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DEPARTMENT OF LABOR SAYS CERTAIN GIG WORKERS ARE CONTRACTORS

Insights
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In a major positive development for gig economy businesses, the U.S. Department of Labor today issued an opinion letter today confirming that certain workers providing work for a virtual marketplace company are, indeed, independent contractors. While this letter can only be used as an authoritative legal defense by the specific (unnamed) gig economy business that requested the letter, this publication still provides the federal government's official interpretation on whether a certain business model or practice complies with the law. We now have a solid understanding of how the current USDOL views the misclassification question and will approach it from an enforcement perspective, and the news is all good for gig businesses.

BRIEF FACTUAL BACKGROUND

The identity of the gig economy business that requested the letter is unknown (as the USDOL removed the actual name to protect the entity's privacy), but what we do know paints the picture of your average modern gig business. The business 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, or household services. It accomplishes this through a typical analytic hierarchy

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process software platform, using objective criteria to match consumers to service providers.

Like virtually all gig economy businesses, this particular company was concerned about the risks of a misclassification claim that might lead to wage and hour liability under the Fair Labor Standards Act (FLSA). It asked the agency to provide a determination about whether the workers that provide these services would be considered employees or independent contractors if challenged under the current state of the law. The USDOL concluded that, assuming all the facts provided by the entity were accurate, the workers are contractors and not employees.

SIX-FACTOR TEST APPLIED

To reach this conclusion, the agency applied its longstanding and unchanged six-factor balancing test, derived from Supreme Court precedent, to determine whether the workers are economically independent (leading to a finding of contractor status) or economically dependent (leading to an employee finding) in the working relationship with the entity in question. The six factors, and some detail about the particular relationship being examined, are as follows:

1. **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. Instead, they are provided flexibility to choose if, when, where, how, and for whom they will work, and they regularly use this flexibility to their own profit and personal advantage. They have complete autonomy to choose the hours of work that are most beneficial to them, and there is no minimum amount of work. The workers have the right to work simultaneously for competitors, and they routinely do so in order to maximize their profit (including working "multi-app"—simultaneously running a competitor's platform and 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 service provider

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

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

   The workers appear to maintain a high degree of freedom to exit the working relationship. They are not restricted from interacting with competitors, either during the relationship itself (since service providers may work on multiple platforms simultaneously) or after the relationship ends. 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.

3. **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. Addressing a common argument raised by many worker advocates and attorneys seeing employee classification, the USDOL noted that the business's investment in its own virtual referral platform does not, alone, establish an employment relationship with the workers who use that platform. As the agency noted, they are not investments in the work the service providers perform, comparing them to a standard business's investments in office space, payroll software, timekeeping systems, and other products to operate its business.

4. **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 and competing virtual platforms and exercise managerial discretion in order to maximize their profits, thereby showing "considerable independence" from the business. They also do not undergo mandatory training, increasing their economic independence.

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

   The workers do not receive a predetermined amount of compensation for their work, but instead control the major determinants of profit or loss. While the company

may set default prices, it allows service providers to choose different types of jobs with different prices, take as many jobs as they see fit, and negotiate the price of their jobs. They can further control their profit or loss by toggling back and forth between different competing platforms. Additionally, because the company charges a fee for cancelled services, the workers risk losing money 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.

6. **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 its workers, and its business operations effectively terminate at the point of connecting service providers to consumers, 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 the 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.

CONCLUSION

In the announcement accompanying the publication of the letter, the USDOL confirmed that the opinion letter was an official, written opinion by the Department's Wage and Hour Division on how the FLSA applies in the specific circumstances presented by the entity that requested the letter. "An important role of the U.S. Department of Labor is to ensure that employers who want to do the right thing have clear compliance assistance," said Keith Sonderling, Acting Administrator of the Department's Wage and Hour Division. "Today, the U.S. Department of Labor offers further insight

into the nexus of current labor law and innovations in the job market."

While not a magic bullet that will cure all that ails the modern gig economy industry, today's development is a welcome one—and a preview as to how today's USDOL will treat misclassification concerns that fall into their laps from gig economy (and other) businesses. The next step is for the agency to take formal action with respect to investigatory decisions based on this same reasoning, or possibly issue guidance or formal regulations along these same lines. We can also hope that a court will look to this letter and adopt these same principles in an active piece of misclassification litigation. We will continue to provide necessary updates about the impact of this letter, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information.

If you have questions, please contact your Fisher Phillips attorney or any attorney in our Gig Economy Practice Group.

This Legal Alert provides an overview of a specific regulatory development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.