Labor Department Offers Hint It May Be Supportive Of Gig Companies In Misclassification Situations

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Although the document itself is fairly dense and complex, specifically focusing on the home-care registry industry, the Labor Department's latest field assistance bulletin could provide a helpful clue to gig economy companies about how the agency could regulate the concept of misclassification on a broader scale. The July 13 document tilts the scales back towards an even playing field, which should be music to the ears of gig economy businesses across the country.

By way of background, the Obama-era Department of Labor was not necessarily of a friend of businesses when it came to independent contractor misclassification matters. In July 2015, the USDOL – then headed by Obama appointee Tom Perez – issued Administrator's Interpretation No. 2015-1, subtitled "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors." This document pronounced misclassification as a "problematic trend" and sought to limit the number of businesses using independent contractors. In it, the Department of Labor 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. If there was any doubt about how the previous administration viewed the matter, it was confirmed when Secretary Perez took a parting shot at the gig economy on his way out the door in January 2017, saying that it "threatened the basic social compact for American workers."

The first piece of good news with the new administration came in June 2017, soon after Alexander Acosta was confirmed. The USDOL issued a three-sentence news release announcing the withdrawal of the 2015 guidance. "U.S. Secretary of Labor Alexander Acosta today announced the withdrawal of the U.S. Department of Labor's 2015 and 2016 informal guidance on joint employment and independent contractors," the June 7, 2017 release read. Over the next several months, Acosta went out of his way to describe his support for the gig economy at least three times.

So perhaps the July 13 action should not come as much of a surprise. As reported by Bloomberg's Ben Penn, while the bulletin answers a specific inquiry regarding the home-care registry industry, it "offers a glimpse into how the Trump administration may task federal investigators to handle an issue that's perplexing businesses throughout the economy—including app-based companies like Uber and TaskRabbit—that want to maintain an independent contractor model without running

afoul of the law." The bulletin provides detail regarding the factors that wouldn't necessarily lead to a misclassification finding (such as providing general training) and those that might (dictating how to care for a client), but again, is meant to apply to this specific industry only.

Still, it is a breath of fresh air to see federal regulators apply common-sense rules and balancing tests to these situations, especially since the gig industry demands a flexible approach to regulation. If the courts and agencies continue to apply a 20th-century set of laws to a very 21st-century business situation, the more flexibility the better.

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