Differentiations Within The Gig Economy – USDOL's Take On Independent Contractors

Insights
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The U.S. Department of Labor issued an opinion letter this week confirming that certain service providers referred through a virtual marketplace company are, indeed, independent contractors for purposes of the federal Fair Labor Standards Act. While the conclusion is very fact-specific, its publication provides a broad understanding of how the current USDOL will approach a certain business model or practice when faced with the question of whether workers have been misidentified as independent contractors.

Brief Factual Background
The gig economy business that requested the letter is a "virtual marketplace company" that operates in the "on-demand" or "sharing" economy. Generally, it is an online and/or smartphone-based referral service that connects service providers to end-market consumers. Although we don't know what service is provided by this specific entity, we can assume they provide a service typical of the gig industry: transportation, delivery, shopping, moving, cleaning, plumbing, painting, and/or household services. It accomplishes this through a typical analytic hierarchy process software platform, using objective criteria to match consumers to service providers. The USDOL concluded that, assuming all the facts provided by the entity were accurate, the workers are contractors and not employees under the FLSA.

Six-Factor Test Applied
To reach this conclusion, the agency applied the longstanding six-factor balancing test, derived from Supreme Court precedent, to determine whether an employment relationship existed between the workers (service providers) and the entity in question (the referral service). The six factors, and some detail about the particular relationship being examined, are as follows:

- **The nature and degree of the potential employer's control.**

The USDOL first noted that the business does not impose any duties on its workers, such as strict shifts, large quotas, or long hours. The workers have the right to work simultaneously for competitors, and they routinely do so in order to maximize their profit (picking the best opportunity on a job-by-job basis).

Further, the company does not rate or inspect a worker's performance for quality. In fact, it does not impose requirements on how its service providers must perform their work, is not present when the

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service provider works, and does not monitor, supervise, or control the particulars of that work.

- **The permanency of the worker's relationship with the potential employer.**

The workers appear to maintain a high degree of freedom to exit and re-enter the working relationship. And even if a worker spends many years working with the business, they essentially do so on a "project-by-project" basis without any real permanency.

- **The amount of the worker's investment in facilities, equipment, or helpers.**

The workers must purchase all necessary resources for their work, and are not reimbursed for those purchases. The USDOL noted that the referral service's investment in its own virtual referral platform is not investment related to the work the service providers perform.

- **The amount of skill, initiative, judgment, or foresight required for the worker's services.**

Regardless of the specific services performed by the workers, they chose between different service opportunities within and among competing virtual platforms and exercise managerial discretion in order to maximize their profits, thereby showing "considerable independence" from the business.

- **The worker's opportunities for profit or loss.**

While the company may set default prices, it allows service providers to negotiate the price of their jobs. Additionally, because the company charges a fee for cancelled services, the workers risk losing both any potential profit and the fee amount if they do not complete a job they have accepted. These opportunities for profit or loss give them a substantial amount of control over their level of compensation, and therefore independence from the business.

- **The extent of integration of the worker's services into the potential employer's business.**

Finally, the USDOL concluded that the workers are not integrated into the company's business. First, the workers who use the virtual platform do not develop, maintain, or otherwise operate that platform. Rather, they use that platform to acquire service opportunities. Second, the company offers a finished product to the service providers and consumers, and its involvement effectively terminates at the point of connecting service the parties, not extending to the workers' actual provision of services. "In other words," the agency concluded, "the [workers] are not an integral part of your service; they are consumers of that service and negotiate over the terms and conditions of using that service. Accordingly, they are not operationally integrated into the business." Addressing a major bone of contention as it relates to Prong B of California's so-called ABC test, the USDOL said that the business's "primary purpose" is not to provide services to end-market consumers, but to provide a referral system that connects service providers with consumers.

The Bottom Line

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The opinion letter is a useful roadmap to evaluating the status of certain workers – at least for purposes of the FLSA. It remains to be seen what this would look like at the edges of the "gig" economy. Notably, not all entities offering such work are merely facilitating a connection. Readers should be careful not to place too much weight on the "gig" nature of the arrangement and be sure to consider the context (both with respect to the potential employer *and* the potential employee) when making a determination.

While not a magic bullet, this development is a welcome one – and a preview as to how today's USDOL should frame the question in investigations. We can also hope that a court will look to this letter and recognize the same longstanding principles in litigation matters.

Service Focus

Wage and Hour

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