HOUSE . . . . . No. 4610

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES

REPORT
of the
SPECIAL JOINT
COMMITTEE
on
INITIATIVE PETITIONS
on the
INITIATIVE PETITION
of
CHARLES DEWEY ELLISON, III
AND OTHERS
FOR THE PASSAGE OF AN ACT
DEFINING AND REGULATING THE RELATIONSHIP
BETWEEN NETWORK COMPANIES AND APP-BASED DRIVERS
FOR CERTAIN PURPOSES OF THE GENERAL LAWS
(see House, No. 4258)

April 30, 2024.

MAJORITY REPORT.

A majority of the Special Joint Committee on Initiative Petitions ("The Committee"), recommends that Initiative Petition No. 23-25, House 4256; Initiative Petition No. 23-29, House 4257; Initiative Petition No. 23-30, House 4258; Initiative Petition No. 23-31, House 4259; and Initiative Petition No. 23-32, House 4260, ("the Initiative Petitions") as currently drafted and presented to this Committee, OUGHT NOT TO BE ENACTED BY THE LEGISLATURE AT THIS TIME

The purpose of this report is to provide a recommendation to the full legislature on whether to accept the Initiative Petitions as written for consideration and enactment.

The five Initiative Petitions would all similarly declare Transportation Network Drivers and Delivery Network Drivers ("Drivers") as independent contractors when engaging with Transportation Network Companies and Delivery Network Companies ("Companies"). The five Initiative Petitions differ in legal mechanisms to achieve this and the scale and scope of the type of benefits Drivers would receive, from no additional work benefits to Drivers to creating a new class of benefits for these Drivers.

Testimony

The Committee heard from experienced professionals, proponents and opponents, as well as members of the general public.

Patrick Moore, First Assistant Attorney General of the Commonwealth of Massachusetts, testified as a subject matter expert on the five Initiative Petitions. First Assistant Attorney General Moore gave a brief overview of each Initiative Petition as follows:

House 4257 and House 4260 were referred to as "bare bones" Initiative Petitions that similarly define Drivers as not employees, and Companies as not employers.

House 4257 specifies that Drivers who accept requests through an online enabled application are not employees for purposes of certain Massachusetts labor and employment laws, specifically those governing wage and hours, workplace conditions, workers' compensation, and unemployment insurance. The Initiative Petition would also specify that Companies are not employers for the purposes of those laws.

House 4260 also specifies that Drivers are not employees for purposes of certain Massachusetts employment laws, and that Companies are not employers. It would accomplish this in a slightly different manner than House 4257 by amending applicable statutes to specifically exempt Drivers, including Massachusetts General Laws ("G.L.") Chapter 149 Section 148B, which governs wage and hour laws and workplace conditions, Chapter 151A which governs unemployment insurance, and Chapter 152 which governs workers' compensation.

The three remaining Initiative Petitions achieve the same objective of clarifying that Drivers are not employees and Companies are not employers, but also require Companies to provide minimum compensation and benefit terms to the Drivers.

House 4258 is similar to House 4257 with compensation and benefit terms added to it. This Initiative Petition establishes baseline contract terms between Drivers and Companies and sets forth certain defined minimum and benefit terms. Beginning with the compensation, Drivers would be assured a base compensation equal to 120 per cent of the Massachusetts minimum wage for time spent getting to or completing ride or delivery requests. Drivers would also be entitled to per mile compensation for that time beginning at 28¢ per mile. The law would require that increases in compensation be tied to any future annual increases of the state minimum wage and for the Executive Office of Labor and Workforce Development to increase the per mile compensation by the percentage increase in the state minimum wage, if any. If the earnings for a Driver fall below the minimum compensation amount, the Company must pay the Driver the difference between what the Driver earned and the minimum compensation amount. The baseline contract terms provide for certain defined benefits for Drivers, including a limited healthcare stipend, paid sick time related to hours driven, and certain private occupational accident insurance benefits. The Initiative Petition would prohibit covered companies from discriminatory practices and grant Drivers the opportunity to appeal a termination.

