

## **DOL PROVIDES NEW INSIGHT ON EMPLOYEE-VERSUS-INDEPENDENT CONTRACTOR CLASSIFICATION, JUST AS MICHIGAN ATTORNEY GENERAL LAUNCHES PAYROLL FRAUD ENFORCEMENT UNIT**

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On April 29, 2019, the Department of Labor (DOL) issued an opinion letter signaling that workers who utilize smartphone apps - such as Uber, Lyft, Angie's List, and others - to connect with customers will likely be treated as independent contractors rather than employees under the Fair Labor Standards Act.

The DOL issued the opinion letter in response to an inquiry from an unidentified "virtual marketplace company." Applying the six-factor economic realities test: (1) nature and degree of control; (2) permanency of the relationship; (3) amount of investment; (4) amount of skill, initiative, judgment or foresight required; (5) opportunity for profit or loss; and (6) extent of integration of the worker's services into the business, the DOL concluded that "as a matter of economic reality, [workers] are working for the consumer, not [the virtual platform]." In reaching this conclusion, the DOL stressed that the workers:

- Had the freedom to choose when, where and how long they worked;
- Provided their own equipment;
- Did not have a mandatory training program; and
- Were not an integral part of the company's business because they "do not develop, maintain or otherwise operate" the platform connecting them with customers

While the DOL's conclusion that the workers are independent contractors rather than employees is not law or official rulemaking, it does offer businesses a roadmap for accurately classifying workers.

Accurate classification may be more important than ever, given that Attorney General Dana Nessel recently launched a new Payroll Fraud Enforcement Unit. According to Nessel, the Unit will primarily focus on the misclassification of employees as independent contractors, in an effort to prevent employers from avoiding overtime, health insurance, and other benefit payments. Collecting payroll taxes is a significant issue driving the initiative. Nessel emphasized that Michigan loses an estimated \$107 million in payroll taxes annually because of worker misclassification.

Michigan employers should review their independent contractor relationships in light of this new guidance and future increased enforcement efforts. Contact any member of our Workplace Law group if you have any concerns about your independent contractors.



#### ABOUT THE AUTHOR

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*Brent R. Scott concentrates his practice on advising and representing companies in all aspects of employment, labor, and general business law matters across multiple industries.*

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