

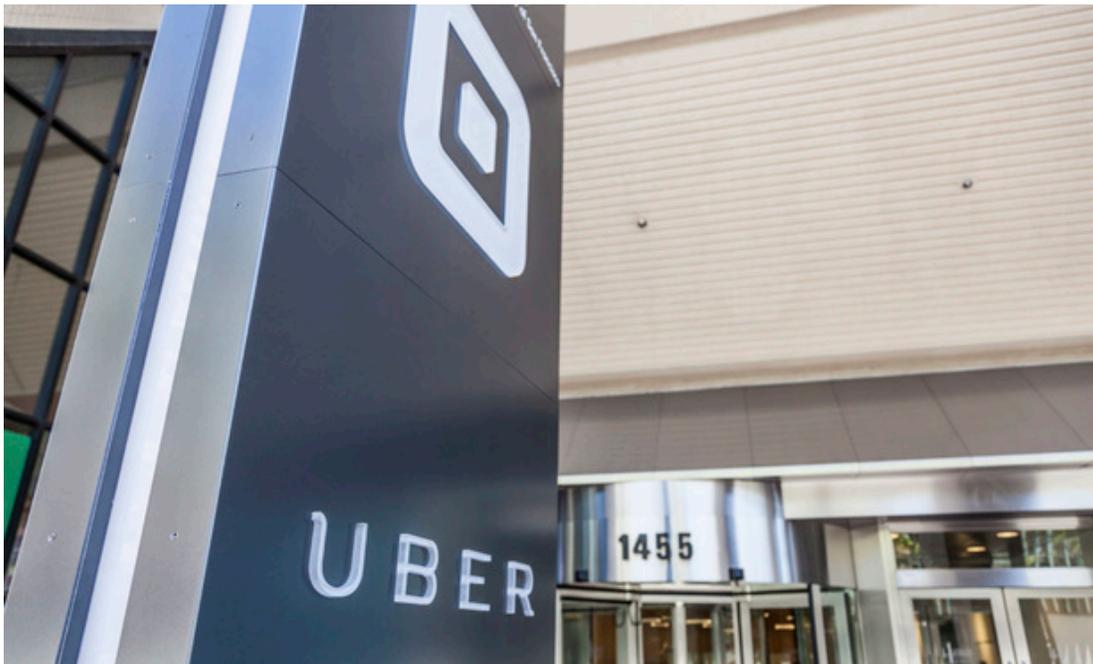
THE **RECORDER**

NLRB to Argue Against Uber in Key Labor Fight in Ninth Circuit

Appeals court grants argument time to agency in class action fight.

Erin Mulvaney, The Recorder

August 23, 2017



*Uber headquarters in San Francisco
Jason Doiy*

The National Labor Relations Board will get a chance to argue against Uber Technologies Inc. in a key appeal—over class actions and employment arbitration clauses—that is snarled in a federal appeals court.

A case before the U.S. Court of Appeals for the Ninth Circuit brought by Uber drivers asks the court to confront whether judges may enforce an individual arbitration agreement that would prevent the drivers from joining a class action to sue the company for allegedly [misclassifying them as independent contractors](#).

The arbitration agreement in question would waive the right to engage in legal “concerted activity.” The [court agreed Tuesday](#) to give the NLRB 10 minutes to argue at the Sept. 20 hearing in San Francisco. Gibson, Dunn & Crutcher's Theodore Boutros

Jr. will argue for Uber. Shannon Liss-Riordan, who has led many of the battles in California against Uber, will argue for the drivers.

The [labor board's unopposed motion](#) said the agency will "offer the court a distinct perspective on the nature and scope" of the intersection between the National Labor Relations Act and federal arbitration policy. The board has previously litigated the issue of whether an individual arbitration agreement violates the labor act if it permits employees to opt out of the terms. The board previously has held that those waivers violate the rights of employees.

Attorneys for drivers contend Uber's arbitration agreements may interfere with the Ninth Circuit's decision in *Morris v. Ernst & Young*, which held that the National Labor Relations Act prohibits collective action waivers. That case is part of a trio of consolidated cases before the U.S. Supreme Court, [which is set to hear the dispute in October](#). NLRB general counsel Richard Griffin has asked the high court for argument time there, to defend class actions.

In [several actions pending before the Ninth Circuit](#), drivers have sought to be considered employees—rather than independent contractors—through forming class actions and attempting to override arbitration clauses. The right to collectively bargain and have benefits such as minimum wage, overtime and workers' compensation protection is reserved for employees under federal labor law.

The labor board said in court papers in the Ninth Circuit that it "takes no position on whether Uber's drivers are statutorily protected 'employees.'"

Uber [drivers argue](#) in the Ninth Circuit that the lower court's class certification order follows a long line of precedent in which workers "who have been misclassified as independent contractors have routinely been able to challenge their classification on a classwide basis."

"Indeed, it would make little sense for workers performing the same job to have to make such a challenge one-by-one, when the company itself has set forth a blanket decision to classify them all as independent contractors, and the district court's ruling broke no new ground in allowing such a classwide challenge," Liss-Riordan wrote in the drivers' brief.

Uber, [in its opening brief](#), argued that federal district courts have issued a series of "anti-arbitration and pro-class-certification orders that have wreaked havoc on Uber's relationship with its drivers." Uber's Gibson Dunn team said, "The district court has

encouraged as many drivers as possible to opt out of arbitration and join the class actions pending against Uber.”

The company asked the appeals court to reverse the lower decision and uphold the arbitration agreements, and to decertify a class of more than 240,000 drivers.

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