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Two Federal Agencies Make It Easier to Establish Independent Contractor Status

ALERT | June 5, 2019

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Recently, both the U.S. Department of Labor (DOL) and the National Labor Relations Board (NLRB) issued documents supporting independent contractor status, evidencing the more pro-employer stance of the Trump administration as compared to the Obama administration. Although those documents — an opinion letter from the DOL and an advice memorandum from the NLRB's Office of General Counsel — apply only to misclassification claims under the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA), respectively, they provide helpful guidance to companies on structuring their independent contractor relationships to minimize the risk of a misclassification claim. Companies should be mindful, however, that other laws — such as state wage and hour, unemployment compensation and workers' compensation statutes — may impose higher burdens for proving that individuals are independent contractors.

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Department of Labor Opinion Letter

On April 29, the DOL issued an opinion on whether service providers working for a virtual marketplace company (VMC) are employees or independent contractors under the FLSA. A VMC is "an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation, delivery, shopping, moving, cleaning, plumbing, painting, and household services."

The VMC that sought the DOL's opinion provides a software platform that receives a service request from a consumer and provides that information to a service provider through the software platform. From that point, the service provider communicates directly with the consumer. The service provider decides whether to accept a particular service request, determines the time during which he or she wishes to provide services, and negotiates price adjustments directly with the consumer. Service providers also have the right to obtain work on a competitor software platform at the same time that they access the VMC's platform and to determine the most desirable service opportunity available at a given time. Further, service providers purchase their own supplies and equipment and are responsible for all of their expenses. On the facts presented to it, the DOL easily found that the service providers are independent contractors. In doing so, the DOL applied the "economic realities" test, which has long been used to evaluate independent contractor status under the FLSA. The test analyzes six factors to determine whether a worker is economically dependent on a potential employer:

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
6. the extent of integration of the worker's services into the potential employer's business.

The DOL concluded that each of these factors pointed toward independent contractor status.

Control

The DOL found that the VMC does not exercise control over its service providers. It does not require specific hours or a specific amount of work. It does not dictate how service providers must perform their work and does not monitor, supervise or control the work. Finally, it permits the service providers to work for competitors, even canvassing opportunities from competitors at the same time that they review opportunities from the VMC to select the opportunity that provides the most profit.

Permanency of Relation

The DOL again relied on the ability of service providers to pursue work for competitors in finding that, because service providers are free to stop working for the VMC and perform services for a competitor, the relationship is not permanent. The DOL was not swayed by the provision in the contract between the VMC and the service providers stating that the VMC would terminate the relationship only for cause, which is suggestive of a long-term relationship, finding that the termination for cause provision applied only on a project-by-project basis.

Investment in Facilities, Equipment or Helpers

The DOL noted that the service providers are responsible for obtaining all necessary resources to perform their services at their own expense. The VMC's investment is limited to the virtual referral platform.

Skill, Initiative, Judgment or Foresight Required

Again relying on the ability of the service providers to choose between service opportunities on competing virtual platforms with the objective of maximizing their profits, the DOL concluded that the service providers exercise managerial discretion. The DOL also noted that the service providers do not undergo mandatory training, which reflects their economic independence.

Opportunity for Profit and Loss

The DOL observed that the service providers have the ability to choose between different jobs with different prices, can accept as many or as few jobs as they wish, can negotiate the price of the jobs with the consumer, and can interact with competing VMC platforms to select the opportunities that will maximize profit. The DOL noted that the VMC retains some control over the service providers' profits and losses by setting default prices for jobs, but concluded that, overall, the profit and loss factor weighed in favor of independent contractor status.

Integrality

The DOL found that the service providers are not integrated into the VMC's business. The VMC's business is to provide a system of referring consumers to service providers. The service providers, on the other hand, are in the business of providing services to the consumers. They are not involved at all in operating the software platform. They merely access it to acquire service opportunities.

NLRB Advice Memorandum

The NLRB used the common law agency test recently adopted in its opinion in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), to conclude that UberX and Uber Black drivers are independent contractors and therefore not eligible to unionize under the NLRA. In *SuperShuttle*, the Board found that drivers who transported passengers by van were independent contractors because they had total control over their work schedules, kept all fares they collected, and had discretion over which trips to perform. According to the Board, the SuperShuttle drivers had "'nearly unfettered opportunity to meet and exceed their weekly overhead,' indicating significant opportunity for economic gain."

Like the economic realities test used by the DOL, the NLRB's common law agency test focuses on (1) the extent of control over the work; (2) the skill required in the particular occupation; (3) whether the worker supplies his or her own instrumentalities, tools and place of work; (4) the length of time for which the person is employed; and (5) whether the work is part of the regular business of the employer. However, the common law agency test also looks at several other factors, such as (1) whether the worker is engaged in a distinct occupation or business; (2) whether the kind of occupation is

the type in which the work usually is done under the direction of the employer or by a specialist without supervision; (3) the skill required for the particular occupation; (4) the method of payment; (5) whether the parties believe they are creating the relationship of master and servant; and (6) whether the principal is or is not in business.

The NLRB noted that, in the shared-ride and taxicab industries, it also gives significant weight to two additional factors: (1) the extent of the company's control over the manners and means by which the drivers conduct business and (2) the relationship between the company's compensation and the amount of fares collected. Quoting its *SuperShuttle* opinion, the Board noted that an "important animating principle by which to evaluate those factors . . . is whether the position presents the opportunities and risks inherent in entrepreneurialism."

In analyzing whether the UberX and Uber Black drivers were independent contractors, the Board considered the common law factors, "viewed through the 'prism of entrepreneurial opportunity.'" It determined that the drivers had significant opportunities for economic gain because they had freedom to set their own work schedules, control their work locations, and work for competitors. Although Uber collected a percentage of fares paid by riders rather than charging drivers a flat fee for the opportunity to use the Uber app, the NLRB did not find this issue dispositive in light of the drivers' independence from Uber's control. The Board also noted that other factors of the common law agency test supported independent contractor status, including that the drivers provided their own cars; were responsible for chief operating expenses, such as gas, cleaning and maintenance; and operated without supervision. Even though the drivers did not work in a distinct occupation or business, but rather as part of Uber's regular business of transporting passengers, the Board did not find that to be strong enough indicia of an employment relationship to overcome all of the other factors pointing toward an independent contractor relationship.

Conclusion

Although the DOL and the NLRB used somewhat different tests for determining independent contractor status, they each concluded that the arrangements at issue provided sufficient economic independence to support an independent contractor relationship. The facts described in the DOL opinion letter presented a fairly straightforward case for finding independent contractor status under the economic realities test, and perhaps the DOL would have reached a different conclusion if the relationship between the service providers and the VMC had more indicia of employee

status. Likewise, the NLRB had no difficulty reaching the conclusion that Uber drivers were independent contractors following its analysis in the *SuperShuttle* case. Nevertheless, the opinion letter and advice memorandum provide a helpful structure for employers to adopt in establishing and maintaining their independent contractor relationships.