



**HOME BUILDERS & REMODELERS ASSOCIATION
OF CONNECTICUT, INC.**

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*Your Home
Is Our
Business*

February 19, 2013

To: Senator Catherine A. Osten, Co-Chairman
Representative Peter A. Tercyak, Co-Chairman
Members of the Labor & Public Employees Committee

From: Bill Ethier, CAE, Chief Executive Officer

Re: **SB 344, AA Clarifying the Definition of Independent Contractor**

The HBRA of Connecticut is a professional trade association with about nine hundred (900) member firms statewide employing tens of thousands of CT's citizens. Our members, all small businesses, are residential and small commercial builders, land developers, remodelers, general contractors, subcontractors, suppliers and those businesses and professionals that provide services to our diverse industry and to consumers. While our membership has declined over the course of our seven-year Great Housing Recession from its high of 1,500 members, we build between 70% to 80% of all new homes and apartments in the state each year and engage in countless home remodeling projects.

We have serious concerns about SB 344 and oppose its absolute prohibition on finding certain workers can be independent contractors.

While we wholeheartedly agree that the misclassification issue and the definition of independent contractors versus employees needs to be resolved, and we join with DOL and others to remove bad actors from our industry, SB 344 is not the way to do it, at least for the residential construction industry.

Currently, as you know, the Dept of Labor's ABC Test is the regulatory tool used to make a worker classification decision. It is a tool used for every industry and profession, a one-size fits all approach that does not work well at all for home builders and remodelers. **We have serious issues of interpretation of the ABC Test** when we know we're hiring legitimate independent contractors, yet many answers to the ABC Test would lead to the conclusion that the worker is an employee. Home building and remodeling general contractors then get caught up in after-the-fact interpretations and are subject to enforcement actions and the imposition of hefty penalties. **We have highlighted every one of our concerns on the attached markup of the ABC Test.** We urge you to review this markup so you can see the difficulty the test presents to residential contractors. **We desperately need more clarity on this issue.** Unfortunately, SB 344 does not provide it for us.

SB 344, in particular, while only a one-line concept, reveals one of the difficulties of the ABC Test for our industry and we have two major issues with its absolute bar to finding a worker is an independent contractor.

First, the issue of providing tools to a worker can generally be a good question to distinguish employees from independent contractors. Typically, ICs do bring their own tools and a firm provides tools only for its employees. However, see our comments on question A14 in the ABC Test attachment, the only question that addresses tools. Question A14 asks, "Does the firm furnish the tools and materials needed to do the work?" For our industry, these are two entirely distinct questions, tools versus materials, demanding different answers and making it impossible to accurately answer this single ABC Test question.

Second, SB 344's bar on finding a worker is an IC if paid on an hourly basis ignores a common practice of hiring specialty contractors who do work on a home through a time and materials contract. Such contracts mean we pay for work on an hourly basis, yet SB 344 would result in such specialty contractors becoming our employees. Also, either through the normal course of home construction or due to last minute change orders from home buyers or homeowners, additional work is required to be performed by an independent contractor. And many types of work for which it is difficult to accurately estimate total job costs are paid for on an hourly basis. This is more fair to the independent contractor as well as less costly to the client. Finally, the general contractor who has a trusting relationship with the independent contractor based on a working track record will engage the IC to do work on an hourly basis. SB 344 would destroy, for no legitimate reason, the ability to engage many legitimate ICs without adding great expense.

Third, as highlighted in our attached markup of the ABC Test, in working to build or remodel someone's home, often the builder or home improvement contractor must out of necessity to service their client's demands (i.e., the home buyer or homeowner) exercise a higher degree of control over work performed by independent contractors that does not on its face allow the general contractor to pass the ABC Test.

These last two issues with SB 344, hourly pay of a worker and the degree of direction and control over work performed, highlight how the one-size fits all approach of CT's ABC Test does not work for residential construction businesses. Many other examples are noted in our attached markup.

In the alternative, for at least the residential construction industry, we strongly urge you to create a rule that compliance with Part "C" of the ABC Test, if such compliance is established prior to forming the working relationship between the firm and worker, shall be the determinative test, overriding answers to, or even obviating the need for considering, Parts "A" and "B" of the ABC Test.

Please do not pass SB 344 as written for the residential construction industry. Rather, we strongly urge you to adopt the alternative rule, specific for the residential construction industry, as indicated in the prior paragraph and in our attached markup of the ABC Test. Thank you for the opportunity to express our views on this very important topic.

