August 6, 2025

Mr. David Fish
Executive Director
Legal and Regulatory Services
New Jersey Department of Labor and Workforce Development
PO Box 110, 13th Floor
Trenton, NJ 08625-0110

RE: SHRM and GSC-SHRM Regulatory Comment on the ABC Test; Independent Contractors, PRN 2025-051

Sent Via Email: david.fish@dol.nj.gov

Dear Mr. Fish:

As the voice of all things work, workers, and the workplace, SHRM is the foremost expert, convener, and thought leader on issues impacting today's evolving workplaces. With nearly 340,000 members in 180 countries, SHRM impacts the lives of more than 362 million workers and families globally. Garden State Council-SHRM (GSC-SHRM) is the liaison and support organization that links New Jersey's 11 local SHRM chapters with SHRM's regional and national organizations. GSC-SHRM is dedicated to uniting and supporting New Jersey's nearly 8,000 SHRM members. On behalf of SHRM and GSC-SHRM, we welcome the opportunity to respond to the New Jersey Department of Labor and Workforce Development's proposed rule on independent contractors to determine a worker's status under applicable state laws that incorporate the ABC test.[1]

I. Introduction

SHRM's membership of HR professionals and business executives sits at the intersection of work, workers, and the workplace, fostering positive collaboration and workplace cultures where both thrive. With hands-on experience in talent management, benefits design, and compliance, SHRM members are uniquely positioned to provide valuable insights into workplace policy developments. By leveraging the collective experience and expertise of its membership, SHRM ensures that workplace policies are practical, sustainable, and aligned with the realities of modern employment.

The proposed rule addresses several responsibilities central to HR professionals and other business executives to determine a worker's status — either as an employee or independent contractor — and has significant legal implications. Any regulatory guidance on this fundamental determination must prioritize clarity, consistency, and legal-compliance-oriented language. As proposed, a putative employer, an entity alleged to be an employer but whose status has not yet been

[1] The proposed rule states that the department's examples and facts "shall be applied to the question of independent contractor status" under all New Jersey statutes and New Jersey Department of Labor and Workforce Development Rules under the ABC test. Those include definitions of workers' independent contractor status for the purposes of minimum wage, overtime, unemployment compensation insurance, workers' compensation law, and sick leave.

established, bears the burden of proof to demonstrate that the worker in question is not an employee for the purposes of various laws. This means the putative employer must satisfy all three prongs of the ABC test. SHRM is concerned that this requirement, as interpreted by the department in the proposed regulation, removes any notion of clarity and consistency and even goes so far as to eliminate the chance that a putative employer could ever satisfy its burden of proving that a worker is not an employee under the ABC test. The proposed regulation creates too much uncertainty and tips the scale too heavily toward finding an employment relationship under each of the three prongs of the ABC test. In practice, SHRM believes that the proposed regulation creates an unworkable framework, which is no framework at all for companies that need to contract with independent workers and creates a near-irrefutable presumption of such status, inconsistent with the state Legislature's intent, New Jersey case law, and good public policy.

SHRM does not believe this should be the end result of this proposed regulation. The assumption that every worker should fall within the confines of an employment relationship is outdated and rests on incorrect assumptions about the benefits of employee status versus independent contractor status. Many workers prefer the independent contractor designation and do not seek a traditional employer-employee relationship for a variety of reasons. SHRM research has found that in the U.S., a plurality of independent workers prefer maintaining their independent status over becoming employees.[2] Additionally, the top two reasons cited by U.S. independent workers are the ability to be their own boss (30%) and the flexibility in setting their own schedules (27%).[3]

Forcing such an employee designation would strip workers of significant autonomy over their working conditions, robbing both workers and companies of the ability to plan and invest in stable and predictable relationships. This is not in the best interest of workers, organizations, or the larger economy. SHRM respectfully offers these comments in the hope that the department issues balanced regulatory guidance that reflects the needs of both employers and workers while recognizing the importance of diverse work arrangements and innovative workforce solutions for attracting and retaining top talent.

II. Regulatory Interpretation of Prong A Is Out of Step with the Statute's Intent, New Jersey Case Law, and Good Public Policy and Workplace Realities

Under NJ Rev Stat § 43:21-19(i)(6)(A), known as Prong A, a putative employer must prove that the worker "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." However, the proposed regulation as drafted does not provide a legitimate pathway that would allow an organization or the ultimate consumer to provide *any* input on the work, final product, a timeline for completion, or any other factor that does not go toward the manner of performance of an independent contractor without triggering an employment relationship. This result is inconsistent with applicable law.

