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## Uber, Postmates Ask 9th Circ. To Stop Calif. Contractor Law

By **Abby Wargo**

Law360 (April 12, 2022, 2:53 PM EDT) -- Uber and Postmates urged the Ninth Circuit to block a California statute making it more difficult to classify workers as independent contractors, arguing a trial court held them to too strict a standard when it rejected their push to freeze a controversial 2019 employee classification law.

On Monday, the delivery services and two delivery drivers filed a reply brief in their suit against the state asking the Ninth Circuit to grant them a preliminary injunction halting the enforcement of Assembly Bill 5, which makes it harder for workers to be classified as independent contractors rather than employees. They told the court that the state would be able to dispute their allegations at trial, but that the district court should have believed them on a motion to dismiss.

"Plaintiffs' complaint asserts serious constitutional challenges based on thoroughly alleged facts, and the government's response is (like the district court's ruling) largely just a disagreement with those facts," the delivery services said in their reply.

Democratic Gov. Gavin Newsom **signed A.B. 5 into law** in September 2019, which codified a 2018 California Supreme Court decision known as **Dynamex**. A.B. 5 codifies the "ABC test" that classifies a worker as an employee of the company unless the company can show the worker operates separately from the business.

Uber, Postmates and two delivery drivers sued, arguing the law violated the U.S. Constitution's equal protection and due process clauses. In January 2020, they asked the district court for an injunction to stop the law from taking effect, which was **denied**. In July, a California federal court ruled that A.B. 5 did not violate the equal protection clause.

The delivery services argued Monday that the district court's ruling contradicted the allegations in their complaint despite the claims being sufficient to survive defeat at that stage of the litigation. The deprivation of constitutional rights, they argued, is an urgent issue deserving of an injunction.

They said the law's exemption provisions makes "arbitrary distinctions" between gig workers and employees and that it is intended to punish delivery drivers and the companies they operate for. The law is also riddled with loopholes created by politicians making back door deals with companies and industries that don't want to be affected by the law, the companies argued.

"This crazy quilt of legislative exemptions has only two conceivable justifications: the desire to punish app-based drivers and the network companies they use, and the pressure to cave 'to the demands of ... political constituents,'" Uber and Postmates said in their reply brief.

The delivery companies argued that the state Legislature made accommodations for freelance journalists and that they should have been extended a similar accommodation, saying that the Legislature's failure to treat them fairly displays hostility.

The delivery companies also pushed back against the government's assertion that being a business owner is a classification rather than an occupation, saying that the state was wrong to correlate running a business with working as a regular employee. In doing so, the companies argued the state was trying to "forbid driver independence."

The district court was also wrong to dismiss the claims because the delivery drivers' reclassification would "shred" their contracts with the delivery companies. Such a severe impact means the law should be looked at with more scrutiny, they argued.

"The evidently superior way to achieve the Legislature's goals is to guarantee app-based drivers compensation, benefits, insurance and worker protections while preserving app-based drivers' contractually guaranteed independence, not to force hundreds of thousands of them into rigid employment relationships or (worse still) out of work," the companies said.

In February, the Teamsters, Service Employees International Union California State Council and United Food and Commercial Workers Western States Council **submitted an amicus brief** in support of the state, saying the law does not single out gig workers and that it is constitutional.

The California Department of Justice told Law360 it was reviewing the brief.

"We'll continue to do our part to defend laws that are designed to protect workers and ensure fair labor and business practices," a spokesperson said Tuesday.

Theane Evangelis of Gibson Dunn & Crutcher LLP, who is representing the delivery companies, said the law is unconstitutional and against the will of the voters.

"The voters rejected A.B. 5 ... yet the state continues to try to enforce A.B. 5 against app-based drivers. We look forward to the Ninth Circuit's consideration of our appeal," Evangelis told Law360.

Spokespeople for Uber and Postmates did not immediately respond to requests for comment Tuesday.

Uber, Postmates and the drivers are represented by Theane Evangelis, Blaine H. Evanson, Heather L. Richardson, Dhananjay S. Manthripragada and Alexander N. Harris of Gibson Dunn & Crutcher LLP.

California Attorney General Rob Bonta is represented in-house by Thomas S. Patterson, Mark Beckington and Jose Zelidon-Zepeda.

The case is Lydia Olson et al. v. California et al., case number 21-55757, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Beverly Banks and Vin Gurrieri. Editing by Neil Cohen.

*Update: This story has been updated with comments from the California Department of Justice and Evangelis.*