

## The Biggest Transportation Rulings Of 2018

By Linda Chiem

*Law360 (December 14, 2018, 2:06 PM EST)* -- The transportation industry saw some major court decisions in 2018, with freight railroads losing a long-running appellate battle over Amtrak's regulatory authority and Uber landing a Ninth Circuit win making it more difficult for drivers to pursue worker misclassification claims against it.

The year yielded a mixed bag of rulings that clarify the constitutional boundaries of certain transportation regulations, advance workers' wage-and-hour lawsuits and beat back class actions through arbitration agreements, experts told Law360.

Here, Law360 looks back at a few of the year's biggest rulings affecting the transportation sector.

### California Upends Worker Classification Test

Transportation industry stakeholders spent much of 2018 lamenting the impact of the California Supreme Court's April Dynamex decision, which established a more rigid standard for distinguishing between employees and independent contractors for the purposes of Golden State wage orders.

The state high court adopted a three-prong test known as the "ABC" standard that presumes all workers are employees unless a business can show the worker is free from its supervision, performs work outside the usual course or place of business and works "in an independently established trade, occupation or business of the same nature" as the work they do for the entity that is hiring them.

The ruling put the burden on employers to prove that workers aren't employees in the Golden State for the purposes of state wage orders that govern items such as overtime and meal and rest breaks.

"Dynamex was a step in an avoidable direction — a step that most people had hoped was not going to be shoved in everybody's face as quickly as it was — that the old way of doing things is not going to last very much longer," Clark Hill PLC attorney Brad Hughes told Law360. "The independent contractor economy is going to face far more stringent worker and labor laws across the country."

As a result of Dynamex, attorneys have braced for uncertainty and an increase in misclassification lawsuits against trucking, logistics, port service, gig-economy and other transportation service companies that have used independent contractors or independent owner-operators.

"It's a decision that is outside of its time," Greg Feary, managing partner of Scopelitis Garvin Light

Hanson & Feary PC, told Law360. "It's not in touch with the current environment or the labor environment and certainly is not in touch with what's going on in transportation."

Dynamex threw into "paralysis" the normal course of business planning around the use of independent contractors, Feary said.

Management-side attorneys describe Dynamex as a groundbreaking and disruptive ruling that complicates how transportation service providers will comply with a patchwork of state requirements. Plaintiffs attorneys, meanwhile, say the ruling ensures companies will no longer be allowed to dodge minimum wage laws — and snag unfair competitive advantages — by classifying large chunks of their workforce as independent contractors.

"Companies in California are concerned that the gig is up, since the California Supreme Court adopted an expansive test for who is an 'employee' under the law, and they are waging a well-financed and aggressive campaign to overrule the court's decision," said Rebecca Smith, director of work structures at the advocacy group the National Employment Law Project.

The case is Dynamex Operations West Inc. v. The Superior Court of Los Angeles County, case number S222732, in the Supreme Court of California.

### **9th Circ. Deals Blow to Uber Drivers' Misclassification Suits**

The Ninth Circuit in September dismantled a class of hundreds of thousands of Uber drivers alleging they were misclassified as independent contractors, handing the ride-hailing giant a major victory in a yearslong battle over whether it has skirted labor laws by considering its drivers to be contractors rather than employees.

A unanimous Ninth Circuit panel determined that Uber Technologies Inc.'s arbitration agreements with drivers were valid and enforceable based on the U.S. Supreme Court's May Epic Systems ruling, as well as an earlier Ninth Circuit ruling related to Uber's arbitration agreements. It dealt a body blow to the hundreds of thousands of current and former Uber drivers who sought to band together to gain employee status, but will now have to pursue their claims against Uber in individual arbitration.

And experts say it made even bleaker any situation for workers seeking to vindicate important statutory rights via class actions.

