

## LAW &amp; POLICY GROUP

**GRIST**

## INDEPENDENT CONTRACTOR OR EMPLOYEE? DOL, NLRB WEIGH ONLINE MARKETPLACES

*By Mercer's Catherine Stamm and Cheryl Hughes  
May 16, 2019*

**In This Article**

[VMP Structure](#) | [DOL Analysis](#) | [NLRB's Uber Findings](#) | [State Laws](#) | [Employer Implications](#) | [Related Resources](#)

Service providers working for a virtual marketplace provider (VMP) are independent contractors in the “on-demand” economy, not employees protected by the [Fair Labor Standards Act](#) (FLSA), the Department of Labor (DOL) says in an April 29 opinion letter ([FLSA 2019-6](#)). An April 16 [advice memorandum](#) from the National Labor Relations Board (NLRB) likewise finds Uber drivers are contractors rather than employees.

**VMP STRUCTURE**

The VMP that sought DOL's opinion uses an online platform and smartphone software that connects consumers to providers of various services, including transportation, delivery, shopping, moving, cleaning and more. The service providers must pass certain background checks and adhere to the VMP's terms of use. Otherwise, the providers are free to work as much or as little as they choose and schedule their own hours. They may perform similar work for competitors or even for the VMP's clients on their own terms outside of the software platform. The service providers must provide and pay for all their own supplies and equipment. The business pays them as IRS [Form 1099-MISC](#) workers on a per-job basis.

**DOL ANALYSIS**

To determine whether the service providers are employees economically dependent on the VMP, the DOL used a fact-specific analysis that considers these factors:

- Employer control
- Relationship permanency
- Worker investment in facilities, equipment or helpers
- Skill, initiative, judgment or foresight required for the worker's services

- Worker's opportunity for profit or loss
- Integration of worker's services in the business's primary purpose

While the DOL concluded in this case that the service providers are independent contractors not covered by the FLSA, the agency cautions that each determination must weigh these factors as a whole. Although only the party that requested advice can rely on a DOL opinion letter, it does provide some insight into the agency's views on a particular issue.

### NLRB'S UBER FINDINGS

In a separate advice memo, the NLRB's general counsel found that drivers for the ride-sharing company Uber are independent contractors. The general counsel's conclusion relied on the common-law "agency" test, which examines factors similar to the ones used in the DOL opinion letter.

The NLRB general counsel considered all the common-law factors through "the prism of entrepreneurial opportunity" and concluded that Uber drivers are independent contractors. As support, the memo notes that drivers have virtually complete control of their cars, work schedules and log-in locations, as well as the freedom to work for Uber competitors. The facts show the drivers have the "significant entrepreneurial opportunity" that distinguishes independent contractors from employees, the memo said.

### STATE LAWS

Despite these federal opinions, some states have set their own standards for determining which workers are independent contractors and exempt from state labor laws. Two examples of states with independent contractor standards that differ from the federal tests include California and New Jersey.

#### California

In a 2018 California case, the state's supreme court applied standards distinct from the tests used by the DOL or the NLRB (*Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018)). According to the court, three factors are necessary for independent contractor status:

- The worker is free from the hiring entity's control and direction with respect to the work contract and performance.
- The work performed is outside the usual course of the hiring entity's business.
- The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Using these factors, the court found that a delivery service's drivers, while free to set their own schedules, must comply with certain standards set by the business. Those standards, taken together, create an employment relationship, making the drivers employees under California law, the court ruled.

## New Jersey

New Jersey's standards for distinguishing an employee from an independent contractor are virtually identical to the criteria specified by California's supreme court. The state's unemployment insurance law ([NJ Stat. Ann. § 43:21-19\(i\)\(6\)](#)) finds an employment relationship exists unless a worker not only has control over how, when and where to perform the work, but also is normally involved in an independent trade, occupation or business.

## EMPLOYER IMPLICATIONS

In the burgeoning gig economy, some businesses may need to assess whether a particular worker is an employee or an independent contractor to determine whether certain laws apply. Similar standards come into play when evaluating whether certain workers are employees eligible for ERISA-covered benefit plans or independent contractors excluded from those plans. Examples of rights extended to employees but not contractors include the FLSA's minimum wage and overtime standards, leave protections under the [Family and Medical Leave Act](#) (FMLA), ERISA vesting requirements for retirement plans, and an offer of health coverage under the [Affordable Care Act](#) (ACA). Many state laws impose additional obligations and may set different factors to determine the employment relationship.

The DOL opinion letter and NLRB memorandum may provide a guide for employers making similar determinations about employee or independent contractor status under the FLSA and National Labor Relations Act. However, given the potential for litigation, the varying tests applied by other federal agencies and courts, and the divergent standards under some state laws, employers should work with legal counsel to make these determinations.

## RELATED RESOURCES

### Non-Mercer Resources

- [Opinion Letter \(FLSA 2019-6\)](#) (DOL, April 29, 2019)
- [General Counsel Advice Memorandum \(ADV. 13-CA-163062\)](#) (NLRB, April 16, 2019)
- [Dynamex Operations West, Inc. v. Superior Court](#), 4 Cal.5th 903 (2018)
- [Summary of NJ Stat. Ann. § 43:21-19\(i\)\(6\)](#) (NJ Dep't of Lab. and Workforce Dev.)

### Other Mercer Resources

- [Building Your Workforce for the Future](#) (May 3, 2019)
- [Three Keys To Engage and Motivate Your Gig Workers](#) (May 22, 2017)
- [Will the Gig Workforce Drive New Normal for Benefits?](#) (June 16, 2016)

*Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.*