House 4259 amends G.L. Chapter 149 and Chapter 151A like House 4260 but creates contract terms between Drivers and Companies similar to those in House 4258.

House 4256 has the broadest classification provision. The initiative would specify that Drivers are not employees for any purpose whatsoever under Massachusetts law and that Companies are not employers for any purpose whatsoever under Massachusetts law. Like the two prior Initiative Petitions, it would then create baseline contract terms between Drivers and Companies and set forth certain defined minimum compensation and benefits. The wages and benefits are similar to those set forth in the prior two Initiative Petitions. Like those Initiative Petitions, Companies would be prohibited from discriminatory practices and must grant Drivers the opportunity to appeal a termination.

First Assistant Attorney General Moore also noted that there are currently legal challenges to all five of these Initiative Petitions with plaintiffs asserting that the Attorney General incorrectly certified the Initiative Petitions on the basis that the Initiative Petitions violate the "single subject" provision of Article XLVIII of the Amendments to the Constitution. Additionally, the relationship between Drivers and Companies is the subject of a lawsuit from the Attorney General's Office, beginning under then-Attorney General Healey. This lawsuit contemplates whether under the current Massachusetts Wage Act and the "ABC Test" definition of an employer-employee relationship, Drivers should be considered employees and Companies considered employers. First Assistant Attorney General Moore testified that if the Supreme Judicial Court rules that Drivers are employees under current statute, the Attorney General's Office would be able to pursue lost wages and benefits for these Drivers from the Companies they worked for. The five Initiative Petitions, if any pass,

would end any prospective application of the decision should the Supreme Judicial Court declare that Drivers are to be classified as employees.

Subject matter experts from academia and policy institutions provided testimony on the history of employment law, including the increase in the use of independent contractors in the 1970s, approaches to employment law in other jurisdictions such as California and the European Union, and relevant industry statistics concerning Drivers and Companies.

Dr. Hilary Robinson, Associate Professor of Law and Sociology at Northeastern University, testified that through these proposals, the Companies are claiming to be a "protected class" that should be exempt from several statutes that govern relationships between employers and employees and provide worker protections and benefits. Dr. Robinson further testified that in her analysis of California's laws pertaining to this issue, classifying Drivers as employees did not impact flexibility or patterns of work, and that the Companies, as they do now, retained control over what work Drivers have access to perform, contradicting the claim that this model needs Drivers to be independent contractors for successful operation and flexibility for Drivers. She also testified that in her opinion, none of these five Initiative Petitions should be presented on the ballot, as voters will not have the necessary information or background to make a truly informed decision.

Further testimony from Dr. Veena Dubal, Professor of Law at the University of California, Irvine, stated that evidence has shown that the passage of Proposition 22, which classifies Drivers as independent contractors in California and which contains similar provisions as the five Initiative Petitions before us, has shown to have a negative impact on Drivers, with 40-60 per cent of Drivers' work uncompensated and Drivers netting an average of $6.20 per hour, compared to the state minimum wage of $16 an hour. Dr. Dubal presented the results of a study showing that two-thirds of Drivers, many of whom have made a significant capital investment in their work as Drivers, have been terminated or had their account deactivated at some point, with 18 per cent losing their vehicle and 12 per cent losing their housing as a result. Dr. Dubal went on to show the occupational danger Drivers face, citing research showing gig workers are found to suffer the highest rate of on-the-job fatalities and 67 per cent of Drivers have reported instances of violence, harassment, or abuse while driving.

