# Will New Misclassification Standard Wipe The Grubhub Trial Victory Off The Books? Plaintiff Takes First Step Under ABC Test

Insights
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Late Friday afternoon, the attorneys for the worker who came out on the losing end of the Grubhub misclassification trial asked the appeals court to return the case to the lower court for a new hearing. Their reasoning? Last week's momentous *Dynamex* ruling by the California Supreme Court changed the standard that courts should follow when making a classification determination between employee and independent contractor, and the plaintiff wants the court to take a fresh look at the case with this new standard in mind. This maneuver was all but inevitable, and gig companies around the country (but especially in California) should pay close attention to the proceedings to see how this development might impact them.

As we have examined already, the *Dynamex* case scrapped the flexible *Borello* test that had been applied in the Grubhub case and replaced it with a rigid and far stricter test – the ABC test. For a summary of what this test entails, read here. In sum, however, the new test requires that a business prove that a worker satisfies three very specific elements in order to be classified as an employee. And the Grubhub plaintiff thinks that Grubhub could not prove these elements if his case were examined under this new standard.

In the Friday filing, the worker's attorneys indicate that the new standard "requires that this case be remanded for further consideration." Specifically, they point out that the lower court had already made a judicial determination that seemingly demonstrates that Grubhub could not satisfy Prong B of the ABC test: "that the worker performs work that is outside the usual course of the hiring entity's business." In the Grubhub trial ruling, the lower federal court concluded that Grubhub is in the business of "online restaurant ordering and…food delivery" while examining a similar test under the previous California standard (which happened not to be determinative at the time). Therefore, the worker's attorneys argue, it seems all but certain that they would have won their case had this new standard been applied at the time, warranting a remand back to the lower court for new proceedings. They also argue that their client would have won Prongs A and C but that it is not necessary to even spend a lot of time examining these issues since Prong B is "so apparent" in their favor.

But their brief also sheds light on two of Grubhub's likely arguments in opposition to this request. First, the new standard would **need to be applied retroactively** in order for the worker to have a new day in trial court since Grubhub won its trial in February and the new standard was not

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announced until April 30. The worker's attorneys cite cases from California's Supreme Court, the U.S. Supreme Court, the 9th Circuit Court of Appeals, and a lower federal court in California to argue that judicial decisions like this one should be applied on a retroactive basis, but no doubt that Grubhub will closely examine this issue before conceding it.

Second, the worker's attorneys would need to convince the court that this new standard should **apply to expense reimbursement claims** and not just standard wage and hour claims. Remember —the only portion of the case against Grubhub that survived the pretrial motions was a claim for under $600 in reimbursement costs. The money at stake isn't really the main issue; the issue is whether the worker was properly classified as a contractor. But from a framing standpoint, the only issue before the court rests on a reimbursement claim. If the courts determine that this new standard shouldn't apply to such claims, but only to pure wage and hour matters, this case will not be the vehicle by which plaintiffs rest their hopes in having the ABC test applied to gig companies.

We will provide updates once Grubhub files its response and then, of course, once we know whether this case will be headed back down to the trial court for further proceedings.

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