



Meeting Minutes: Attorney General’s Advisory Task Force on Worker Misclassification

Meeting Date and Time: October 8th, 2024, 9:00 am – 11:00 am

Minutes Prepared By: Abdulaziz Mohamed

Location: Bloomington City Hall, and Microsoft Teams

Attendance

Members Present

Representative Emma Greenman
Rod Adams
Commissioner Nicole Blissenbach
Octavio Chung Bustamante
Daniel Getschel
Burt Johnson
Melissa Hysing
Briana Kemp
Amir Malik
Deputy Commissioner Evan Rowe
Aaron Sojourner
Brittany VanDerBill
Kim Vu-Dinh
John Stanoch
Brian Elliot (Ex-Officio)
Lee Atakpu (Ex-Officio)

Members Absent

Senator Clare Oumou Verbaten
Commissioner Paul Marquart

Attorney General’s Office (AGO) Staff Members Present

Carin Mrotz
Abdulaziz Mohamed
Laura Sayles



Agenda Items

1. Call to order and roll call

Emma Greenman calls the meeting to order at 10:10 am. A quorum was present.

2. Approval of meeting agenda

A motion was made and seconded to approve the agenda as amended. A vote was taken, and the motion passed unanimously.

3. Approval of September 20th minutes

A motion was made and seconded to approve the September 20th minutes. A vote was taken, and the motion passed unanimously.

4. Task Force Business

Discussion of task force business was had as follows:

- Representative Emma Greenman opened task force business by highlighting that the task force is now a year into its work, primarily focused on education and enforcement. She emphasized the importance of today's meeting and the next one, which will dive deeper into testing issues and criteria. She also acknowledged the work of specific team members in planning the agenda and helping gather information. Representative Emma Greenman closed by referencing a matrix of principles related to labor classification, aiming to ground the task force's discussions in relevant public policy considerations.

5. Presentation: Classification Tests in Use

A presentation on ABC classifications tests utilized in Massachusetts and New Jersey were given by Kate Watkins, Assistant Attorney General in the Massachusetts Attorney General's Office, and Marcus Mitchell, Deputy Attorney General in the New Jersey Attorney General's Office, respectively. The presentation featured the following:

- Kate Watkins provided an overview of the ABC test used to classify independent contractors in Massachusetts, explaining that the state doesn't have a single independent contractor test but rather four, with two being quite similar. Established in 1990 and last amended in 2004, the state ABC test presumes that individuals are employees unless all three conditions are met: first, the individual must have freedom from direction and control in how they perform their services,



while the employer can specify what needs to be accomplished; second, the services must be outside the employer's usual course of business, meaning they are not a regular and essential part of the employer's operations; and third, the individual must operate as an entrepreneur, offering services to multiple clients and having control over their profit and loss. Kate Watkins noted that if any of these criteria aren't met, the individual is classified as an employee, and enforcement actions can be taken by the Attorney General's Office or through private lawsuits, particularly if there are additional violations of wage and hour laws. She emphasized that the simplicity of the three-part test aids in its enforcement.

- Marcus Mitchell discussed his role in the Labor Enforcement section, where he represents the state Department of Labor in court and enforces employment and labor laws, particularly concerning the unemployment compensation fund. Marcys emphasized the significance of the ABC test in New Jersey, which presumes individuals are employees unless all three prongs of the test are met. He noted that New Jersey's version modifies the second prong, allowing for a broader interpretation of what constitutes the usual course of business. This modification means that workers can still be classified as independent contractors even if their services are performed outside the employer's place of business.

6. Discussion: Classification Tests in Use

Based on the presentations given, the task force members asked questions and engaged in a discussion as follows:

- Commissioner Nicole Blissenbach sought clarification on the classification tests used in Massachusetts, noting that the ABC test applies to wage and hour laws but that there are different tests for workers compensation, unemployment insurance, and revenue, although some are similar. Kate Watkins confirmed that to be the case. Marcus Mitchell also confirmed Commissioner Nicole Blissenbach's points with respect to New Jersey, explaining that there are different employment tests for various laws, including discrimination.
- Commissioner Nicole Blissenbach asked whether misclassification can be considered a violation of its own, separate from any wage and hour issues, and, if such a situation exists, what test would apply. Kate Watkins stated that if an employee were to sue for misclassification without a wage violation, they could still seek damages related to the misclassification itself, such as tax burdens or other costs incurred. Marcus Mitchell confirmed that while misclassification is typically linked to violations of unemployment compensation laws, New Jersey has established independent penalties for misclassification as well.
- Aaron Sojourner asked whether there are aspects of the enforcement tests that are particularly easy to administer and agree upon, as well as parts that are more challenging, especially in terms of gathering or interpreting evidence. Marcus Mitchell explained that litigation often arises from disputes over the tests, making



