

# Gig Economy Virtual Marketplace Company Gets FLSA Nod in DOL Opinion Letter

By Suellen Oswald

May 2, 2019

## Meet the Authors



### Suellen Oswald

Principal

216-750-4339

[Suellen.Oswald@jacksonlewis.com](mailto:Suellen.Oswald@jacksonlewis.com)

## Related Services

Staffing and Independent

Workforce

Technology

Wage and Hour

The Department of Labor's (DOL) Opinion Letter [FLSA2019-6](#) issued April 29, 2019, was welcomed by virtual marketplace companies (VMCs) in particular, as well as traditional businesses that treat freelancers as independent contractors. At a minimum, this letter gives the business community insight on how the DOL regards the VMC business model.

The VMC business that requested the opinion letter operates as an "on-demand" or "sharing" service provider that connects consumers with a variety of household and personal service providers through its proprietary software platform. The VMC treats providers as independent contractors. After the VMC matches consumers and providers, the VMC's relationship to the transaction is concluded.

Based on the VMC's business model, which was particularly well-suited for the FLSA's six-factor test, the DOL concluded that the providers are independent contractors who do not work for the VMC. The VMC was deemed a "referral service" that does not receive services or have a working relationship with providers. Instead, the DOL determined that the providers did not fit "any traditional paradigm" covered by the FLSA and "as a matter of economic reality," the providers work for the consumers. The DOL looked at the following FLSA Six-Factors as a test analysis:

1. Control: The VMC's lack of control over providers and how they provide their services, including the providers' ability to determine hours of work, no minimum number of projects that must be accepted, and complete freedom to accept all other external opportunities (including with competitors) to maximize individual profit, and no inspection of work performed by the VMC, easily established independent contractor status.
2. Permanency of Relationship: That work performed by providers to consumers was strictly on a project-by-project basis, providers are free to contract with competitors, and the very limited basis for the VMC to terminate its relationship with a provider (i.e. repeated cancellations) easily resulted in a finding of independent contractor status.
3. Investment in facilities, equipment, or helpers: The DOL's analysis focused on whether the VMC provided facilities, equipment, or helpers to the providers and determined that the VMC invested only in its virtual referral platform and did not invest in work performed by providers. This too resulted in a finding of independent contractor status.
4. Skill and initiative: The providers' ability to choose between different service opportunities and competing virtual platforms enabled them to exercise independence from the VMC while maximizing their profits. In addition, that the VMC did not train the providers also supported the providers' economic independence. This factor was easily met for independent contractor status.
5. Opportunity for profit/loss: The providers' independence from the VMC, including no predetermined basic compensation and complete freedom to accept work from the VMC

or other competing platforms established that the providers' managerial skills drove their profit or loss. These facts resulted in a finding of independent contractor status.

**6. Integration of Providers' Services in the VMC's Business:** The DOL's determination that the VMC's business was a referral-based virtual platform that service providers use to connect with consumers was key. The DOL determined that the providers "do not develop, maintain, or otherwise operate" the platform. Instead the providers "use that platform to acquire service opportunities." Thus, rather than being an integral part of the VMC's referral service, the service providers were deemed "consumers" of the VMC's on-demand platform.

**What This Means for Businesses:** This determination by the DOL is good news, especially for VMCs, and it is a marked departure from the prior Administration's view that gig workers were more likely to be deemed employees. The Opinion Letter is based on the VMC business model, but its language is rather broad and traditional businesses that use independent contractors likely will seek to rely on its favorable view of non-employee workers under the FLSA. However, businesses should remain keenly aware of a host of state laws that are more restrictive than the FLSA when analyzing independent contractor status. Key among those differing state laws is the result of the California Supreme Court's Dynamex decision<sup>[1]</sup> and the ABC test, which is very challenging because it requires proof that a worker performs services that are "outside the usual course of the company's business." However, on a brighter note, a number of states have passed "marketplace contractor" statutes that treat many VMC-type service providers as independent contractors for various purposes.

**Implications:**

1. The DOL Opinion Letter analyzed an on-demand VMC, a service provider that offers a host of household and personal services, under the FLSA's six-factor test for independent contractors and, not surprisingly, found that all factors pointed to the providers being independent contractors.

2. The Opinion Letter may have limited practical impact since most misclassification cases are filed under state law, which tends to be different from the FLSA. The state law factors in the applicable jurisdiction must be analyzed.

3. Several states have passed "marketplace contractor" statutes that treat many service providers on VMC-type platforms as independent contractors, including Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, Texas, and Utah.

<sup>[1]</sup> Dynamex Operation West, Inc. v. Superior Court, 4 Cal. 5th 903 (2018)

©2019 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.