"Employers doing business in California are certainly being strongly prompted to make use of arbitration agreements if they aren't already, or to tighten existing agreements," said Glenn A. Danas, a partner with plaintiffs firm Robins Kaplan LLP. "The plaintiffs bar held out some hope based on the federal labor law statutes after the NLRB's DR Horton decision — holding that class arbitration couldn't be barred in mandatory employment agreements as it violates federal labor law — but the Supreme Court slammed the door on that argument last term in Epic Systems."

So Uber's win wasn't surprising. Epic Systems established that businesses aren't violating the National Labor Relations Act if they force workers to forgo the ability to pursue class actions by including class waivers in arbitration agreements that workers must sign as a condition of employment.

Instead, the justices held that mandatory arbitration agreements must be enforced under the Federal Arbitration Act according to their terms, even if those terms include individual arbitration.

“The underlying issue, that has nothing to do with arbitration, is whether these type of workers are employees or independent contractors,” said Andrew Pollis, a professor with Case Western Reserve University School of Law and former litigator with Cleveland-based Hahn Loeser & Parks LLP. “Instead of ruling on the merits of that question, [the courts] have said this has got to go to arbitration. The distinction between independent contractors and employees matters so much because employees are entitled to certain protections and benefits.”

The consolidated appeal includes Douglas O'Connor et al. v. Uber Technologies Inc., case numbers 14-16078, 15-17420, 15-17532, 16-15000 and 16-15595; Hakan Yucesoy et al. v. Uber Technologies Inc., case numbers 15-17422, 15-17534 and 16-15001; Abdul Mohamed et al. v. Uber Technologies Inc., case numbers 15-17533 and 16-15035; and Ricardo Del Rio et al. v. Uber Technologies Inc., case number 15-17475, all in the U.S. Court of Appeals for the Ninth Circuit.

### **D.C. Circuit Weighs Rail On-Time Performance Metrics**

In a case concerning the constitutional boundaries for Congress giving an entity regulatory power over its commercial rivals, the U.S. Department of Transportation convinced the D.C. Circuit in July to reinstate a federal statute allowing Amtrak to help the Federal Railroad Administration set performance and scheduling standards along the nation's railways.

The DOT's novel, and ultimately successful, legal play kept alive a long-running legal battle with the Association of American Railroads over the Passenger Rail Investment and Improvement Act of 2008, which a previous D.C. Circuit panel had struck down as unconstitutional in 2016.

The more recent D.C. Circuit panel sided with the DOT by ruling that PRIIA — a law that set out to enhance passenger rail performance and service through a number of provisions — was constitutional so long as it got rid of a section containing an arbitration clause. That section, known as Section 207(d), essentially allowed a private citizen or an improperly appointed government official to exercise significant governmental power in the event that Amtrak and the FRA disagreed on what metrics or standards to come up with.

The DOT had argued that “the crux of the constitutional problem was not that Amtrak had input or the opportunity to ‘persuade’ the administration.” It was “that Amtrak, through unilateral resort to the arbitrator, had the power ‘to make law’ by formulating regulatory metrics and standards without the agreement or control of the administration.” So taking a scalpel to the arbitration provision rendered the statute constitutional, according to the DOT.

A divided panel agreed, and AAR's attempt to get the full D.C. Circuit to rehear the decision en banc was denied in October.

Daniel Wolff, a trial and appellate partner with Crowell & Moring LLP, told Law360 that the D.C. Circuit majority gravitated toward a minimalist approach of resolving the problems with Section 207 and ultimately liked the government's alternative approach to keeping most of PRIIA intact.

“It's a pretty incredible thing for a court to strike down a law facially — not as applied — and say that Section 207 violated due process. This decision reflects, on the part of the majority, a judicial restraint and that they wanted to do the least damage to the statute,” Wolff said.

“This happens whenever you’re confronted with an aspect of a law that looks unconstitutional,” he added. “You’re balancing two different concerns of do you do the least damage with minimal impact or do you decide whether that’s what Congress would have intended. And essentially, out of the meat grinder comes a new law.”

The appellate case is Association of American Railroads v. DOT et al., case number 17-5123, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Kelly Duncan and Aaron Pelc.