Grubhub Driver Granted Employee Status in Misclassification Case In California

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Workers are traditionally classified as either employees or independent contractors. Gig economy workers are generally classified as independent contractors by the companies. However, we have recently seen both the Courts and state legislatures struggle with this dichotomy as it is applied to gig economy workers, who primarily work as rideshare or delivery drivers.

On March 30, 2023, a federal district judge for the Northern District of California in the case *Lawson v. Grubhub Holdings Inc.,* Case No. 3:15-cv-05128, ruled that a Grubhub delivery driver is an employee, not an independent contractor, for minimum wage and overtime claims, under the ABC test. This is the first court ruling in the country holding that an app-based driver is an employee for wage law purposes.

The ABC test is a three-part test that employers must meet if they want to classify a worker as an independent contractor. A worker is only an independent contractor if they meet all three parts of the test:

1. The worker is free from the control and direction of the hirer in relation to the performance of the work, both under the contract and in fact;
2. The worker performs work that is outside the usual course of the hirer's business; and
3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hirer.

After determining that Grubhub could not show that an exception to the ABC test applies, the Court held that Grubhub's delivery driver is necessary to Grubhub's business, failing to meet Part B of the ABC test, which makes him an employee.

In 2015, a Grubhub delivery driver brought suit against Grubhub alleging that he was misclassified as an independent contractor and denied minimum wage, overtime, and business expense reimbursement, which are only available to employees. This was one of the earliest legal challenges against app-based delivery companies in California.

After a bench trial in 2017, the Court concluded that Grubhub properly classified their drivers as independent contractors under the *Borello* or multifactor test. This test looked at the level of control potential employers had over the manner and means of accomplishing the desired results. To determine whether a worker is an employee or independent contractor over thirteen potential factors are weighed, like whether the employer or the worker supplies the tools for doing the work and the length of time that services are to be performed. The Grubhub driver filed an appeal.

In 2018, California's Supreme Court threw out the *Borello* test in favor of the ABC test in *Dynamex Operations West v. Superior Court*. The ABC test was enshrined into law as Assembly Bill 5 in 2019. The Grubhub driver's appeal was put on hold until the California Supreme Court determined that *Dynamex* would apply retroactively.

In 2021, the Ninth Circuit reversed and remanded the earlier judgment for Grubhub and required the lower court to determine if an exception to the ABC test applies and if not, to apply the ABC test to the earlier case. The trial court allowed Grubhub to supplement the earlier record and after oral argument rendered a decision.

In 2023, the Court held that Grubhub failed to prove that an exception to the ABC test applied and that under the ABC test, Grubhub's drivers are a necessary part of the business, making them employees.

Grubhub first argued that the Business to Business exception to the ABC test applied. Under the Business to Business exception, if an individual or business entity contracts to provide services to another business, the determination of employee or independent contractor status of the business services provider is governed by *Borello,* not the ABC test. Grubhub had to prove that its drivers met all thirteen factors to qualify for the exception.

The Court analyzed two of the factors argued by Grubhub: whether the driver advertises to the public as available to provide similar services and whether the driver can negotiate his own rates. The Court found that neither factor applied because working for multiple app-based companies does not constitute advertising to the public and the driver could not negotiate his own rate. Since all thirteen factors had to be met, the exception did not apply. Therefore, the ABC test was the appropriate test to determine the employment classification of the delivery drivers.

To meet the ABC test, Grubhub had to show that the drivers perform work outside of Grubhub's usual course of business. Grubhub argued that it merely connects restaurants with diners to facilitate food ordering. However, the Court was not convinced and held that delivery services were necessary to the business because Grubhub made more money when there were more deliveries, performed delivery services continuously, and publicly advertised delivery services to diners.

Since Grubhub could not show that the drivers were unnecessary to Grubhub's usual course of business, the Court determined that the driver was an employee and allowed him to present a case for minimum wage and overtime violations. The Court was convinced that Grubhub violated minimum wage regulations but not overtime regulations. Grubhub is likely to appeal the ruling.

While Proposition 22 limits the impact of the decision in California, this Decision could persuade other state and federal courts to attempt to classify their app-based delivery drivers.

If you have a question involving this specific case or any issue with employment relationships, please call one of Reminger's Employment Practice Liability Practice Group members.