

# Anti-Freelancing Legislation

## Presentation for TechWrite STL

July 2020

Featuring Ruth E. Thaler-Carter and John Goffstein, Esq.

Presenter information: **Ruth E. Thaler-Carter** is a long-time freelance writer/editor who is active in several professional organizations, including the Editorial Freelancers Association, National Association of Independent Writers and Editors, National Writers Union, and Freelancers Union, that have been following and responding to the “anti-freelancing legislation” issue.

Guest speaker **John Goffstein, Esq.** is an attorney whose practice focuses on litigation. He has litigated this topic “at the highest levels” and going back many years.

John is a past president of the St. Louis County Bar Association; has been chair of the Employment Law Section of the St. Louis Metropolitan Bar Association; is a member of the Missouri Bar; and is admitted to practice before the United States Supreme Court, Eighth Circuit, and Eastern and Western Districts of Missouri. He has been published in ABA journals and numerous Missouri Bar journals and periodicals. He is a member of the St. Louis City Circuit Court’s Mediation Panel and a federal court-certified mediator; has served the labor-management community as an arbitrator; and is special counsel to the Office of the City of St. Louis Circuit Attorney.

John was appointed by the governor of Missouri and unanimously confirmed by the Missouri Senate as director of the Certificate of Need Program for the State of Missouri, which oversees hospital and nursing home care and construction facilities. He was appointed by the Missouri Supreme Court to and served for eight years as a member of the Disciplinary Committee of the Missouri Bar Association to secure the enforcement of ethical rules pertaining to lawyer conduct for the 21st Judicial Circuit in St. Louis County. He was also appointed by the mayor of the City of St. Louis to serve two consecutive four-year terms as one of three District directors, and was chair of the agency that regulates federal and state funding of clean water and environmental projects.

John received both his B.S. and J.D. degrees from the University of Missouri, and was named Outstanding Young Lawyer of St. Louis County in 1976.

### **Background information**

Legislation introduced in several states threatens the ability of freelancers to stay in business as independent contractors. While the issue has moved to the back burner lately while attention focuses on the coronavirus and social justice movement, it remains a concern that we should be aware of and that could return to the fore. One piece of good news is that Missouri’s legislation seems to protect rather than threaten freelancers, but that doesn’t help those who get most of their work from clients in other states.

This issue began most recently with California legislation AB 5 that was meant to protect “gig workers” — primarily Lyft and Uber drivers — from not getting benefits they deserved for the amount of time they worked because of being classified as independent contractors when they were actually functioning as employees. The goal was to limit when employers can designate workers as independent contractors. For freelance journalists in particular, and for many general freelancers, the legislation was seen as giving news organizations incentives to bring contractors in-house, rather than “exploiting them with insecure piecework” — but not all independents want to go in-house. For instance, if you wrote 35 articles for the same client in a year, the client had to bring you on as an employee or stop using your work. For journalists and other freelancers with weekly (or even more-frequent) assignments, that was a business-killer.

AB5 forbids businesses to use contractors unless they can pass the “ABC test.” It’s designed to ensure that all workers are classified as employees unless they perform their work independent of supervision, have an established business doing the same sort of work for multiple customers *and* are doing work that isn’t part of the client company’s core business. Meeting one or two of these requirements wasn’t enough; you had to meet all three.

<https://www.voiceofsandiego.org/topics/government/sacramento-report-gonzalez-previews-ab-5-changes/>

**California’s AB 5 bill in the news**

<https://www.sbsun.com/2020/04/09/covid-19s-economic-fallout-shows-why-california-must-stop-its-war-against-freelancers/>

<https://www.cnn.com/2020/06/24/tech/ab5-uber-lyft-lawsuit-preliminary-injunction/index.html>

Assemblywoman Lorena Gonzalez, who introduced AB 5, responded to widespread objections by saying she planned to introduce changes. She agreed to drop the cap requiring a business to make any freelancer a part-time or full-time employee if they produce 35 articles or more in a year.

She also planned to clarify that an exemption in the bill, allowing businesses to provide services to other businesses, can also apply to individual freelancers.

