Trump Era DOL Guidance on Classification of Gig Economy Workers

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On April 29, 2019, the United States Department of Labor ("DOL") issued a new opinion letter, FLSA 2019-6, regarding whether virtual marketplace company ("VMC") service providers are employees or independent contractors. The DOL concluded that VMC service providers are independent contractors, marking a positive change for VMCs and businesses in the booming "gig economy," as well as traditional businesses that utilize freelancers, consultants, and contractors.

A Brief Background

On July 15, 2015, the DOL Wage and Hour Administrator issued an Administrative Interpretation that emphasized the broad reach of the FLSA and warned employers against the misclassification of workers as independent contractors. Many understood the Interpretation to indicate that the DOL considered workers in the gig economy to be employees. However, on June 7, 2017, Labor Secretary Alexander Acosta rescinded the Wage and Hour Administrator's prior guidance on independent contractors, signifying a shift in position from the prior administration's position on a key wage issue. This change was welcomed by many in the business community, who felt that this was a first step in clarifying the complex rules and regulations established under Obama's Labor Department. Through the issuance of the DOL's first Opinion Letter on classification under the Trump administration, companies now have a clearer insight on how this administration's Labor Department regards workers in the growing gig economy.

Opinion Letter, FLSA 2019-6

The DOL kept the name of the entity that requested the Opinion Letter private; however, the entity self-described as a VMC. The DOL defined a VMC as "an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation, delivery, shopping, moving, cleaning, plumbing, painting, and household services." Therefore, this entity is comparable to other commonly used service platforms, such as Uber, Lyft, Airbnb, Instacart, etc. The DOL reviewed the workers' status under the federal FLSA using the six-factor "economic realities test." The DOL applied this test to the facts in the letter submitted by the employer, concluding that every factor weighed in favor of independent contractor status.

Application of the Six-Factor Test

The touchstone of independent contractor versus employee status is "economic dependence." In order to determine economic dependence, the DOL considered the following six factors derived from Supreme Court precedence.

1. **Control**. This factor analyzes the nature and degree of the potential employer's control. When a business requires a worker to work exclusively for that business, whether through a contractual arrangement or because the type of work makes it impractical to work elsewhere, it exercises a great degree of control over the worker. In its Opinion letter, the DOL noted that the VMC allows its service providers to establish flexible schedules and to even work for competitors. Moreover, the entity in question does not inspect the service provider's work for quality or rate their performance. Therefore, the DOL concluded that this factor weighs in favor of independent contractor status.

2. **Permanency of Relation**. This factor considers the permanency of the worker's relationship with the potential employer. Permanency is established when a business requires a worker to agree to a fixed duration of work and disallows workers to work for competitors. A relationship may also be deemed to have permanence when there is a long-standing working relationship. In its Opinion Letter, the DOL stated that the workers appear to have a high degree of autonomy to exit the working relationship and even to work for competing businesses. The DOL stated that this type of freedom is indicative of an independent contractor status.

3. **Investment in Facilities, Equipment, or Helpers**. This factor examines the worker's investment in the facilities, equipment, or helpers. If the business makes the investment in the materials and human capital that are necessary for a worker to complete his or her job, the worker becomes more economically reliant on the business and tends to be an employee over an independent contractor. The DOL noted that the service providers at issue are required to purchase all necessary resources to complete their work without reimbursement. Although the client invests in the virtual referral platform, which the service provider relies upon to obtain work, this is not an investment in the actual work the service providers perform, and service providers can use similar software referral programs through a competitor. Therefore, the DOL concluded that this factor weighed more heavily in favor of classification as an independent contractor.

4. **Skill, Initiative, Judgment, and Foresight Required**. This factor contemplates the amount of skill, initiative, judgment, and foresight required for the worker's services. If a business's profits are achieved as a result of a worker's independent judgment, initiative, or foresight, the worker is more likely an independent contractor. Also relevant to this analysis is how the worker acquired his or her skills. If the business provides the worker with the skills necessary to accomplish the work, it indicates employee status. Although the entity at issue did not clearly identify the types of services

that it offers on its client's virtual marketplace, the DOL stated that the service providers have autonomy to choose between different service opportunities, including utilizing competitor platforms, to maximize their financial gain. Moreover, the service providers do not undergo mandatory training. The DOL concluded that these factors indicate independent contractor status.

5. **Opportunity for Profit and Loss**. This factor weighs the worker's opportunities for profit or loss. Where a worker earns additional compensation through the exercise of independent judgment, initiative, or foresight, has freedom to renegotiate compensation throughout the relationship, or has some amount of capital investment at risk, the worker is more likely an independent contractor. The DOL noted that the service providers have the ability to maximize their profits, including through working for different platforms, and are not confined to a set amount of compensation. Because of the significant amount of control that they have over their level of compensation, this factor favors independent contractor status.

6. **Integrality**. This factor evaluates the integration of the worker's services into the potential employer's business. A worker's services are deemed integrated into a business if they form the primary purpose of the business. The DOL stated that the service providers at issue are not integrated into the client's referral business. The client merely provides a connection between service providers and end consumers. The service providers do not operate the virtual platform provided by the client, but instead use it to locate job opportunities. Therefore, this factor weighs in favor of independent contractor classification.

Key Takeaways

Although the DOL's Opinion Letter is not binding on courts, courts may defer to this interpretation of law. Furthermore, if there are reasonable factual similarities, a business may rely on the DOL's guidance as a good faith defense against claims arising under the FLSA. Therefore, businesses, especially those that operate in the gig economy, have welcomed this shift in direction from the DOL.

However, businesses should remain mindful of the multitude of state laws that are more restrictive than the federal FLSA when making classification decisions. For instance, certain states, such as California, New Jersey, Connecticut, Illinois, Vermont, New Hampshire, Massachusetts, and Nevada, apply some version of the "ABC test" to determine a worker's classification. It is challenging to classify a worker as an Independent Contractor under the ABC test because it requires, *inter alia,* evidence that a worker performs services that are outside the usual course of the company's business. The costs of misclassification under state or federal law can be substantial.

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