[2] SHRM Global Worker Project: A Human-Centered Approach to the Contemporary Global Workforce - Supplemental, SHRM, 2025.
[3] Id.

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(a) The multiple factors enumerated to evaluate the control over work leave no room for normal client-to-organization interactions.

For Prong A, the proposed rule outlines multiple subparts and a nonexhaustive list of factors to evaluate the level of control in determining a worker's status. SHRM's primary concern is that the guidance for Prong A is so heavily weighted toward finding an employment relationship that nearly any potential touchpoint — whether it occurs in practice or not — could be interpreted as establishing sufficient control over the worker to defeat independent contractor status under New Jersey law. At the very least, the near-endless list of factors destroys any notion of predictability and the ability to plan and invest in legitimate and bona fide independent contractor relationships and businesses.

Of particular concern is subsection (c)(9), which evaluates "whether the putative employer provides training to the individual." Without clarification, this provision will discourage businesses from offering independent workers valuable training in areas such as safety or anti-harassment. This outcome would be contrary to the overall well-being of the workforce and inconsistent with sound public policy that encourages safe and respectful work relationships and encourages these types of trainings and upskilling even when not required by applicable laws.[4]

As currently written, it is difficult to envision a scenario in which a worker would not be deemed an employee. Routine business practices — such as providing training, including agreed-upon deadlines, or requiring the use of specific cleaning supplies or software for consistency — could be construed as exerting sufficient control to establish an employment relationship. However, many of these actions do not speak directly to "control or direction over the *performance*" of the work (emphasis added). For example, even if a putative employer requires a service to meet certain quality standards, fit within defined parameters, or be completed by a specific time or in compliance with the final quality standards set by a third-party customer, this does not dictate *how* the service is performed or the manner or means by which to achieve the agreed-upon results. The proposed regulation is directly contrary to New Jersey law and is bad public policy.[5] And this restrictive and static view of progress ignores the national interest in developing and training a workforce, independent or employed, in artificial intelligence skills.

SHRM maintains that it is unreasonable to expect any worker to operate entirely independently from the organization it is doing business with. Instead, the department should define and assess independence relative to control over the manner and means by which to perform services, rather

[4] See *L. Off. Of Gerard C. Vince, LLC v. Bd of Rev*., No. A-5441-1712, 2019 WL 4165066, at *3 (N.J. Super. Ct. App. Div. Sept. 3, 2019), which held that a paralegal was an independent contractor under the ABC test, even though the law office supervised the paralegal's work, because the supervision stemmed from ethical obligations imposed by the New Jersey Bar. Supervision that stems from a legal requirement does not suggest employee status, according to numerous federal agencies such as the Internal Revenue Service with respect to affiliates of broker-dealers and the U.S. Department of Transportation with respect to motor carriers. New Jersey would find itself opposed to federal agencies if it used legal requirements as a test for control to the detriment of the worker and consumers.
[5] See *Trauma Nurses, Inc. v. Bd. Of Rev., New Jersey Dept't of Lab.*, 242 N.J. Super. 135, 144 (App. Div. 1990), in which a hospital's rules, practices, and procedures that a staffing agency's nurses were required to follow did not evidence control by the staffing agency. See also *Philadelphia Newspapers, Inc. v. Bd. Of Rev.* 397 N.J. Super. 309, 322, 937 A.2d 318, 327 (App. Div. 2007).

than with respect to setting final agreed-upon results or, contrary to the proposed regulation, requiring compliance with applicable legal requirements.

(b) SHRM recommends a more nuanced approach because the long, multi-factor list may be impractical for everyday business decision-making across industries.

The rule's nine subparts used to assess the level of control do not provide sufficient guidance on how to weigh or prioritize the listed factors, nor is the framework flexible or adaptable enough to apply across a wide range of industries. SHRM urges the department to consider that many businesses operate with factors unique to their industries and working relationships. For example, in some sectors, a worker may have full control over the type, quality, and quantity of equipment, tools, and supplies used, as well as flexibility in when the work is performed — especially when deadlines are not fixed or tied to specific delivery times. However, that may not be true in another industry, where work must be completed in a more uniform manner or on a stricter timeline.

The listed examples should provide guideposts, but SHRM's concern with the proposed regulation stems from the fact that, while courts can conduct post hoc, multi-factor analyses, SHRM members must make timely, strategic decisions about how to classify their workers on a day-to-day basis. The lack of practical, forward-facing guidance in the proposed regulation significantly limits an employer's ability to manage operations effectively.

