ("no one factor is determinative, and the consideration of factors must relate to the particular relationship under consideration."); *Gustafson v. Bell Atl. Corp.,* 171 F. Supp. 2d 311, 324 (S.D.N.Y. 2001) ("No one factor in this common law test is dispositive and 'the test is based on the totality of the circumstances.'")

See also note 2.

[8] Rev. Rul. 87-41, 1987-1 C.B. 296.

[9] See, Russell A. Hollrah and Patrick A. Hollrah, *The Time Has Come for Congress to Finish Its Work on Harmonizing the Definition of "Employee"*, 26 Brooklyn J.L. & Pol'y, 439, 482 (2018).

[10] Id.

[11] So long as this test was confined to state unemployment statutes, its impact on independent-contractor relationships was limited. If a state's "ABC" test resulted in a company being deemed the employer of a common-law independent contractor for purposes of its unemployment statute, the company could simply pay the unemployment tax in that state but otherwise continue treating the affected individuals as independent contractors for all other purposes. Once an "ABC" test applied beyond unemployment, e.g., in California and Illinois, it became more disruptive. If an "ABC" test were adopted at the national level, the economic disruption it would produce is incalculable.

[12] E.g., Alaska Stat. Ann. § 23.20.525(a)(8) provides "service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the

satisfaction of the department that ["ABC" test]," Conn. Gen. Stat. Ann. § 31-222(a)(2)(B) provides "[s]ervice performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that ["ABC" test]," and Mass. Gen. Laws Ann. ch. 151A, § 2 provides "[s]ervice performed by an individual, except in such cases as the context of this chapter otherwise requires, shall be deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the commissioner that ["ABC" test]." See also *Bruger v. Olero, Inc.,* 434 F. Supp. 3d 647, 653, n.5 (N.D. Ill. 2020) ("[t]he ABC test is generally broader than the common-law test for employment, as it creates "a near-presumption that a worker is an employee rather than an independent contractor.")

[13] AB 2257 exempts the following categories: graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, event planning, wedding planning, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, interpreting services, marketing, administrator of human resources, travel agent, graphic design. grant writer, fine artist, enrolled agent, payment processing agent, still photographer, photojournalist, videographer, photo editor, still photographer, photojournalist, videographer, photo editor, freelance writer, translator, editor, copy editor, illustrator, newspaper cartoonist, content contributor, advisor, producer, narrator, cartographer, licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, licensed cosmetologist, specialized performer hired by a performing arts company or organization to teach a master class, appraiser, professional foresters, real estate licensee, home inspector, repossession agency, recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers, directors, musical engineers, mixers engaged in the creation of sound recordings, certain musicians engaged in the creation of sound recordings, certain vocalists, photographers working on recording photo shoots, album covers, and other press and publicity purposes, independent radio promoters, other individual engaged to render any creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions, individual performing work pursuant to a subcontract in the construction industry, data aggregator, person or organization who is licensed by the Department of Insurance, person who provides underwriting inspections, premium audits, risk management, or loss control work for the insurance and financial service industries, physician, surgeon, dentist, podiatrist, psychologist, veterinarian, lawyer, architect, landscape architect, engineer, private investigator, accountant, securities broker-dealer, investment adviser, direct sales salesperson, manufactured housing salesperson, commercial fisher working on an American vessel, newspaper distributor, newspaper carrier, individual who is engaged by an international exchange visitor program, competition judge, individual performing services pursuant to a contract between a motor club and a third party to provide motor club services utilizing the employees and vehicles of the third party.

[14] For example, AB 2257 enacted new Labor Code section 2776, which provides that the "ABC" test and the holding in *Dynamex Operations W. Inc. v. Superior Court*, 4 Cal.5th 903 (2018), (*"Dynamex")* do not apply to a bona fide business-to-business contracting relationship, and instead the determination of employee or independent contractor status of the "business services provider" shall be governed by *Borello.* To qualify for this carve-out, the contracting business needs to demonstrate that all of the following criteria are satisfied:

> (1) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. **(In substance, the "A" factor of the "ABC" test.)**
>
> (2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This condition does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.

