



Uber Hit With Misclassification Suit Invoking Dynamex Bill

By [Vin Gurrieri](#)

Law360 (September 12, 2019, 2:48 PM EDT) -- An Uber driver in California slapped the company with a proposed class action alleging she and other drivers were misclassified as independent contractors and shorted on pay, just hours after California lawmakers sent Gov. Gavin Newsom a contentious bill making it harder for businesses to label workers contractors rather than employees.

Plaintiff Angela McRay's suit against [Uber Technologies Inc.](#) was filed in federal court Wednesday, with the state [on the verge of enacting](#) A.B. 5, a bill toughening the state's rules on employee classification. Gov. Newsom is expected to sign the bill into law.

The bill, which would take effect in 2020 and codify the [California Supreme Court's](#) 2018 [Dynamex](#) decision, imposes a three-part legal standard called an ABC test on employers in nonexempt industries that want to classify their workers as independent contractors.

The test requires employers 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.

McRay's suit, which referenced both Dynamex and A.B. 5, alleged that Uber can't prove that its drivers are independent contractors under the ABC test.

"The California Supreme Court made a strong statement in the recent Dynamex decision — and the California legislature has now reinforced that statement by passing Assembly Bill 5 — of the importance to the public good of employers properly classifying their workers as employees," McRay said in her complaint. "That public interest is harmed by an employer such as Uber ignoring the decision and continuing to

classify its employees as independent contractors.”

Uber responded to the advancement of A.B. 5 by continuing to assert that its drivers are properly classified.

The company’s Chief Legal Officer Tony West acknowledged in a statement Wednesday that the ABC test “certainly sets a higher bar for companies to demonstrate that independent workers are indeed independent,” but added that “just because the test is hard does not mean we will not be able to pass it.”

West noted 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.” He also said the company will continue to respond to litigation or arbitrations in which it is accused of misclassification, in keeping with Uber’s current approach.

McRay’s complaint, citing news reports that included West’s quotes, said his comments exemplify Uber “publicly and defiantly” refusing to reclassify its drivers as employees even though California lawmakers “clearly intended for Uber to be covered” by A.B. 5.

“Uber has publicly stated that it intends to defy this statute and continue to classify its drivers as independent contractors — in violation of the express intent of the California legislature,” McRay’s complaint said. “This ongoing defiance of the law constitutes a willful violation of California law.”

McRay’s 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

She also contends that Uber drivers do perform work “in the usual course of Uber’s business,” which it describes as “a car service that provides transportation to its customers,” and that drivers like McRay “perform that transportation service.”

“Uber holds itself out as a transportation service, and it generates its revenue primarily from customers paying for the very rides that its drivers perform,” McRay’s complaint said. “Without drivers to provide rides for Uber’s customers, Uber would not exist.”

Additionally, McRay alleges that Uber exercises a significant amount of control over drivers through a “litany” of rules and policies that drivers must adhere to, and that drivers “are not engaged in their own transportation business” when they are driving for Uber.

A spokesperson for Uber responded to Law360’s request for comment Thursday by referencing West’s comments yesterday.

“As we have said, under A.B. 5 the classification test would now be different in California, but that doesn’t mean we won’t pass the test,” Uber’s spokesperson said.

McRay, who has driven for Uber for about three years, is represented by Shannon Liss-Riordan, a prominent Massachusetts employment attorney who has represented workers in numerous misclassification cases against businesses in the so-called gig economy that rely on contracted labor, including previous litigation against Uber.

In one of those cases, Uber earlier this year [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 told Law360 on Thursday that McRay’s case 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 the previous case.

In explaining why arbitration agreements shouldn’t apply, she referenced [a Third Circuit decision from yesterday](#) involving the issue of whether Uber drivers fall under the Federal Arbitration Act’s exemption for transportation workers.

She also said McRay’s case was filed seeking “public injunctive relief” — an order requiring Uber to comply with state labor laws — something the California Supreme Court has held can’t be compelled to arbitration.

“Now that the California legislature has codified the Dynamex ABC test, it is beyond clear that the public interest of California is that companies such as Uber properly

classify their drivers, because when they don't it doesn't just affect the workers, it also affects the public as a whole," Liss-Riordan said, adding that the "entire transportation industry and the economy in general is adversely affected by companies like Uber ignoring the law and not providing their workers with the pay they're entitled to."

McRay is represented by Shannon Liss-Riordan, Anne R. Kramer and Adelaide Pagano of [Lichten and 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-5723, in the [U.S. District Court for the Northern District of California](#).

--Additional reporting by Braden Campbell and Danielle Nichole Smith. Editing by Alanna Weissman.

Update: This story has been updated to include additional information and comment from the parties.