

May 7, 2019

## U.S. Department of Labor Issues New Guidance Narrowing the Definition of Workers Qualifying Under the FLSA as Employees

In an April 29, 2019 opinion letter (FLSA2019-6) (“Letter”), the U.S. Department of Labor (“DOL”) issued new guidance on who qualifies as an employee for purposes of the Fair Labor Standards Act (“FLSA”).<sup>1</sup> The DOL, in considering whether service providers working for a virtual marketplace company (“VMC”) were employees or independent contractors under the FLSA, applied a six-prong “economic dependence” test, and concluded that all six factors weighed in favor of independent contractor status in the specific circumstance before it. The Letter’s interpretation of who is an employee under the FLSA is narrower than the approach embraced in the now-withdrawn 2015 Obama Administration’s Administrator’s Interpretation (AI-2015-1),<sup>2</sup> which emphasized that “most workers are employees under the FLSA’s broad definitions.”<sup>3</sup> The new DOL guidance, however, is similar to the recently narrowed National Labor Relations Board’s (“NLRB”) test for determining whether workers are employees under the National Labor Relations Act (“NLRA”).<sup>4</sup>

In announcing the Letter, the Acting Administrator of the DOL’s Wage and Hour Division Keith Sonderling stated that the Letter is to “offer further insight into the nexus of current labor law and innovations in the job market.”<sup>5</sup> But the DOL guidance could have implications beyond the “on-demand” or “sharing” economy that was at issue in the Letter.

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<sup>1</sup> Opinion Letter FLSA2019-6, Department of Labor (April 29, 2019), [https://www.dol.gov/whd/opinion/FLSA/2019/2019\\_04\\_29\\_06\\_FLSA.pdf](https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf).

<sup>2</sup> Administrator’s Interpretation No. 2015-1, “The Application of the Fair Labor Standards Act’s “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors,” Department of Labor (July 15, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> News, “NLRB Returns to Long-Standing Independent-Contractor Standard,” National Labor Relations Board (Jan. 25, 2019), <https://www.nlr.gov/news-outreach/news-story/nlr-returns-long-standing-independent-contractor-standard>.

<sup>5</sup> News Release, “U.S. Department of Labor Issues New Wage and Hour Opinion Letter, Concludes Service Providers for a Virtual Marketplace Company are Independent Contractors.,” Department of Labor (April 29, 2019), <https://www.dol.gov/newsroom/releases/whd/whd20190429>.

### Prior DOL and NLRB Guidance

In 2015, the DOL under the Obama Administration issued guidance on the standards for determining who is an employee under the FLSA.<sup>6</sup> The 2015 Administrator’s Interpretation set out an “economic realities” six-factor test—the same test and factors that were cited by the DOL in the 2019 Letter. But in the 2015 guidance, the DOL instructed that the test be “liberally construed to provide broad coverage for workers,” out of concern that employers were commonly misclassifying employee as independent contractors to “cut costs and avoid compliance with labor laws.”<sup>7</sup> The Trump Administration withdrew that guidance in 2017, while stating that such withdrawal “does not change the legal responsibilities of employers under the [FLSA].”<sup>8</sup>

In January of this year, in a decision involving a group of franchisee airport shuttle operators, the NLRB revised its test for determining whether workers are employees or independent contractors for purposes of the NLRA.<sup>9</sup> While seemingly adhering to its traditional common-law agency test, which includes a non-exhaustive list of ten factors,<sup>10</sup> the NLRB stated that those factors would be assessed through the “prism of entrepreneurial opportunity” when relevant, thereby making it easier to find a worker to be an independent contractor.<sup>11</sup> In holding that the drivers in *SuperShuttle* were independent contractors, the NLRB relied on factors indicating significant opportunity for economic gain and significant risk of loss, *i.e.*, that the franchisees had complete autonomy over their work schedule, had no set routes, had discretion over the bids they accepted, kept all of the fares collected, and purchased or leased their own vans.

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<sup>6</sup> Administrator’s Interpretation No. 2015-1, *supra* note 2.

<sup>7</sup> *Id.*

<sup>8</sup> News Release, “US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance,” Department of Labor (June 7, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170607>.

<sup>9</sup> *SuperShuttle DFW, Inc. and Amalgamated T Transit Union Local 1338*, 367 NLRB No. 75 (N.L.R.B.) (Jan. 25, 2019).

<sup>10</sup> Under the NLRB “common-law agency” test, the relevant factors include: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business. *Id.* at \*2.

<sup>11</sup> *Id.* at \*15.

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### 2019 DOL Letter Background

The Letter was a response to a request for an opinion from a particular VMC, which the DOL defines as “an online and/or smartphone-based referral service that connects service providers [through a software platform] to end-market consumers to provide a wide variety of services, such as transportation, delivery, shopping, moving, cleaning, plumbing, painting, and household services.”<sup>12</sup>

According to the Letter, the VMC at issue, before matching service providers with consumers, asked service providers to certify their experience and qualifications, complete background and identity checks through third parties, and accept a terms of use agreement and service agreement, which stated that the VMC provides only a platform connecting service providers with consumers and disclaimed any employment relationship with the providers.

The VMC allowed the service providers to design their own work schedule, accept or reject any service opportunities, and simultaneously work on a competitor VMC platform. Also, there was no requirement as to how the service providers must perform their work or a minimum number of service opportunities they had to accept. Moreover, the VMC did not inspect or evaluate the service providers’ work for quality, and it required them to purchase all of their supplies and equipment at their own expense.

