



# Labor Department Could Provide Opinion On The Gig Economy

Insights

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Bloomberg Law's Jaclyn Diaz wrote a very interesting story earlier this week asking whether the U.S. Department of Labor (USDOL) would soon issue an opinion letter to aid gig economy companies with commonplace labor and employment issues—namely, the ever-present threat of misclassification. Unfortunately, the story seems to indicate that such a letter is not on the horizon anytime soon, but it does describe the current atmosphere as one that could soon support such an opinion.

By way of quick background, the USDOL announced last year that it would be reinstating the practice of issuing opinion letters to aid businesses when it came to wage and hour compliance. Our Wage and Hour blog tackled this subject in a comprehensive post from June 2017 which you can read here. In sum, opinion letters have served as part of the agency's compliance function from the earliest days of the Fair Labor Standards act, providing USDOL's official, written positions regarding the application of that law's requirements to specific circumstances presented by interested members of the public. But the practice of issuing the letters was discontinued during the Obama administration, seen as being of limited utility and requiring too much time and resources to develop. Employers hailed the return of the letters under the Trump administration, and the USDOL has been very active in issuing them so far this year.

Bloomberg recently submitted a FOIA public records request and unearthed three requests for opinion letters on issues that touch the gig economy:

- An attorney for a Florida-based electrical contracting company that employs more than 50 workers wanted an opinion on whether the company is correctly classifying its independent contractors.
- A human resources consultant for a North Carolina physician's practice that contracts with a health coach to provide services to pediatric patients had a similar question about classification, but also wanted to know whether contractors can receive health benefits.
- The National Limousine Association submitted a request seeking an opinion that all drivers for a transportation network company (such as Uber or Lyft) are actually employees and not independent contractors.

The article provides an opinion (pun intended) that none of these letters is likely to garner a response from the agency. "Multiple sources" indicated to Diaz that they aren't "detailed enough" to

warrant an opinion letter, as they typically need to be “incredibly fact-specific” in presenting a scenario and these fell short of that mark. Moreover, the request from the National Limousine Association seems to be nothing but a bald-faced attempt at gaining a business advantage in the industry by seeking an opinion that would be of harm to direct business competitors, which is not an endeavor that the agency would usually participate in.

The good news? The article indicates that several attorneys and former USDOL staffers from prior administrators believe it is likely that worker classification will soon be the subject of an opinion letter. It’s just too big of an issue to ignore, the article’s sources state. It could be that the agency waits until the Wage and Hour Division appoints a permanent leader (a current nomination is being held up due to political gamesmanship in D.C.) before tackling what is considered to be a “burning issue.” We monitor the USDOL’s activities on a daily basis, and the minute we see a gig economy or misclassification opinion letter issued, you can be sure we’ll post about it.

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