(3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.
(4) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.
(5) The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business.
(6) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed. **(In substance, the "C" factor of the "ABC" test.)**
(7) The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.
(8) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.
(9) Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.
(10) The business service provider can negotiate its own rates.
(11) Consistent with the nature of the work, the business service provider can set its own hours and location of work.
(12) The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

Similarly, new Labor Code Section 2777 provides that the "ABC" test and the holding in *Dynamex* do not apply to the relationship between a "referral agency" and a "service provider" and instead the determination of whether the "service provider" is an employee or independent contractor of the "referral agency" shall be governed by *Borello*. To qualify for this carve-out, the "referral agency" needs to demonstrate that <u>all</u> of the following criteria are satisfied:

(1) The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact. **(In substance, the "A" factor of the "ABC" test.)**
(2) If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration in order to provide the services under the contract, the service provider shall certify to the referral agency that they have the required business license or business tax registration. The referral agency shall keep the certifications for a period of at least three years.
(3) If the work for the client requires the service provider to hold a state [construction] contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, the service provider has the required contractor's license.
(4) If there is an applicable professional licensure, permit, certification, or registration administered or recognized by the state available for the type of work being performed for the client, the service provider shall certify to the referral agency that they have the appropriate professional licensure, permit, certification, or registration. The referral agency shall keep the certifications for a period of at least three years.
(5) The service provider delivers services to the client under the service provider's name, without being required to deliver the services under the name of the referral agency.
(6) The service provider provides its own tools and supplies to perform the services.
(7) The service provider is customarily engaged, or was previously engaged, in an independently established business or trade of the same nature as, or related to, the work performed for the client. **(In substance, the "C" factor of the "ABC" test.)**

(8) The referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency.

(9) The service provider sets their own hours and terms of work or negotiates their hours and terms of work directly with the client.

(10) Without deduction by the referral agency, the service provider sets their own rates, negotiates their rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client.

(11) The service provider is free to accept or reject clients and contracts, without being penalized in any form by the referral agency. This paragraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

And new Labor Code section 2778 provides that the "ABC" test and the holding in *Dynamex* do not apply to a contract for "professional services," and instead the determination of whether the individual is an employee or independent contractor shall be governed by *Borello* if the hiring entity demonstrates that all of the following factors are satisfied:

(1) The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity. Nothing in this paragraph prohibits an individual from choosing to perform services at the location of the hiring entity.

(2) If work is performed more than six months after the effective date of this section and the work is performed in a jurisdiction that requires the individual to have a business license or business tax registration, the individual has the required business license or business tax registration in order to provide the services under the contract, in addition to any required professional licenses or permits for the individual to practice in their profession.

(3) The individual has the ability to set or negotiate their own rates for the services performed.

(4) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.

(5) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work. **(In substance, the "C" factor of the "ABC" test.)**

(6) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services. **(In substance, the "A" factor of the "ABC" test.)**

Finally, new Labor Code section 2779 provides that the "ABC" test and the holding in *Dynamex* do not apply to the relationship between two individuals wherein each individual is acting as a sole proprietor or separate business entity formed as a partnership, limited liability company, limited liability partnership, or corporation performing work pursuant to a contract for purposes of providing services at the location of a single-engagement event under the following conditions:

(1) Neither individual is subject to control and direction by the other, in connection with the performance of the work, both under the contract for the performance of the work and in fact. **(In substance, the "A" factor of the "ABC" test.)**

(2) Each individual has the ability to negotiate their rate of pay with the other individual.

(3) The written contract between both individuals specifies the total payment for services provided by both individuals at the single-engagement event, and the specific rate paid to each individual.

(4) Each individual maintains their own business location, which may include the individual's personal residence.

(5) Each individual provides their own tools, vehicles, and equipment to perform the services under the contract.

(6) If the work is performed in a jurisdiction that requires an individual to have a business license or business tax registration, then each individual has the required business license or business tax registration.

(7) Each individual is customarily engaged in the same or similar type of work performed under the contract or each individual separately holds themselves out to other potential customers as available to perform the same type of work. **(In substance, the "C" factor of the "ABC" test.)**

(8) Each individual can contract with other businesses to provide the same or similar services and maintain their own clientele without restrictions.

