Dynamex Ripples Continue To Be Felt: 2 Very Recent Developments

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It's impossible to ignore the reverberations that continue to shake the business landscape after the landmark April 30 *Dynamex* ruling introduced the notorious ABC test to the California gig economy industry. For those living under a rock the past few months, the ABC test adopted by the California Supreme Court now forces businesses to prove that each and every worker satisfies all three elements of the ABC test in order to properly classify them as independent contractors: (A) that the worker is **free from the control and direction** of the hirer in connection with the performance of the work; (B) that the worker performs work that is **outside the usual course** of the hiring entity's business; and (C) that the worker is **customarily engaged in an independently established trade, occupation, or business** of the same nature as the work performed for the hiring entity. Given the significant difficulty a gig economy business would have in meeting this test for each and every one of its workers, it has caused a seismic shift in the way gig companies structure the relationship with their workers.

How are businesses and workers responding to this massive game-changing development? Two developments from the past few days tell the story.

Businesses Appeal To California Lawmakers To Reverse Course
The California Chamber of Commerce and a coalition of dozens of businesses and business advocacy groups—including gig companies Uber, Lyft, Handy, Instacart, Caviar, Doordash, and Postmates—directed a letter to Governor Jerry Brown and the entire state legislature on June 20 seeking relief from the effects of *Dynamex*. "The economic impact of this ruling has far-reaching negative implications for nearly all sectors of the economy," they said, encouraging the lawmakers to suspend or postpone the application of the decision until all impacted parties can work together to develop a "balanced test" for determining misclassification status.

They note that the ABC test "places in doubt" the sustainability of many industries (which includes the gig economy) and has the potential to cause substantial economic harm to the state. It points out that the application of the test will hurt those individuals seeking flexible work arrangements, citing recent federal statistics that indicate 79 percent of independent contractors prefer their work arrangements to traditional jobs.

The main legal argument advanced by the Chamber and the coalition is that the legislature—not the court system—should be responsible for crafting statewide policy. They note that the California

Supreme Court did not receive briefing, testimony, or other evidence regarding the impact that this new test would have on the state economy before adopting what amounted to a significant change in the law. Instead, the authors ask the legislature to hold hearings and invite stakeholders from all sectors to discuss this topic, and craft a better test that "reflects California's economy today." There is no word yet from the legislature or governor about whether this letter's message will be well received.

Grubhub Plaintiff Asks Court To Apply *Dynamex* Retroactively

Meanwhile, one of the first legal cases to be caught in the *Dynamex* crossfire was the one against Grubhub that led to the nation's first-ever gig economy trial ruling. In February, applying the previous flexible standard, a federal court in California ruled that a driver for gig company Grubhub was properly classified as a contractor. The plaintiff immediately appealed the ruling, and while that appeal was pending, the *Dynamex* case came down. The Grubhub plaintiff immediately asked the appeals court to return the case back down to the trial court for a fresh ruling applying the ABC test. Grubhub responded by arguing, among other things, that the *Dynamex* decision should not be applied retroactively against Grubhub because of "basic principles of fairness and due process."

Earlier today, the Grubhub plaintiff fired a shot across the bow of the company with a legal filing in the appeals court. The June 22 filing notes that the defendant in the *Dynamex* case made a similar argument to the California Supreme Court, contending that the decision should be modified to clarify that it only applies prospectively. For some of the reasons raised by Grubhub, the *Dynamex* defendant said that employers in California lacked fair notice that proper classification of independent contractors might have been insufficient to shield them from exposure under the state's wage and hour law, and that due process demanded only prospective application. However, as the Grubhub plaintiff helpfully points out, the California Supreme Court unceremoniously denied Dynamex's petition for a rehearing or a modification to the ruling with a June 20 order.

Although the Grubhub plaintiff contends that this ruling means that the Supreme Court has definitively stated that *Dynamex* should be applied retroactively, that might be taking things a few steps too far. While the court had a chance to adopt or reject that position, it essentially punted. That now leaves lower courts to sort through the mess, and it shouldn't be too long before we see the first ruling on this very subject.

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