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DOL, NLRB weigh employee vs. independent contractor status

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May 16, 2019; revised March 12, 2021

In this article

The US Department of Labor (DOL) has proposed withdrawal of the final Fair Labor Standards Act (FLSA) independent contractor rule and has withdrawn opinion letter FLSA 2019-6. That letter found service providers working for a virtual marketplace provider (VMP) are independent contractors in the "on-demand" economy, not employees protected by the FLSA. A similar 2019 advice memorandum from the National Labor Relations Board (NLRB) finding Uber drivers are independent contractors rather than employees remains in place, at least for now. Updates to this GRIST reflect the Biden administration's withdrawal of the DOL opinion letter and proposed rescission of the final rule.

FLSA independent contractor rule revisited

DOL's proposal to rescind a final FLSA rule on independent contractor status aligns with the agency's earlier withdrawal of a related opinion letter analyzing independent contractor vs. employee status. The Trump administration rule would have made it easier for businesses to classify workers as independent contractors rather than employees. After delaying the effective date to May 7 to review issues of law, policy and fact, DOL now is proposing to withdraw the final rule (and perhaps start anew in writing this rule). The agency says several concepts in the rule's independent contractor analysis that neither courts nor DOL have previously applied could cause confusion or inconsistent outcomes rather than provide clarity or certainty. DOL will take comments on the proposed rescission until April 11, 2021 — 30 days after publication in the Federal Register.

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DOL opinion letter on 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.

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

Because DOL has withdrawn this opinion letter, it can no longer be relied on as a statement of agency policy.

NLRB's Uber findings

In a separate April 2019 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 now-withdrawn DOL opinion letter.

The NLRB general counsel considered all 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. According to the memo, the facts show the drivers have the "significant entrepreneurial opportunity" that distinguishes independent contractors from employees.

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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:

- A — The worker is free from the hiring entity's control and direction with respect to the work contract and performance.
- B — The work performed is outside the usual course of the hiring entity's business.
- C — 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.

A 2019 state law (Ch. 296) codified this ABC test for distinguishing between employees and independent contractors. However, voters last fall passed a ballot measure excluding app-based ride-share and delivery drivers from that law, and litigation over the 2019 law is ongoing.

New Jersey

New Jersey's standards for distinguishing an employee from an independent contractor are virtually identical to California's criteria. 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 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

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Family and Medical Leave Act, ERISA vesting requirements for retirement plans, and employer offers of health coverage under the Affordable Care Act. Many state laws impose additional obligations and may set different factors to determine the employment relationship.

The NLRB memorandum gives some guidance for employers determining employee or independent contractor status under the National Labor Relations Act, but the Biden administration's new general counsel might revise this memorandum. Employers making similar determinations under the FLSA face uncertainty in light of the withdrawn DOL opinion letter and FLSA independent contractor rule. Given the potential for litigation, the varying tests applied by different 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

- Proposed rule, Withdrawal of FLSA rule on independent contractor status (Federal Register, March 12, 2021)
- Final rule, Independent contractor status under the Fair Labor Standards Act (FLSA): Delay of effective date (Federal Register, March 4, 2021)
- Withdrawal of opinion letter (FLSA 2019-6) (DOL, Feb. 19, 2021)
- Final rule, Independent contractor status under the Fair Labor Standards Act (Federal Register, Jan. 7, 2021)
- Advice memoranda 13-CA-163062, 14-CA-158833 and 29-CA-177483 (NLRB General Counsel's Office, April 16, 2019)
- *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018)

Mercer Law & Policy resources

Links to any resources on Mercer Link are accessible to Mercer consultants. Clients and prospects may contact their consultants for copies or access 2019 and later GRISTs via the Law & Policy Group's webpage and library on www.mercer.com/our-thinking.html.

- Final FLSA rule revises employee vs. independent contractor test (March 11, 2021)
- California: App-based drivers are contractors — not employees (Nov. 5, 2020)
- DOL proposes to simplify worker classification test under FLSA (Oct. 5, 2020)

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- New Jersey enacts law to combat worker misclassification (March 18, 2020)
- Some independent contractors in California will become employees (Sept. 26, 2019)
- US labor relations board reinstates traditional independent contractor standard (Feb. 1, 2019)

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)

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