

# Small Business Notes

## Special Edition—May 2019

### U.S. Department of Labor Reviews Standards for Workers as Employees or Independent Contractor in “Gig-Economy” and “Virtual Marketplace” Context

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▪ **U.S. Department of Labor Reviews Standards for Workers as Employees or Independent Contractor in “Gig-Economy” and “Virtual Marketplace” Context**

On April 29, 2019, the U.S. Department of Labor, Wage and Hour Division, released an opinion on whether service providers working for a virtual marketplace company (VMC) are employees or independent contractors for purposes of the Fair Labor Standards Act.

The opinion (FLSA 2019-6) was in response to an inquiry from a VMC which, the opinion notes, is an online and/or smartphone based referral service that connects service providers to consumers in areas such as, moving, cleaning, plumbing, shopping, transportation painting and household services. The VMC in this case operated in the following ways:

- It operates a software platform called an analytic hierarchy platform that organizes data from consumers and service providers and uses objective criteria to match the two parties.
- It requires service providers to provide basic information (e.g., name, contact information, social security number); to self-certify as to experience and qualifications in the services offered; and to complete a background check through an accredited third party and an identity check through another third party. It also requires service providers to accept a terms of use agreement that the VMC is only providing a platform for connecting with consumers, that service providers and not the VMC are providing services, and that service providers are independent contractors.
- It collects information from consumers and provides that information to service providers through its virtual platform. That platform allows service providers to contact consumers and exchange details about the requested service including issues of scope, price, and timing.
- It sets default pricing based on region and job scope and issues IRS Form 1099 to service providers for work performed for consumers.
- It permits service providers to accept, reject, or ignore service opportunities on the VMC’s platform; select opportunities by time and place, determine the tools, equipment, and materials needed, and makes clear that it does not inspect service providers work.

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- It permits registered service providers to also seek and acquire work on competitive VMCs.
- It allows service providers to determine the factors that go into accepting or rejecting work.
- It allows the service providers to determine how the work will be performed (i.e., what transportation route to take, what make or model of tool to employ). It also requires providers to purchase –without reimbursement from the VMC– all their own supplies and equipment and to sustain all operating costs.
- It will terminate the relationship with a service provider only for material breach; fraud, or repeated canceling or rescheduling of work opportunities on short notice.

In addressing the question of worker status in its opinion the Department of Labor noted that “the touchstone of employee versus independent contractor status has long been ‘economic dependence’ which, the opinion continued, is a fact-specific inquiry that is individualized to each worker.” When determining economic dependence the Department of Labor uses six factors derived from Supreme Court precedent:

- The nature and degree of the potential employer’s control;
- The permanency of the worker’s relationship with the potential employer;
- The amount of worker involvement in facilities, equipment, or helpers;
- The amount of skill, initiative, judgment, or foresight required of the worker;
- The worker’s opportunity for profit or loss;
- The extent of integration of the worker’s services into the potential employer’s business.

After a discussion of the case law defining and supporting each of these factors, the opinion applied them to the requesting VMC’s circumstances and concluded that the Department of Labor “does not see any indication that the service providers are economically dependent” on the VMC within the meaning of the Fair Labor Standards Act .

- Control. Rather than exerting control, the opinion noted, the VMC’s user agreement with service providers “gives the service providers significant flexibility” on if, when, where, how, and for whom they work, including the opportunity to seek work from competing VMC and other external sources.
- Permanency of relationship.
- The service provider maintained as high degree of freedom to exit the working relationship with the VMC and in interacting with competitors.
- Investment in facilities, equipment, or helpers. The VMC did not invest in facilities, equipment, or helpers but instead required the provider to obtain all these without reimbursement by the VMC.

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- Required, skill, initiative, judgment or foresight. Since providers can choose between different opportunities, and can choose how to provide services, they are exercising “managerial discretion” and independence from the VMC.
- Opportunity for profit and loss. The ability of service providers to choose among jobs, determine how many jobs to take, and negotiate the prices of their jobs gives them a high degree of control over profit and loss and, therefore, independence from the VMC.
- Integration. The VMC operates a referral platform. The service providers are not an integral part of the operation of that platform but are, instead, users of the platform for which they negotiate the terms and conditions of service. In short the primary business of the VMC is not to provide services to end user consumers but to provide a referral system that connects users with providers.

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