

Gallagher Sharp Employment Newsflash: U.S. Department of Labor finds Employees in the “Gig Economy” are Independent Contractors

By Attorney Julie Juergens

The U.S. Department of Labor’s (DOL) Wage and Hour Division issued an Opinion Letter on April 29, 2019 addressing whether service providers working for an unnamed virtual marketplace company platform (an online and/or smartphone-based referral service that connects service providers with consumers; e.g. Lyft or TaskRabbit) are employees or independent contractors. The Opinion Letter explained that when determining whether a service provider is an employee or independent contractor, the “touchstone ... has long been ‘economic dependence.’” Six, non-exhaustive factors are examined to determine economic independence: (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.

After examining these factors, the DOL concluded service providers were independent contractors because service providers are allowed “significant flexibility, including the ability to pursue external economic opportunities,” are free to exit the working relationship, are not prohibited from working for competitors concurrently, are also free to invest in facilities, equipment, or helpers, do not undergo mandatory training to develop skill required for their services, have almost complete control over their profits or losses, and are not integrated into the company’s referral business.

While not binding upon any court, courts may defer to the agency’s interpretation of the law. The DOL’s Letter provides a useful framework to gig economy companies to argue that service providers are not employees and, therefore, not subject to the FLSA.

The Opinion Letter can be found at:

https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf.

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