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US DOL Issues Final Rule to Simplify Analysis of Workers in Gig Economy

January 20, 2021

A critical and growing issue facing gig economy platforms and other similar business models is the failure of existing laws to reflect the realities of a modern, adapting workforce. In response to calls for action, the United States Department of Labor recently published a **final rule** providing a simplified framework to determine if a worker is an "employee" or an "independent contractor" under the Fair Labor Standards Act (FLSA). The final rule, scheduled to take effect on March 8, represents the latest DOL endorsement of the gig economy platform model.

Background

In its final rule, the DOL observed that the FLSA does not define the term "independent contractor." Instead, the DOL long ago adopted the economic realities test to determine proper worker classification. The economic realities test ultimately evaluates the extent of a worker's economic dependence on the putative employer: the more dependent the worker is on the business, the more likely he or she could be considered an employee of that business.

The DOL noted that there has been significant confusion regarding the meaning of economic dependence and increasing legal uncertainty against the backdrop of increasingly flexible work arrangements. The DOL therefore promulgated the final rule to provide greater clarity on its own worker classification test under the FLSA.

DOL provides five factors to determine a worker's 'economic reality'

In its effort to clarify the confusion caused by the ever-changing meaning of the "economic reality" of a worker's engagement, the DOL provided five factors to assess a worker's economic dependence. Although the factors below are not exhaustive, and no single factor is dispositive, the DOL has clarified that the first two factors "are the most probative as to whether or not an individual is an economically dependent 'employee.'" If these two factors point to the same conclusion, the remaining three factors need not be analyzed in making the classification determination.

1. **The nature and degree of the worker's control over the work.** This factor examines whether the worker exercises substantial control over key aspects of the performance of the work, such as scheduling the hours worked, selecting projects and/or being able to work for competing companies. The DOL noted, however, that even if a business required a worker to comply with specific legal obligations – such as satisfying health/safety standards and carrying proper insurance, or contractually agreed-upon deadlines or quality control standards – this alone would *not* constitute "control" for the purpose of this factor.
2. **The worker's opportunity for profit or loss.** This factor focuses on the extent of the worker's opportunity to earn profits or incur losses based on (i) his or her own managerial skill, business acumen or judgment, and (ii) management of his or her investment in or capital expenditure on helpers or equipment or material to further his or her work. By contrast, if a worker "is unable to affect his or her earnings or is only able to do so by working more hours or faster," the more likely he or she is classified as an employee under the FLSA.

If these first two factors conflict, however, the following three remaining factors can serve as further guideposts for proper classification.

3. **The amount of skill required for the work.** This factor examines whether the individual's work requires specialized training or skill that the business does not provide.
4. **The degree of permanence of the working relationship.** This factor examines whether the relationship is impermanent (i.e., finite or sporadic) or permanent (i.e., indefinite or continuous). If a worker's engagement falls into the former category, this would be indicative of an independent contractor relationship.
5. **Whether the work is part of an "integrated" unit of production.** This factor focuses on the extent the work is a component of the business's "integrated production process" for a good or service. Significantly, in incorporating this rule, the DOL rejected the prior test's assessment of a worker's "integrality" – which focused solely on a worker's "importance" or "centrality" – because it found that identifying the "'core or primary business purpose' is not a useful inquiry in the modern economy." Instead, under this factor, the worker is not likely to be found to be an employee if they are not "integrated" into the business's production process, which is composed of operational subparts working in coordination towards a "specified unified purpose."

Also noteworthy, the DOL announced that offering health, retirement and other benefits to independent contractors in and of itself is not "necessarily indicative of employment status." However, the DOL cautioned that offering the same benefits to both independent contractors and employees poses misclassification risks.

Will the final rule take effect?

This remains to be seen. While the final rule is scheduled to go into effect on March 8, 2021, the future of the final rule remains uncertain because the incoming Biden administration is expected to issue a directive to all agencies to delay the effective date of any pending regulation that is not yet effective. Further, under the Congressional Review Act, the Democratic majority in the Senate and House could rescind the final rule with presidential approval.

What does this all mean?

Unlike the DOL's 2019 **Opinion Letter supporting the gig economy**, if implemented, the final rule constitutes binding authority that stands to alter how the DOL and adjudicative bodies analyze and ultimately classify workers under the FLSA. Although its practical impact can be limited by state laws with different and potentially more rigorous standards, the final rule represents another positive development for gig economy platforms and others businesses hampered by worker classification tests that fail to reflect, as the DOL describes it, the modern economy.

Please contact us with any questions about the final rule or worker classification issues.

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