Gig Economy Plaintiffs Will Test-Drive New SCOTUS Ruling Against Arbitration

Plaintiffs and management-side lawyers will assess whether and how the U.S. Supreme Court's "New Prime" ruling can be applied to on-demand transportation workers.

By Erin Mulvaney | February 12, 2019

Gig economy companies such as Uber, GrubHub and Lyft will face renewed arguments against the arbitration agreements their drivers are forced to sign, as plaintiffs lawyers test the scope of a new U.S. Supreme Court ruling to keep cases in the courtroom.

Photo: Diego M. Radzinschi/ALM

The Supreme Court's **unanimous decision (https://www.law.com/nationallawjournal/2019/01/15/gorsuchs-unanimous-arbitration-ruling-is-loss-for-business/)** in January in *New Prime v. Oliveira*

clarified that an exemption for “transportation workers” in the Federal Arbitration Act applies to both independent contractors and employees who engage in interstate commerce.

The decision marked a rare strike against arbitration by the Supreme Court, which has issued rulings in recent years bolstering the power of employers and companies to stop workers and consumers from taking disputes to court.

Now, questions have surfaced about whether the *New Prime* ruling could be expanded to the gig economy, where companies that employ on-demand drivers have used arbitration agreements to stop disputes involving worker classification and wages from going to court.

Already in the weeks since the ruling was issued, there are signs plaintiffs lawyers will use the opinion to reinforce their arguments that drivers who signed arbitration agreements should nonetheless be allowed to sue their employers in court. The U.S. Chamber of Commerce **warned (https://www.supremecourt.gov/DocketPDF/17/17-340/47628/20180521171332688_17-340.tsac.Chamber.pdf)** the justices that “untold thousands of arbitration agreements would be called into question” if the court ruled for the truck drivers.

A central question in many gig economy cases revolves around worker classification. Uber, Lyft and other companies consider their drivers to be contractors, working flexible schedules but not entitled to certain benefits and other labor rights accorded to employees.

“Many gig-economy companies to date have labeled their drivers ‘independent contractors’ in an attempt to avoid wage-and-hour and other employment laws. *New Prime* makes it clear they won’t be able to use that label to force their drivers into arbitration,” Rick Bales, a professor at Ohio Northern University College of Law, said **in a recent blog post (http://law.missouri.edu/arbitrationinfo/new-prime-gig-economy/)**.

On-demand companies are expected to argue that their drivers should not fall under the exemption for “transportation workers” such as truck drivers because they do not engage in “interstate commerce.” Trial and appeals courts will now look at whether and how often on-demand drivers can be considered participating in “interstate commerce.”

Shannon Liss-Riordan, a partner at Boston’s Licthen & Liss-Riordan who has fought for on-demand drivers, said in an interview she has argued for years that drivers fighting to bring their claims to court should fall into the transportation worker exception. She has already alerted judges in pending cases to the *New Prime* decision.

Some cases in federal court were put on hold pending the *New Prime* decision. A case against **Amazon.com Inc (https://assets.documentcloud.org/documents/5731845/Amazon.pdf)**. on behalf of drivers was stayed until the decision was reached and Liss-Riordan alerted the court to the potential impact. She’s also making the argument in a number of her cases on behalf of drivers for food delivery companies. These include a collective action against **GrubHub (https://assets.documentcloud.org/documents/5731844/GrubHub.pdf)** in Chicago on behalf of 7,000 drivers, another against Postmates, now pending in the U.S. Court of Appeals for the Ninth Circuit, and another against DoorDash.

“The case just confirms we should be eligible for the exemption,” Liss-Riordan said. “We are entitled either way, but the *New Prime* decision is helpful because it clarifies the court does not need to decide whether the workers are employees.”

Domenique Camacho Moran, a labor and employment partner at Farrell Fritz in New York, said there is still uncertainty about whether gig economy drivers will fall under the exemption outlined in the FAA. “That’s the million-dollar question,” she said.

Moran said it won’t be an “easy argument” for companies such as Uber and Lyft to contend their drivers should not fall under the arbitration exemption for transportation workers.

“We are seeing now arbitration agreements may be a useful vehicle for resolving disputes expeditiously, but there may not be a wholesale rubber stamp,” Moran said.

Still, some state laws that govern arbitration disputes could limit the reach of the Supreme Court’s decision.

“If the federal arbitration agreement doesn’t apply, is there a state law that says it does apply and still going to mandate,” Moran said. “There is state common law and still going to enforce.”

Fisher & Phillips (https://www.law.com/law-firm-profile/?id=1738&name=Fisher-Phillips) partner Anderson Scott in Atlanta said he has yet to see any new cases that rely solely on *New Prime*.

The management-side law firm posted an **advisory (https://www.fisherphillips.com/gig-employer/Could-Recent-Supreme-Court)**, co-written by Scott and Felix Digilov, noting commentary about whether gig economy companies should be worried. There’s no immediate resolution, but “the evolution of the *New Prime* decision—and whether it bleeds into the gig economy—will be ‘interesting.’”

Read more:

Gorsuch's Unanimous Arbitration Ruling Is Loss for Business (https://at.law.com/yoAoZ5?cmp=share_twitter)

Kavanaugh's First Opinion Is Unanimous Win for Arbitration (https://at.law.com/CQfkeV?cmp=share_twitter)

Writing Styles of Gorsuch and Kavanaugh Revealed in Arbitration Rulings (https://at.law.com/ve5usK?cmp=share_twitter)

Senator's SCOTUS Brief Challenges Wave of Pro-Arbitration Decisions (https://at.law.com/AYyPDG?cmp=share_twitter)
