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Freedom to Gig: New Department of Labor Opinion Bolsters Employers' Ability to Classify "Virtual Workers" as Independent Contractors

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The U.S. Department of Labor on Monday unveiled its first guidance under the current Administration on the hotly contested issue of employee-versus-independent contractor classification, saying workers for an unnamed technology platform that connects service providers with clients are independent contractors. The guidance was provided through an Administrator's Opinion Letter, and as such it provides unique defenses to employers with similar situations and who rely on the letter.

The company referenced in the letter is a virtual marketplace company ("VMC") which operates in the so-called "on-demand" or "sharing" economy. Generally, a VMC is an online and/or smartphone based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation, delivery, shopping, moving, cleaning, plumbing, painting, and household services. The VMC business model uses a software platform that matches consumers to service providers.

In the Opinion Letter, the Wage and Hour Administrator analyzes the company's business model using a six-factor test aimed at discerning the "economic realities" of whether workers are employees, who are subject to the Fair Labor Standards Act, versus independent contractors, who are not. This opinion may provide a useful roadmap for businesses that work with independent contractors, consultants, and similar non-employee workers.

The inquiry to the DOL was premised on a VMC whose business model is based on connecting workers with consumers. The workers/service providers underlying the DOL's opinion were not provided with equipment, materials, or working space by the platform and could, in effect, immediately begin working for consumers who were paired with them on the platform after being activated. The platform provided the contractors with basic information about the customer's service request (*e.g.*, what was needed, time when it was needed) and allowed the workers to communicate directly with customers.

Under their written agreements with the company, service providers could: accept, reject, or ignore any service opportunity on the platform; select service opportunities by time and place; determine the tools, equipment, and materials needed to deliver the services; and hire assistants or personnel. The VMC did not monitor, supervise, or control the particulars of how the service providers' work was performed, or inspect or rate the quality of the service provider's work. Customers on the platform had the ability to rate service providers' performance. Service providers were also at liberty to provide services to customers outside the company's technology platform, including on competing platforms.

The Administrator reiterated the DOL's position that the touchstone of employee versus independent contractor status has long been "economic dependence." While the inability of an individual to work on his or her own terms often suggests dependence, the ability to simultaneously draw income through work for others, such as by working for a competitor, indicates "considerable independence."

The DOL reiterated the "non-exclusive" six factors it—along with numerous courts—considers while determining economic dependence:

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, or foresight required for the worker's services;

5. The worker's opportunities for profit or loss; and
6. The extent of integration of the worker's services into the potential employer's business.

On the "control" factor, the DOL noted that "[a] business may have control where it, for example, requires a worker to work exclusively for the business; disavow working for or interacting with competitors during the working relationship; work against the interests of a competitor; work inflexible shifts, achieve large quotas, or work long hours, so that it is impracticable to work elsewhere; or otherwise face restrictions on or sanctions for external economic conduct…"

Regarding the "permanence" factor, the DOL observed that arises where "a business… requires a worker to agree to a fixed term of work; disavow working for or interacting with competitors after the working relationship ends; or otherwise, face restrictions on or sanctions for leaving the job in order to pursue external economic opportunities…"

On the "extent of integration" factor, the DOL noted that a worker's services are integrated into a business if they form the "primary purpose" of that business.

The DOL concluded that the VMC is essentially a referral platform and that the service providers at issue are independent contractors. The VMC receives no services from the service providers. Rather, it simply allows them to provide services to end-market consumers through the company's technology platform. In other words, the workers only use that platform to acquire service opportunities. The DOL stated that the VMCs offer a finished product to its service providers. As such, the service providers are not an integral part of the company's referral service; but rather they are consumers of that service.

The Opinion Letter provides welcome flexibility to businesses who seek to utilize independent contractors. In particular, it may apply to many other types of independent contractor versus employee analyses. For this reason, and with this Opinion Letter in hand, it may be a perfect time for many employers to reevaluate their independent contractors' classifications and if they believe that the contractors have been properly classified, document how they reached that conclusion.

This documentation may be critical to lessen or even eliminate liability should a court later find that the workers were misclassified or the Administrator's Opinion was wrong. This protection derives under two defenses made available by the Act in very narrow circumstances. One defense is "good faith reliance" on an Administrator's Opinion. In those cases, the employer will not owe any overtime pay or other damages even if the Opinion is ultimately held to be contrary to the law. The second is establishing the employer's good faith effort to comply with the law. When an employer is found to have acted in good faith, the court may, in its sound discretion, reduce or eliminate the potential damages award. As such, the Administrator's Opinion may provide employers with potential "good faith" defenses to avoid paying double the amount of unpaid overtime wages as statutory liquidated damages or, in some instances, some amount less than the amount of unpaid overtime.

For assistance in determining how this Opinion Letter may be applicable to your operations and how it may serve as a means to reduce, if not eliminate, your exposure under the FLSA for misclassifying contractors, contact Abad Lopez, Rob Boonin, any other member of Dykema's Labor & Employment Law Group, or your Dykema relationship attorney.

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