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DOL Guidance Shows Narrowed Take On Who's An Employee

By **Braden Campbell**

Law360 (April 29, 2019, 3:51 PM EDT) -- The U.S. Department of Labor on Monday unveiled its first Trump-era guidance on the hot-button issue of employee-versus-independent contractor classification, saying workers for an unnamed gig economy platform that connects service providers with clients are contractors.

Then-acting DOL Wage and Hour Division Administrator Keith Sonderling's opinion letter analyzes the company's business model using a six-factor test aimed at discerning the "economic realities" of whether workers are employees, who are subject to the Fair Labor Standards Act's minimum wage and overtime protections, or independent contractors, who are not.

The U.S. Department of Labor said Monday that an unnamed gig economy platform's workers are contractors because they are economically independent from the business. (Jimmy Hoover | Law360)

Sonderling concluded that the workers are contractors because they are economically independent from the business, which he described as a "virtual marketplace company that operates in the so-called 'on-demand' or 'sharing' economy."

The guidance was issued as an opinion letter, which offers the Wage and Hour Division's perspective on specific pay- and benefits-related questions posed by employers or other entities the DOL regulates. The letters, which don't bind judges but can bolster businesses' legal defenses to workers' claims, do not name their recipients but provide circumstantial information about them.

The letter avoids specifics about the company, only placing it in a class of smartphone- or web-based businesses offering platforms that pair consumers with workers who provide certain services. This grouping includes the ride-hailing apps Uber and Lyft, general labor app TaskRabbit, cleaning app Handy and others.

Former high-ranking DOL attorney Susan Hartill told Law360 the new letter is more business-friendly than similar guidance from the Obama administration.

“I think it [gives] a little bit more flexibility, I think it does provide a road map for businesses to structure their arrangements” so that their workers are independent contractors, said Harthill, now an employment partner at management-side Morgan Lewis & Bockius LLP.

Sonderling describes workers’ “economic dependence” on businesses as “the touchstone of employee versus independent contractor status.” The DOL weighs this dependence by analyzing six facets of the work relationship: the potential employer’s “control” over the worker; the “permanency” of the relationship; the worker’s “investment in facilities, equipment or helpers”; the “skill, initiative, judgment or foresight” their work requires; their “opportunities for profit or loss” and the extent of their services’ integration into the business.

The letter summarizes the DOL’s read of each factor before applying them to the company’s description of its model, saying each weighed against workers’ economic dependence on the platform.

Sonderling said the company “does not appear to exert control” over workers, but rather gives them “significant flexibility, including the ability to pursue external economic opportunities.” Far from being permanent workers, “the service providers appear to maintain a high degree of freedom” to leave the company and are free to work for competing platforms, Sonderling said. The workers provide their own equipment, have “considerable independence” from the company, control their pay in a few ways — such as by choosing their work or working for a competitor — and “are not integrated into [the company’s] referral business,” he added.

The analysis is striking in its conclusiveness for the business, said Charlotte Garden, a labor law professor at Seattle University School of Law.

“Not every platform will present a case that is this straightforward for DOL, but still, this is a major swing from the Obama administration approach,” Garden said.

That approach, which the DOL outlined in a 2015 guidance memo and the Trump administration struck in 2017, focused on the “actual day-to-day experience of workers,” Garden said. By contrast, the new guidance emphasizes “the theoretical ability for workers to, for example, make entrepreneurial decisions about how they do their work,” she said.

Harthill, the ex-DOL attorney, said Sonderling’s memo applies the traditional test but “emphasizes a couple of things differently,” notably workers’ ability to work for competing platforms. Sonderling cites this freedom in his analysis of the control, permanency and profit-or-loss factors, Harthill pointed out.

BakerHostetler employment classification expert Todd Lebowitz, who runs employment classification blog whoismyemployee.com, said Monday’s memo offers peace of mind to businesses in the platform space. It also offers them a legal shield, albeit an imperfect one, under the Portal-to-Portal Act, which protects from liability businesses that rely in “good faith” on the DOL’s statutory interpretations.

“Any company that operates in this space … should print out this opinion, and they should make some sort of internal record that they intend to rely on this opinion,” Lebowitz said.

And while the DOL’s analysis is most useful to these so-called platform businesses, “every entity that uses independent contractors would benefit from reading” it, Lebowitz said.

“This letter contains a really helpful checklist, sentence-by-sentence, of factors that support independent contractor status no matter what the business model is,” Lebowitz said.

Monday’s letter comes a little over four months after the National Labor Relations Board narrowed its test for whether workers are independent contractors or employees, only the latter of whom can form unions under the National Labor Relations Act. That test, outlined in a ruling that rejected a bid by airport shuttle operators to unionize, turns on workers’ entrepreneurship.

“There are some differences between the tests under the NLRA and the FLSA, but the kind of higher-level approach of the agencies is similar,” Garden said.

Sonderling returned to his role as deputy administrator of the Wage and Hour Division later on Monday, following Administrator Cheryl Stanton’s swearing-in.

--Additional reporting by Vin Gurrieri. Editing by Alanna Weissman and Kelly Duncan.

Update: This story has been updated with additional details and expert comment.