

NJ “Gig Economy” Bill Will Negatively Affect Many Freelancers

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During late 2019, the NJ Assembly Labor Committee was rushing 2 new bills, called Senate bill S4204 and Assembly bill A5936, through the legislature in an attempt to crack down on employee misclassification. Introduced in early November, the combined bill ([S4204/A5936](#)) was moving quickly toward approval. On January 8, 2020, Senate President Stephen Sweeney announced that the NJ bill would [not be scheduled for votes](#) during that current lame-duck session. However, the bill was reintroduced on January 14, 2020 in apparently identical form as [S863](#). The bill is supported by labor unions but opposed by independent freelance service providers and allied professional societies.

What is this “gig economy” bill?

The NJ bill is modeled after [California’s Assembly Bill 5](#) (AB5), which went into effect on January 1, 2020 and was written primarily to require app-based [“gig economy” companies](#) such as Uber and Lyft to reclassify its contract workers as employees. The law applies to these workers because the company controls how they work, and the work is considered crucial to the company’s regular business. Reclassification means that these workers are entitled to minimum wage, overtime, unemployment insurance, and workers’ compensation. In addition to these drivers, however, the bill sweeps up independent contractors in multiple industries. For example, freelance medical writers in California have to ensure that they provide 35 or fewer “content submissions” per year to prove independent status. There is a “business to business” exemption, but the 13 criteria would be difficult to meet—in part because working for an intermediary (such as a medical education company) is [disallowed](#).

Like other states, New Jersey enforces a 3-point test for determining whether a worker is an independent contractor. To prove independent status, S4204/A5936 stated that workers must meet each of 3 criteria in the “ABC test”:

- A. The individual has been and will continue to be free from control or direction over the performance of the service, both under the individual’s contract of service and in fact; and
- B. The individual’s service is either outside the usual course of the business for which that service is performed, 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 work performed.

These criteria require freelancers to prove that their work is *outside* of their clients’ main line of business—which is impossible for the typical writer—with no option for arguing that they are independent

because they do not work on site. Notably, this off-site provision did exist in a [previous version](#) of the bill, and its omission above accounts for the retained “either” (which lacks an “or”) in item B. The ultimate wording of item B will be critical for some freelancers but remains unclear; the reintroduced bill S863 has slightly different criteria:

- A. The individual has been and will continue to be free from control or direction over the performance of the service, both under the individual’s contract of service and in fact; and
- B. The individual’s service is either outside the usual course of the business for which that service is performed, or the work is performed outside of all the places of business of the enterprise for which the service is performed; and
- C. The individual is customarily engaged in an independently established business or enterprise of the same nature as that involved in the work performed.

Regardless of the wording for these criteria, however, many if not most freelancers will experience a negative impact from the bill if it gets approved. Protests in 2019 by individuals, professional groups including the [American Society of Journalists and Authors](#) (ASJA), and even the [US Chamber of Commerce](#) failed to convince lawmakers that the NJ bill is misguided and in fact even more restrictive than California’s AB5.

Potential effects of this bill

Some legislators have insisted that the NJ bill will not change the status of true independent contractors. According to Senator Sweeney in [November](#), “The amendments to the bill will continue to ensure the ability of legitimate independent contractors to pursue their work at the same time they safeguard against misclassification.” On the other hand, State Senate Minority Leader Thomas Kean Jr. claimed that [he would oppose the bill](#) because of public backlash from independent professionals.

Like AB5, the NJ bill exempts certain professions such as agricultural labor, domestic service, realtors, mutual fund brokers, door-to-door salespeople, and others, but this list does not include freelance writers or journalists. The negative repercussions for independent contractors who are not exempt are considered merely “[unintended consequences](#).” But the consequences are real. Some companies such as Rev.com, a transcription service, have stopped accepting new freelancers from New Jersey merely out of fear that the bill will pass and cause them too much risk in hiring. The company has already left California because of AB5. Many independent writers fear that even if they can achieve exempt status in some way, their clients may be reluctant to hire them for fear of violating the law. Anecdotes tell of pharmaceutical companies and agencies already making this decision.

