Not Yet Time To Pop Champagne Corks After IC Guidance Withdrawn

Insights
6.09.17

Earlier this week, the U.S. Department of Labor dropped a bit of a bombshell when it announced the immediate withdrawal of two informal guidance letters issued back when President Obama governed the executive branch. The 2015 guidance on independent contractor (IC) misclassification and the 2016 guidance on joint employment were wiped from the books; if you search for them now on the agency's website, you'll find a blank page reading: "Page Not Found – The page you requested wasn't found on our website." What should gig economy companies take from this development, especially the withdrawal of the IC guidance? Yesterday I spent some time talking to a BNA reporter about this issue, and put some talking points together to sum up my take. Here are the highlights:

- Some analysts have said this development is "much ado about nothing," that it is mere window dressing by the administration given that the informal guidance itself never really said anything new. Their view (which is technically correct) is that the guidance merely repackaged existing law and therefore broke new ground. Therefore, they believe the withdrawal is a hollow gesture that does not change the playing field for employers at all.
- But there's another school of thought that says this development does have some significance, even if the guidance itself never broke new ground. The guidance represented an attempt to shift the conversation when it comes to misclassification; it pronounced misclassification as a "problematic trend" and sought to limit the number of businesses using independent contractors. In it, the U.S. Department of Labor (USDOL) said that the test to determine whether an individual was misclassified should be applied in a "broad" manner, and, once applied, most individuals would be considered employees. This philosophy is now out the window, no longer set forth by an official document by the USDOL. That's got to be significant.
- How is it significant? In three specific ways:
  1. It signals that the enforcement priority of the USDOL has shifted away from IC misclassification, and when confronted with a classification case, the agency is not as apt to treat the situation from the default attitude of "the-worker-must-be-an-employee."
  2. It changes the tone of the national conversation on IC misclassification, given that the default attitude has now been scrubbed clean at the USDOL.
  3. Most importantly, it portends future changes about this issue at the USDOL, whether that comes in the form of specific opinion letters, informal guidance documents, or new regulations.

- What can gig companies hope for in the future given these changes? Look no further than Texas or Florida, two states which have recently passed laws regulating ride-sharing companies that now assure these companies that their workers will be considered independent contractors and not employees so long as they meet some very simple criteria. Imagine if the federal government issues a regulation, or even just publishes informal guidance, that mimics these new laws? The USDOL could issue a regulation that says: "as long as your workers are not told specific hours when they should be available to work, and are permitted to work for competitor companies, and are allowed to engage in whatever other work they want to when not working for you, and enter into a written agreement whereby they acknowledge they are independent contractors, then they will be held to independent contractors and not employees for purposes of the wage and hour laws and all other similar regulations." Such a move would do wonders for the gig economy.
- For now, that is a dream – certainly a dream now one step closer to reality, but a dream nonetheless. So it is not time to pop the corks from any champagne bottles. An there are other reasons for caution at the current time. Despite the USDOL withdrawal, plaintiffs can still file class action claims against businesses (though they can no longer rely upon the USDOL IC misclassification guidance for legal support) and individual states can regulate the market in a more aggressive manner. Expect to see some states fill the breach now left by the federal government with a more worker-friendly regulatory structure that may fill the void left by the USDOL.

In sum, things may not be much different today than they were yesterday, but the developments mean that a better tomorrow appears to be on the horizon for gig companies.

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