

USDOL Opinion Letter on Gig Work: A Narrow, Faulty Ruling With No Precedential Effect

On April 29th, the Trump Department of Labor issued an [opinion letter](#), requested by an unnamed online platform company, on the status of its workers as employees or independent contractors. This fact sheet explains the context for the letter and its effect on important debates about whether companies dispatching workers online are employers.

What is an opinion letter?

Opinion letters are requests to the U.S. Department of Labor’s Wage and Hour Division to make a determination in a single case, without investigation and based on facts presented by the company, as to a legal or policy issue. They were frequently used in the George W. Bush administration and operated as free passes for the requesting companies, which used them to defend against workers’ claims. They were discontinued in the Obama administration. As Obama Wage and Hour Administrator David Weil, now Dean and Professor at the Heller School of Social Policy and Management at Brandeis University, [told The New York Times](#), opinion letters are a “capricious tool for settling complicated regulatory questions.”

Does the opinion letter represent official DOL policy toward all online platform companies?

No. Opinion letters apply only to the company that requested the letter. Opinion letters are not dispositive and do not set precedent—although companies may portray them as broadly applicable to themselves.

This is an especially important point in this case, because the facts presented to DOL by the company indicate that workers are free to negotiate prices with customers and to build a customer base from their online contacts. That is not the case for the vast majority of online workers, who are forbidden from negotiating wages or taking customers offline, or must pay a penalty for doing so.

Does the opinion letter affect all laws?

No. This opinion letter applies only to the DOL’s enforcement of the federal Fair Labor Standards Act, and cannot serve as precedent in FLSA litigation. It makes no determinations with respect to other laws like anti-discrimination laws, collective bargaining laws, or state minimum wage, overtime, and social insurance laws such as workers’ compensation, unemployment insurance, and paid family leave.

Why would an online platform company seek an opinion letter?

The effort to secure a DOL opinion letter may be just one more piece of a [coordinated industry campaign](#) to strip gig workers of minimum wage and other employee protections. Some app-based companies are eager to lock their workers into independent contractor status, stripping them of the basic labor rights and protections, and allowing the companies to evade payroll taxes and worker lawsuits.

These companies typically assign workers to jobs, determine the amount that workers will earn from the job, discipline workers who don't live up to their exacting standards, arrange the jobs so that workers face pressure to work at specific times and places, and often monitor every move that workers make while they are at work.

The companies' characterization of workers as "independent businesses" is being challenged across the country. Uber is subject to 60,000 arbitration demands by its drivers alleging misuse of the "independent contractor" label it forced on its workers, and has been sued in court by workers multiple times. Like Uber, Lyft is facing [thousands of individual claims](#), some involving driver injuries and deaths. Lyft has been sued in [nine separate class-action lawsuits by drivers](#). The cleaning company Handy has been sued five times. The companies have largely avoided trials by forcing workers to sign arbitration agreements, but state agencies in New York, Oregon, and California, which are not subject to arbitration rules, have found that app-based workers are employees of the companies. Lyft is under investigation for employee misclassification in five states. These companies have paid out millions of dollars to settle the claims but are not changing their business practices and continue to call their workers "independent contractors."

What else are online platform companies doing to change the law?

As more jurisdictions are affording workers employment-related rights, the companies have [aggressively sought exemptions](#) from state labor laws across the country, armed with a seemingly endless supply of venture capital. They are rigging the rules to deny workers minimum wage, unemployment insurance, and other basic employee protections in the process.

For example, in a few short years, ride-hailing companies led by Uber and Lyft were able to convince legislators in half the states to create special exemptions from state law. To accomplish this feat, in [2016 Uber and Lyft together employed more lobbyists](#) than Microsoft, Amazon, and Walmart combined.

In 2018, they managed to get their bills introduced in 11 states, with six states—Florida, Indiana, Iowa, Kentucky, Tennessee, and Utah—joining Arizona in exempting *all* so-called "marketplace platform" employers from basic labor standards, such as minimum wage and anti-discrimination laws. Many companies, including Instacart, Postmates, DoorDash, Lyft, Handy, and the tech lobbying arm TechNet, are participating in an [all-out campaign](#) to overturn a California Supreme Court ruling that would confer employee status to most of their workers. And many of those same companies spent \$4.9 million in 2018 lobbying for a bill that would have secured similar exemptions in federal law, among other changes.

This effort to "carve out" or exclude workers from employee labor protections is particularly offensive because grave job-quality issues wrack these jobs, where workers deliver food,

clean homes, take care of children, and drive passengers to the airport. Companies reportedly have [stolen workers' tips](#), paid drivers rates [far below minimum wage](#), and left families [without a breadwinner](#) after fatal on-the-job accidents were not covered by workers' compensation.

Why would the Trump DOL issue an opinion letter on this topic?

This administration has sided with big-money corporate interests over working people at every turn. It has relaxed health and safety rules, rolled back child labor rules, reversed important gains made in the Obama administration with respect to overtime pay, and defended forced arbitration rules that keep workers from having their day in court, with the President himself [attacking unions](#) and others who seek to give workers a voice on the job.

With respect to important issues of who is an employer, the Trump administration [reversed guidance on this topic](#) issued by the Obama administration. Its National Labor Relations Board has [reinterpreted labor law](#) to increase the number of [workers who are independent contractors](#) and proposed rules that [would let big business off the hook](#) for labor violations, as [has its DOL](#).

How will online platform companies attempt to use the opinion letter?

Whatever gig company sought the opinion will likely—and wrongly—use the letter to argue that it acted in good faith in classifying its workers as contractors, even when its actions fail to satisfy the traditional legal test for determining employment status. Other online platform companies will likely use it to convince legislators, courts, and arbitrators that workers working for any platform at all are independent contractors and have no labor rights.

What should courts and labor agencies do?

Ignore the letter. First, the opinion letter is based on that company's version of the facts. No workers were consulted to act as a check on what the company said. Second, the analysis in the letter is hopelessly flawed. For example, DOL said that the fact that the company did not tell workers what transportation to use to get to the job or the order in which to clean an apartment were indications that the workers were in business for themselves. It said that since workers could leave their jobs at any time, they weren't employees. These and other facts are features of regular employment, not indications that workers are entrepreneurs. DOL's claim that the workers are not integral to the company's business is also unpersuasive. DOL said that the workers weren't integral to the companies' operations because they weren't themselves computer programmers. But platforms themselves have said that they will not survive without a steady stream of workers, who form the core of their businesses.

Condemn the letter. Governors and enforcement agencies should publically condemn the letter and pledge to ignore it. It is a cynical interpretation of employment law. [This statement](#) from the New Jersey DOL provides a good model: "This opinion letter has zero effect on how the New Jersey Department of Labor enforces state laws regarding wage payment, minimum wage, overtime, earned sick leave, equal pay, unemployment compensation, temporary disability insurance benefits, or family leave insurance benefits."