

Will California's New Worker Classification Test Be Applied Retroactively? One Judge Says Yes

By [Erin Mulvaney](#) | July 23, 2018 at 06:12 PM



Photo: Daniel Hertzberg for ALM

- Gig economy companies and judges are grappling with the California Supreme Court [ruling that upheld](#) how employers classify their workers, and whether the new test applies retroactively to businesses facing lawsuits has emerged as a central question.
- The Supreme Court's decision in the case *Dynamex Operations West v. Superior Court* created a new worker classification standard—the “ABC” test—that is more rigid than the previously used scheme to determine whether a worker is an independent contractor or employee. The distinction is key in wage-and-hour disputes, as employees are entitled to benefits such as minimum wage and overtime.
- The [April ruling](#) makes it more difficult for gig economy companies—whose business models are often based on independent contractors—to keep denying employee status to their workforce. Management-side attorneys contend [the test is difficult to overcome](#), particularly because one aspect requires the employer to prove that the worker is performing work outside the usual course of the company's business.

- In the aftermath of the ruling, business groups [pressed the Supreme Court to clarify](#) whether its decision applied retroactively—but the justices remained mum, turning down a request to modify the opinion to apply only to future disputes. The retroactive scope of the ruling is playing out now in state and federal courts, including in a worker misclassification dispute against online food-ordering portal Grubhub Inc. pending in federal appeals court.
- Plaintiffs lawyers were buoyed last week following a ruling in their favor by an Orange County judge. Superior Court Judge William Claster, [ruling](#) in a dispute involving exotic dancers and the Anaheim-based company Imperial Showgirls, said the Supreme Court’s decision in the *Dynamex* case does apply retroactively.
- Claster said the Supreme Court could have said explicitly that the ruling applied only prospectively. “The lack of such a pronouncement suggests that the decision should apply retroactively,” the judge wrote.
- Shannon Liss-Riordan of Lichten & Liss-Riordan, a lawyer for the adult dancers, said she is hopeful to use the Orange County ruling in pending disputes against Grubhub and [lawsuits she filed](#) in the wake of *Dynamex* against gig companies Lyft and Postmates.
- “I think it’s clear that *Dynamex* is retroactive,” Liss-Riordan said Monday in an interview. “With this decision, we will show in *Grubhub* that it doesn’t make sense that it’s not. It’s a good first step in addressing that.”
- Lawyers from [Jackson Lewis](#), which represented management in the dancers’ case, did not immediately respond to requests for comment. Long & Levit was also on the defense team.
- California courts could follow the Orange County decision and rule similarly in the mountain of cases that confront worker classification in California, [Fisher Phillips](#) partner Rich Meneghello [wrote in a recent post](#).
- “One of the biggest questions remaining about the test was whether it should be applied retroactively. In other words, should businesses be protected for having relied upon the current law for years, or should they be held liable for years of possible wage and hour violations under a brand test just adopted out of the blue?” Meneghello wrote. He added: “We’ll see if other courts follow this same line of thinking, but for now, businesses appear to have a hurdle to overcome if they hope to limit the impact of the *Dynamex* case and shrink the application of the ABC test.”

- The Grubhub dispute is pending in the U.S. Court of Appeals for the Ninth Circuit. [The trial](#) was one of the first tests of the gig economy's business model. A jury sided with the company that a driver for the on-demand food service company was not an employee. Liss-Riordan is pressing to apply the *Dynamex* decision in the case.
- A team from [Gibson, Dunn & Crutcher](#) represents the company. "Grubhub has vigorously argued that applying *Dynamex* here would violate due process and contravene federal and state law," Gibson Dunn's Theane Evangelis [said in a court filing](#) on June 28.
- The scope of the consequences of the *Dynamex* ruling remain unclear, but the ruling could substantially affect on-demand companies.
- David Winnett, a plaintiffs attorney at The Veen Firm in San Francisco, predicted the *Dynamex* ruling will change the way companies operate. Businesses such as Uber and other on-demand services have maintained a foothold in the marketplace because they worked around traditional labor regulations, he said.
- "Businesses are going to have to change the way they operate, otherwise, they're going to violate regulations and face liability over and over again for failure to comply with wage and hour obligations to their employees," Winnett said. "In many ways, it's a game changer. There are lawyers in different areas of practice watching how far-reaching this is going to be."