

# DOL'S STANCE ON WORKER MISCLASSIFICATION BELIES THE MODERN BUSINESS WORLD

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A short time ago, in a location not too far away (Washington, D.C.), the U.S. Department of Labor issued a new interpretation in an effort to further crack down on the perceived problem of employee misclassification. This was yet another example of the government being out of step with the realities of the modern business world. So much so, in fact, that the DOL would probably apply its predictable and out-of-date rules beyond the modern business world to worlds beyond our galaxy. In fact, the agency would likely find that a popular Star Wars character is an employee and not an independent contractor.

The new heroine Rey — introduced in 2015's Star Wars: The Force Awakens — scavenges for valuable parts and then sells them to a local junk dealer in order to survive. Despite all the signs being present that Rey is her own boss (which she proves time and time again during the film), recent statements from the DOL would have me think that they would incorrectly find her to be an employee of the junk dealer if their jurisdiction ranged to the desert planet of Jakku.

Let's start with the facts. Rey is a scavenger, pure and simple. Alone on an isolated desert planet, she spends her days in a junk field scavenging decaying starship wrecks for valuable technology. She owns her own quarterstaff and other scavenging equipment. Once she acquires a piece of property, she travels to an outpost to sell her wares to a junk dealer named Unkar Plutt.

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Rey first visits a cleaning station to ready her scavenged items for sale. According to *The Force Awakens Visual Dictionary*, Plutt rents the cleaning stations to scavengers like Rey and deducts the rental costs from the price he pays for the goods. Once presentable, Rey brings her goods to Plutt, who unilaterally sets a take-it-or-leave-it price for the merchandise. If Rey agrees, she receives payment in the form of food portions, which appear to be the main form of currency on the desolate planet.

Now, let's turn to the DOL's current stance on this issue. In July 2015, the agency published an interpretation, pronouncing misclassification as a "problematic trend" and seeking to limit the number of businesses using independent contractors. The document said that the test that should be used is "broad" and, once applied, most individuals would be considered employees. It boiled the issue down to a key question: Is the worker in business for herself (which makes her an independent contractor) or is she economically dependent on the business (which makes her an employee)?

In the case of Rey, she is most definitely economically dependent on Unkar Plutt. She has no choice but to do business with him if she wants to survive on that part of the planet. So according to the DOL, Rey would be considered Plutt's employee, entitled to minimum wage, overtime pay, workers' compensation coverage, civil rights protections, unemployment eligibility, and a whole host of other galactic benefits.

If the DOL gets its way and its interpretation is treated like authoritative law, gone would be the days where you would defend Plutt by pointing out that Rey owns her own equipment, is free to trade with other junk dealers, chooses when to work and when to take time off, uses his cleaning stations but rents them for her own purposes, and isn't subject to any sort of employment policies or practices.

By asking but a single question to determine which camp a worker should be segregated into, the DOL ignores the realities of the 21st century. What if a worker like Rey was both economically dependent on the junk dealer but also most assuredly in business for herself? After all, her skill at scavenging sets her apart from others who do business at the outpost, and her relationship with Plutt is not permanent in nature (although he did try to kill her when she escaped the planet, but that's another story).

Just like your Uber or Lyft driver in the burgeoning gig economy, Rey should not be so easily defined by the DOL. After all, the federal government is stuck in the past, using a 20th century legal test to define a 21st century legal issue. The time has come for the DOL to open its eyes to the realities of the modern business world and adopt a more flexible test for determining whether a worker is a contractor or employee. Or better yet, as has been proposed by such thought leaders as the Brookings Institute, it should start work on developing a hybrid third category of worker somewhere in between the two (the “dependent contractor” or “independent worker”), a more elegant classification for a more civilized age.

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