STATE OF CONNECTICUT
EMPLOYMENT SECURITY DIVISION
UNEMPLOYMENT COMPENSATION TAX DIVISION
{HBRA of CT Comments on this "ABC Test" are noted in red, italic type}

SELF-ASSESSMENT OF THE EMPLOYER-EMPLOYEE RELATIONSHIP FOR CT
UNEMPLOYMENT TAXES

The determination of independent contractor status versus employee status is often a complex decision. Connecticut unemployment law states that employment is any service performed under an express or implied contract of hire that creates the relationship of employer and employee. Workers who are employees under the common law definition of master and servant (the standard applied by the Internal Revenue Service) are therefore covered for state unemployment purposes. In Connecticut however, irrespective of whether the common law relationship of master and servant exists, the law holds that service will be considered employment subject to the act unless the service recipient can establish compliance with Connecticut General Statutes Section 31-222(a)(1)(B)(ii), commonly referred to as the ABC test which is outlined below.

To be considered an independent contractor, an individual must meet all three of the following tests.

- A. The worker must be free from direction and control in the performance of the service, both under the contract of hire and in fact. (Essentially, this is the common law definition.) *{Home builders & remodeler general contractors must, by necessity, exercise some degree of control over subcontractors on a home job site. There would be complete chaos if "free from direction and control" means no direction or control. While a GC doesn't set specific hours in which a sub must work, they must control the overall schedule and set specific start and completion dates. GC's don't control how specific tasks are done, but must control the overall sequence of work so a home is built properly and efficiently, and GCs must set quality expectations. The quality expectations of both the GC and the home buyer/homeowner must be corrected immediately, which means the GC must exercise some direction and control over the sub immediately to achieve the quality expectations. That should not automatically convert those subs into employees. Comments are provided below on each of the 20 questions that make up the "A" part of the ABC test.}*

AND

- B. The worker's services must be performed:

EITHER

(1) Outside the usual course of the employer's business *{This needs clarification because sometimes a GC's employees will perform a particular task, but at other times an independent subcontractor must be brought in to perform the same task because the employees are working on a different home or otherwise engaged in other work in, for example, a subdivision.}*

OR

(2) Outside all of the employer's places of business. *{This needs clarification because if the home construction site is considered the*

employer's "place of business" this test can never be passed. By definition, all or most construction work is done at the home under construction. It's an absurd interpretation of the law to say that work done at the construction site is not outside the employer's place of business and that needs to be fixed.}

AND

- C. The worker must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service being provided.

{See our comments on part "C" of the ABC Test below. For the residential construction industry, perhaps unlike some other industries, part "C" is much less of an interpretation issue than is parts "A" and "B". The distinctions between industries and professions in this regard highlight how the one-size fits all use of the ABC Test does not serve CT's businesses very well.}

It is important to note that test A above will not be satisfied if the person or persons for whom the service is performed retain the right to exercise direction and control over the service, even when the right is not used. Also, bear in mind that an individual who forms a business in response to an offer of work as an independent contractor will meet neither the "customarily engaged" nor the "independently established" criteria of test C.

The following form is designed to allow you to perform a self-examination of the status of workers in your business whom you consider to be independent contractors.

**SELF-ASSESSMENT OF THE EMPLOYER-EMPLOYEE RELATIONSHIP FOR CT
UNEMPLOYMENT TAXES – page 2**

The determination of a worker's status is both technical and complex. This self-assessment is designed only as a guide; it is not an official Department of Labor form. If you have questions concerning the employee versus independent contractor status of a worker please contact you local Unemployment Compensation Field Audit Unit in any one of the areas listed below:

Bridgeport	203-455-2725	Hartford	860-256-3725	Norwich	860-859-5700
Danbury	203-797-4148	Middletown	860-754-5130	Torrington	860-626-6221
Enfield	860-741-4285	New Britain	860-827-7063	Waterbury	203-437-3400
Hamden	203-859-3325	New London	860-439-7550	Willimantic	860-723-2689

As an aid to determining whether an individual is an employee (EE) under the common law rules or an independent contractor (IC), twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer - employee relationship. These twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee.

These twenty factors are designed only as guides for determining whether an individual is an employee. The degree of importance of each factor varies depending on the specific situation. **No single fact or small group of facts is conclusive evidence of the presence or absence of control.** There will be situations where some factors do not apply. Careful scrutiny is required to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the actual substance of the arrangement. (That is, if the relationship of employer-employee exists, the designation of the relationship by the parties as anything other than that of employer-employee is immaterial.)