Independent workers in several fields have written about the negative consequences to their careers, including the inability to deduct business expenses (eg, home office, meetings, education), the loss of clients and income, and possibly the need to move out of state to retain their livelihoods. They have tried to reassure lawmakers that far from being victimized by our clients, we are earning more than if we worked in house and prefer the freedom of being our own bosses. Some have suggested that the bill is [discriminatory](#) against people who *need* to have (rather than just choose) a flexible working arrangement. This may include older people, mothers with young children, caretakers, disabled people, people who need extra part-time work just to afford living in New Jersey, and others.

Do we even need this bill?

Some critics argue that the bill is unnecessary. First, the IRS has already codified the difference between true independent contractors and employees in its well-known “[20 questions](#).” Second, a typical contract already reinforces independent-contractor status with relevant clauses (eg, the contractor knowingly forgoes employee benefits, pays her own taxes, and produces works made for hire). Third, if companies like Uber are abusing existing laws, then authorities should penalize them, and in fact, New Jersey issued Uber a [\\$640 million bill](#) for overdue taxes from the last 4 years.

Although New Jersey lawmakers are probably truly concerned about protecting workers, it is also true that collecting more tax dollars is a strong incentive. Estimates indicate that New Jersey has lost [almost \\$9 million](#) in state income taxes yearly since 2000 because of misclassified workers, while overall, the state loses some [\\$462 million annually](#) because of underreported wages. On the other hand, independent truckers warn of negative financial consequences if there are not enough drivers in New Jersey to move freight and shippers decide to send freight to other states instead. This would result in higher prices for goods within New Jersey. Truckers are so concerned that they began a [petition to oppose the bill](#).

During consideration of S4204/A5936, the NJ Senate Labor Committee met in Trenton on December 5, 2019; also attending were protestors including independent contractors from [Fight For Freelancers](#) and other concerned parties. The bill cleared the Committee and was on its way to the full NJ Senate—but then stalled the following week because of continued protests. [Confusion about the wording](#) is a continuing problem. According to the [NJ Civil Justice Institute](#), the 2 linked parts of the original bill, S4204 and A5936, had substantive differences, while overall, the bill itself was deemed an “unreasonable, arbitrary and capricious reading” of existing law. It is unclear whether the recently reintroduced bill will dispel confusion.

Non-NJ residents should take note

Several states other than California and New Jersey are working on similar legislation, including New York through [Senate Bill S6699A](#), Illinois, Washington, Wisconsin, Oregon, and others. Massachusetts

has already enacted the 3-part (ABC) test under General Law Chapter 149 [section 148B](#). In the meantime, legal action against AB5 in California began even before the bill took effect. The [ASJA and the National Press Photographers Association](#) sued the state of California in December 2019 for violation of the 1st and 14th Amendments. That same month, Uber and Postmates [filed an injunction](#) against the law in an effort to prevent it. Freelancers should note, however, that even if an injunction were granted with regard to one business entity, the law would still be enforced against workers in other professions. This is worth keeping in mind with regard to the New Jersey bill.

To make matters worse, on May 2, 2019, the US government introduced federal bills [H.R.2474](#) and [S.1306](#), which contain the same ABC test. H.R. 2474 is also known as the PRO Act, for Protecting the Right to Organize. The bill passed in the House on [February 6, 2020](#), although passage by the Senate is extremely unlikely for now. As of last May, most of the major Democratic candidates [supported the act](#). Of course, passage of a federal law would obviate any further debate about state laws and would affect freelancers throughout the country.

What should freelancers do?

In case or until the NJ bill passes, freelancers should consider doing the following:

- Do not assume that common sense, LLC or corporate business structure, compliance with IRS guidelines, or other standard business practices will ensure your independent status.
- Consult an accountant for tax implications and a lawyer for legal implications.
- Follow the progress of NJ S863.
- Stay updated on the laws in your state. Even if you do not live in California or New Jersey, other states are considering similar laws.
- Stay up to date on the status of the Pro Act.
- Call or write to your state representatives, sign the petition, and/or join concerned groups such as Fight For Freelancers.
- Post your experiences and any useful information about these bills on social media and online discussion groups to help other freelancers.

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