At the same time, the VMC set the default prices for different services, imposed a cancellation fee if a service provider cancels an accepted service opportunity without sufficient notice, allowed consumers to rate the service providers’ performance, and reserved the right to terminate its relationship with a service provider who commits a material breach such as fraud or inappropriate behavior toward a consumer or the VMC.

### The April 29 DOL Opinion Letter

In determining that a service provider for this particular VMC was an independent contractor, not an employee, the DOL applied the six-factor “economic dependence” test, derived from the Supreme Court precedents *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) and *United States v. Silk*, 331 U.S. 704, 716 (1947). The factors, which are aimed at determining the “economic realities” of the relationship between the service providers and the VMC, are:

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;

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<sup>12</sup> Department of Labor, *supra* note 1, at 1.

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.<sup>13</sup>

The DOL concluded that all six factors weighed in favor of finding that the service providers who use the VMC's virtual platform are economically independent from the VMC and therefore independent contractors, not employees. Specifically, as to each factor, the DOL found:

First, as to the nature and degree of the potential employer's control, the DOL found that the fact the service providers have "complete autonomy" to choose the hours of work, simultaneously work for a competing VMC, and are subject to minimal supervision by the VMC "weighed heavily in favor of" independent contractor status.<sup>14</sup> Several requirements imposed by the VMC, such as background and identity checks or the VMC's reservation of the right to remove a service provider, were found to be insufficient to overcome the "general lack of control" that the VMC exercises over "when where, how, and for whom" the providers work.<sup>15</sup>

Second, the DOL found that there was no permanent working relationship between the VMC and its service providers because the providers are free to interact with the VMC's competitors and to exit the relationship.

Third, the DOL found that the VMC at issue does not invest in "facilities, equipment, or helpers on behalf of their service providers," but rather, requires them to purchase all necessary equipment for their work at their own expense.<sup>16</sup> The DOL, while recognizing that the VMC does invest in its virtual referral platform upon which the service providers do rely, found that such an investment, without more, was insufficient to establish an employment relationship, as service providers use similar software on competitor platforms.

Fourth, as to the amount of skill, initiative, judgment, or foresight required for the worker's services, the DOL found that this factor too weighed in favor of independent contractor status because the service providers exercise managerial discretion—by potentially choosing between different services opportunities and competing virtual platforms—and do not undergo mandatory training.

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<sup>13</sup> *Id.* at 4. The Letter noted that encompassed within these factors is the "worker's degree of independent organization and operation."

<sup>14</sup> *Id.* at 7–8.

<sup>15</sup> *Id.* at 8 n.4.

<sup>16</sup> *Id.* at 9.

Fifth, the DOL found that the service providers have “control [over] the major determinants of profit or loss” because they could work for different platforms, choose how to perform the job, negotiate the prices of their jobs, and cancel an accepted job notwithstanding a cancellation fee.<sup>17</sup>

Finally, the DOL found that the service providers are not “operationally integrated” into the VMC’s referral business because the service providers themselves are merely “consumers” of the VMC’s service “as a matter of economic reality,” and the VMC’s primary business purpose is to provide a referral platform rather than to provide services to end-market consumers.<sup>18</sup>

### Implications and Key Takeaways

The Letter is a significant development for employers who use or wish to use independent contractors. Moreover, its conclusion that the service providers are working for end-market consumers, not the VMC, “as a matter of economic reality” is in line with recent trends on the issue of who is an employee under the FLSA and NLRA.

With the DOL Letter, companies that operate in the “on-demand” or “sharing” economy may expect to enjoy increased flexibility in classifying their service providers as independent contractors as opposed to employees. And even though the Letter factually addresses a specific type of employment arrangement—a gig arrangement on a virtual platform—all employers, no matter the industry or type of employment arrangement, may benefit from the DOL’s reasoning as to which factors support independent contractor status. There is, however, a continued risk of litigation on worker misclassification, as it is unclear how much deference courts will give this non-binding guidance, particularly in light of several significant cases currently on appeal in the Third and Ninth Circuits. *See, e.g., Lawson v. Grubhub, Inc.*, No. 18-15386 (9th Cir. filed Mar. 8, 2018) (appealing district court decision holding that a driver for an online food ordering platform was an independent contractor under California law); *Razak, et al. v. Uber Techs., Inc.*, No. CV 16-573, 2016 WL 5874822 (E.D. Pa. Oct. 7, 2016), *appeal docketed*, No. 18-1944 (3d Cir. Apr. 27, 2018) (holding that drivers for a ride-sharing service sufficiently alleged that they were employees under the FLSA and state law).

Further, the Letter may provide a reasonable defense to employers under the Portal-to-Portal Act if they were to rely on the DOL’s guidance.<sup>19</sup> Under the Act, an employer is protected from any liability arising from its alleged failure to pay minimum wages or overtime compensation under the FLSA if it can prove good faith conformity with and reliance on “any written administrative regulation, order, ruling, approval,

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<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> 29 U.S.C.A. § 252.

or interpretation.”<sup>20</sup> Other agencies and/or states, however, may have different views from those expressed in the DOL Letter. Employers who use or intend to use independent contractors may wish to ensure that their arrangements with such individuals comport with the DOL’s six-factor “economic dependence” test, and may also wish to make a written record that they are relying on the test in classifying them as independent contractors. Employers should also consider consulting with counsel to ensure that their arrangements also comport with any other agency guidance or state law applicable to their workforce.

The DOL News Release can be found here: <https://www.dol.gov/newsroom/releases/whd/whd20190429>.

The opinion letter can be found here:

[https://www.dol.gov/whd/opinion/FLSA/2019/2019\\_04\\_29\\_06\\_FLSA.pdf](https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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<sup>20</sup> 29 U.S.C.A. § 259; *see also* 29 U.S.C.A. § 258.