



Driver Asks Court To Block Uber 'Contractor' Classification

By [Vin Gurrieri](#)

Law360 (September 16, 2019, 7:24 PM EDT) -- A California Uber driver suing the company for misclassification has urged a federal judge to order the ride-sharing platform to immediately start deeming its drivers employees, saying a bill advanced last week by Golden State lawmakers making it harder to classify workers as independent contractors bolsters her case.

Plaintiff Angela McRay filed a motion on Friday seeking a preliminary injunction that would bar [Uber Technologies Inc.](#) from continuing to classify its drivers as independent contractors rather than as employees as part of her [proposed class action](#) alleging Uber illegally misclassified and underpaid her and other drivers.

McRay's suit was lodged just hours after California lawmakers advanced to Gov. Gavin Newsom [a controversial bill dubbed A.B. 5](#) that would codify the [California Supreme Court's](#) 2018 [Dynamex](#) decision, which imposed a rigid three-part legal standard called the "ABC test" on businesses in nonexempt industries that want to classify their workers as independent contractors.

The test requires businesses to prove three things to classify workers as independent contractors: that the workers are free from their control, perform work outside the usual business, and — independent of the work for the company — are regularly engaged in the trade they're hired to do.

In Friday's motion, McRay said the likelihood that her suit will succeed was "heightened" by the advancement of A.B. 5 — which the governor is expected to sign — and that a preliminary injunction should be issued in the meantime to curtail a series of ongoing harms against Uber drivers and the public caused by Uber's alleged misclassification.

The purported harms cited by McRay include Uber drivers' being deprived of workplace protections and being forced to shoulder the costs of business expenses like vehicle maintenance. Additionally, the company's classification practices have caused "public harm" to California by "diminishing" its labor standards, caused the state to lose out on tax revenue, and put taxpayers on the hook for public assistance for drivers that can't make ends meet as a result of being misclassified, according to McRay's motion.

McRay also argued that even those transportation companies who play by Dynamex's rules and classify drivers as employees are being "unfairly" disadvantaged.

"Plaintiff and similarly situated Uber drivers, as well as competing companies who are attempting to comply with the law, as well as the coffers of California, will suffer irreparable harm in the absence of a preliminary injunction while enduring years more of litigation," McRay said. "This court should therefore grant preliminary injunctive relief and enjoin Uber from classifying plaintiff and other Uber drivers as 'independent contractors' and order Uber to classify its drivers as employees under California."

McRay, who has driven for Uber for about three years, filed her proposed class action last week just as the state legislature placed A.B. 5 in a position to be enacted soon. Her suit, which referenced both Dynamex and A.B. 5, alleged that Uber can't prove its drivers are independent contractors under the ABC test.

Her suit alleges that Uber, as a result of misclassifying its drivers, committed a series of wage violations against them, including not paying for business expenses like gas, insurance and vehicle maintenance, and not paying them required minimum wages and overtime.

Uber, for its part, responded to the advancement of A.B. 5 by continuing to assert that its drivers are properly classified as contractors.

Tony West, Uber's chief legal officer, noted in a Sept. 11 statement that several courts have held that drivers' work falls outside the usual course of Uber's business, which he described as "serving as a technology platform for several different types of digital marketplaces."

While West acknowledged that the ABC test "certainly sets a higher bar for companies to demonstrate that independent workers are indeed independent," he added in his statement that "just because the test is hard does not mean we will not be able to pass it."

McRay's complaint, as well as her preliminary injunction motion, each cited news reports that included the statements West made after A.B. 5 advanced.

"This case is no usual case. The 'ABC test' has been the law in California since Dynamex was issued and is only further reinforced with the passage of A.B. 5 this week," McRay said in her injunction motion. "As demonstrated by the intense public debate surrounding the Dynamex decision and subsequent codification through A.B. 5 — but continued obstinance of Uber in the face of clear law — this case is an extreme case that compels a preliminary injunction."

Shannon Liss-Riordan, a prominent Massachusetts employment attorney who represents McRay and has represented workers in numerous misclassification cases against businesses in the so-called gig economy that rely on contracted labor, told Law360 when the suit was filed that it applies to California Uber drivers who have arbitration agreements, as opposed to those not bound by arbitration agreements who were covered under the settlement in a previous case.

Uber [earlier this year](#) had agreed to pay \$20 million to nearly 14,000 drivers in California and Massachusetts who weren't bound by a company arbitration agreement to settle a misclassification suit. Although the deal required Uber to change certain policies in those states,

it didn't require the company to start classifying the drivers as employees.

Liss-Riordan, who is a candidate for [U.S. Senate](#) in Massachusetts, told Law360 in a statement Monday that she filed the suit on McRay's behalf after West stated that Uber wouldn't reclassify its drivers even after A.B. 5 takes effect "because Uber should not be above the law."

"The state of California has spoken — both through its Supreme Court and its legislature — that workers must be paid fair wages and that employers like Uber cannot avoid their responsibilities under the law," Liss-Riordan said.

"I want to go to the Senate to put an end to corporate welfare, which is what we are giving to companies like Uber that are avoiding all responsibilities as employers — and burdening workers, states, and the federal government by not paying their fair share of taxes and other employer obligations," she added. "I have clients who are Uber drivers who sleep in their cars because they cannot afford housing. They don't have health care. Uber is a multibillion-dollar company. It can afford to pay its workers properly if it wants to continue its business."

A representative for Uber was unavailable for comment Monday.

McRay is represented by Shannon Liss-Riordan, Anne R. Kramer and Adelaide Pagano of [Lichten & Liss-Riordan PC](#).

Counsel information for Uber was not immediately available.

The case is Angela McRay v. Uber Technologies Inc., case number [4:19-cv-05723](#), in the [U.S. District Court for the Northern District of California](#).

--Editing by Daniel King.

Update: This story has been updated to include comment from plaintiffs' counsel.