



The GrubHub Inc. website is demonstrated on a smartphone. Photo by Andrew Harrer/Bloomberg via Getty Images

GrubHub Wage Case May See New Delivery: Worker Status Test Redo

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- *Supreme Court of California weighing test for worker classification*
- *Decision could affect closely watched GrubHub trial in federal court*



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A case in a federal court in California involving GrubHub could upend worker classification in the gig economy. And a separate case in the state supreme court could upend the GrubHub case.

The parties in the GrubHub litigation gave their closing arguments in October and are waiting for the judge's ruling, which could come at any time. "What's really odd about that is the trial is done. Now the plaintiff's trying to change the rules of the game after the whistle has been blown," Todd Lebowitz, a partner in Baker & Hostetler LLP's Cleveland office, told Bloomberg Law.

What's happened since the federal bench trial concluded last fall? The Supreme Court of California is moving ahead with a separate worker classification case which could change the legal test used in the state to determine a worker's status.

And that state case “may completely change the way that California decides who’s an independent contractor versus employee,” said Lebowitz, who specializes in employment classification disputes.

The case before the California high court is *Dynamex Operations W. v. Superior Court*. In the case, “the Supreme Court appears to be considering whether to adopt a revised test to apply in determining whether a worker is an employee or an independent contractor under California wage law,” attorney Shannon Liss-Riordan wrote in a Jan. 2 notice she filed with the federal court hearing the GrubHub case.

Liss-Riordan is the lawyer for former GrubHub food delivery driver Raef Lawson, who says the online food ordering company incorrectly classified him as an independent contractor and that it owes him overtime and reimbursement for business expenses he’d be entitled to under state law if he had been classified correctly as an employee. Other gig economy worker classification cases have either settled or ended through other methods.

Lawson’s lawsuit is the first to reach [trial](#) over the question of whether workers are independent contractors or employees. It’s been seen as significant because the San Francisco-based U.S. District Court for the Northern District of California, in the heart of the gig economy, is where many similar cases are filed.

“Even though this district court case won’t be precedent-setting, a good way to look at it is that it will set the table,” Richard Meneghello, a partner in management law firm Fisher & Phillips LLP’s Portland, Ore., office, told Bloomberg Law. “A lot of courts will be looking to it to set the initial lay of the land.”

[Multi-factor Approach or ABC Test?](#)

Although the GrubHub case is being heard in a federal court, the lawsuit is based on state law. If the Supreme Court of California changes how it interprets state law, the federal court would likely follow the state high court’s ruling.

Lawson and GrubHub agreed that the test for worker status that applies in their case is a multifactor test the state supreme court [adopted](#) in 1989. It’s also called the Borello test, named for the *S. G. Borello & Sons, Inc. v. Dept. of Indus. Relations* case in which the court adopted it. The test lists nearly a dozen factors to be weighed to determine the economic reality of the relationship between a worker and a business: independent contractor or employee.

Lawson’s lawyer, Liss-Riordan, called the federal court’s attention to a Dec. 28, 2017, [order](#) in the *Dynamex* case, in which the supreme court asked parties to file briefs addressing whether the California law on classifying workers as employees or

independent contractors should embody a test similar to the “ABC” test the New Jersey Supreme Court [adopted](#) in 2015.

New Jersey’s test is called ABC because it includes three conditions that must all be satisfied for someone to be considered an independent contractor. If A, B, or C isn’t present, the worker is considered an employee. New Jersey adopted it in a case brought by Sleepy’s LLC mattress delivery drivers. Liss-Riordan’s firm, Lichten & Liss-Riordan, P.C. in Boston, represented the Sleepy’s drivers, who said they were incorrectly classified as independent contractors.

“An advantage of an ABC test over a multifactor common law test is that it creates brighter lines,” Liss-Riordan told Bloomberg Law. “Whenever you have a test that’s not as clear about a lot of factors it just leaves a lot of leeway for lawyers to argue about a lot of things.”

The court was already considering *Borello* and a second test that [defines](#) an employee as someone who is permitted to perform work for someone else. This test has been seen as potentially transforming workers who are classified as independent contractors into employees.

The state supreme court scheduled a Feb. 6 oral argument in the *Dynamex* case, including on the question of worker classification.

Dynamex is a nationwide courier and delivery service. Like GrubHub, Dynamex relies heavily on drivers to deliver ordered goods. The company classified its drivers as employees prior to 2004, but then changed their status to independent contractors. Driver Charles Lee then sued, on behalf of himself and some 1,800 other drivers.

[Employee Status Easier With ABC?](#)

A finding of employee status is more likely under the ABC test than the multifactor test, Lebowitz told Bloomberg law. “You can easily have a scenario where someone is an employee under the ABC test and a contractor under the right to control test,” he said. “It’s very plausible because the standards are so different.

Liss-Riordan appeared to agree. If the state supreme court in *Dynamex* adopts the ABC test, “this would make it significantly harder for GrubHub to prove that its drivers, including Mr. Lawson, have been properly classified as independent contractors,” she wrote in her notice.

She told Bloomberg Law that she is confident Lawson satisfies California’s test for employee status as it stands now. But she suggested in her notice to the federal trial judge that Lawson’s case should be put on hold if the judge believes the state supreme

court is likely to adopt the ABC test in *Dynamex*, which could affect the outcome for her client.

GrubHub declined to address the possibility the supreme court could adopt a new test or Liss-Riordan's suggestion for the federal court to hold off on issuing a ruling. "We continue to believe that Raef Lawson took full advantage of the freedom and flexibility that his partnership with Grubhub afforded him by deciding when, where and how frequently he performed deliveries," the company said in a statement provided to Bloomberg Law by Katie Norris, a corporate communications manager. "In presenting our case, we proved that Lawson was an independent contractor in business for himself, not an employee of Grubhub."

What may happen next isn't clear. The trial judge could wait for a ruling from the state supreme court before she decides the case. That could take months or years, and it isn't certain the state supreme court will change the test for employee status.

If the judge rules and then the supreme court changes the test, "I would think that the judge would have to allow the parties either to submit new evidence or submit new argument," Lebowitz said.

Subtext in Liss-Riordan's notice may hint at what could happen if the court were to rule that Lawson was correctly classified as an independent contractor, Meneghello said. "The oblique thing that's not said is 'if you're thinking about ruling in GrubHub's favor, just take a look at this so we're not reversed on appeal,'" he told Bloomberg law.