# Once-Pivotal *Grubhub* Case Back On The Court Docket – But Has The Gig Economy Moved On?

Insights
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A federal appeals court just resurrected a pivotal gig economy battle that at one time seemed to be the center of the legal universe – but for a variety of reasons seems much less important these days. The 9th Circuit Court of Appeals issued a brief administrative order on January 28 that took the landmark *Lawson v. Grubhub* case out of suspended animation and placed it back on its active docket, ready to be argued and eventually decided. But thanks to a recent California Supreme Court decision and a critical ballot measure outcome, the outcome seems fairly predictable while the overall stakes seem much lower. What do gig economy employers need to know about this recent activity?

**Quick Recap: What Happened?**

You can be forgiven for not recalling exactly where we are in this latest chapter of a long-running legal battle. After all, it's been almost a year-and-a-half since the last activity occurred in this case. So here's the quick recap. Gig economy stalwart Grubhub squared off with a former driver, Raef Lawson, in the nation's first-ever gig economy misclassification trial in late 2017, leading to a victory for Grubhub in February 2018. Things took a turn for the worse in April 2018 when the California Supreme Court dropped a bombshell and changed the state's misclassification standard with its infamous *Dynamex* decision, which ushered in the notorious ABC test.

Lawson's attorneys argued that he should now be declared the victor given the new standard, and filed an appeal with the 9th Circuit Court of Appeals way back in May 2018. Many businesses have been waiting on pins and needles since then to see how things would turn out. Would the court apply the new standard, making it much harder for Grubhub to prevail? Or would it apply the same standard that had been in place when the dispute actually arose?

The parties submitted an opening appeals brief in November 2018, the response brief in January 2019, and the reply brief in March 2019. And since then: crickets. In September 2019, the appeals court officially put the case on hold while it waited to hear from the California Supreme Court on whether the new ABC test should be applied retroactively to the case, or whether the appeal would apply the older flexible misclassification test that had been in place at the time the trial took place.

**Two Big Intervening Events Have Happened**

In the year-plus since the case was put on ice, two very big things happened (and we're not talking about the life-changing pandemic and the crucial presidential election).

- In January 2021, the California Supreme Court held that the ABC test does, in fact, apply on a retroactive basis. The court held that the brand-new ABC test "was within the scope of what employers reasonably could have foreseen" and that prior court decisions should have put businesses on notice of the potential expansiveness of the employment definition within California.
- But even before then, on Election Day 2020, California voters approved Proposition 22, a ballot measure that confirms the independent contractor status of certain rideshare and delivery drivers. The new law went into effect on December 16, 2020, meaning that most drivers who perform work for Grubhub are considered independent contractors for all purposes under state law.

**Where Do We Stand?**

These two steps mean two very significant things. First, unfortunately for Grubhub and many other gig economy companies, courts in California (and those federal courts interpreting California state law) will now interpret the ABC test as having been in effect on a retroactive basis. In other words, businesses should have known that the restrictive test would be applied to misclassification challenges and should have adjusted their business models accordingly.

What this means for the litigation is that the 9th Circuit will now revisit the facts and evidence from the *Lawson* trial and apply the ABC test instead of the flexible standard that had originally governed the case, determining whether Lawson was an employee or contractor using this new burdensome standard. And given the way that most courts have interpreted the ABC test, it seems most likely – though not completely preordained – that Grubhub has an uphill climb.

But the other big news – that California voters changed the law for delivery and rideshare drivers so that the ABC test doesn't apply – means that the scope of any victory Lawson may achieve will pale in comparison to what many worker advocates originally intended. Any recovery he achieves will be cut off as of the date the law changed (if it spans that far in the first place) – but, more importantly, any other workers hoping to launch similar legal challenges against Grubhub will find only a brick wall instead of the fertile ground they assumed they would find.

**What's Next?**

The 9th Circuit has a few options at its disposal at this point. It could decide to render an opinion in the case, applying the evidence that had been taken at the original trial to the ABC test instead of the flexible standard that had been the law of the land back in February 2018. Or it could decide that further evidence is needed – after all, the trial was tailored to the legal standards in effect at the

time, and both parties might feel they have some more information to share now that a new standard is in place – and send the case back down to the trial court for further proceedings.

We'll keep an eye on the developments and report back as events warrant.

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**Richard R. Meneghello**
Chief Content Officer
503.205.8044
Email

## *Industry Focus*

Gig Economy