A third subject matter expert, Liya Palagashvili, Senior Research Fellow at the Mercatus Center at George Mason University, highlighted the benefits for workers who enjoy the flexibility of the current model. In Ms. Palagashvili's opinion, attempts to classify or regulate gig workers as employees are counterproductive because 90 per cent of jobs in 2020 were traditional, W-2 jobs, while the gig economy is designed for people who are hoping to earn supplemental income in a flexible manner. Ms. Palagashvili stated that a study in the aftermath of Assembly Bill 5, a California policy declaring Drivers as employees, showed no consistent evidence that W-2 employment increased and a significant decline not only in self-employment but overall employment as well for affected occupations in California, matching studies of anecdotal findings from the New York Times and the Los Angeles Times. Ms. Palagashvili further testified that, in her

opinion, the best policy to pursue would be to enhance access to benefits while maintaining the ability for gig work to persist as supplemental and flexible work. When asked by the Committee, Ms. Palagashvili indicated that while the majority of Uber Drivers have health insurance, she was unsure if the insurance was private or state-funded, since Companies cannot provide health insurance benefits to Drivers due to their status as independent contractors.

Two panels spoke as proponents in favor of the Initiative Petitions. The first panel consisted of two Drivers, one who drives for Uber and Lyft, and another who drives for Instacart, as well as two local industry representatives. The panelists emphasized the flexibility and control over the schedule that the independent contractor model affords Drivers, and how reliant communities are on the services that Drivers provide, highlighting those in Gateway Communities, rural areas, and the elderly. The Drivers on this panel stated that these jobs provided the income and the flexible scheduling necessary to have control over their lives, and shared that like any industry, the rideshare business is not for every prospective worker. The panel cited data from an industry-poll that found that 75 per cent of Drivers year after year prefer being independent contractors, and that more than 80 per cent of Drivers drive 15 hours or less a week. When asked, the two Drivers on the panel stated that one received Social Security benefits and the other received health insurance through MassHealth, but neither has a W-2 job.

The second panel of proponents consisted of representatives from the Companies of Uber, Lyft, DoorDash, and Instacart testifying in support of the five Initiative Petitions. This panel discussed the benefits their platforms provide for customers, Drivers, and small businesses, “who all use their platforms to grow and thrive”. This panel specifically mentioned achieving the policy goal of flexibility and benefits for Drivers. The panelists testified that the employee-employer laws do not prohibit flexible, on-demand scheduling, but that the framework of such a model would not be feasible for the Companies. Pointing to data, the panel shared that 80 per cent of Drivers on the Instacart platform wish to remain independent contractors, and on average Instacart Drivers work less than 10 hours a week, with many Drivers using it for supplemental income. Uber pointed to statistics that Drivers on the platform earn on average $28.96 per utilized hour, and that the overwhelming majority of de-platforming occurs because drivers come out of compliance with the stricter laws in Massachusetts that currently regulate Companies. During questioning from the Committee, this panel noted that the proposed regulatory framework would align deactivation standards, and that the taxicab industry also operates in an independent contractor framework. Additionally, the panelists testified that Companies could decide to pull operations out of the Commonwealth if Drivers were to be classified as employees whether through court decisions or the Initiative Petitions failing, similar to the decision to end operations in Minneapolis and St. Paul, Minnesota due to a mandated increase in minimum fares for Drivers in those Cities.

The panel shared that the Companies will plan to move forward to the ballot with just one of the five proposed Initiative Petitions, but their preference is for a legislative

compromise and to avoid the ballot box altogether, as was accomplished in Washington state.

There were three panels of opponents who testified against all five Initiative Petitions. The first panel consisted of two representatives from the International Brotherhood of Teamsters, including the President of Teamsters Local 25 and the States Legislative Director. This panel testified that the eyes of the labor movement across the country are on Massachusetts, specifically to see if the Companies will succeed in watering down the employment laws that are already on the books in statute. This panel's concern was that if the Companies are able to accomplish this in Massachusetts, they will be able to exploit laws across the country. The Teamsters shared the position that the traditional employee-employer model should be respected and properly enforced, and they oppose any proposal that offers a third model to classify workers and ultimately weakens employment standards. The panel not only noted their belief that Companies are currently misclassifying Drivers as independent contractors, enabling wage theft and essentially taxpayer subsidization of these companies, but that these Initiative Petitions have implications beyond the app-based work of Uber and Lyft.

