Gig Employers: An Old Friend Returns, Courtesy of the U.S. D(emand) O(pinion) L(etters)

Insights
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As reported on our Wage & Hour Law Blog just a few days ago, the U.S. Department of Labor (DOL) has announced that it will revive its historical practice of issuing Opinion Letters in response to specific inquiries from businesses and workers about the application of (among other things) the Fair Labor Standards Act of 1938 to their real-world issues. This development is welcome – and extremely important – to the businesses fueling the growth of the gig economy, businesses that may feel understandable uncertainty about how the 80 year-old FLSA will be applied to the emerging business models that were not contemplated when the statute was first drafted.

Beginning in 2010, the Obama administration's Labor Department shelved the Opinion Letter practice, instead opting to issue a small handful of "Administrator Interpretations" regarding issues the Labor Department deemed in need of clarification (a grand total of just six in seven years!). These Interpretations were essentially on the DOL's own initiative, were not responsive to unique arrangements and questions, and have been of little practical value to your businesses. In fact, the Obama-era DOL's two most relevant Interpretations were withdrawn by the new administration earlier this month.

But now the Opinion Letter practice will soon be resurrected. For the first time since 2010, our clients will now be able to receive guidance from the DOL about whether specific arrangements and practices may, for example: result in a worker being treated as an employee or independent contractor under federal wage law; create overtime pay obligations (or not) and a corresponding obligation to track hours worked; or the need to apply company policies to a broader set of workers (or not). Not only can businesses directly communicate with the DOL about their particular arrangements and practices, but they can also track the DOL's opinion letters to understand possible risks and opportunities, and to facilitate compliance. In addition, to the extent a business receives a DOL opinion that its arrangement passes muster under the FLSA, so long as that arrangement is appropriately defined in the request for an opinion, the company will have earned a good faith defense to actions brought against it under the FLSA regarding the practices in question.

This news could not come soon enough for gig economy companies. While it is difficult to precisely track the number of gig economy workers since the last DOL report on "Contingent and Alternative Employment Arrangements" was issued in February 2005, recent research by Intuit and Emergent Research projects that more than 9 million Americans will work in the Gig economy in 2021, an increase of over 140% just from 2014 (3.8 million). Since we know that the freelance population and

increase of over 140% just from 2016 (3.8 million). Since we know that the freelance population and gig economy grew substantially during the period in which the DOL refused to issue Opinion Letters, the concerned players in the industry have been unable to seek meaningful guidance from the federal government about the particular, and sometimes peculiar, arrangements between businesses and their service providers.

This may be an opportune time to seek a DOL opinion on a company practice or arrangement, especially given the expectation that the DOL is not only shifting towards a more business-friendly path, but also as the DOL continues to better understand the nature of this emerging economy and how it functions in ways not plainly contemplated by existing law.

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