SHRM recommends amending the language associated with Prong A to recognize that the determination of the level of control should be based on real-world conditions and that any list of nonexhaustive factors must also recognize that different industries will require different approaches. What constitutes "direction or control over performance" will vary, and the test should focus on the nature and degree of control over the essential terms and conditions of the working relationship — not merely on whether any form of control exists, especially if it is not actually exercised. Moreover, control should be evaluated in relation to the types of control an employer is permitted to exercise over an employee. Finally, any final rule should clearly state that businesses may provide training and benefits without establishing an employment relationship, because this clarity is critical to supporting a modern, thriving workplace and is consistent with New Jersey law.

III. The Proposed Regulation Transforms Prong B's Two-Part, Either/Or Statutory Analysis into a Single, Circular Test

NJ Rev Stat § 43:21-19(i)(6)(B), known as Prong B, evaluates whether "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" (emphasis added). Statutorily, this introduces a two-part test in which a putative employer must satisfy *only one* of the two prongs. Because this language is set by statute, the relevant inquiry is whether the proposed rule correctly interprets Prong B in light of the text, related laws, and case law. SHRM contends that it does not.

Primarily, SHRM's issue stems from the regulatory interpretation rendering the two-part analysis circular. Under the statute, even if a service falls within the employer's usual course of business, it may still qualify under the second prong if it is performed outside the employer's places of business. Rather than offering employers an alternative route to demonstrate compliance, the proposed regulation ties the two prongs together in a way that predetermines the outcome. As a result, a putative employer can never contract out a service that is within its usual course of business — despite the statute explicitly allowing for this possibility under the alternative analysis.

The main issue with the department's regulatory interpretation of Prong B centers on its treatment of the second prong. The rule expands the employer's "places of business" to include not only its physical locations but also the homes or workplaces of customers if the services are deemed integral to the business. This fundamentally undermines the statutory alternative paths to compliance with Part B distinction between the two prongs by folding the second back into the first, eliminating any practical distinction between them, thereby making the second alternative path to compliance with Part B illusory. It also fundamentally misunderstands the nature of Prong B and an employer's freedom to decide what business it is in. A car manufacturer assembles and builds cars. But key to its success is the ability to sell them. To that, the car manufacturer may employ marketing and sales employees in vast, sophisticated departments. But the actual job or task of selling the cars — including negotiating over price, arranging financing, and wooing customers — is done by car dealers, a traditionally recognized separate and distinct entity.

Likewise, the proposed rule redefines "places of business" so broadly that it includes virtually any location where work is performed — including vehicles operated by a driver to transport goods or people or the home or business of a customer — so long as the work is integral to the employer's business. This effectively collapses the second prong into the first. If the service is considered part of the usual course of business and simultaneously performed "within" the employer's broadly defined places of business, both prongs lead to the same result: the establishment of an employment relationship. Additionally, the examples offered under the rule imply that entire industries — such as transportation or home services — can no longer rely on independent contractors. SHRM believes many of these examples are incorrect and will only create confusion rather than clarity.

The proposed regulation's interpretation of Prong B contradicts both the statutory language and common business practice. It is counterintuitive to conclude that any work contracted within a business's usual course must automatically create an employment relationship — regardless of where the services are performed. There are many legitimate scenarios in which a business might outsource essential or core functions without forming such a relationship. SHRM understands that this provision is meant to prevent misclassification by employers seeking to avoid legal obligations, but its rigid application and lack of nuance allow no flexibility for legitimate business decisions.

Like Prong A, Prong B's regulatory guidance sets a standard that is so heavily weighted toward finding an employment relationship that it limits flexibility and disregards legitimate, evolving work models. In today's digital economy, work can be performed from virtually anywhere. Technology has enabled unprecedented flexibility in how, when, and where people work — and businesses have adapted by integrating remote, hybrid, and on-demand models. Public policy must

evolve alongside these changes to reflect how modern work is actually performed. There is no one-size-fits-all approach to workforce structure. SHRM urges the department to revise its interpretation of Prong B to reflect both the statutory text and the realities of today's workforce.

IV. Regulations Defining Prong C Should be Reframed to Reflect Its Underlying Purpose and Intent

Under NJ Rev Stat § 43:21-19(i)(6)(C), known as Prong C, the putative employer must prove that "such individual is customarily engaged in an independently established trade, occupation, profession or business." SHRM has serious concerns with the regulatory guidance associated with Prong C.

