Department of Justice Says Gig Economy Workers Should Be Allowed to Unionize

Insights
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The Biden administration recently weighed in on one of the thorniest questions in the gig economy world – whether gig workers should be allowed to unionize – and it should come as little surprise that the government has offered a pro-labor answer to that question. The Department of Justice (DOJ) filed a February *amicus* brief in the *Atlanta Opera* case we warned you about at the turn of the year that provides a blueprint for a change in the law to permit independent contractor workers in the gig economy space to band together to form unions. What do you need to know about this turn of events?

Background

The distinction between an "employee" and an "independent contractor" has grown of significant importance in the age of the gig economy. Unfortunately, the test to determine proper worker classification is growing increasingly murky as states and the federal government adopt different definitions and standards.

An unexpected – but not surprising – result of the murkiness in the worker classification space lies in the overlap of the gig economy with antitrust regulation. As the DOJ noted in an *amicus* brief it filed with the National Labor Relations Board (NLRB) on February 10, "the rights of workers to organize consistent with protections provided to workers by federal law" are currently not available workers in the gig economy. In other words, independent contractors currently have no protection under federal law to unionize.

Why is that? Because while current federal antitrust legislation exempts employees and their unions from antitrust scrutiny, it does not exempt *all* workers. This means that workers who are classified as "independent contractors" in the gig economy (and elsewhere) lack protections provided to other workers who are classified as "employees," in that they cannot unionize without coming under scrutiny for violating federal antitrust regulations.

What Did the DOJ Say?

The DOJ noted its concern with the current worker-classification test as it presents a situation of inequity in the workforce. As the DOJ noted, most independent contractors who work in the gig economy are considered low-wage workers. In fact, the DOJ argued that many of the workers

economy are considered low-wage workers. In fact, the DOJ argued that many of the workers classified as independent contractors have been "defined [as such] involuntarily rather than as a matter of entrepreneurial initiative." Thus, the concept pushed by many legislators that the independent contractor classification should "be viewed through the prism of entrepreneurial opportunity" is a false narrative.

Given this, the DOJ encouraged the NLRB to reassess the current worker classification test "to better protect labor market competition and the welfare of workers by adopting a sound, up-to-date, consistent approach to worker classification that adequately protects workers' rights to organize." From this language, it appears that the DOJ supports the NLRB creating a test that would classify current independent workers as employees, allowing them to form unions.

However, many members of Congress filed an amicus brief arguing that the NLRB does not have authority to redefine the test for worker classification. Instead, these lawmakers argue that the test for worker classification was settled by the courts, and that any new changes to the worker classification test should run through Congress. Finally, Republicans argue that abrogating the current worker classification test would go against precedent, and that the NLRB should adhere to prior court decisions.

What's Next?

While it is not clear as of now what the NLRB will do, it is clear that the test for worker classification is nowhere near settled. If the NLRB changes the current classification test, employers and companies in the gig economy should be prepared to reassess their current independent contractors' worker status, including the potential legal implications of having to reclassify such employees.

To stay up to date with the developments in this case and the latest changes to worker classification law, make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our Gig Economy Team or Labor Relations Practice Group.

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