A second panel of opponents consisted of representatives from the Massachusetts AFL-CIO, the Massachusetts Building Trades Council, and the California Labor Federation. This panel stated that the strong employment laws of the Commonwealth are built on the base assumption that workers are employees entitled to numerous benefits. In their opinion, Big Tech companies cannot be trusted, as they have actively skirted the law, "lining their own pockets," and are now offering benefits that are far below the minimum standard that employees are entitled to. The panel noted that Massachusetts has no carveout currently to the ABC test and Massachusetts law goes even further by offsetting federal carveouts to the ABC test. Additionally, the panel shared that misclassification of workers has been rampant in the trades, where Companies are incorrectly classifying employees as independent contractors to avoid providing benefits. The panel remarked that there is no need to sacrifice hard-won rights that workers have fought for to simply line the pockets of tech companies and additionally shared that California found gig workers to be employees under every state employee-employer test. The panel highlighted the irony of the campaign for Proposition 22 to remove the employee designation of Drivers in California, which was run at the onset of the COVID-19 pandemic, when Drivers did not have access to masks, vaccines, air shields, sick time, or death benefits.

The last panel of opponents consisted of a representative from the Massachusetts Coalition for Occupational Safety and Health, a rider who was permanently injured while in a rideshare vehicle, and a Driver. This panel echoed the sentiments of previous opposition panels by saying that Companies are misclassifying workers and added that this is to the detriment of worker earnings, benefits, and even safety, as Companies are not forced to comply with OSHA regulations. Through this misclassification, Companies have avoided responsibility for their workers, including workers' compensation and death benefits for Drivers. The rider who was injured in an Uber ride in 2021, testified that Uber has refused to face him in court, and that its insurance policy only covered seven

months of his continuing care, where his prescriptions cost $9,000 a month. The rider noted that the Companies' "shotgun pellet approach," — starting with nine Initiative Petitions, then whittling down to five Initiative Petitions — hoping just one Initiative Petition can beat the legal challenges so they can shirk responsibility for actions taken by their Drivers. The Driver on the panel, who has driven for Lyft since 2013 just a few days after the platform was live in Massachusetts, questioned the data and statistics that the Companies shared. In the Driver's experience, Drivers do not have control over their work, which is unlike independent contractor work. The Driver also stated that she was deactivated from the platform after speaking out against the Company.

Conclusion

These Initiative Petitions elicit multifaceted public policy questions regarding the fundamental nature of the employer-employee relationship and the individual terms governing that relationship. The Committee is also cognizant of legal challenges regarding these initiative petitions that are to be argued before the Supreme Judicial Court in the month of May 2024, after the constitutional deadline that the legislature can enact these initiative petitions. This timeline adds further complexity to the question of enactment.

The testimony heard by the Committee showed an overall lack of consensus on the merits or issues raised by the initiative petitions. The Committee feels that any action on this subject must strike a balance between existing employee rights and protection, and the need to ensure that TNCs can continue to operate, which they maintain would not be possible if Drivers were not classified as independent contractors.

Particularly salient is the petitioners' assertion that the drivers will lose flexibility if the Companies are not able to lawfully classify them as independent contractors. Drivers who testified before the Committee focused on the importance of flexibility and the benefit of being able to work whenever they choose. However, proponents did not provide an answer as to why work-hours flexibility would be impossible to provide regardless of employment status. Massachusetts law currently does not limit the flexibility that employers can offer to their employees.

For these reasons, given the legal and other uncertainties surrounding these initiatives, we, the undersigned members of the Special Joint Committee on Initiative Petitions, recommend that House No. 4257, House No. 4260, House No. 4258, House No. 4259, and House No. 4256, as currently drafted and presented to this Committee, OUGHT NOT TO BE ENACTED BY THE LEGISLATURE AT THIS TIME.

Senators.	Representatives.
Cindy F. Friedman	Alice Hanlon Peisch
Paul R. Feeney	Michael S. Day
Jason M. Lewis	Kenneth I. Gordon
Ryan C. Fattman	David T. Vieira