LONG ARM OF THE LAW —

New court ruling could force Uber, Lyft to convert drivers to employees

California Supreme Court: It'll be tougher for firms to not have bona fide employees.

CYRUS FARIVAR - 5/2/2018, 4:15 AM

Kelly Sullivan/Getty Images for Lyft

Enlarge / A Lyft driver in San Francisco, California.

The California Supreme Court has ruled that it will now be harder for employers to formally classify their workers as independent contractors rather than employees.

The court's Monday opinion in *Dynamex v. Superior Court of Los Angeles County* could have a profound impact on many tech companies like Uber, Lyft, Instacart, and others that provide on-demand services. Dynamex is a courier and delivery company based in Kent, Washington.

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The overwhelming majority of gig economy companies' workers are not employees, and so they do not get any health, retirement, unemployment, or other benefits that typically come with full-time employment. Uber, for example, uses the euphemism "driver partners" when referring to its non-employee drivers, who constitute the backbone of the company's service.

The court found:

> Although in some circumstances classification as an independent contractor may be advantageous to workers as well as to businesses, the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors...
>
> Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees.

Numerous employment law experts that Ars spoke with said that the new opinion could end up being a moment of reckoning for Silicon Valley. Among those we spoke with is Shannon Liss-Riordan, a Boston-based labor lawyer who has brought numerous cases against Uber, Grubhub, and others.

"The test will provide much stronger worker protections and make it extremely difficult for companies to classify their workforce as independent contractors, as many employers have been trying to do, and unfortunately many courts have allowed them to get away with it," Liss-Riordan said in an email to Ars. "Under this test, if the work is performed within the usual course of the company's business, the worker is an employee."

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Byron Goldstein, an Oakland-based attorney who also has brought cases against startups over labor issues, agreed.

"There are many tech companies cheating the law, their workers, and their competitors because they misclassify their workers," he emailed Ars. "Because this decision provides clarity regarding whether a worker is an employee, those companies should understand that they do not get a free pass merely because they write software."

Prior to this ruling, Goldstein continued, there was a narrower test relying on a 1989 California Supreme Court precedent in a case known as *Borello*.

Now, businesses cannot simply say that any or all of their workers are contractors with a wave of a hand—or a relevant clause buried in their contracts.

The court found that companies can only do so if they meet certain requirements:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business, the worker should be considered an employee and the hiring business an employer under the suffer or permit to work standard in wage orders.

Or put another way, as Goldstein added: "Uber's business is providing rides, so it is now harder for Uber and other companies to manipulate classifications or otherwise evade those long-standing California worker protections, such as a requirement that a worker get paid minimum wage for each hour that is worked."

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Similarly, Michael LeRoy, a professor of labor law at the University of Illinois at Urbana-Champaign, told Ars that the new ruling likely will "raise costs" for tech firms.

"It's hard to see Uber sticking around to bear these new costs," he emailed. "Over time, they might consider withdrawing from this immense market and become more focused on international markets with huge populations and far less regulation."

Uber and other companies continue to face numerous lawsuits over wages.

Miriam Cherry, a labor law professor at St. Louis University, emailed Ars to say that this new opinion would "stir things up" in those ongoing cases.

"Many of the cases have been in settlement negotiations for some time," she wrote. "But there are going to be new workers, who are not bound by those settlements' agreements, who might bring cases—and this change in the law will only strengthen their positions."

Uber did not immediately respond to Ars' request for comment.

"Hi there, we are still reviewing the decision," emailed Lyft spokeswoman Alexandra LaManna.

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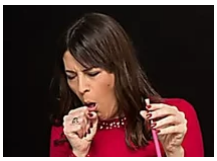

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