Alert

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COZEN O'CONNOR

DOL Shares Its Views on Independent Contractors in the Gig Economy

The Wage and Hour Division of the U.S. Department of Labor released this week its first opinion letter under the Trump administration on the subject of the classification of independent contractors under the Fair Labor Standards Act, providing insight on the current DOL's view of this often-complicated issue. The opinion letter, which analyzes the relationship between a "virtual marketplace company" in the "on-demand" or "sharing" economy, represents a stark departure from Obama-era guidance (withdrawn by the Trump DOL in 2017), which took the position that most workers should be classified as employees under the FLSA.

In the opinion letter, the DOL discussed the six factors that it considers when determining whether a worker is an employee or independent contractor: (1) the nature and degree of the potential employer's control; (2) the permanency of the worker's relationship with the potential employer; (3) the amount of the worker's investment in facilities, equipment, or helpers; (4) the amount of skill, initiative, judgment, and foresight required for the worker's services; (5) the worker's opportunities for profit or loss; and (6) the integration of the worker's services into the potential employer's business. These factors draw heavily from existing independent contractor case law, including the Fifth Circuit's recent independent contractor opinion, which is cited frequently in the opinion letter.

The DOL then applied those factors to the business model of the virtual marketplace company. Under this model, the company recruits a pool of workers, called "service providers," who provide services to the end-market consumer users of the company's matchmaking platform. The DOL noted that these service providers have significant flexibility, including the ability to pursue external economic opportunities, to "choose if, when, where, how, and for whom they will work … to their own profit and personal advantage." The DOL also pointed to the fact that service providers may perform work for competing platforms and do not rely on the company to provide any facilities, equipment, or helpers. The DOL specifically noted that simply providing the virtual platform through which service providers are connected to jobs does not weigh in favor of employee status. The DOL likewise confirmed, as a number of courts have done, that taking quality control measures, performing background checks, verifying credentials, and removing a non-compliant service provider do not establish an employment relationship.

The DOL's guidance comes on the heels of a similar sea change by the National Labor Relations Board earlier this year, when it overruled an Obama-era decision that minimized the opportunity for profit and loss as a factor in the Board's independent contractor analysis.

Although the DOL opinion letter carries particular significance for virtual marketplace companies and similar companies competing in the gig economy space, it provides valuable guidance for all companies and individuals wrestling with classification issues. All employers should take this opportunity to review their independent contractor arrangements to ensure that workers are properly classified, focusing on the six factors outlined in the DOL opinion letter. In addition to reviewing the actual day-to-day relationship between the company and the worker, employers should review written contracts with independent contractors to ensure they properly address the relationship between the parties.

Finally, local legislation governing independent contractor arrangements also may play a role in these reviews, such as the New York City "Freelance Isn't Free" Act, as states and municipalities pass laws to regulate in these areas.

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