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# U.S. Department of Labor issues guidance on status of on-demand service providers as independent contractors

**By Seth Neulight and Christopher Higgins**

The United States Department of Labor Wage and Hour Division (WHD) released new guidance in the form of an opinion letter on the hot-button issue of whether individuals who provide "on-demand" services for companies in the "gig" economy are independent contractors or employees under the federal Fair Labor Standards Act (FLSA). This guidance marks the first effort by the Trump administration DOL to weigh in on this issue. While the opinion is not legally binding, it should help companies that connect service providers with consumers through online platforms defend the status of these service providers as independent contractors.

The FLSA requires that employers comply with various wage and hour obligations to workers, such as the provision of minimum wages and overtime pay. However, these obligations apply only to employees, not independent contractors. As the gig economy has quickly expanded in recent years, individual service providers who contract with companies in this sector have filed an increasing number of class action lawsuits claiming they were misclassified as independent contractors and seek recovery of unpaid wages and penalties under the FLSA and state wage-hour laws.

On April 29, 2019, WHD Acting Administrator Keith Sonderling issued a ten-page letter opining that individuals who provide services for an anonymous "virtual marketplace company" (VMC) were properly classified as independent contractors under the FLSA. The DOL described 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."

To reach its conclusion that the VMC's service providers were independent contractors, the DOL applied a well-established "economic realities" test. This multi-factor test focuses on the extent of a worker's "economic dependence" on the company for whom he or she provides services. Specifically, the DOL considered six factors: (i) the nature and degree of the company's control; (ii) the "permanency" of the parties' relationship; (iii) the amount of the worker's investment in facilities, equipment or helpers; (iv) the amount of skill, initiative, judgment or foresight required for the worker's services; (v) the worker's opportunity for profit or loss and (vi) the extent of integration of the worker's services into the company's business. The DOL emphasized that this

test is fact-specific, and the factors must be weighed to answer the ultimate question of "whether the worker is 'engaged in business for himself or herself,' or 'is dependent upon the business to which he or she renders service.'"

In the specific matter at issue, the DOL opined that all six factors weighed in favor of the company's classification of the workers as independent contractors. The workers were found to have significant flexibility to pursue external economic opportunities. The company did not impose any specific shifts, production quotas or hours. The workers were able to choose if, when, how and for whom they provided services for their own profit and personal advantage. The workers could provide services for competitors, and routinely did so. The company did not inspect the workers' services or rate their performance. The company did not require the workers to undergo training. The workers were required to purchase all resources needed for their services. While the company set default prices for the services, the workers could: (i) choose between different types of jobs with different prices; (ii) negotiate the prices of their jobs and (iii) take as many or as few jobs as they wished. Finally, the DOL found that the workers were not integrated into the company's business because the workers did not develop, maintain or operate the online platform. The DOL concluded that the company's primary purpose was to "provide a referral system," and its "operations effectively terminate at the point of connecting service providers to consumers."

The DOL's opinion letter offers helpful guidance to gig technology companies in structuring their relationships with service providers. The letter also may help such companies defend against legal challenges to their independent contractor relationships. While the guidance is not binding law, courts may rely upon DOL interpretations of the FLSA as persuasive authority. Additionally, a company's "good faith" reliance on such opinions by the DOL may provide a "safe harbor" defense to FLSA claims in certain circumstances.

Nonetheless, as a word of caution, companies are obligated to comply with both the FLSA and the separate, often different, wage and hour laws of the states in which they operate. Certain states, such as California and Massachusetts, impose narrower legal standards for independent contractor status, either by statute or in case law. Thus, companies in the gig services sectors should consult with counsel to conduct a state-by-state analysis of the classifications of individuals who provide services using their platforms.

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