# Grubhub Fights Back, Argues That Gig Companies Should Not Be Retroactively Tagged With Misclassification Liability In A Post-Dynamex World

Insights
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Now that sports betting has been legalized by the Supreme Court, I might want to consider laying some action on an upcoming game, because I am on fire with my recent predictions. In a blog post from last week, I correctly predicted the two arguments that Grubhub would be making in response to the plaintiff's argument that the trial victory should be wiped off the books and returned to the lower court for further proceedings. Late last night, the gig economy company filed a brief with the 9th Circuit Court of Appeals in an attempt to preserve its momentous trial victory.

Quick recap: In February, Grubhub prevailed in what appears to be the first-ever gig economy misclassification case to reach a judicial merits determination. In March, the plaintiff in that case filed an appeal to the 9th Circuit Court of Appeals, where the case now sits. But in late April, in a separate case, the California Supreme Court scrapped the flexible test for determining whether a worker is misclassified that had been applied in the Grubhub trial (known as the *Borello* standard) replaced it with a rigid and far stricter test – the ABC test. For a summary of what this test entails, read here. Within a matter of days, the plaintiff from the Grubhub trial filed a motion to remand the case back to the lower court so that the judge could revisit the decision in light of the new standard.

In my May 7 blog post, I predicted that Grubhub would make two main arguments in response to the motion to remand, and my prediction came true late last night when Grubhub filed its opposition motion. The two arguments: that the new *Dynamex* standard (the ABC test) shouldn't be applied retroactively; and even if it was, the *Dynamex* standard does not apply to the claims for expense reimbursement that are at issue in the case.

**Retroactive Application of *Dynamex***

Grubhub first asks the appeals court not to send the case back to the lower court for a determination on whether *Dynamex* should be applied retroactively. It contends that the question of whether a particular ruling should be given retroactive application is a "pure question of law," and the appeals court is the perfect venue for making such a determination. "Punting the issue to the district court would simply delay the inevitable because an appeal of its decision would surely follow no matter the outcome, leaving the parties exactly where they are now," Grubhub argues.

But Grubhub goes further, and starts laying the foundation for the argument that the new test should not be applied to this specific case. "Basic principles of fairness and due process preclude retroactive application of the ABC test adopted in *Dynamex*—a tectonic shift in state law—to the independent contractor classification question already decided at trial." From a **fairness** perspective, it points out that the company lacked fair notice that proper classification of independent contractors under *Borello* might have been insufficient to shield them from exposure under California's wage and hour law, and that law requires a defendant to be able to determine "in advance, and based on objectively identifiable standards" what conduct can give rise to liability. From a **due process** perspective, it argues that prior California appellate decisions provided a misclassification standard that Grubhub—like other California companies—"could and reasonably did rely on longstanding rules for classifying independent contractors under California's longstanding *Borello* test, which reflects principles dating back nearly 70 years." It hints at a parade of horribles that could unfold should the court decide otherwise, noting that "countless cases would be need to be retried" across the state should *Dynamex* be given the sweeping retroactive application sought by the plaintiff.

[Two notes of interest: first, Grubhub's attorneys point out that multiple interested parties have already filed requests with the California Supreme Court asking for clarity on the issue of retroactive application, so we might even get an answer from the California high court on this very question. Second, Grubhub is not conceding anything with respect to classification under the ABC test; in a footnote, it argues that its workers are independent contractors under any test, and reserves the right to make such an argument should push come to shove.]

**Expense Reimbursement Claims Not Impacted By ABC Test**

Grubhub then argues that a close examination of the *Dynamex* ruling reveals that the California Supreme Court expressly declined to apply the ABC test to expense reimbursement claims, which is the main crux of the recovery sought at trial by the Grubhub plaintiff. It asks the 9th Circiit to affirm the lower court's ruling using the flexible *Borello* standard. This argument is fairly unique to this specific case, as the only portion of the case against Grubhub that survived the pretrial motions was a claim for under $600 in reimbursement costs. The determination of this second issue will not have widespread application across the gig economy or misclassification tests at large. While it might serve as a method of obtaining victory for Grubhub in this specific case, such a victory would only delay the inevitable court rulings that are sure to come regarding the application of the ABC test to gig economy companies.

There is no telling when the 9th Circuit will rule on this request, but we will provide updates when the issue is decided.

[Note: take the Cavs +1 in Game 2 tonight.]
[Final note: This prediction is not legal advice.]

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