

## 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.

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