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Ninth Circuit Reversed Grubhub's Victory on Independent Contractor Classification in Light of the Retroactive Application of Dynamex

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On Monday, the Ninth Circuit vacated a judgment for Grubhub, Inc. and against a former food delivery driver, Raef Lawson, who claimed that he was misclassified as an independent contractor when he performed food delivery services. Lawson had asserted claims for minimum wage, overtime, and expense reimbursement.

The district court entered judgment in favor of Grubhub following a bench trial in February 2018, before a flurry of legislative and court activity redefined the limits of independent contractor status in California, particularly with respect to app-based workers. Without the benefit of subsequent decisions and legislation, the district court used the multi-factor test set out by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (i.e., the "*Borello* factors") to assess whether a person qualified as an independent contractor. The primary *Borello* factor—the hiring entity's "right to control" the work—weighed strongly in favor of independent contractor status because Grubhub did not control the manner and means by which Lawson performed his food deliveries.

But just three months after the judgment, the California Supreme Court issued the landmark decision in *Dynamex Operations W., Inc. v. Superior Court* in which the Court adopted the "ABC test" for classification of workers raising claims "rooted in wage orders." The ABC test greatly restricted the types of workers who could qualify as independent contractors, notwithstanding if the hiring entity lacked the right to control the work of the worker. Then, in September 2019, the Ninth Circuit certified the issue of whether the ABC test applied retroactively to the California Supreme Court.

Also in 2019, the California Legislature passed Assembly Bill No. 5 ("AB 5"), which codified the ABC test for claims relating to wage orders, prospectively (effective January 1, 2020), extended the application of the test to the determination of "employer" under the Labor Code and Unemployment Insurance Code, and created several industry-specific exemptions from the ABC test that expressly applied retroactively.

Finally, nearly a year later, in response to AB 5, California voters overwhelmingly passed Proposition

22, which provided that, if certain conditions are met, “app based drivers” (like Lawson) qualified as independent contractors rather than employees.

Lawson appealed the district court judgment as well as its earlier denial of class certification (which was based on the fact that only two out of thousands of delivery workers in California had opted out of Grubhub’s arbitration and class action waiver). The Ninth Circuit stayed Lawson’s appeal pending the California Supreme Court’s decision on the certified question about the retroactive application of *Dynamex* and its ABC test.

In January 2021, the California Supreme Court answered that question in *Vazquez v. Jan-Pro Franchising International, Inc.*, and held that the ABC test did in fact apply retroactively to claims rooted in the wage orders. The Court recognized that under the general rule, judicial decisions are given retroactive effect while changes to the law created by new legislation normally apply only prospectively. The Court found no reason to depart from the general rule in concluding that *Dynamex* applies retroactively, meaning that the decision applies to all cases that were not yet final as of the date the decision in *Dynamex* became final in 2018.

In the September 20, 2021 *Grubhub* opinion, the Ninth Circuit left the district court’s denial of certification in place but vacated the judgment as to the minimum wage, overtime, and expense reimbursement claims. As to the former two claims, the Ninth Circuit recognized both minimum wage and overtime claims were “rooted in wage orders,” so it directed the district court to apply the ABC test to those claims. As to the expense reimbursement claim, the Ninth Circuit held that neither *Dynamex* nor AB 5 settled whether the ABC test applied to that claim since expense reimbursement claims do not arise from the wage orders. While AB 5 expressly decreed that the ABC test applied to all Labor Code claims after January 1, 2020, Lawson had already left Grubhub by 2020, so that rule did not apply to him. Thus, the Ninth Circuit instructed the district court to determine in the first instance whether to apply the ABC test to a pre-2020 expense reimbursement claim.

While Grubhub conceded that Proposition 22—which was passed in November 2020 and scaled back the application of the ABC test for app-based drivers—did not apply retroactively, which the Ninth Circuit confirmed, it did argue that Proposition 22 “abated” application of the ABC test to Lawson’s claims. Put another way, Grubhub reasoned that the subsequent passage of Proposition 22 prohibited the collection of any benefits owed to Lawson under the ABC test because those benefits were not reduced to judgment before the proposition was passed. To support its argument, Grubhub cited a line of cases holding that statutory causes of action are abated when the statute providing the cause of action is repealed before the plaintiff obtains a judgment. The Ninth Circuit rejected the abatement argument, observing that Proposition 22 did not wholly abolish causes of action under the ABC test. “Rather, it crafted a conditional and prospective exemption from the test for some workers. Proposition 22 neither changed the underlying Labor Code provisions governing these claims nor ‘changed the portion of AB-5 that set forth the ABC test itself.’” Accordingly, the abatement doctrine did not apply.

The *Grubhub* decision shows the incredibly complicated rules California has created to determine independent contractor status in the context of app-based workers. The competing case law, legislation, and ballot initiatives create a complicated tapestry of conflicting rules that are difficult to sort out. Indeed, the constitutionality of Proposition 22 itself continues to be litigated after a superior court judge in Alameda County recently held the law to be unconstitutional and unenforceable because it purportedly infringes on the power of the Legislature to regulate workers’ compensation. With that in mind, if you are considering classifying a worker as an independent contractor, you

should be sure to first consult with an employment lawyer.

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