THE COMMON LAW IS ALSO TEST "A" OF THE "ABC" TEST FOR CT UNEMPLOYMENT					
#	FACTOR	DESCRIPTION	EE	IC	DNA
A1	INSTRUCTIONS	Does the firm provide instructions or procedures the worker is expected to follow in doing the work?	YES	NO	
<i>{By necessity, YES, in almost all cases. We're not building widgets or jet engines. Almost every home is unique, framing differs from house to house, many others things are designed differently from house to house, and change orders frequently come from home buyers or homeowners that necessitate immediate instructions. Instructions and procedures given to subcontractors are necessary for them to get the job done correctly. That should not turn them into employees.}</i>					
A2	TRAINING	Does the firm provide training to the worker?	YES	NO	
<i>{Generally NO, but it's unclear when providing instructions and procedures, Q A1, are deemed to be training under this Q A2. Also, other laws or GC practices may require that all workers, both employees and independent contractors, coming onto a home construction site abide by certain rules, or go through safety training. The type and level of training the question is intended to illicit needs to be clarified.}</i>					
A3	INTEGRATION	Does the continuation of the scope and function of the firm depend appreciably upon the services of the worker?	YES	NO	
<i>{Of course it does, so YES. A GC will have an inspection schedule and, therefore, must schedule work accordingly. For example, the GC cannot schedule an electrical inspection if the wallboard has been put up. Also as noted earlier, quality expectations and performance are critical. There can be 20 or more independent subcontractors that touch a home under construction. Each and</i>					

<i>every one is by necessity integrated into the successful completion of a home. If any one independent sub messes up its work, the home buyer or home owner is not going to be happy, in some cases all other work must cease until it's corrected, and the GC may not get paid, or the home buyer won't close a transfer, so, YES, the continuation of the GC's firm is put in jeopardy by and "depends appreciably" upon the services of the worker, be it an employee or IC.)</i>					
A4	PERSONAL SERVICE	Does the firm require the personal services of the worker to get the job done?	YES	NO	
<i>{What does personal services mean? Needs clarification. A legitimate independent contractor, which is hired by a GC to perform work on a home under construction, (e.g., fire place installer, closet shelving installer, painter, roofer, many others) may also be engaged by the GC to work on the GC's own home – is this what the question is intended to know? If so, why? An independent contractor is free to say no to doing the work on the GC's own home.}</i>					
A5	ASSISTANTS	Does the firm hire, supervise and pay for any assistants needed by the worker to do the work?	YES	NO	
<i>{No, the GC pays their own employees as employees. The independent sub pays their own employees as employees.}</i>					
A6	CONTINUING RELATIONSHIP	Does the relationship between the firm and the worker contemplate continuing or recurring work?	YES	NO	
<i>{YES, of course, but what does "contemplate" mean in this context? Every subcontractor goes into a home construction job hoping to be reengaged for the next home, or even every home in a subdivision. It's also every GC's understanding that continued or recurring work may occur if the subcontractor performs under their contracts to the GC's standards. Good subcontractors are sometimes hard to find; when you do find one, a GC wants to continue their GC/Sub relationship. Answering this question YES should not convert independent contractors to employees.}</i>					
A7	HOURS OF WORK	Does the firm set the hours of work or the amount of hours to be worked by the individual?	YES	NO	
<i>{Sometimes, the "hours of work" must be set for both employees and subcontractors in order to coordinate schedules with other subcontractors or the GC's employees' work, abide by local noise ordinances or the requirements of a home owner (e.g., homeowner says they want all workers, GC's employees or subs, off the job site between certain hours). Generally, though, the "amount of hours to be worked" is not set for subcontractors.} So, Q A7 asks two questions, the first is often answered YES, the second NO. So, given only one answer choice, what does a GC do?}</i>					
A8	FULL TIME	Is the worker required to devote full time to the firm during the relationship?	YES	NO	
<i>{Uncertain answer; needs clarification. A subcontractor is often required to finish a job within a start and completion date, or before moving onto another job. That's necessary to efficiently schedule the work of many subcontractors. The requirement "during the relationship" is also confusing because it could be as simple as hiring a subcontractor to do their job, which may take only a day or two, yet for scheduling purposes and perhaps safety reasons, the sub is required that once started the job requires full attention by the sub until it gets done. Is that a "full time" requirement that triggers a YES to this question? It should not, nor should such normal and frequent requirements convert IC subcontractors to employees.}</i>					
A9	PLACE OF WORK	Is the individual required to perform the work on the firm's premises?	YES	NO	
<i>{By definition, home construction work is required to be done at a home construction site. A home construction site is not a manufacturing setting, factory facility or an office. For building construction, if the site of the construction is considered to be the GC's premises, the question is nonsensical and absurd. See also Test "B" below. Components that go into a home may be fully or partially built off-site at a subcontractor's or manufacturer's facility but finish construction or installation at the home construction site is done by the subcontractor who started the work off-site, or by another business entity altogether (e.g., an installer who receives delivery from a manufacturer or distributor of a component, and installs it at the home site). If the home</i>					

