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California high court: 'ABC test' for gig workers is retroactive, in blow to Uber, Lyft

Carolyn Said | Jan. 14, 2021

California Supreme Court Chief Justice Tani G. Cantil-Sakauye delivers her State of the Judiciary address at the Capitol in Sacramento, Calif. In a unanimous opinion authored by Cantil-Sakauye, California's strict "ABC test" that makes it hard to claim workers are independent contractors applies retroactively, the state Supreme Court ruled on… *Photo: Rich Pedronceli / Associated Press*

California's strict "ABC test" that makes it hard to claim workers are independent contractors applies retroactively, the state Supreme Court ruled on Thursday in a decision that could hurt Uber, Lyft and other gig companies in numerous lawsuits.

The ABC test was issued in an April 2018 decision called Dynamex that said workers must be considered employees unless they A. work free from control of hiring entity; B. perform work outside the usual court of the hiring entity's business; and C. have independent businesses doing that type of work.

"Public policy and fairness concerns, such as protecting workers and benefitting businesses that comply with the wage order obligations, favor retroactive application of Dynamex," said a unanimous opinion authored by Chief Justice Tani Cantil-Sakauye. The Ninth Circuit Court of Appeals in May 2019 had said Dynamex should be retroactive.

The Dynamex decision underpins California's controversial AB5 gig-work law, which codified the ABC test while exempting numerous professions, and expanding its reach beyond wage orders.

Uber, Lyft, DoorDash and other gig companies classify workers as independent contractors rather than employees, saying they rely upon that model's flexibility. Doing so also saves them millions of dollars on benefits, minimum wage, overtime and other expenses. The gig companies spent $220 million convincing voters to pass November's Proposition 22, which keeps their workers as independent contractors and exempts them from AB5 going forward. Union groups sued to overturn the measure this week.

Prop 22 does not shield the gig companies retroactively. They are facing a range of lawsuits over employment classification, from both government agencies and their own workers. The Supreme Court decision means that if the gig companies lose those cases, they could face much bigger penalties since they could be found responsible for actions before Dynamex took effect in April 2018.

In the biggest one, California's attorney general and three city attorneys sued Uber and Lyft in May. The California labor commissioner sued the two ride-hailing companies in August, saying they committed wage theft by misclassifying drivers. Various drivers and couriers have joined forces in misclassification lawsuits against Uber, Lyft and other gig companies.

Uber and Lyft did not immediately reply to requests for comment.

Shannon Liss-Riordan, a Boston attorney who has filed misclassification cases on behalf of gig workers and janitors said the decision should help California workers seeking redress over wage violations that occurred before April 2018. She has lawsuits and arbitrations pending against Uber, Lyft, Grubhub, DoorDash, Postmates, Instacart, Shipt and Amazon.

The court “emphasized that this strict test was necessary because the prior looser standard ... had led to inconsistent outcomes that did not adequately protect workers,” she said in an email. “This decision is a further indictment of Prop 22, which the gig economy paid for last year in the hope of not having to provide its workers the benefits that the California Supreme Court has made clear are so important to our social contract.”

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