Gig Economy Companies May Soon Get Benefit Of Federal Misclassification Rule

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The formal regulatory notice released yesterday is so short and sterile that the average gig economy business could be forgiven for ignoring it: "The Department of Labor is proposing a regulation for determining independent contractor status under the Fair Labor Standards Act." But the implications are immense. Given the manner in which the current administration has treated the misclassification question, yesterday's announcement seems to be a signal that we will soon see a federal regulation that will provide a flexible standard permitting typical gig economy businesses to classify their workers as contractors under federal law. And according to Bloomberg Law's Ben Penn, the Department of Labor will aim to fast-track the rule so that it is completed by year's end, insulating the rule from the possibility that a new administration voted into the White House this November could quickly reverse course. What do gig economy businesses need to know about this interesting development?

Signs Point To Flexible Standard

There have developed two competing schools of thought when it comes to the proper legal standard to determine the status of workers as either independent contractors or employees: a bright-line rule (like the ABC test) that erects barriers making it difficult for the average gig economy business to classify workers as contractors; or a flexible standard that permits for some measure of forgiveness in the legal analysis and generally permits the average gig business to treat workers as contractors. And all signs point to the fact that the new rule expected from the USDOL will provide the flexibility that gig economy companies and other businesses crave. Here's the supporting evidence:

- As early as 2017, within months of the new administration assuming control of the Labor Department, the agency withdrew guidance published during the Obama administration that had hampered businesses when it came to independent contractor misclassification and joint employment standards. The guidance letters that had been scrapped didn't carry the force of law but were relied upon by USDOL investigators and courts when examining allegations of wrongdoing and were often cited by plaintiffs' attorneys to support their demands.
- In July 2018, the agency issued a field assistance bulletin further tilting the misclassification scales back towards an even playing field and providing what many assumed was a helpful clue to gig economy companies about how the agency could regulate the concept of misclassification on a broader scale.

- In April 2019, the USDOL issued a much-heralded opinion letter confirming that certain workers providing workers for a virtual marketplace company are, indeed, independent contractors. It provided the federal government's official interpretation on whether a certain business model or practice complies with the law and offered solid evidence of how the agency views the misclassification question.
- Finally, tucked away in yesterday's regulatory agenda notice is a single word that signals the purpose of the agency's action: "deregulatory." This appears to announce that the rule will further the current administration's penchant for removing barriers that interfere with a business's ability to conduct its work most efficiently.

When Will We See The New Rule?

The big question, then, is when we can expect to see this rule unveiled and finalized. The prior Labor Secretary indicated that a misclassification rule was on its way back in 2018, so we shouldn't be faulted for not holding our collective breath in anticipation. But this time could be different – especially given the political dynamics at play.

According to sources providing information to Bloomberg Law's Ben Penn, "the administration wants to wrap up the rulemaking in the final months of President Donald Trump's term in part because a Democrat could be president next year, said the sources, who spoke on condition of anonymity. If a worker classification rule were to be proposed but not finalized and Trump doesn't get re-elected, a new administration would easily be able to kill the effort. Or new DOL leaders inheriting the incomplete rule could finalize it by interpreting the term "employee" much more broadly than Republican regulators envisioned."

That would mean a warp-speed effort to finalize the rule. In the six months left in the current administration's term, the agency would need to reveal a proposed rule, manage a public notice-and-comment period sufficient to pass legal muster, and then finalize the rule in a way that responds to the many comments and criticisms the proposal is certain to face. And of course, even if a rule gets finalized in this tight timeframe, there always stands the possibility that challengers could file litigation and win a court order blocking the rule from taking effect on the eve of implementation. Which all adds up to the fact that this proposal could face tremendous challenges before gig economy companies can feel comfortable relying upon it.

It is also worth noting that such a rule would not be a magic bullet for all gig economy businesses across the country. After all, this rule would only regulate the treatment of classification questions under the federal wage and hour law, while state rules and laws that provide a heightened state of regulation would remain in place.

All that being said, seeing a uniform flexible rule addressing the misclassification question would be a step in the right direction. The USDOL may even attempt to craft a standard that specifically addresses the unique nature of the gig economy when it comes to misclassification. We'll continue to

monitor the situation and will provide an update when we see movement in this area – which could be sooner rather than later.

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