

DOL Sends Gig-Worker Proposed Rule to White House for Review

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September 2, 2020

Companies may have more clarity on which workers can be classified as independent contractors under a proposed rule that the U.S. Department of Labor (DOL) sent to the White House for review.

The federal government had announced plans in the spring 2020 regulatory agenda to issue a proposed rule (<https://www.reginfo.gov/public/do/eAgendaViewRule?publd=202004&RIN=1235-AA34>) on how to determine if workers are independent contractors or employees under the Fair Labor Standards Act. Independent contractors, including many gig-economy workers, are not eligible for minimum wage, overtime and other benefits that employees must receive.

Although the proposal's details are not yet available to the public, President Donald Trump's administration has been consistently focused on deregulation and limiting the cost of any new regulations. "By amending and eliminating regulations that are ineffective, duplicative, and obsolete, the administration can promote economic growth and innovation and protect individual liberty," according to an announcement from the White House Office of Management and Budget.

We've rounded up resources and articles from *SHRM Online* and other trusted outlets on the news.

DOL Aims to Fast-Track Rule

In light of the upcoming election, DOL leaders want to fast-track the worker classification regulation and finalize a new rule by the end of 2020. If Trump is re-elected, the department could continue its rulemaking process on a slower schedule. Even if Trump loses the election, the Labor Department could still successfully finalize a rule in the last days of the administration if Republicans retain their Senate majority. However, if Democratic presidential nominee Joe Biden wins the election and Democrats take over the Senate majority, lawmakers may use the Congressional Review Act (CRA) to quash the rule and curb similar rulemaking in the future.

(Bloomberg Law (<https://news.bloomberglaw.com/daily-labor-report/dol-to-unveil-high-stakes-rule-on-worker-classification>))

Flexible Standard

Business groups have been advocating for a flexible independent-contractor standard that fits the modern workforce and generally allows the average gig-economy business to classify workers as contractors. The Trump administration's prior actions indicate that the proposed rule will allow for such flexibility. For example, the DOL issued an opinion letter in 2019 confirming that certain gig workers are independent contractors. The DOL concluded that the workers who use a technology platform or "virtual marketplace" to connect with consumers—as described in the request for an opinion letter—are independent contractors rather than employees of the platform provider. The virtual-marketplace company provides a referral service, the DOL said. Opinion letters are not binding regulations, but they can help employers show that they made a good-faith effort to comply with the law.

(Fisher Phillips (<https://www.fisherphillips.com/gig-employer/gig-economy-companies-may-soon-get-benefit>)) and (*SHRM Online* (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-says-certain-gig-economy-workers-not-employees.aspx))

Spotlight on California

Although the federal government has focused on giving businesses more flexibility, some states, such as California, are making it harder for companies to classify workers as independent contractors. On Aug. 10, a trial court judge in San Francisco issued a preliminary injunction blocking Uber and Lyft from continuing to classify drivers as independent contractors under the state's employment laws. However, the ride-hailing giants got a break when a state appeals court halted the preliminary injunction just before it took effect. The appeals court will now review the trial court's order and hear oral arguments in the case on Oct. 13. Uber, Lyft and other gig-economy businesses will also be focused on the November election and California's Proposition 22. The ballot initiative would define app-based drivers as independent contractors while also requiring businesses to provide some benefits to workers.

(*SHRM Online*) (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/uber-and-lyft-can-keep-independent-contractor-model-in-california-for-now.aspx)

Reclassifying Drivers Would Be Costly

Uber and Lyft may cease operations in California if they ultimately have to classify drivers as employees in the state. A 2019 Barclays analysis estimated that reclassifying workers in California could cost the ride-hailing companies about \$3,625 per driver, which would add about \$500 million to Uber's and \$290 million to Lyft's annual costs. These costs are associated with "a panoply of basic protections to which employees are entitled under California law, including minimum wage, workers' compensation, unemployment insurance, paid sick leave, and paid family leave," noted California Superior Court Judge Ethan Schulman in his Aug. 10 order granting the preliminary injunction against Uber and Lyft.

(*The San Diego Union-Tribune*) (<https://www.sandiegouniontribune.com/business/story/2020-08-31/uber-and-lyft-face-day-of-reckoning>)

Misclassification Risks

Gig work is increasingly attractive to a growing percentage of the workforce, particularly Millennials and members of Generation Z, who value autonomy, flexibility and work/life balance. It can also provide benefits to employers that may not need full-time staff year-round or that may be struggling to fill jobs. While there can be benefits to using gig workers rather than full-time staff, there are some key downsides. The risks of misclassifying workers as independent contractors include violation of wage and hour laws; unpaid income tax withholdings and Social Security, Medicare and unemployment insurance contributions; and gaps in workers' compensation insurance coverage.

(*SHRM Online*) (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/know-the-perils-of-the-gig-economy.aspx)

Visit SHRM's resource page on independent contractors (www.shrm.org/resourcesandtools/pages/independent-contractors.aspx).

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