



Federal Appeals Court Hands Uber Major Victory In Arbitration Agreement Fight

DECISION PROVIDES BOOST TO GIG ECONOMY BUSINESSES

Insights

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The 9th Circuit Court of Appeals delivered a significant victory to Uber and other gig economy businesses by reversing a trial court's denials of Uber's motions to compel arbitration in companion class action lawsuits brought by former drivers in Massachusetts and California. The decision not only provides tremendous leverage to Uber as it continues to fight class action litigation over classification issues, but it also boosts gig employers in their efforts to require mandatory arbitration instead of costly courtroom battles.

Background: Litigation Unfolding Across Several Platforms

In one case, *Mohamed v. Uber Technologies, Inc.*, a Massachusetts Uber driver sued Uber and several subsidiaries for violations of the Fair Credit Reporting Act (FCRA) and related state laws. He claimed that Uber's involuntary termination of his business relationship with the company, based on consumer credit background information it obtained about him, violated various federal and state laws.

In a related case, *Gillette v. Uber Technologies, Inc.*, other drivers made similar claims related to alleged improper background checks. In that case, a class action lawsuit was also pursued using the California Labor Code Private Attorneys General Act ("PAGA"), alleging that drivers were improperly classified as independent contractors rather than employees.

The *Mohamed* and *Gillette* cases are proceeding alongside the much-publicized *O'Connor* wage and hour class action over classification status, in which the same trial court last month rejected a \$100 million settlement as being insufficient.

Uber moved to compel arbitration in both cases, based on a 2013 agreement signed by Gillette and a 2014 agreement signed by Mohamed. The 2013 and 2014 agreements were similar in that they both required arbitration of all claims and also both provided that all disputes as to arbitrability itself (i.e. whether the arbitration agreement was enforceable) would be decided by the arbitrator, not by a court.

Both agreements also provided that the drivers waived their rights to bring any claim on a class or collective basis, meaning that their cases could only proceed on an individual basis. The 2013

agreement was different in that it provided that any disputes specific to the question of whether the claim could proceed on a class or an individual basis were to be decided by the court.

Decision: Appeals Court Hands Victory To Uber

The 9th Circuit's September 7 decision began by addressing the "delegation clauses" in the agreements, which delegated decisions over enforceability of the agreements to an arbitrator. The trial court had ruled last year that the delegation clauses conflicted with other language in the agreements providing that disputes arising out of the agreements were subject to "the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco."

The 9th Circuit reversed this ruling, holding that any supposed conflict was "illusory" because the venue provision only related to which court the parties would need to go to as a last resort in enforcing the arbitration agreements themselves, as clarified by certain "carve-out" language in the agreements.

The trial court had also found that the delegation clauses were "unconscionable" and therefore unenforceable under basic California contract law. In this regard, the trial court focused on three factors: first, that the delegation language was purportedly "hidden" in fine print; second, that for drivers to opt out of the 2013 agreement, they had to appear at Uber's office in person or submit written requests by overnight courier; and third, that the agreements on their face required drivers to pay at least a portion of arbitration fees as to proceedings directly relating to the question of arbitrability, potentially deterring them from bringing claims.

The 9th Circuit disagreed, rejecting all of the unconscionability arguments. It ruled that the arbitration agreement was not "adhesive" because the drivers could opt out of arbitration altogether. The court pointed to the fact that many Uber drivers had, in fact, opted out despite the need to appear in person or send an overnight letter to do so.

The 9th Circuit also reiterated the rulings of prior courts that a provision in one agreement purporting to waive the right to bring PAGA representative claims was void, but should not impact the general enforceability of the agreements.

Novel Argument Also Addressed

The court also addressed another issue that has been controversial in California courts recently, namely the question of whether a co-defendant in the same lawsuit, who was not a party to the arbitration agreement at issue, could join in compelling arbitration. This argument was advanced by one the subsidiary company that performed consumer credit checks as part of Uber's driver onboarding process (Hirease).

The argument was that all the defendants should be able to invoke the arbitration clause because the plaintiffs' lawsuit alleged that they had all acted in concert to violate the plaintiffs' rights. This argument is similar to one that has been advanced by many non-signatory co-defendants.

The court rejected Hirease's argument, but in doing so noted that Hirease was only sued on one of many causes of action, and based on its own alleged failure to act (delivering a copy of consumer credit reports as required under Massachusetts law). The court distinguished this from other cases where plaintiffs (who have signed arbitration agreements with one defendant but not others) bring cases against multiple defendants "that are based on the same facts and are inherently inseparable from the arbitrable claims."

What Does This Decision Mean For Gig Employers?

From Uber's perspective, the 9th Circuit's September 7 decision could impact the larger *O'Connor* class action case: it will arguably serve as a binding precedent as to the enforceability of Uber's arbitration agreements, thus limiting the *O'Connor* plaintiffs' ability to bring class claims. Some estimates indicate that the class of drivers now able to take part in the misclassification class action has been reduced from approximately 350,000 individuals to about 6,000. If this decision applies as expected, Uber has gained significant leverage in its battle.

From gig employers' perspective, this decision is also welcome news. It demonstrates that the common practice of requiring workers to accept arbitration agreements contained within Terms of Use contracts can be valid provided they follow the guidance the court offered. Further, it also provides a roadmap for drafting valid opt-out provisions, which have become a more necessary component given recent 9th Circuit precedent.

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