Employment Law Alert: DOL Opinion Letter

U.S. Department of Labor Issues Opinion Letter Classifying Workers in the Gig Economy As Independent Contractors

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The U.S. Department of Labor (DOL) recently issued an Opinion Letter analyzing the classification of workers in the virtual marketplace or "gig economy." This refers to companies that operate in the "on-demand" or "sharing" economy, using online and smartphone applications to connect consumers to service providers in a wide variety of services, such as transportation, cleaning, delivery, and shopping.

The DOL was asked to analyze the classification of such service providers under the Federal Labor Standards Act (FLSA), ultimately deciding that based upon the facts provided by the unidentified company in question, the service providers were independent contractors.

This is vitally important in that independent contractors are not afforded the same protections under the FLSA as employees. For example, employees are entitled to minimum wage, overtime pay, and other benefits under the FLSA, while independent contractors are not.

The DOL characterized the company as merely a "referral service" that "empowers service providers to provide services to end-market consumers." Essentially, the DOL found, the service providers are working for the consumer rather than the company. In that sense, the service providers are not economically dependent upon the company – the traditional test the DOL uses in classifying workers as employees or independent contractors.

The DOL analyzed six factors in making that determination. In particular, the DOL found the company lacked any significant control over the service providers, by allowing service providers to set their own schedules and work load. The company also did not stop service providers from working for others outside of the virtual platform, including competitors, nor do they have a permanent working relationship. The company also requires its service providers to invest in and provide its own equipment, for which it does not reimburse. It additionally does not require trainings of its service providers and allows the service providers "managerial discretion" in performing their services. Further, the service providers have complete control over their ability to control their profits or losses, by choosing one job over another, negotiating prices, or taking more or less jobs as they themselves determine. Lastly, the DOL determined a lack of integrality, meaning that the service providers are not an integral part of the business. Instead, the company developed a finished platform specifically as a referral business to connect the service providers and consumers. More plainly, the company's business is not that of transportation or cleaning, for example. The company's business is simply providing the referral opportunity for that transportation or cleaning by the service provider.

It is worth noting that the determinations reached in this Opinion Letter were issued based upon the specific facts provided by that unidentified company to the DOL; however, the principles stated therein will likely be applied broadly to other companies in that industry.

For more information on the classification of independent contractors and employees, please contact **Matthew Mitchell**.