### **Missouri legislation**

Missouri’s House has legislation in place, but not passed, that appears to be more supportive of independent contractors than something like AB 5:

Missouri HB 1137 (Misclassification of Workers)

<https://legiscan.com/MO/drafts/SB740/2020/house.mo.gov/billtracking/bills191/hlrbillspdf/...>

Sponsor: Representative Justin Hill: [Justin.hill@house.mo.gov](mailto:Justin.hill@house.mo.gov)

Missouri Senate Bill No. 740 ([trackbill.com/bill/...](http://trackbill.com/bill/...)) seemed to set provisions for individuals to be considered independent contractors; it’s similar to HB 1137.

HB 1137 is also the same as Senate Bill SB 313  
([house.mo.gov/billtracking/bills191/sumpdf/HB1137I.pdf](http://house.mo.gov/billtracking/bills191/sumpdf/HB1137I.pdf))

### **New York**

In New York, [a proposed Senate bill](#) would enact similar requirements if passed.

### **New Jersey**

<https://www.change.org/p/governor-phil-murphy-save-independent-contractors-in-new-jersey>

Two bills hat were introduced in the New Jersey legislature in November 2019: NJ Senate bill [S4204](#) and NJ Assembly bill A5936. Essentially, they classify every worker as an employee unless they can pass a very narrow set of criteria. The goal was to prevent companies from misclassifying workers, but the laws have been called “poorly written” and could keep many independents from being earning a living the way they choose.

In New Jersey, the test essentially states that:

1. Independent contractors perform their work on their own and without supervision of the hiring entity.
2. Independent contractors perform services that are outside the ordinary course of business *or* work entirely off-premises of the hiring entity.
3. Independent contractors are routinely engaged in the services they are performing.

Anyone who meets *all* of these criteria may be free to keep operating as an independent contractor. If not, they are considered an employee.

<https://www.inc.com/erik-sherman/now-new-jerseys-thinking-about-a-bill-that-will-punish-self-employed.html>

The U.S. Chamber of Commerce sent a letter opposing New Jersey Senate Bill S. 4204 on November 13, 2019. <https://www.uschamber.com/comment/letter-opposing-new-jersey-senate-bill-s-4204>.

Several organizations have spoken out against this kind of legislation.

<https://fightforfreelancers.files.wordpress.com/2020/01/independent-contractor-laws-threaten-womens-livelihoods-3.pdf>

<https://www.the-efa.org/statement-on-legislation-affecting-freelancers/>

[https://docs.google.com/document/d/1BL6V\\_gzHWwMHbeQD6Nkop244t809Y9louDVKX1hxq8s/edit?usp=sharing](https://docs.google.com/document/d/1BL6V_gzHWwMHbeQD6Nkop244t809Y9louDVKX1hxq8s/edit?usp=sharing)

[https://cdn.ymaws.com/www.amwa.org/resource/resmgr/about\\_amwa/Background\\_Information\\_AMWA\\_.pdf](https://cdn.ymaws.com/www.amwa.org/resource/resmgr/about_amwa/Background_Information_AMWA_.pdf)

[https://cdn.ymaws.com/www.amwa.org/resource/resmgr/about\\_amwa/amwa\\_statement\\_legislation\\_n.pdf](https://cdn.ymaws.com/www.amwa.org/resource/resmgr/about_amwa/amwa_statement_legislation_n.pdf)

### **Results/Impacts:**

LIVESTRONG.com fired their California freelancers en masse because of AB5.

Vox Media, parent company of [Vox.com](https://www.vox.com), announced that it would [lay off hundreds of freelancers in California](#)

The *Los Angeles Times* brought [30 contractors](#) in-house after a 2018 California Supreme Court [decision](#) first established the broader use of the ABC test.

Two groups representing freelancers [filed suit](#) to block A B5.  
<https://nppa.org/news/nppa-files-suit-challenging-new-unconstitutional-california-law>

One colleague helped create a Facebook group of more than 900 freelancers, independent contractors and business owners who are “fighting for our livelihoods and trying to explain to our legislators why they need to fix these bills instead of fast-tracking them through a lame-duck legislative session.”

Minneapolis’ Workplace Advisory Committee introduced a Freelance Workers Protection Ordinance

### **What We Can Do Now**

Incorporate as an LLC, which protects your personal assets and establishes you as a business vs. individual — LLC is probably the best choice

Find a CPA to help with tax aspects

Document independent status — check the IRS 20 conditions/criteria, and make sure you have a business card, website, business e-mail address, business checking account, etc.