<i>construction site is considered to be the GC's premises, the question must always be answered YES. That's a ridiculous result and is a demonstration that building construction work is unlike most other types of work places. The question needs to be clarified to accommodate building construction's unique situation.)</i>					
A10	ORDER OR SEQUENCE	Is the worker required to perform the services in an order or pattern set by the firm?	YES	NO	
<i>{YES, there is always a required sequence ("order or pattern" ?) that is set by the GC and demanded by the overall scheduling of multiple subcontractors and both the GC's, lender's and government official's inspections of the construction work. Contracts and good business practices will set these sequences. Answering YES here for construction work should not convert subcontractors to employees.}</i>					
A11	REPORTS	Is the worker required to give oral or written reports to the firm on the state of the work?	YES	NO	
<i>{YES, subcontractors must at least verbally report to the GC if the sub's work is completed, if there's a problem that's been encountered (e.g., independent framing sub reports to the GC that the independent plumber drilled so many holes in the wall studs that structural integrity has been compromised, many other examples of necessary communications), if the sub needs more materials, or has to come back the next day. Without the constant communication between subcontractors and the GC there would be chaos on a construction job site. Requiring this communication should not convert subcontractors into employees.}</i>					
A12	PAYMENTS	Is the worker's pay based upon time worked?	YES	NO	
<i>{Generally NO, but while jobs are bid, some are done on an hourly basis by independent subcontractors. It is difficult to price some work on certain home construction sites, so subs will bid on a time and materials basis. Change orders, too, that come from either the GC or the home buyer or home owner (e.g., for inside trim, paint colors, countertops, fixtures, many other items) can be last minute and be quite involved. For many trusted subcontractors, with whom the GC has experience, the sub is allowed to bill the GC on a time basis.}</i>					
A13	EXPENSES	Does the firm pay the worker's expenses?	YES	NO	
<i>{Generally NO; but a subcontractor's expenses are generally included in the quote or bill for the work performed.}</i>					
A14	TOOLS & MATERIALS	Does the firm furnish the tools and materials needed to do the work?	YES	NO	
<i>Like question A7, for the construction industry, these are two distinct questions comingled together. Generally, the tools to do a subcontractor's work are not provided; the sub brings their own tools to the job site. But materials are often supplied by the GC. For example, lumber is bought by the GC, delivered to the job site by the lumberyard, and the GC hires an independent framer to perform the framing work. The same can be said for many other types of materials, such as wallboard, tile, flooring, light fixtures, bathroom fixtures, appliances, furnaces and other equipment – all bought by the GC and delivered to the home construction site, but installed by independent subcontractor craftsmen and installers. These subs or installers may also bring other materials to the job site (e.g., the GC supplies the fixtures and appliances, and maybe even piping and conduit, but the plumber and electrician brings minor parts). The GC's purchase and supply of many materials is important for quality control reasons, bulk pricing advantages, and for the GC's control of warranty relationships with suppliers and manufacturers so the GC can better service their home buyer or home owner client. So, with legitimate independent subcontractors, the tools question is answered NO but the materials question is often answered YES and that answer should not convert subcontractors to employees. If given only one choice, what does a GC do?}</i>					
A15	INVESTMENT	Does the worker have a significant investment in the facilities used in doing the work?	NO	YES	
<i>{Question is unclear. What is meant by "facilities" used in doing the work? Certainly, some legitimate subcontractors have a significant investment in the tools and vehicles they own to get</i>					

