



Biden DOL Shreds Trump-Era Gig Economy Guidance Letter

Insights

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The new administration's efforts to reverse course on many of the gains that gig economy businesses achieved under previous White House leadership took another step today as the Department of Labor (DOL) withdrew a guidance letter that indicated typical gig workers are independent contractors. By scrapping the April 29, 2019 letter, the Biden DOL sent yet another signal to businesses that they will have an uphill battle in classifying workers as contractors for at least the next four years. What do businesses need to know about today's activity?

What Did The April 2019 Letter Say?

The letter that was withdrawn today was issued by the Trump-era DOL in April 2019. It confirmed that certain workers providing work for a virtual marketplace company were, indeed, considered independent contractors by the agency at that time. While this letter could only be used as an authoritative legal defense by the specific (unnamed) gig economy business that requested it, this publication was still valuable in that it provided the federal government's official interpretation on whether a certain business model or practice complied with the law. Thanks to the letter, we had a solid understanding of how the then-current DOL viewed the misclassification question and would approach it from an enforcement perspective.

The identity of the business that requested the letter was an average modern gig business. Identified only as a "virtual marketplace company" that operates in the "on-demand" or "sharing" economy, we knew it was an online and/or smartphone-based referral service that connects service providers to end-market consumers. It accomplishes this through a typical analytic hierarchy process software platform, using objective criteria to match consumers to service providers.

Like virtually all gig economy businesses, this particular company was concerned about the risks of a misclassification claim that might lead to wage and hour liability under the Fair Labor Standards Act (FLSA). It asked the agency to provide a determination about whether the workers that provide these services would be considered employees or independent contractors if challenged under the current state of the law. The DOL concluded that, assuming all the facts provided by the entity were accurate, the workers are contractors and not employees.

What Happened Today?

The DOL issued a brief notice today that the Wage and Hour Division (WHD) is withdrawing the opinion letter. It noted that, several weeks ago, it proposed to delay the effective date of the final rule entitled “Independent Contractor Status Under the Fair Labor Standards Act” (anecdotally known as the Gig Economy Rule) to allow an additional opportunity for review and consideration. Because the April 2019 letter “addressed the same issue under consideration by the Department — independent contractor status under the FLSA – ...WHD is withdrawing this opinion letter.”

The DOL noted that this withdrawal is “an official ruling of the Wage and Hour Division” and that, from here on out “this letter may not be relied upon as a statement of agency policy as of the date of withdrawal, February 19, 2021.”

What's Next?

This withdrawal should come as no surprise to anyone who has paid attention to the news over the past few months. Even before President Biden was sworn in, he indicated that he would freeze the pending Gig Economy Rule before it took effect, removing a powerful weapon that the business community was tantalizingly close to acquiring. Sure enough, the agency put the rule on ice for 60 days, with a current effective date of May 7, 2021. However, given Biden’s aggressive stance against misclassification and the resume of the man about to take charge of the DOL, union advocate Marty Walsh, it seems unlikely that the rule will ever take effect in its current form.

We’ll keep an eye out for further developments and report back as events progress in this area.

Related People



Richard R. Meneghello
Chief Content Officer
503.205.8044
Email