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it hard to pinpoint easy-to-administer parts. He mentioned that every employment test has complexities, particularly with prong B, where courts consider the totality of facts, leading to overlap among the prongs. While he finds the ABC test a useful framework, he acknowledged that isolating specific issues can be challenging due to this overlap. Kate Watkins agreed that the second prong of the ABC test is broad and often the starting point for analysis in investigations and litigation. She noted it is less fact-specific than the first prong, focusing on interpreting business decisions. While the third prong is well-established, it often overlaps with the others, complicating the assessment, especially when employers try to classify employees as independent contractors by having them register as businesses.

- Melissa Hysing asked for clarification on the ABC test regarding whether all three prongs must be met in each state. She also inquired if all three prongs must be satisfied for an employer to classify someone as an independent contractor. Additionally, she wanted to know if other tests weigh factors differently and how that affects enforcement complexity. Kate Watkins confirmed Massachusetts has a presumption of employment for individuals providing services, which was recently clarified in a case. While it doesn't specify remuneration, she suggested that performing services implies it. She noted she can't speak to other agencies' tests but emphasized that many relationships clearly qualify as employment. Marcus Mitchell stated that New Jersey presumes individuals are employees when they perform services for pay, requiring all three prongs of the ABC test to classify them as independent contractors. He noted that many employment tests list factors without weighing them and acknowledged the complexities of jurisdiction in cases, illustrated by a barge case involving drifting state lines.
- Representative Emma Greenman emphasized the need to clarify roles between enforcement agencies and the AGO to reduce complex cases and provide more legal certainty. This would guide those involved in labor transactions and decrease litigation. She expressed interest in how these factors affect enforcement agencies' decision-making and the efficiency of resolving cases outside of court.
- Lee Atakpu questioned how the ABC tests in different states might evolve in response to changes in employment law and the rise of new industries, particularly the gig economy. He asked if the tests have been robust enough to adapt over time and how they might need to change to remain relevant as work structures and business models develop. Marucs Mitchell noted that changes in employment law tend to progress slowly due to the common law system and the limited number of cases reaching the Supreme Court. He acknowledged the mergence of new business models and related litigation but expressed uncertainty about predicting future changes. Kate Watkins highlighted that the ABC test has effectively addressed current issues in employment law, particularly regarding the distinction between independent contractors and employees. She pointed to relevant case law that integrates service platforms with the actual provision of



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services. Demonstrating the test's adaptability to evolving work landscapes. While there have been efforts to amend the statute, none have succeeded.

- Carin Mrotz asked if the presumption of employment in some states creates extra paperwork or burdens for employers, compared to Minnesota, where there is no presumption and employers decide on classification without defaulting to employee status. Marcus Mitchell stated that in New Jersey, the presumption of employment mainly impacts legal outcomes in litigation, not additional paperwork for employers. Employers still handle tax filings for all wages, regardless of worker classification, so the presumption affects legal implications rather than administrative burdens. Kate Watkins noted that the presumption of employment acts as a defense against claims, but it requires more work for employers, such as maintaining records and ensuring adequate wages.
- Senator Clare Oumou Verbeten highlighted her learnings from a year-long task force on employment misclassification, especially in construction. She noted the difficulties workers face in proving wages due to poor record-keeping and cash payments. She asked how the ABC test or penalties in New Jersey and Massachusetts might affect works' ability to claim owed wages and benefits. Marcus Mitchell acknowledged the difficult of comparing enforcement and the ABC test across states. He refrained from speaking on behalf of workers, since his role is in enforcement. Kate Watkins noted that many cases involve informal payments and lack of records, giving workers an advantage since employers without records have limited damages. She highlighted that penalties and treble damages in lawsuits provide extra compensation for workers, supporting deterrence against underpayment.
- Commissioner Nicole Blissenbach asked for clarification on the exceptions or exemptions to the ABC test for wage and hour laws in New Jersey and Massachusetts. Daniel Getschel asked how the IRS' classification of a worker for tax purposes affects the application of other classification tests, like common law tests, in their respective states. Kate Watkins noted that the amin exemptions to the ABC test are for realtors due to specific statutes and for interstate delivery drivers, where federal preemption applies. She also explained that IRS classifications for tax purposes don't affect their analysis, as workers can be classified as independent contractors for tax but still be considered employees under wage and hour laws. Marcus Mitchell stated that, like Kate Watkins, New Jersey's wage and hour analysis doesn't consider IRS classifications. He explained that there aren't specific exemptions from the ABC test in New Jersey's wage and hour laws. While unemployment compensation laws may relate to federal standards, he emphasized that he wouldn't want to speculate further, as there aren't clearly defined exceptions in the wage and hour laws.



