



# New Agency Insights On Independent Contractors

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Staffing agencies fill the demand for temporary workers. Rideshare companies use apps to match people needing a ride with people willing to give them a ride. Health care registries dispatch caregivers to clients' homes. The burning question is: When does the matchmaker cross the line and become an employer of its "independent contractors"? Two recent documents issued by a federal agency and a state agency provide some insight into this question, at least from the administrative agency standpoint.

Last month, the U.S. Department of Labor issued a field assistance bulletin to its enforcement administrators, addressing how to determine if and when a home health caregiver referred to a client by a "home care, nurse or caregiver registr[y]" has an employer-employee relationship with a registry under the Fair Labor Standards Act. The bulletin explains that "[a] registry is an entity that typically matches people who need caregiving services with caregivers who provide the services, usually nurses, home health aides, personal care attendants, or home care workers with other titles ..." The bulletin further clarified that simply calling a worker an "independent contractor" is never dispositive; rather, the DOL will apply the "economic reality test" when making such determinations. The bulletin began its analysis with the practice of background and reference checks. The DOL noted that, so long as a registry conducts only basic checks (e.g. confirming the caregiver is properly licensed and possesses the requisite skills, checking criminal background, credit and any additional checks required by state or local law), this does not establish an employment relationship. However, to the extent the registry expands its role to include determining, for example, whether the caregiver's personality would be a good fit for the client, or otherwise making subjective decisions as to whether to offer the caregiver a particular assignment, that can lead to a conclusion that the registry is engaged in employer-like activities.

The DOL went on to note that, in order to avoid creating an employment relationship, the caregiver must be free to accept or reject the assignment, and must be free to accept assignments from other registries. In addition, while the registry may perform payroll functions, and may receive a fee from the client for performing that functions, it should pay the caregiver based upon hours reported by the client, and at a rate mutually agreed upon by the caregiver and the client (and not a rate dictated by the registry).

The DOL summarized some additional factors that could result in finding that a home health caregiver is an employee of the registry after the caregiver goes to work for a client. Those factors

include: (1) instructing a caregiver on how to perform his or her duties for the client; (2) visiting the client's home to monitor a caregiver's performance and otherwise evaluating a caregiver's performance; (3) issuing discipline to a caregiver; and (4) requiring a caregiver to adhere to the registry's policies for time off from work. The DOL also made clear that to the extent a registry provides a caregiver with tools and supplies necessary to do the job, that factor tends to tip the scale in favor of an employment relationship.

The bulletin concludes that no single factor is dispositive, and instructs investigators to weigh all factors when determining whether an employment relationship between the assigning agency and the caregiver exists.

In addition to signaling how the DOL will assess this question when called upon to do so, there is little doubt that attorneys seeking to establish an employer-employee relationship, as well as those defending against such claims, will cite to this bulletin in court papers. It remains to be seen if and to what extent courts will follow the DOL's guidance.

Then, a few weeks later, the New York State Unemployment Insurance Appeal Board waded into the fray, granting unemployment benefits to three former Uber drivers. (Perhaps not surprisingly, the New York Taxi Workers Alliance is a named party to the appeal.) In doing so, the board found that "credible evidence establishes that Uber exercises sufficient supervision, direction or control over the three claimants and other similarly situated [d]rivers." That evidence included, (1) Uber's control over acceptable and unacceptable vehicles, as well as Uber's partnerships with outfits that lease acceptable vehicles to Uber drivers; (2) Uber's onboarding process, "which includes taking Uber's map test to gauge knowledge of the roads of New York City"; (3) providing prospective drivers with an onboarding video that Uber indicated was "essential information" for drivers, as well as a "Welcome to Uber" handbook; (4) an Uber "CODE OF CONDUCT" issued to drivers; (5) Uber's unilateral setting of fares; (6) Uber's requirement that drivers immediately notify Uber of an accident, and Uber's practice of deactivating the driver until it receives proof that the car has been repaired (or that the driver is using another "acceptable" vehicle); and (7) the ability for passengers to rate drivers, and evidence of Uber's using those ratings to "monitor [d]rivers' performance, including suspending or terminating their relationship." The board found this last factor — Uber's rating system — to be a significant point in its decision.

In short, the board found Uber's business model to be "similar in many respects to other more traditional car service companies," adding, "[h]ere, the technology merely replaces much of the duties of an employee-dispatcher to dispatch a trip request solely to the nearest driver who may accept the dispatched assignment." And, as did the DOL, the board took the time to remind us all that "written agreements characterizing drivers as independent contractors are not dispositive of employer-employee relationships, but merely just one of many factors to be considered."

## Conclusion

While the DOL's bulletin and the New York State Unemployment Insurance Appeal Board's decision are of limited, if any, precedential value in the court system, companies would be well advised to keep in mind the factors outlined in both. In the DOL bulletin, the main focus was the extent to which the registry dispatching a home health caregiver exerts more than minimal control over the hiring process, as well as control over the caregiver's post-hire activities. As for the New York State Unemployment Insurance Appeal Board, the main factors considered focused more on the onboarding process. Having said that, both agencies pointed to the factors of (1) who sets the pay (for caregivers) and the fare (for Uber drivers), and (2) whether the company undertakes to rate/evaluate/ or discipline the caregiver or driver, as key factors in determining whether an employer-employee relationship exists.

Image and quality control are central concern to any business. Companies that provide manpower to clients or match up service providers with customers should seriously consider the factors set forth in the DOL's bulletin and the New York State Unemployment Insurance Appeal Board's decision when making policies that could, in the end, turn independent contractors into employees.

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