[15] *Sanchez v. Lasership, Inc.*, 937 F. Supp. 2d 730, 741-42.

[16] *Mattatuck Museum–Mattatuck Historical Soc'y v. Administrator, Unemployment Compensation Act,* 679 A.2d 347 (1996).

[17] *Bigfoot's, Inc. v. Board of Review of the Indus. Comm'n of Utah,* 710 P.2d 180 (Utah 1985).

[18] Another equally absurd outcome produced by the "C" factor operating in isolation as a mandatory factor occurred in *Begovic v. Unemployment Comp. Bd. of Rev.,* 234 A.3d 921 (Pa. Commw. Ct. 2020), wherein an individual was held to be an employee under a two-factor, "AB" test of a purported employer that operated a political action committee. As was the case in *RN Plus Inc.,* this individual was determined to have been free from control but to have failed the "B" factor, based on a determination that the individual was not "customarily engaged in an independently established trade, occupation, profession or business."

According to the findings in the case, the individual had called the committee and offered to canvass and collect signatures for ballot initiatives because she politically agreed with its agenda. The committee offered to pay her a stated amount per signature she obtained. She could work whenever she desired and not work when she chose not to. She could hire subcontractors or friends and did not have any particular territory or other restrictions on where she could canvass for signatures. The Chairman of the committee testified that in this industry the canvassers always work as independent contractors when collecting signatures.

The individual nonetheless was held to be an employee of the committee, based on findings that her work was "on the side to make extra money." The court found no evidence that she had established a private enterprise or independent business through which she provided services to the committee, no evidence that she advertised a canvassing "business" or that she "solicited" canvassing business from sources other than the committee. She testified that before performing canvassing for the committee, she "did not have experience" as either canvasser or collector of signatures and that she "was not trained in anything professionally."

By virtue of the "C" factor being a mandatory factor, the canvassing/signature-gathering industry is likely to be completely disrupted, as this is not the type of work for which an individual typically would create a business enterprise. A multi-factor test could take this reality into account and accord lesser weight to this factor. But the "ABC" test operates rigidly to deny independent-contractor status to this entire sector of the economy – notwithstanding its absurdity.

[19] Accord, *Kirby of Norwich v. Adm'r, Unemployment Comp. Act*, 2018 Conn. LEXIS 72 (Jan. 31, 2018), in which the Supreme Court of Connecticut indicated that to satisfy the "C" factor, evidence that an individual provides services for multiple clients is one factor, but additional factors should also be considered, such as whether the individual: maintains a home office; is independently licensed by the state; had business cards; has sought similar work from third parties; maintains the individual's own liability insurance; and advertises the individual's services to third parties.

[20] Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, NAVIGANT ECONOMICS (December 2010) available at: http://www.navigantеconomics.com/docs/Role%20of%20Independent%20 Contractors%20 December%202010%20Final.pdf.

[21] *Id.*

[22] *Id.* Accord, MBO Partners, *The State of Independence in America 2020*, MBO_Partners_State_of_Independence_2020_Report.pdf (mbopartners.com) at p.6 (("A very consistent theme across the ten years of the MBO Partners State of Independence research series is that independent workers choose to be independent for the autonomy, flexibility, and control it provides. Between 2011 and 2019, the percentage of independent workers saying it was their choice completely rose from 55 percent to 67 percent, while those saying it was a result of factors beyond their control fell from 15 percent to 7 percent."); U.S. Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements Summary* (June 7, 2018) www.bls.gov/news.release/conemp.nr0.htm ("79 percent of independent contractors preferred their arrangement over a traditional job).

[23] E.g., Christopher Wink, *Entrepreneurship was already in decline. Now What's going to happen?* (May 5,2020), https://technical.ly/2020/05/05/entrepreneurship-was-already-in-decline-now-whats-going-to-happen-recession-

economy-new-startups/, Leigh Buchanan, *American Entrepreneurship Is Actually Vanishing, Here's Why,* (May 2015), https://www.inc.com/magazine/201505/leigh-buchanan/the-vanishing-startups-in-decline.html.