



Judge Forces Instacart To Reclassify Workers As Employees – But Not This Instant

Insights

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Gig economy company Instacart lost the latest round of its misclassification battle in San Diego yesterday, as a California state court judge granted a preliminary injunction forcing it to reclassify its independent contractor workers as employees. But the judge took some of the sting out of the ruling by putting on hold any enforcement efforts by the city, allowing this “lively area of the law” to work itself out a bit more before dropping the hammer on the company. The February 24 ruling is the latest example of the ABC Test in action, demonstrating just how disastrous it could be to the traditional gig economy model and just how far it can be taken by aggressive government officials.

The court originally sided with Instacart several weeks ago when it denied the City of San Diego’s request for a temporary restraining order (TRO) that would have immediately transformed the company’s workers to employees. But the city pressed on using an argument that Instacart was violating the state’s Unfair Competition Law by misclassifying its workers. It requested a preliminary injunction by arguing that the company’s workers fell on the side of employee designation under the ABC test codified into law by AB-5 as of January 1.

In yesterday’s six-page ruling, Judge Timothy B. Taylor said that San Diego made a “very plausible” showing of improper classification under the ABC test. While “the matter is not free from doubt, and there is some evidence to the contrary,” the judge said that the evidence preponderates in favor of a finding that defendant cannot satisfy at least one prong of the ABC test. And remember – just one of the three prongs is all that is needed for someone challenging a business model to succeed. It’s up to a business facing such a challenge to prove all three elements are satisfied to maintain a contractor model.

Besides proving that it will likely prevail on the merits at trial, the City of San Diego also had to demonstrate to the judge the interim harm that would occur if the injunction is denied as compared with the harm that Instacart would be likely to suffer if the preliminary injunction were issued. Instacart tried to sway the court by providing a parade of horrors that it would be forced to undertake should it be forced to immediately reclassify its contractors as employees. It would have to:

- hire tens of thousands of shoppers in California;
- develop rules, protocols, and management teams to monitor the new employees' performance

- and control their work;
- invest in infrastructure, such as supervisory staff and software, to enforce new rules on how workers allocate their time;
- redesign its business model to ensure workers were actively working during compensable time;
- require workers to accept all orders and prohibit them from using competing platforms during their shifts;
- secure a large workforce that would work on scheduled shifts under its supervision as opposed to the flexibility of the current platform;
- design new software systems to monitor and manage the new employees; and
- design systems to analyze shopping patterns and project customer demand to ascertain how many employees to schedule for shifts at specified times and places.

The company also noted that the additional costs associated with onboarding, managing, and retaining new employees could force it to change its pricing strategies. Finally, Instacart said that converting to an employment model would harm its ability to compete with other companies that use an independent contractor model, especially since it was the “sole target” of the litigation by San Diego.

But this wasn’t enough to convince the judge to deny the city’s request. It noted all the harms that would befall the community should the company be permitted to continue classifying its workers as contractors: unpaid wages, overtime, and rest breaks; missed meals; a failure to reimburse workers for expenses necessary to perform the work; and underpaid payroll taxes.

Two other factors swayed the judge to rule in the city’s favor. First, he noted that the policy of California is “unapologetically pro-employee.” He pointed out that all three branches of state government have spoken on this issue: the Supreme Court adopted the ABC test in its *Dynamex* decision two years ago, the legislature passed AB-5 last fall, and the governor signed the law into effect soon after. “To put it in the vernacular,” the judge said, “the handwriting is on the wall.” Second, he noted that Instacart cannot claim to be caught off guard or unprepared to adjust to his decision. He pointed out that *Dynamex* was unanimously decided by the state Supreme Court nearly two years ago. “While change is hard, defendant cannot legitimately claim surprise or that it has not had time to adjust its business model.” Moreover, the judge indicated that the evidence taken thus far in the litigation leads it to believe that Instacart need only make “relatively minor additional steps” that will allow it to be in full compliance by ensuring the workers in question are true “free agents.”

The company released a statement soon after the court’s decision saying that it would not only appeal the order but that it would be taking steps to ensure the ruling remains on ice during the appeals process so that its service will not be disrupted in San Diego. We’ll keep an eye on this litigation and provide updates as necessary.

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