# Grubhub Trial Decision Could Be Delayed For A Very Scary Reason

Insights
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The first few days of 2018 might not be going to plan for those gig economy businesses hoping that the new year might bring some relief in the seemingly never-ending misclassification struggle. As we sit on pins and needles waiting for a decision from the trial court judge in the blockbuster *Grubhub* trial (you can familiarize yourself with the trial here and here if you need a refresher), the plaintiff's attorney is asking for a delay in the court's ruling. Yesterday, plaintiff Raef Lawson's attorney provided the court with a quick one-page filing that might otherwise seem innocuous; after all, it was just a "Notice of Supplemental Authority," a common legal tool intended to alert the court to some additional legal precedent that might impact the case. But its contents could signal that a bombshell is on the way.

The filing points out that, last week, the California Supreme Court sent a notice to the parties in a completely separate case – *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County* – asking for their thoughts about whether to adopt a revised test for determining whether a worker is an employee or independent contractor under state law. The scary part? The California Supreme Court specifically asked the parties to assess whether state law should embody a test similar to the "ABC" test adopted by the Supreme Court of New Jersey in a 2015 case. And that test is nothing but bad news for gig economy companies.

The "ABC" test, as formulated by the Supreme Court of New Jersey in *Hargrove v. Sleepy's LLC*, presumes an individual in question is an employee unless the employer can satisfy three very specific criteria:

(A) Such individual has been and will continue to be **free from control or direction** over the performance of such service, both under his contract of service and in fact;

(B) Such service is either **outside the usual course of the business** for which such service is performed, or that such service is performed **outside of all the places of business** of the enterprise for which such service is performed; and

(C) Such individual is **customarily engaged** in an independently established trade, occupation, profession or business.

So let's take a closer look at these A-B-C items and what they might mean if they became the law in the state of California.

Item A isn't that big of a deal. The question of control is the centerpiece of just about any independent contractor misclassification test across the country, whether we're talking about a court, a regulatory agency, an investigator, or interpretative guidance. It's items B and C that are worrisome.

Item B would require a business to only use independent contractors to handle work that is outside their usual course of business, or to perform work in locations outside of their normal business coverage. That's just about impossible to square with most gig economy businesses, as most of them exist for the sole purpose of connecting needy consumers with workers who happen to have the time, capacity, and means to handle the work. Although many try to argue they aren't actually "in" the business of providing the specific service around which the business is shaped, but instead are just a digital connection platform, this argument hasn't caught much traction and has been viewed skeptically by those examining its merits.

And Item C might be near impossible to comply with. It would require a gig business to only retain workers who are customarily engaged in that trade or business to do their work. So a rideshare company, presumably, could only retain professional drivers to do their work. A handyman company might only be able to contract with professional service people. And a delivery company might only be able to work with professional delivery drivers. This could ruin the gig economy as we know it. After all, a great many of those providing services for gig companies – taking advantage of their idle capacity so they can fill a specific need and make some extra money – are handling these jobs as side hustles. They are not running an independently established trade, occupation, profession, or business. And moreover, how would a gig economy business confirm that their workers are meeting these standards? Presumably they could ask new workers joining the digital platform to confirm this status during the application or registration process, but they couldn't realistically invest the time and effort to investigate and confirm this status in a way that would ensure it would withstand scrutiny from a court or regulatory body.

Getting back to the business at hand, the California Supreme Court was somehow made aware of this New Jersey ABC test and is now kicking the tires about whether to adopt it for workers in their own state. And in the *Grubhub* trial, the plaintiff's attorney is asking the trial court to "hold its ruling in abeyance" until the Supreme Court issues its ruling in *Dynamex* and determines whether to adopt the ABC test. According to the attorney, "should the Court adopt the ABC test, as it appears to be considering, this would make it significantly harder for Grubhub to prove that its drivers have been properly classified as independent contractors."

There is no word on the timing of this request. The trial court could, of course, ignore it and issue its ruling any day now. Or it could sit and wait to see what the Supreme Court has to say. Whatever

happens, with the possible adoption of the ABC test hanging over their heads, gig businesses in California will now have something else to worry about in 2018. Happy New Year, folks.

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