The proposed regulation includes seven nonexhaustive factors to assess whether a worker is "customarily engaged in an independently established business." However, not all of these factors are found in New Jersey case law, undermining the legal authority to establish them without precedent. Moreover, the proposed factors present only one side of the analysis and fail to consider what a worker *can* do or is free to pursue. SHRM is concerned that these criteria do not provide a complete or accurate reflection of whether an individual is truly operating as an independent worker.

The proposed factors include:

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 received from others in the same industry.
4. The number of employees of the individual's business.
5. The extent of the individual's investment in their own tools, equipment, vehicles, buildings, infrastructure, and other resources.
6. Whether the individual sets their own rate of pay.
7. Whether the individual advertises, maintains a visible business location, and is available to work in the relevant market.

SHRM notes that only the first three factors are cited in the *Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor* opinion, and the remaining four are not supported by existing case law. The first three touch on the core question of independence — specifically, the worker's separation from the putative employer — but the latter factors do not provide the same insight into true entrepreneurial status. SHRM supports the consideration of economic independence through the lens of opportunity for profit or loss, as reflected in the federal "economic realities" test. However, regulatory guidance must address the central question of whether the individual is "customarily engaged in an independently established trade, occupation, profession or business" — without relying heavily on indicators beyond the putative employer's control.

SHRM recognizes that, under both federal and state wage and hour law, the burden of proving an exception rests with the putative employer, but it is problematic to hinge that burden on factors wholly outside their influence — such as how the individual operates their business, whether they employ others, how they advertise, or how they choose to scale their operations. These are decisions that lie solely with the worker. Given this, SHRM questions why employers are responsible for proving such factors. And one step before that, how can companies and independent workers plan, invest, and work in their businesses when the ultimate question of independence — and potentially crippling liability — is dependent on the accurate balance of this stew of multiple factors?

SHRM is also concerned about the assumptions embedded in these criteria. Many independent workers intentionally operate lean businesses. They may choose to avoid hiring staff, limit their client base to a few high-value relationships, or decline to advertise publicly. These decisions may stem from a desire for autonomy, flexibility, or improved work/life integration — all of which are reasons why individuals often choose independent contracting in the first place.

SHRM understands the intent behind Prong C: to identify cases where a worker is so economically dependent on a single employer that true independence is lacking. However, SHRM believes Prong C should be revised to focus on whether a worker *has the freedom* to seek and accept other work — not whether they *actually* have done so. A worker's ability to manage their workload, choose projects, and allocate time to maximize earnings demonstrates entrepreneurial decision-making. These are the factors that should be central in classification determinations because they more accurately reflect economic independence than static criteria outside the employer's control. This reframing would help both employers and workers more accurately evaluate economic independence and support more consistent, reasonable determinations about whether a worker should be classified as an employee or an independent contractor.

V. Conclusion

SHRM and GSC-SHRM appreciate the opportunity to offer these comments on the proposed rule because the determination of a worker's status is a fundamental inquiry for workers and businesses alike. To compete and grow, organizations need the flexibility to adopt diverse work arrangements. Independent work provides businesses with the agility to scale and access specialized skills while offering workers the freedom to pursue opportunities that align with their goals. Independent contractors remain essential to both the U.S. and New Jersey economies, delivering critical services across industries. As independent work continues to grow in popularity and importance, both businesses and workers should not be hindered by outdated or overly restrictive rules and regulations.

SHRM and GCS-SHRM support the stated goals of the regulation to "mitigate or eliminate possible confusion among employers and employees as to the question of independent contractor status for the purpose of determining coverage pursuant to various laws" and to provide "clarity to both employers and employees regarding the issue of independent contractor status." SHRM and GSC-SHRM respectfully offer this comment to shape a policy that works for the betterment of work, workers, and the workplace. The comment and concerns offered herein seek to point the

department's interest to the real-world consequences associated with the proposed regulation and that, as currently written, may fail to deliver the necessary clarity in language, consistency in application, and practical, compliance-oriented guidance. As always, SHRM and its affiliates are committed to elevating the collective experience and expertise of our membership to assist policymakers in creating policies that protect work, workers, and the workplace.

If you have questions regarding SHRM's and GSC-SHRM's position on the proposed regulation or other policies impacting the workplace, please contact SHRM's Government Affairs (governmentaffairs@shrm.org).

Sincerely,

Emily M. Dickens
Chief of Staff, Head of Government
Affairs, & Corporate Secretary
SHRM