



# COMPLIANCE BULLETIN

## HIGHLIGHTS

- The DOL issued an opinion that workers using a virtual marketplace platform are independent contractors.
- This opinion indicates that the DOL generally classifies gig workers as independent contractors.
- This interpretation may not apply to all gig workers in different situations.

## IMPORTANT DATES

### April 29, 2019

The DOL issued an opinion letter asserting that gig workers using a virtual marketplace platform are independent contractors for purposes of the FLSA.

## DOL Issues Opinion Letter on Gig Worker Classification

### OVERVIEW

In the growing “gig economy,” individuals perform jobs on a one-off or short-term basis, typically through an online application or job marketplace. On April 29, 2019, the Department of Labor (DOL) issued an [opinion letter](#) addressing whether individuals working for a virtual marketplace company (VMC) are employees or independent contractors under the Fair Labor Standards Act (FLSA).

According to the DOL, the VMC described in the opinion letter provides a referral service—it does not receive services from the workers itself. As a result, the DOL clarifies that **workers who use the VMC to provide services are independent contractors.**

### ACTION STEPS

**This opinion letter indicates that the DOL generally classifies gig workers as independent contractors.** Opinion letters are specific to the situations presented, but employers can look to them for guidance on the DOL’s interpretation of the law.

The interpretation in this opinion letter may not apply to all gig workers, if their circumstances are substantially different from the situation addressed in the letter.

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## Background

The FLSA provides certain benefits and protections for workers who are classified as employees, such as minimum wage and overtime requirements. However, the FLSA does not apply to independent contractors.

In determining whether an individual is an employee or an independent contractor for purposes of the FLSA, the DOL favors using the **economic realities test**, which looks at whether a worker is economically dependent on the employer or engaged in business for him- or herself. According to the DOL, if the worker is economically dependent on the employer, then the worker is an employee and should be protected by the FLSA.

Whether a worker is economically dependent on a potential employer is a fact-specific inquiry that must be made on a case-by-case basis. Independent contractors are often characterized by their ability to, for example, regularly negotiate working conditions, set their own work hours or simultaneously work for another business.

Generally, a VMC is an online and/or smartphone-based referral service that connects workers to end-market consumers to provide a wide variety of services (such as transportation, delivery, shopping, moving, cleaning, plumbing, painting and household services). Employees of these types of companies are often called “gig workers,” because of the short-term, one-off nature of the work involved.

## DOL Opinion Letter

According to the DOL, the facts in this case demonstrate economic independence, rather than economic dependence, in the working relationship between the VMC and its workers. As a result, the workers who use the VMC are independent contractors, not employees of the VMC, for purposes of the FLSA. This means that these types of gig workers generally will not be entitled to the FLSA’s employment protections, such as minimum wage and overtime requirements.

The DOL asserts that the VMC provides a referral service—it does not receive services from workers, but empowers workers to provide services to end-market consumers. The workers are not working for the VMC’s virtual marketplace; they are working for consumers through the virtual marketplace. They do not work directly for the VMC to the consumer’s benefit; rather, they work directly for the consumer to the VMC’s benefit. As a matter of economic reality, they are working for the consumer, not the VMC.

In its analysis, the DOL considered the following six factors:

- ✓ **Control.** The VMC does not appear to exert control over its workers. Rather, the VMC gives workers significant flexibility, including the ability to pursue other economic opportunities. The VMC does not

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impose any duties, such as strict shifts, large quotas or long hours. Workers have the flexibility to choose if, when, where, how and for whom they will work, and they regularly use this flexibility to their own profit and personal advantage. Moreover, the VMC does not impose requirements on how its workers must perform their work, is not present when the service provider works, and does not monitor, supervise, inspect or control the particulars of that work.

- ✓ **Permanency of the relationship.** The VMC does not appear to have a permanent working relationship with its workers that would be indicative of an employer-employee relationship. The workers appear to maintain a high degree of freedom to exit the working relationship. Most importantly, the VMC does not restrict them from interacting with competitors, either during the relationship itself (since workers may work on multiple platforms simultaneously) or after the relationship ends. Despite the VMC's promise that it will terminate a relationship with a worker only for cause, it appears that workers who maintain a lengthy working relationship with the VMC do so only on a "project-by-project basis."
- ✓ **Investment in facilities, equipment or helpers.** The VMC does not invest in facilities, equipment or helpers for its workers, but instead requires workers to purchase all necessary resources for their work, and does not reimburse those purchases. The VMC primarily invests in its virtual referral platform, but the DOL asserts that those investments do not, alone, establish an employment relationship with the workers who use that platform because they are not investments in the work that the workers perform. The workers' reliance on the VMC's software to quickly obtain jobs only marginally decreases their relative independence, because they can use similar software on competitor platforms.
- ✓ **Skill, initiative, judgment or foresight required.** Regardless of the specific services they perform, the VMC's workers choose between different service opportunities and competing virtual platforms, and they exercise managerial discretion in order to maximize their profits. Additionally, the VMC's workers do not undergo mandatory training.
- ✓ **Opportunity for profit and loss.** Even though the VMC retains some control over the workers' profits and losses by setting default prices, it allows workers to choose different types of jobs with different prices, take as many jobs as they see fit and negotiate the price of their jobs, indicating that their opportunity for profit or loss is driven by their own managerial skill, not simply their productivity. Workers can further control their profit or loss by choosing to take jobs from competing VMC platforms. Additionally, because the VMC charges a fee for cancelled services, the workers risk losing money if they do not complete a job they have accepted. The DOL concluded that these opportunities for profit or loss give the workers a substantial amount of control over their level of compensation, and therefore independence from the VMC.
- ✓ **Integrity.** The VMC's workers are not integrated into the VMC's referral business. First, the workers use the VMC's virtual platform to acquire jobs; they do not develop, maintain or otherwise operate that platform. The VMC offers a finished product to its workers; its business operations effectively

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terminate at the point of connecting workers to consumers and do not extend to the worker's actual provision of services. In other words, the workers are not an integral part of the VMC's referral service; they are consumers of that service from the VMC and negotiate with the VMC over the terms and conditions of using that service. Relatedly, the business's "primary purpose" is not to provide services to end-market consumers, but to provide a referral system that connects workers with consumers.

## Impact on Employers

This opinion letter indicates that the DOL generally classifies gig workers as independent contractors. As a result, these types of workers will not be subject to the FLSA's minimum wage and overtime requirements.

While the letter provides insight into how the DOL currently interprets the FLSA's application to gig workers, opinion letters are fact-specific guidance for employers on how to comply with the law in individualized situations. The DOL's interpretation in this case is specific to the employer requesting the opinion letter, based on the particular facts and circumstances described. **Therefore, the DOL's interpretation may not apply to all gig workers, if their circumstances are substantially different from those addressed in the letter.** However, employers in similar circumstances can review the content to determine how it may impact their business.