



# 9th Circuit Kicks Dynamex Retroactivity Question To State High Court

Insights

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With just a one-page, single-paragraph Order, the 9th Circuit Court of Appeals yesterday provided the faintest glimmer of hope for gig economy businesses everywhere – but especially for those in California. The federal appeals court withdrew its May 2 decision that had extended the *Dynamex* decision on a retroactive basis, meaning that the ABC test might not necessarily be as broadly applied as we recently thought. Instead, the 9th Circuit decided to send the issue to the California Supreme Court, asking the state's high court to conclude once and for all whether the ABC test should be applied to alleged misclassification controversies that arose before the *Dynamex* decision was ever issued. (For a quick primer on the *Dynamex* case and the ABC test, [read here](#).)

It's not necessarily an unusual step for a federal appeals court to conclude that a state's highest court is the best forum for deciding questions of state law. It just happened in the 9th Circuit just a few weeks ago when the appeals court certified a question to the Washington Supreme Court about whether obesity was considered a disability under state law. But what makes this particular situation unique is that the 9th Circuit already decided the issue and it appeared done and dusted; the court, for some reason, waited over two months after it originally issued its opinion before deciding that a do-over was in order.

So what does this mean for the business community? I asked my colleague Ben Ebbink – one of the foremost authorities on California law – about what this might mean. And while he said this was a welcome development for businesses and employers, “it is unclear how the California Supreme Court may ultimately rule on the question of retroactivity.” Ben said that following the issuance of the *Dynamex* decision back in April 2018, “the California Supreme Court took further briefing on the issue of retroactivity, but refused to modify or even clarify its decision. This has led some to speculate that the court may swiftly and clearly rule that the decision should be applied on a retroactive basis, consistent with the original 9th Circuit decision.”

Still, a chance is a chance, and businesses can let themselves fantasize about what might happen if the California Supreme Court listens to arguments from the business community about the impact that the retroactive application of the ABC test has been having on their companies. However, as Ben says, you shouldn't necessarily get your hopes up. Instead, he says, “the best hope for employers for relief on the retroactivity issue may come via legislative negotiations around AB5, currently pending

in the California State Senate.” We’ll keep an eye on this legislation – and the California Supreme Court – and post updates as necessary.

### ***Related People***

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**Benjamin M. Ebbink**

Partner

916.210.0400

Email



**Richard R. Meneghello**

Chief Content Officer

503.205.8044

Email

### ***Industry Focus***

Gig Economy