

Andrew S. Berns Quoted In Law360 Article, "New Jersey Cases To Watch In 2021: A Midyear Report"

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Worker Misclassification

The [New Jersey Supreme Court](#) has agreed to determine if insurance agents are categorically independent contractors, a question posed by the Third Circuit in a proposed class action accusing Northwestern Mutual Life Insurance Co. of misclassifying agents as contractors and making unlawful deductions from their commissions.

Fred Walfish is appealing a New Jersey district court's ruling in his proposed class action that he was an independent contractor and not an employee, a decision driven by the "ABC" test established by [Hargrove v. Sleepy's LLC](#). Per Hargrove, an employer seeking to classify workers as independent contractors must show the individual is free from the employer's control, that the work is outside the usual course of business, and that the individual is engaged in an independently established trade or profession.

At issue is whether a New Jersey Unemployment Compensation Law provision, which excludes commission-based insurance agents from the definition of "employee," also applies to the employee-or-independent-contractor determination for insurance agents under the New Jersey Wage Payment Law.

"If that exception is not considered enforceable, the question will be how will they be categorized under the ABC test," said attorney Andrew S. Berns, chair of [Einhorn Barbarito Frost & Botwinick PC's](#) commercial litigation and employment practices.

An ABC test result could then supersede the UCL's statutory exception in similar cases, Berns said.

The case is Fred Walfish v. Northwestern Mutual Life Insurance Co. et al., case number 084836, in the Supreme Court of the State of New Jersey, and Fred Walfish v. Northwestern Mutual Life Insurance Co. et al., case number 19-2105, in the [U.S. Court of Appeals for the Third Circuit](#).

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