

FP GIG ECONOMY SNAPSHOT: DID BUSINESSES DODGE BULLET WITH NEW INDEPENDENT CONTRACTOR RULE?

Insights
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Welcome to FP Gig Economy Snapshot, where we take a quick snapshot look at the most significant workplace law developments with an emphasis on how they impact gig economy businesses. This edition focuses on the Department of Labor's proposal to re-impose a labor-friendly independent contractor rule that will make it harder for businesses to classify workers as contractors instead of employees. But is it possible that the proposal isn't as bad as it seems and that the gig economy actually dodged a bullet? Read on for our analysis.

What Happened?

The Department of Labor (DOL) published a proposed rule on Tuesday that will eventually make it harder for businesses of all types to classify workers as independent contractors under federal wage and hour law. But it will have an oversized impact on the gig economy given that the predominant business model relies on a contractor workforce. [You can read our full overview of the proposal here.](#)

The news itself wasn't surprising; we'd been expecting the Biden DOL to reverse course and scrap the Trump-era independent contractor test for some time now. It won't take effect right away. Instead, after a typical notice-and-comment period that runs through late November, you can expect it to take effect in early 2023.

[Ed. Note: The DOL extended the comment period through mid-December.]

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What Did Analysts Say?

The initial analysis was near-universally negative for businesses, and even hinted at a doom-and-gloom forecast for the stability of the gig economy model.

- The New York Times said “the proposal is a potential blow to gig companies and other service providers that argue their workers are contractors.”
- Reuters said it is “expected to shake up ride-hailing, delivery and other industries that rely on gig workers.”
- Fortune said it “could throw major companies that rely on gig workers into disarray and fundamentally change the current business landscape.”
- Investment firm Wedbush said the proposal “would essentially throw the business model upside down and cause some major structural changes.”

And the market reacted accordingly, as shares of ride-sharing companies “suffered a beating” on Tuesday after the proposal was released.

What Did Gig Economy Businesses Say?

But the two biggest players in the gig economy space took a decidedly more nuanced approach to the news. Bloomberg reported that “the changes weren’t nearly as sweeping as many in the industry were anticipating,” and the news releases from both Uber and Lyft reflected this reality.

- “The proposed rule takes a measured approach, essentially returning us to the Obama era, during which our industry grew exponentially,” said Uber’s head of federal affairs. “In a time of deep economic uncertainty, it’s crucial that the Biden administration continues to hear from the more than 50 million people who have found an earning opportunity with companies like ours.”
- Lyft also said that the proposal would merely restore the approach under President Barack Obama, when drivers were generally classified as contractors, and emphasized that it would not force the company to alter its business model. “This approach previously applied to Lyft and app-based companies and did not result in reclassification of drivers.”



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Essentially, the companies are pleased with the fact that the proposal did not seek to impose a national “ABC” test, which would have made it extremely challenging for gig businesses to pursue normal operations with a contractor workforce. A return to the Obama-era model is certainly not ideal, but it is a manageable state of affairs that the businesses have already navigated through.

Hidden Landmine?

Despite this reaction, you should note the potential landmine buried in the DOL’s new proposal that might catch some businesses unaware. Businesses that *reserve the right* to control certain aspects of the work — even if they don’t *actually exercise* that control — could be found to have an employee relationship with the worker. The DOL claims the prior administration downplayed “the employer’s reserved right or authority to control the worker” and took the position that “the right of the employer to supervise at its discretion is evidence of control, even if the employer rarely exerts supervision.” This should cause you to carefully review the agreements you have in place with your contractor workforce to determine whether a revision is needed.

Want More?

You can expect gig economy companies of all sizes to adjust to the new standard before it takes effect in early 2023. If your organization needs assistance with a return to this new reality, the [Fisher Phillips Gig Economy Team](#) stands ready to assist.

We will continue to monitor workplace law developments as they apply to gig economy businesses, so make sure you are subscribed to [Fisher Phillips’ Insight system](#) to get the most up-to-date information directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [Gig Economy Team](#).