Mass. Uber Drivers Can Proceed In Misclassification Row

By [Cara Bayles](#)

Law360, San Francisco (March 1, 2018, 10:45 PM EST) -- A California federal judge said Thursday he wants to "thaw out" an Uber wage suit that's been paused for years, saying a putative class action alleging that Uber misclassifies Massachusetts drivers as independent contractors can move forward, but that a similar case concerning California drivers must await a Ninth Circuit ruling.

U.S. District Judge Edward Chen said he would allow named plaintiff Hakan Yucesoy to refile his motion for class certification, which has been on ice since November 2016. Yucesoy brought his suit on behalf of Massachusetts Uber drivers in 2014, alleging the ride-hailing giant mislabeled them as independent contractors and cheated them out of tips.

Judge Chen said Yucesoy's attorney, Shannon Liss-Riordan of [Lichten & Liss-Riordan PC](#), could add additional named plaintiffs to the suit and carve out a class of 2,500 Massachusetts drivers who never signed arbitration agreements when they joined the Uber platform.

"Why not begin to tee this thing up?" Judge Chen asked during a hearing in San Francisco. "We can clean up discovery, have you file your brief assuming the class is only 2,500, and then proceed on those lines such that this would be briefed and be ready to be addressed in July, so this isn't just sitting there for another several months."

The Yucesoy suit was filed in Massachusetts federal court but removed to California at Uber's request where it fell to Judge Chen, who is also adjudicating a similar case brought by Douglas O'Connor on behalf of California drivers. Both suits allege Uber misclassified employees as independent contractors to avoid business reimbursements and duped customers by charging a gratuity that doesn't entirely go to the driver.

In September 2015, Judge Chen [certified](#) a class of drivers in the O'Connor case. Three months later, he found the arbitration agreements Uber added to its employment contracts to be [unenforceable](#), and allowed 240,000 drivers who signed the agreements to join the class.

Uber sought to [dismantle](#) the classes with Ninth Circuit appeals.

The suits have been [on ice](#) pending a ruling from the appellate court on whether Uber's arbitration clause is enforceable. And the appellate court in turn is holding off until the [U.S. Supreme Court](#) rules in the [Ernst & Young LLP](#) v. Morris case, which will decide whether employers can legally force workers to sign away their right to pursue class actions via arbitration agreements that must be signed as a condition of employment.

But on Thursday, judge Chen said the Supreme Court should decide Morris by July, and that it was time to "tee up" the Yucesoy suit for trial.

Because that case's certification motion was stalled, the judge Thursday said Liss-Riordan should tailor the class to only include drivers who signed up for Uber's platform before the company instituted the arbitration clause in its contracts.

Yucesoy's case will be dictated by Massachusetts' legal definition of an employee, which Judge Chen said will be a "simpler" question than the California case. While Massachusetts determines independent contractors by a clearer three-part test, California courts must apply the 11-factor "Borello" test for worker classification. However, the California Supreme Court is mulling a new system — possibly one similar to the Massachusetts model — for deciding such disputes in the Dynamex Operations West Inc. v. The Superior Court case, which could change the landscape for gig-economy employment litigation.

Judge Chen said Thursday he would not allow Liss-Riordan to add a Private Attorneys General Act claim to the California litigation and then bifurcate the case to allow for a mini-trial on whether drivers are independent contractors. He said he would hold off until there was at least a decision by the Supreme Court in the Morris case.

"My goal at this point is to thaw out the Yucesoy case," he said. "I'm not willing to start moving on the California case until we know something. ... Depending on what happens with O'Connor, if we get a green light or even a yellow light, I'm inclined to put it on some expedited schedule as well."

Liss-Riordan, who also represents O'Connor, had made an impassioned plea that the judge move that case forward. She pointed out that two years before, the case had already been appealed to the Ninth Circuit, and Judge Chen decided that as a matter of public policy, the case should not be stayed. Since then, the appellate court had taken up the case and Judge Chen said he wouldn't go to trial not knowing the scope of the class.

Uber attorney Theane D. Evangelis of Gibson Dunn said at Thursday's hearing that it wouldn't make sense to move forward with either O'Connor or Yucesoy "until we know the rules of the road," adding, "we are literally on the cusp of a decision — more so now than ever."

Liss-Riordan disagreed, saying the O'Connor appeal would likely go to an en banc review and possibly culminate with a Supreme Court petition.

"The drivers I represent, particularly those whose claims have nothing to do with this appeal, are confused," she said. "To put such an important issue on hold when it affects thousands of class members — I don't see why we're being stymied."

The drivers are represented by Shannon Liss-Riordan, Adelaide Pagano and Matthew D. Carlson of Lichten & Liss-Riordan PC.

Uber is represented by Theodore J. Boutrous Jr., Theane D. Evangelis, Joshua S. Lipshutz, Dhananjay

Manthripragada and Kevin J. Ring-Dowell of Gibson Dunn.

The cases are O'Connor et al. v. [Uber Technologies Inc](link). et al., case number [3:13-cv-03826](link), and Hakan Yucesoy v. Uber Technologies Inc. et al., case number 3:15-cv-00262, in the U.S. District Court for the Northern District of California.

--Additional reporting by Linda Chiem, Kat Greene and Melissa Daniels. Editing by Bruce Goldman.

Update: This story has been updated to include additional counsel for the plaintiffs.