

US Department of Labor Issues Opinion Supporting Contractor Status for Gig Economy Workers

May 3, 2019

As a sizable portion of the modern labor economy shifts toward a marketplace-focused work structure, more cases and opinions are coming forth to confirm the viability of the gig economy platform model. A recent opinion letter from the United States Department of Labor (DOL), released on April 29, 2019, is the latest endorsement of the gig economy platform model, in this case, as it relates to worker classification under the Fair Labor Standards Act (FLSA).

Background

The genesis of [the opinion letter](#) was a request from a specific, unnamed gig economy platform (which they referred to as a virtual marketplace company or VMC) to determine whether the service providers using this VMC's software platform (service providers) were properly classified as independent contractors under the FLSA.

The DOL describes the VMC as a typical gig economy platform business. The VMC connects service providers with third-party customers through the use of its software platform in exchange for a referral fee. The VMC's software platform is available online and via a smartphone-based app. In addition, as customary with many gig economy platforms:

- Each service provider agrees to the VMC's terms of use and its platform agreement which, among other things, disclaims any employment relationship between the parties
- Service providers are not interviewed, on-boarded, or required to report to a physical office or undergo training they merely receive information about how to use – and excel in using – the virtual marketplace platform
- The VMC requires each service provider to complete a background check and self-certify any necessary credentials
- Service providers are paid per job performed by the consumer using the VMC's platform pay service provider
- Service providers are issued an IRS Form 1099
- Service providers can accept, reject or ignore service opportunities in their sole discretion
- Service providers determine the tools, equipment and materials necessary to perform services
- Service providers are not required to accept or complete a minimum number of service opportunities
- Service providers design their own schedules
- Service providers are permitted to "multi-app," or simultaneously accept service opportunities on multiple, and often, competing VMC platforms
- The VMC neither supervises the service providers nor imposes requirements on how service providers perform their services
- The VMC does not reimburse the service provider for any expenses

The DOL determines that the service providers are economically independent workers

The DOL observed that the "touchstone" of employee versus independent contractor status under the FLSA is "economic dependence" and, thus, weighed the six factors of the FLSA's "economic realities" test.

In the opinion letter, the control factor (which is routinely referred to as the most important factor in any misclassification analysis) and the factor considering the service provider's investment in its business were deemed to indicate an independent contractor relationship. The opinion letter's treatment of the other factors was also positive for gig economy platforms.

Permanency of relationship

The DOL concluded that the VMC does not have a permanent working relationship with service providers. Rather, the service providers maintained a "high degree of freedom to exit the working relationship," including permitting the service providers to interact with its competitors either during or after the relationship. In addition, even if service providers maintain an extended working relationship with the VMC, they only do so on a project-by-project basis.

Skill, initiative, judgment or foresight required

The DOL determined that service providers demonstrate "considerable independence" from the VMC, "regardless of the specific services they perform" based on the absence of mandatory training and ability to maximize their profits by choosing between different service opportunities and competing marketplace platforms. The reliance on the lack of training to establish "skill" in the opinion letter will undoubtedly be welcomed by gig economy platforms that cater to less skilled workers, such as manual laborers, delivery persons, or retail workers.

Opportunity for profit or loss

The DOL found that service providers enjoy a considerable opportunity for profit or loss because they do not receive a predetermined amount of compensation for their work. Rather, they control their profit or loss by choosing projects from competing marketplace platforms. The DOL reached this conclusion despite the VMC setting default prices, which is a factor often cited by courts and agencies that is purportedly an indication of employment.

Integrity

Finally, service providers are not integrated into the VMC's referral business because the business's "primary purpose is not to provide services to end-market consumers but to provide a referral system service providers with consumers." The DOL found that the VMC offers a "finished product" to services providers, who are consumers of that service and can negotiate over the terms and conditions of using that service. This factor has long frustrated gig economy platforms, given that courts and administrative agencies have frequently rejected their "primary purpose" argument.

What does this all mean?

The practical impact of this opinion letter is somewhat muted given its limited applicability. However, this endorsement of the model by the DOL remains a positive development for gig economy platforms and, while not binding authority, could further persuade states to make similar interpretations of wage and related laws.

Please contact us with any questions about the opinion letter or gig economy platforms.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our [legal notices](#).

Key Contacts

Ann Bevitt London	abevitt@cooley.com +44 (0) 20 7556 4264
Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330
Summer Wynn San Diego	swynn@cooley.com +1 858 550 6030
Steven A. Zuckerman New York	szuckerman@cooley.com +1 212 479 6647

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.