CLIENT ALERTS & INSIGHTS

Department of Labor Withdraws Gig Economy Opinion Letter that Supported Independent Contractor Classification

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On February 19, 2021, the Department of Labor's Wage and Hour Division withdrew its opinion letter that indicated gig economy workers who offer services in a virtual marketplace are independent contractors. The Wage and Hour Division had previously published this opinion letter, FLSA2019-6, on April 29, 2019. This recent withdrawal is another signal that the Department of Labor under the Biden administration is closely scrutinizing the classification of workers as independent contractors.

The Wage and Hour Division previously published the now-withdrawn opinion letter in response to a request from a "virtual marketplace company" that connects service providers with individuals seeking those services. The withdrawn opinion letter opined that the workers offering services in the virtual marketplace platform "are independent contractors, not employees of [the virtual marketplace platform]" based on the Department of Labor's long-standing six-factor "economic realities" test to determine the worker's economic dependence on the entity at issue. The six factors 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, 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 withdrawal of FLSA2019-6 is an "official ruling" of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. Parties may no longer rely on opinion letter FLSA2019-6 as a statement of agency policy as of February 19, 2021. Businesses should note that opinion letters are not legally binding, but parties can present opinion letters in court as persuasive guidance to boost claims or defenses in cases involving similar issues. For the time being, there is no definitive, revised stance from the Wage and Hour Division until it publishes a new opinion letter on the question of classification of gig economy independent contractors.

The withdrawal of this opinion letter follows the Department of Labor's proposed delay of the effective date of the Trump-era final rule entitled "Independent Contractor Status Under the Fair Labor Standards Act." The Department of Labor has proposed to delay the effective date of the final rule in order to provide additional time for review and consideration of the rule. In its withdrawal notice posted to opinion letter FLSA2019-6, the Wage and Hour Division noted as follows: "This letter addressed the same issue under consideration by the Department-independent contractor

status under the FLSA. Thus, consistent with its proposed delay of the final rule, WHD is withdrawing this opinion letter."

Benesch is continuing to monitor further developments and will provide future alerts as the Biden-era Department of Labor continues to develop its stance on the proper classification of workers as independent contractors.

For more information on this topic, contact a member of the firm's Labor & Employment practice group.

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