Published on *The National Law Review* https://natlawreview.com

DOL Issues Opinion Letter That May Provide Guidance on Independent Contractors in the Gig Economy

Article By:

Shannon D. Farmer

Elliot I. Griffin

The Department of Labor (DOL) issued an opinion letter on April 29, 2019 that provides guidance for gig economy companies on when workers can properly be classified as independent contractors not subject to the minimum wage and overtime requirements mandated by the Fair Labor Standards Act (FLSA).

In recent years, the DOL has swung back and forth on its standard for classifying workers as employees versus independent contractors. This uncertainty has made it difficult for businesses to grow and plan for the future. In 2015, the DOL issued an Administrator's Interpretation, which concluded that most workers are employees "under the FLSA's broad definitions." This contentious decision made waves in the industry, as it effectively presumed that workers for ride-share organizations or similar app-based companies were employees rather than independent contractors.

In 2017, the DOL withdrew that guidance, but did not immediately offer a replacement. One year later, in July 2018, the DOL issued guidance on independent contractors in the home health care industry. The DOL noted that certain actions—such as evaluating someone's work, instructing which assignments they had to accept, and approving time off—would be inconsistent with the classification of independent contractor.

The recent opinion letter is more expansive and provides a more detailed analysis, focusing on the role of independent contractors in the gig economy. The guidance responds to a question submitted by an unnamed virtual marketplace company (VMC) on whether its service providers are employees or independent contractors under the FLSA. Applying the traditional six factor economic reality test, the DOL determined the VMC's providers were independent contractors.

The crux of the FLSA independent contract test centers on whether the individual worker is economically dependent on the business for which he/she renders services. It examines the following factors:

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

- The permanency of the worker's relationship with the potential employer
- The amount of the worker's investment in facilities, equipment, or helpers
- The amount of skill, initiative, judgment, or foresight required for the worker's services
- The worker's opportunities for profit or loss
- The extent of integration of the worker's services into the potential employer's business.

In its letter, the DOL characterized the company as a "referral service," and described the workers as service providers working for the consumers—not the company—"through the virtual marketplace." The DOL concluded the workers had "complete autonomy" over their hours of work and the freedom to pursue external opportunities, including working with the company's competitors. Further, the DOL found that there was no permanent relationship because the workers could stop providing services at any time.

Evaluating the remaining factors, the DOL found that the company did not invest in the materials necessary to perform the work, and the workers themselves retained control over the opportunities for profit or loss because they could negotiate rates, despite the company setting the default price. Finally, the DOL found that the service providers were not integrated into the VMC's business because the business was providing the referral platform, not services to customers.

The DOL's employer-friendly reading of the independent contractor standard is likely to continue to add fuel to the extensive litigation throughout the country over the status of gig economy workers, which already has resulted in a variety of seemingly contradictory court decisions. Although the opinion letter is limited to the specific facts and circumstances presented, employers regularly seek to rely on opinion letters to bolster their defense against both liability and liquidated damages in FLSA claims. It remains to be seen what level of deference—if any—courts will give to the DOL's views, particularly since they were issued in the form of an opinion letter rather than formal rulemaking subject to public notice and comment periods.

National Law Review, Volume IX, Number 121