7. Presentation: Research on ABC tests in other states

A presentation on Research on ABC tests in other states was given by Liya Palagashvili, Senior Research Fellow and Director of the Labor Policy Project at the Mercatus Center at George Mason University, and Markus Bjoerkheim, Post-Doctoral Fellow at the Mercatus Center at George Mason University. The presentation featured the following:

- Two Types of ABC Tests
- The Problem with ABC Tests: Prong B
- The Goal of ABC Test: Reduce Misclassification, Increase W-2 Employment
- Our “ABC” Test Study
- ABC Tests: Main Results
- ABC Test: Results on Self-Employment
- Study on California’s AB5
- Results: Study on California’s AB5
- Why Does W-2 Employment Fall with ABC Tests?
- Any other data or research on ABC Tests?
- ABC Tests: An Overkill?
- Better Policy Solutions for Worker Misclassification

For more details, see the presentation posted on the Attorney General’s Worker Misclassification Task Force website or at the link below:

https://www.ag.state.mn.us/Taskforce/Misclassification/Meetings/20241008/MercatusCenter_Report.pdf

8. Discussion: Research on ABC tests in other states

Based on the presentation given, the task force members asked questions and engaged in a discussion as follows:

- Aaron Sojourner pointed out that while potential mechanisms for the decline in employment were discussed, he felt they weren’t thoroughly explored and seemed more speculative than concrete. Liya clarified that the study didn’t directly explore the mechanisms for the employment decline, noting they were based on anecdotes from AB5 and other states rather than through aggregate empirical investigation.
- Aaron Sojourner suggested exploring a potential mechanism related to lower labor costs, which can lower prices by avoiding expenses like unemployment insurance and overtime. He likened it to child labor, suggesting that changes in laws can significantly impact costs and demand, and recommended considering this as a testable mechanism. Markus acknowledged that identifying mechanisms is challenging but emphasized the need to clarify them and explore questions posed by the research further.



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- Aaron Sojourner asked whether the working group noted in the presentation specifically addressed the ABC test or if they made more general statements about balancing risks. Liya explained that the working group discussed the importance of avoiding overly broad approaches like the ABC test, which can negatively impact diverse industries. While the test was mentioned as an example, it wasn't specifically addressed in the report. She emphasized that a target approach is preferable and acknowledged the unexpected findings regarding W2 employment said the self-employment results were noisy, which is why they plan to explore the self-employment results further.
- Aaron Sojourner noted a discrepancy between the gradual mechanisms discussed and the event study findings, which indicated that impacts occurred quickly and stabilized within a year. He suggested that this rapid change provides insight into potential mechanisms at play.
- Representative Emma Greenman asked for clarification on the time frame of the data analyzed before and after the change. Markus stated that the dataset covers 1990 to 2024, with event study plots showing five years before and ten years after policy changes. He highlighted the challenge of identifying true changes to the ABC test, noting that nine out of over twenty states made significant policy changes during the study period, which they examined for effects. Representative Emma Greenman followed up and asked which actual year corresponds to year 0 on the graph. Markus clarified that year 0 varies by state, as they implemented the ABC test at different times. Liya added that year 0 represents the quarter when each state passed the ABC test, which differs for each state.
- Aaron Sojourner asked whether the graph represents a dip and dip or a synthetic control, questioning if the break period is set to 0 by design. Markus explained that it is dip and dip, not zero by construction. He noted that they assess similarities between treatment and control states before the ABC test, using control states as a counterfactual. After implementation, they observed a negative effect on W2 employment, overall employment, and labor force participation in ABC states compared to controls.
- Melissa Hysing asked several questions regarding the nine selected states: whether they have the ABC test for unemployment insurance, wage and hour purposes, or both, how the study accounted for broader economic and demographic changes, and how the California study addressed the disruptive impacts of the pandemic. Markus detailed their research into the nine states, focusing on significant policy changes and their implementation dates. He noted that states like New Jersey and Massachusetts, who presented during the task force meeting, were harder to classify. The largest effects were found in states with clear policy changes, like California. Most states applied the ABC test for wage and hour purposes, with some also using it for unemployment insurance or workers' compensation.
- Melissa Hysing followed up and asked how the California study accounted for disruptions caused by the implementation of the ABC test shortly before the



