Gig Economy Rule Faces Very Uncertain Future

Insights
1.08.21

If it had been released at some other point in time and under different circumstances, perhaps gig economy businesses would be celebrating the release of a federal rule that makes it easier to classify workers as independent contractors. But the fact that it wasn't formalized until the waning days of the current administration means that the rule faces long odds of ever taking effect. We wrote about the rule in our Legal Alert that can be found here – feel free to check it out if you want the particulars of what the rule could bring to the table when it comes to establishing a worker classification standard. The Alert also provides details regarding the roadblocks the rule faces: the impending "midnight" memo to be released on January 20 that will temporarily freeze this rule and prevent it from taking effect on March 8 as planned; the probable litigation that will be filed to block the rule from taking effect on a permanent basis; an incoming administration that will almost certainly take additional steps to shelve the rule; and a possible replacement rule that would almost certainly be worker-centric. Add to that the recent news that Marty Walsh will soon head the Labor Department – his labor background makes it all but certain that he will oppose this rule – and you can see why it seems unlikely that the rule will ever become the law of the land.

One possible avenue for the rule to be salvaged? We could see business groups line up to file their own litigation in the hopes of resurrecting the rule once it is stalled or put on hold. This has happened before: several years ago, after the Obama administration finalized a pay data collection rule and the Trump administration blocked it before it could take effect, a consortium of supporters filed suit and convinced a court to breathe new life into the rule and order it into effect. We could see a similar dynamic unfold over the course of 2021.

One interesting note: the finalized rule contains a series of illustrative examples to demonstrate how the determinative factors would be analyzed under the facts presented, and one is a classic gig economy situation.

Example. An individual accepts assignments from a company that provides an app-based service linking those who need home-repair work with those who perform home-repair work. The individual is able to meaningful increase his earnings by exercising initiative and business acumen and by investing in his own equipment. The company, however, has invested millions of dollars in developing and maintaining the app, marketing itself, maintaining the security of information submitted by actual and prospective customers and workers, and monitoring customer satisfaction with the work performed.

Application. The opportunity for profit or loss factor favors independent contractor status for the individual, despite the substantial difference in the monetary value of the investments made by each party. While the company may have invested substantially more in its business, the value of that investment is not relevant in determining whether the individual has a meaningful opportunity for profit or loss through his initiative, investment, or both.

We'll monitor the situation as it develops over the course of the next few weeks and months and provide updates as warranted.

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