Stay informed

Participate in efforts to educate and respond to damaging legislation

SECOND REGULAR SESSION

# SENATE BILL NO. 740

100TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR ONDER.

Pre-filed December 1, 2019, and ordered printed.

ADRIANE D. CROUSE, Secretary.

3411S.011

## AN ACT

To amend chapter 285, RSMo, by adding thereto one new section relating to the misclassification of workers.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Chapter 285, RSMo, is amended by adding thereto one new section, to be known as section 285.517, to read as follows:

**285.517. 1. Any person who performs work for any employer and satisfies all of the following criteria shall be considered an independent contractor:**

**(1) The person has signed a written contract with the employer that states the employer's intent to retain the services of the person as an independent contractor and contains acknowledgments that the person understands that he or she is:**

**(a) Providing services for the employer as an independent contractor;**

**(b) Not going to be treated as an employee of the employer;**

**(c) Not going to be provided by the employer with either workers' compensation benefits pursuant to chapter 287 or unemployment compensation benefits pursuant to chapter 288;**

**(d) Obligated to pay all applicable federal and state income taxes, if any, on any monies earned pursuant to the contractual relationship, and that the employer will not make any tax withholdings from any payments from the employer; and**

**(e) Responsible for the majority of supplies and other variable expenses that he or she incurs in connection with performing the contracted services unless:**

**a. The expenses are for travel that is not local;**

22           **b. The expenses are reimbursed under an express provision of**  
23 **the contract; or**

24           **c. The supplies or expenses reimbursed are commonly**  
25 **reimbursed under industry practice;**

26           **(2) The person has filed, intends to file, or is contractually**  
27 **required to file, in regard to the fees earned from work, an income tax**  
28 **return with the Internal Revenue Service for a business or for earnings**  
29 **from self-employment;**

30           **(3) The person provides his or her services through a business**  
31 **entity, including but not limited to, a partnership, limited liability**  
32 **company or corporation, or through a sole proprietorship;**

33           **(4) The person has the right to control the manner and means by**  
34 **which the work is to be accomplished, even though he or she may not**  
35 **have control over the final result of the work, provided that the**  
36 **employer may provide orientation, information, guidance, or**  
37 **suggestions about the employer's products, business, services,**  
38 **customers and operating systems, and training otherwise provided by**  
39 **law; and**

40           **(5) The person satisfies three or more of the following:**

41           **(a) The person controls the amount of time personally spent**  
42 **providing services, provided that an agreement may be made with the**  
43 **employer relating to the final completion or final delivery time or**  
44 **schedule, range of hours, or the time entertainment is to be presented**  
45 **if the work contracted for is entertainment;**

46           **(b) The person has control over where the services are**  
47 **performed, except in the case of services that can only be performed at**  
48 **certain locations;**

49           **(c) The person is not required to work exclusively with one**  
50 **employer, unless:**

51           **a. A law, regulation, or ordinance prohibits the person from**  
52 **providing services to more than one employer; or**

53           **b. A license or permit that the person is required to maintain in**  
54 **order to perform the work limits the person to working for only one**  
55 **employer at a time and requires identification of the employer;**

56           **(d) The person is free to exercise independent initiative in**  
57 **soliciting others to purchase his or her services;**

58           **(e) The person is free to hire employees or to contract with**

59 assistants, helpers, or substitutes to perform all or some of the work;

60 (f) The person cannot be required to perform additional services  
61 without a new or modified contract;

62 (g) The person obtains a license or other permission from the  
63 employer to utilize any workspace of the employer in order to perform  
64 the work for which the person was engaged;

65 (h) The employer has been subject to an employment audit by the  
66 Internal Revenue Service and the Internal Revenue Service has not  
67 reclassified the person to be an employee or has not reclassified the  
68 category of workers to be employees; and

69 (i) The person is responsible for maintaining and bearing the  
70 costs of any required business licenses, insurance, certifications, or  
71 permits required to perform services.

72 2. No employer shall be required to classify a person who is  
73 considered an independent contractor under subsection 1 of this  
74 section as an employee, provided that the employer may choose to hire  
75 and classify such person as an employee at any time.

76 3. No political subdivision of the state shall enact, establish,  
77 mandate, or otherwise implement any law, ordinance, or regulation in  
78 conflict with the provisions of this section.

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