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pandemic and the subsequent ballot measure, emphasizing the various changes that occurred during that time. Liya explained that they excluded any exemptions from their analysis, such as those related to Prop 22 for ride-sharing companies. This allowed for a cleaner dataset, as industries that received exemptions, like ridesharing and musicians, were not included. She also mentioned that they conducted checks for COVID impacts and found a causal effect in their analysis, controlling for the broader macroeconomic environment. Markus noted that diff and diff should capture economic changes in control states, unless unique shocks affect treatment states. He confirmed that the ABC test's timing varied across the nine states and that all showed negative impacts on W2 employment, allowing for further assessment of COVID's influence.

- Commissioner Nicole Blissenbach asked how the study accounts for the fact that Massachusetts had the ABC test prior to 2004, despite using data starting from that year. Liya explained that Massachusetts had a traditional ABC test before 2004, but that year marked a shift to a more stringent version of the ABC test. The study focuses on this policy change from the traditional to the extreme version in 2004.
- Commissioner Nicole Blissenbach followed up and asked how New Jersey's use of two different versions of the second factor of the ABC test, which has been in effect for 60 years, is considered in the study. Markus highlighted the complexity of New Jersey's ABC test implementation and noted a key legal ruling that clarified its previous application. They consulted employment lawyers to ensure accurate interpretations, aiming for a conservative analysis. Liya added that excluding tricky cases could show larger negative effects on W2 employment, supporting their cautious approach.
- Commissioner Nicole Blissenbach asked if the report would detail state-by-state differences, noting that varying histories with the ABC test could impact employment outcomes. Unfortunately, there wasn't enough time for an answer.
- Carin Mrotz questioned the framing of the research, noting that it assumes efforts to regulate worker classification aim to increase W2 employment. She emphasized that in her experience, the goal is proper classification rather than increasing employee numbers. She asked how this assumption may influence the data interpretation and whether the terminology, like extreme ABC, reflects advocacy language or guides the analysis in the research. Liya explained that the traditional ABC tests are commonly referred to as such, while the more stringent versions in Massachusetts and California can be termed modified, severe, or extreme. She clarified that these stricter tests complicate independent contractor classification. Regarding data, she explained that they analyzed W2 employment as a proxy for misclassification, suggesting that an increase in W2 workers after the ABC test would indicate reduced misclassification. This focus on W2 employment is relevant for policymakers, despite the lack of direct misclassification data.



- Carin Mrotz noted that improving conditions for independent contractors doesn't require changing their classification to employees. Misclassification can be addressed while still allowing workers to remain legitimate independent contractors with better working conditions. Liya acknowledged that by changing the relationship and contract terms between a worker and an independent contractor, misclassification can be resolved. For example, if a worker has strict controls over their schedule, they may be misclassified. Adjusting the agreement can lead to proper classification without necessarily increasing W2 employment.
- Representative Emma Greenman wrapped up the discussion by emphasizing the need for more data and research on the impacts of worker misclassification changes. She acknowledged the efforts of the presenters and task force members, highlighting the gap in meaningful research in this area, and understanding the importance of these impacts on both traditional employment and independent contracting.

9. Task Force Business

Discussion of task force business was done as follows:

- Representative Emma Greenman closed the task force discussion by confirming the next meeting on October 21st in Bloomington. She thanked the hosts and outlined the agenda, which will include a review of insights from Massachusetts and New Jersey, discussions on agency criteria, and input from various stakeholders, fostering robust discussions and a synthesizing of information gather.

10. Adjournment

Representative Emma Greenman adjourned the meeting at 12:25 pm.