<i>their work done. So, we presume YES would be the correct answer. Some other legitimate subcontractors may require little or no investment, need no or few tools, just their time and expertise, to get their job done. We presume a GC could answer NO for them, but that should not make them the GC's employees. Some subcontractors will invest their time and materials to do their work but not get paid until the GC gets paid by the lender or homeowner. In that sense, those subs have a significant investment in the "facillties." Needs clarification.}</i>					
A16	PROFIT OR LOSS	Can the worker realize a profit or suffer a loss as a result of the services performed for the firm?	NO	YES	
<i>{For most employees, NO, but for an employee with an ownership interest in the GC, YES. For subcontractors, the answer would be YES, they can realize a profit or a loss on any job.}</i>					
A17	WORKS FOR MORE THAN ONE FIRM	Does the individual work for a number of firms at the same time?	NO	YES	
<i>{Generally YES, a subcontractor can work for a number of GC's at the same time, but the nature of the work or scheduling requirements may require the sub to complete one job before moving onto the next job. Also, for sole proprietor or very small independent subs who work by themselves or with 1 or 2 employees, the answer is necessarily NO. These subs cannot work for more than one firm at the same time because it's physically impossible. Answering NO for them should not convert them into the GC's employees.}</i>					
A18	OFFERS SERVICES TO THE PUBLIC	Does the worker offer this service to the general public?	NO	YES	
<i>{This question is incomplete. Some independent subcontractors work only on new construction or only for GC's and, therefore, do not "offer" their services to the general public, although there is nothing that precludes them from doing so. The question should be rephrased to capture the reality of construction work: i.e., Does the worker offer, or could the worker offer, this service to the general public? If rephrased, this question would be answered YES for independent contractors and NO for employees as the question intends to solicit.}</i>					
A19	RIGHT TO FIRE	Does the firm have the right to discharge the worker at any time?	YES	NO	
<i>{If discharge also means a GC can stop an independent subcontractor's work, then the answer is necessarily YES. Absolutely, a GC should be able to stop the IC's work (i.e., discharge the worker?) if they're committing code violations, not meeting quality expectations, don't show up for the job as scheduled, causing safety issues or other disruptions on the job site, or for any other contract violations. Most GC's would, therefore, answer this question YES, but that should not convert ICs into employees.}</i>					
A20	RIGHT TO QUIT	Does the individual have a right to terminate the relationship at any time without incurring liability?	YES	NO	
<i>{Most GCs cannot accurately answer this question without legal counsel. A subcontractor (IC) may have the right to terminate the work relationship if the GC does not act in good faith or does not perform it's end of the agreement (e.g., the GC has not supplied the lumber necessary for a framer to start work, and the framer has other jobs they have scheduled and cannot wait for the GC to perform). Whether or not the IC's termination of work results in the IC incurring liability is a legal question of contract law. Also, some employees, particularly management employees in larger companies, may work under an employment agreement. And, if the employee terminates his employment contrary to the terms of such agreement, liability may be incurred, necessitating a NO answer to the question (implying they're an IC not an employee). Therefore, without more information, the answers to this question do not necessarily lead to concluding the worker is an employee or IC.}</i>					

**IRRESPECTIVE OF THE RESULT OF THE COMMON LAW DETERMINATION
ABOVE, YOU MUST ALSO SATISFY BOTH TEST B AND TEST C BELOW.**

TEST B: ANSWERING EITHER OF THESE QUESTIONS AS IC WILL SATISFY THIS TEST

#	FACTOR	DESCRIPTION	EE	IC	DNA
B1	OUTSIDE USUAL COURSE OF EMPLOYER'S BUSINESS	Is the service provided part of the employer's normal business operation? <i>{See comment on pg 1}</i>	YES	NO	
B2	OUTSIDE EMPLOYER'S PREMISES	Does the individual perform any of the work on the firm's premises? <i>{See comment on pg 1, and comment on question A9. Again, if the home construction site is considered the "firm's premises" the question is absurd.}</i>	YES	NO	

TEST C: THIS TEST MUST BE APPLIED TO EACH INDIVIDUAL. SIMILARLY SITUATED WORKERS MAY DIFFER IN THEIR RESPONSE TO THIS FACTOR.

#	FACTOR	DESCRIPTION	EE	IC	DNA
C1	ENGAGED IN AN INDEPENDENTLY ESTABLISHED BUSINESS OF THE SAME NATURE AS SERVICE PROVIDED	Is the worker customarily engaged in an independently established trade, business, occupation or profession of the same nature as the service being provided? (Items A13-A20 may help to determine the existence of a business.)	NO	YES	

{Test C is generally not a problem except for the reference to questions A13 to A20, issues with which are noted above. But the important note to make on this is that many services related to home construction can be performed by either employees or legitimate independent contractors or both. The important determinant here is whether the person performing the work is set up as an independent business, e.g., has their own business license, letterhead, business card, etc. as noted below. Test C answers should override answers on Test A and Test B. The key is that a preponderance of these items in Test C should be established prior to forming the working relationship between the firm and the worker.}

POTENTIAL EVIDENCE TO SUPPORT YOUR DETERMINATION REGARDING TEST C

Business license	Letterhead stationary	References of other clients
Business liability insurance certificate	Advertisements in yellow pages, newspapers, trade journals, etc.	Registration for or collection of state sales tax on the services provided.
Business card	Bills or invoices with a logo or trade name	Federal identification number for the business.

Notes regarding this determination: