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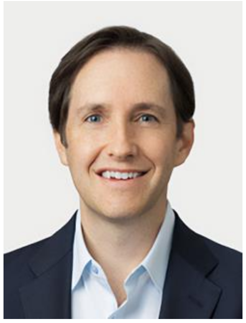
Gig Co. Atty Talks Classification Fights, Free Speech Wins

By **Max Kutner**

Law360 (August 31, 2026, 5:16 PM EDT) -- Gig companies have succeeded in recent weeks in arguing that city food-delivery platform requirements violate their free speech rights, but such companies continue to face independent contractor classification lawsuits and mass arbitration from workers and state attorneys general.



Michael Holecek

Gibson Dunn & Crutcher LLP partner Michael Holecek represents gig companies dealing with those issues. He is counsel for DoorDash in respective challenges to New York City food delivery platform laws requiring the sharing of customer data with restaurants and the display of tipping prompts.

In the customer data suit, a Second Circuit panel on Aug. 5 found that the law violates the First Amendment. In the tipping prompts suit, a New York federal judge on Aug. 20 kept alive a First Amendment claim, although the judge dismissed other claims.

Holecek is also representing gig companies in an attempt by the state of California to reclassify more than a million gig workers, and he defended DoorDash in a tipping suit by Chicago that in November reached an $18 million settlement agreement.

Gig companies continue to face independent contractor classification claims, even though they often wind up in arbitration, because of the shifting classification laws, Holecek said.

"In California alone, the classification tests have changed several times over the past few years," he said. "And nationally, the Department of Labor has introduced and then rescinded several classification rules."

Holecek spoke with Law360 about gig economy wage and hour issues and California's Private Attorneys General Act, which enables workers to sue on behalf of themselves, the state and other workers for labor law violations. This interview has been edited for length and clarity.

You're representing gig companies in challenges to city food-delivery platform requirements. This month, you've had wins on First Amendment arguments. Why do those seem to be succeeding?

It's because in a lot of these new municipality regulations, at bottom, the city has a message it wants to convey. Whether that message is to consumers or delivery workers or the restaurants, it's some information or message. And instead of the city doing it itself, it is basically passing a rule that requires the companies to deliver that message.

Sometimes it's not controversial. Other times the messages are. And so I think in some of these cases, the companies are looking at the law and saying, this is not a message or type of information we want to communicate or want to come through our platform. If the city or state wants to communicate that information, it can.

It's a product of the way that some of these regulations are drafted. Instead of saying you must do this, a lot of them are being drafted as, you must say this or communicate this or provide this message. And so when the city frames the law in those terms, it's susceptible to a First Amendment challenge.

Gig companies also face classification lawsuits from independent contractors, who typically lack benefits and protections mandated for employees, such as minimum wage and overtime pay. How often are independent contractor classification cases resolving as class actions?

You don't see a lot of class actions that resolve the classification disputes. Instead, a lot of these are settled or are brought with arbitrations, and the latest trend is mass arbitrations. You could have hundreds or thousands of arbitrations brought, and some of those resolve, some of those settle.

Some companies were caught off guard by the start of the modern mass arbitration trend in 2018 and 2019. [This followed the U.S. Supreme Court's Epic Systems ruling that courts must enforce arbitration agreements according to their terms. The justices upheld the enforceability of class and collective action waivers in arbitration agreements.]

The companies didn't have arbitration agreements that were designed to deal with a mass arbitration, and a lot of the providers, like AAA and JAMS, didn't have procedures in place as well.

So we had a period of time where it was a bit chaotic. Arbitration's supposed to be more economical, but that got turned on its head. For a while it was more expensive for everybody.

That has somewhat corrected itself. Companies have been more thoughtful about how to structure a mass arbitration agreement so that it could be efficient and effective for everyone. And I think these providers have taken some important steps to try to change their rules so that arbitrations can actually go forward.

How does the defense strategy in classification cases change when the plaintiff is the government, which some courts have found is not party to an arbitration agreement?

We've seen a real uptick in interest from municipalities and state attorneys general in classification. And you're right, in some cases, courts have held that those cities and AGs are not bound by arbitration agreements. I still think that area is in flux and somewhat untested.

But what is particularly challenging for companies is when you have the public prosecutor team up with a private law firm. We have seen a lot more of that in recent years. Basically, you have the resources and financial incentive that a private plaintiffs firm will bring, combined with the prosecutorial and investigatorial powers of the city or state, and I think that dual combination has really created the biggest challenges for companies.

The California Supreme Court is weighing the ability of workers to bring “headless” PAGA claims, on behalf of only other workers. How important is it for the high court to resolve that?

It's important because we're seeing it quite often, a huge uptick in these "headless" PAGA claims that have been brought in the last year or two. You'll even see cases where an individual gig worker will bring a claim, will acknowledge that they're bound by an arbitration agreement and that they have to arbitrate their individual dispute, and then they'll try to amend their complaint and drop their individual claim and say, "No, I only want to litigate this on behalf of the class, not myself."

That is inefficient and expensive, I would say, for all sides to go through all of that procedural wrangling. So I do think clarity from the California Supreme Court would be helpful on that.

California's Labor and Workforce Development Agency has proposed regulations to curb the frequent filing of PAGA notices. How important is it to make it harder for those frequent filers?

What's important is to make sure that the PAGA notices are thoughtful and have some research and facts behind them. The problem is when you're inundated with PAGA notices that are really carbon copy letters.

Often we see these PAGA letters where there are just blatant mistakes in there, where they're talking about one industry or one type of worker, but then the actual plaintiff is a completely different type of worker. That doesn't really serve the worker very well. It makes it really challenging on the company.

If there is reform here that sets the bar at a reasonable level for someone bringing a PAGA notice to have to include enough facts about that person and what their actual grievance is, I think really everyone at the end, the courts, the workers themselves and the companies, all benefit from that.

What other hot-button wage and hour issues are you seeing?

We're seeing cities try to regulate the economics of the worker-platform relationship without touching classification. When you look at some of these minimum wage ordinances, the tipping regulations, deactivation notice laws, none of these laws use the word "employee" or try to change classification, but a lot of them impose obligations that look like employment law.

It's not exactly a classification fight. Rather, it's a shift in the playing field. Instead of a law saying we're going to try to turn you into an employee, it's, we're going to pass a law that makes the relationship look more like an employment relationship. That's something we're seeing across the country, from Seattle to New York. It's just the city trying to change the economics of the relationship.

We've noticed you can't push one lever, push one button, and not have it affect other parts of the platform. We see this with some of the minimum wage regulations, where maybe it is well-intended to increase the pay of delivery workers, but it then raises consumer prices, which then lowers the number of deliveries, and then that has the consequence of lowering the delivery workers' pay. It ends up hurting the people you want to help.

The constituency we often forget about are the third-party small businesses. A lot of these platforms are three-sided platforms. You've got a consumer, you've got a worker, but you also have a small business, whether it's a restaurant, a grocery store, a retail shop. And when you start tinkering with the platform economics, sometimes that causes lower orders, fewer deliveries, and it hurts the small business.

--Editing by Nick Petruncio.