

DISPUTE OVER GIG DRIVERS' INDEPENDENT CONTRACTOR STATUS BEING FOUGHT ON ALL FRONTS IN MASSACHUSETTS

Insights
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Massachusetts is one of handful of states to have adopted the stringent "ABC" test for determining whether a worker is an independent contractor or employee. That has made it one of the most fertile battlegrounds over this dispute as it relates to gig economy drivers using app-based platforms such as Uber, Lyft, DoorDash, and Instacart. With a lawsuit filed by the Attorney General against Uber and Lyft seeking a declaration that drivers who use their platforms are employees and an impassioned fight over a potential November ballot question that specifically would classify such drivers as independent contractors – while affording them certain protections and benefits – this fight will only heat up as 2022 rolls on. The stakes are extremely high. Should these drivers ultimately be deemed employees, the wage-and-hour and tax liability could be staggering. Indeed, such a finding could significantly jeopardize these companies' business models and, perhaps, viability to operate in Massachusetts. This Insight will provide a snapshot view of the various issues at play and set the stage for what's to come.

The Massachusetts Independent Contractor Statute

If you are not familiar with the ABC test, look no further than Massachusetts state laws for a classic example. Section 148B of chapter 149 of the Massachusetts General Laws (the Independent Contractor Statute) creates a presumption that an individual "performing any service" is an employee under chapters 149 and 151 of the Massachusetts General Laws, unless the putative employer can prove:

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1. the individual is free from control and direction in connection with the performance of the service, both under his or her contract for the performance of such service and in fact;
2. the service is performed outside the usual course of the entities' business; and
3. the individual is customarily engaged in an independently-established trade, occupation, profession, or business of the same nature as that involved in the service performed.

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Whether an entity withholds federal or state income taxes, or pays unemployment compensation contributions or workers' compensation premiums, is immaterial to the inquiry.

Violations of the Massachusetts Independent Contractor Statute can be costly. A willful violation is punishable by a fine of up to \$25,000 and/or imprisonment of up to a year for a first offense. Subsequent violations can result in a fine of up to \$50,000 and/or imprisonment of up to two years. Even a violation without willful intent is punishable by a fine of up to \$10,000 and/or imprisonment of up to six months, with subsequent violations potentially resulting in a fine of up to \$25,000 and/or imprisonment of up to a year.

Alternatively, the Attorney General can issue a written warning or civil citation. Each violation (which may be considered, separately, "each failure to pay an employee the appropriate rate or prevailing rate of pay for any pay period") can result in a civil penalty of up to \$25,000. First time offenders face a maximum civil penalty of \$15,000 for willful violations, and of \$7,500 for violations without specific intent. In determining the amount of any civil penalty, the Attorney General takes into consideration (1) whether the entity had prior violations, (2) the employer's intent, (3) the number of employees affected, (4) the monetary extent of the violations, and (5) the total monetary amount of public contract or payroll involved.

In addition, should the employer fail to comply with Massachusetts minimum wage and/or overtime obligation – which is common as part of a misclassification finding – they could be on the hook for treble damages (going back three years), prejudgment interest, and attorneys' fees and costs.

Plaintiffs frequently bring such claims on a class action basis, and the amounts at stake can be very large.

The Attorney General's Lawsuit Against Uber and Lyft

The Massachusetts Independent Contractor Statute was enacted in 1990, and has been in effect, in its current form, since 2004. Uber has operated in Massachusetts since 2011, and Lyft has operated in Massachusetts since 2013, reportedly contracting collectively with over 200,000 drivers in Massachusetts. Both companies treat those drivers as independent contractors.

Years later, in July 2020, Massachusetts Attorney General Maura Healey filed a Complaint for Declaratory Judgment with the Massachusetts Superior Court in Suffolk County. In short, the Complaint claims Uber and Lyft have misclassified drivers who use their platforms: that they do not satisfy the Massachusetts Independent Contractor Statute and, accordingly, are employees. The Complaint seeks declaratory relief to that effect, as well as a declaration that many employment-related statutes — including the Wage Act, the Minimum Wage Law, the Overtime Law, the Earned Sick Time Law, and the Wage Act's Anti-Retaliation Statutes — apply to Uber and Lyft drivers. The Complaint also seeks injunctive relief to that effect.

The lawsuit is currently pending. In January 2021, Uber and Lyft sought to dismiss it, but that effort was unsuccessful. About five months into discovery, on September 20, 2021, the Attorney General filed a motion for summary judgment in an effort to win the case outright. As of this writing, the issue of whether that motion is premature is before the Court, with a hearing on the matter scheduled for early February. Fact discovery is not slated to end until June 2022. You can be sure we will continue to update our readers on the outcome of this pivotal litigation.

The Ballot Questions Asking Massachusetts Votes to Define Gig Drivers as Independent Contractors

In August 2021, the Massachusetts Coalition for Independent Work (backed by Uber, Lyft, and other rideshare entities) filed two versions of a ballot question aimed at giving voters the option of defining the relationship between companies such as Uber, Lyft, DoorDash, and Instacart and those individuals who use their platforms as one of independent contractors. Both ballot questions would

provide drivers, as independent contractors, with a variety of guaranteed compensation and benefits:

- guaranteed compensation of 120% the Massachusetts minimum wage (\$18 per hour in 2023) for time spent completing ride requests (but not time in between);
- an inflation-adjusted per-mile expense reimbursement (starting at 26 cents per mile driven in connection with a ride request);
- a health care stipend;
- paid sick time;
- eligibility for paid family and medical leave; accident insurance; and
- statutory protection against discrimination and a right to appeal any termination of their contract.

Additionally, one version of the ballot question would require all drivers to complete paid occupational safety training, which would include training in connection with safe driving and sexual assault/misconduct. Even though she clearly does not support these ballot initiatives, the Attorney General certified them as constitutional on September 1, 2021.

These initiatives now sit with the Massachusetts Legislature, for consideration of whether state lawmakers can find a legislative solution that would obviate the need for the ballot question (which seems very unlikely). If not, the coalition will have to get over 13,000 more signatures by July 2022 to secure a place on the ballot, on which only one version of the question is expected to appear.

On January 18, a group of voters, backed by the Coalition to Protect Workers' Rights, filed a Complaint for Declaratory Relief with the Massachusetts Supreme Judicial Court against the Attorney General and Secretary of State, claiming they erred in certifying the ballot questions. More specifically, the plaintiffs claim the questions violate Article 48 of the Massachusetts Constitution, which requires that all provisions of a ballot initiative contain only subjects that are related or mutually dependent. They argue these ballot questions would regulate the relationship between the drivers and companies "in multiple disparate areas of employment law that are not related to or mutually

dependent on one another, including laws relating to wages and hours, unemployment compensation, workers' compensation, discrimination, and tax."

As of this writing, this equity action (which is similar to one playing out in California, which is also an ABC state) is in its infancy. Given the time constraints here, however, we expect a relatively swift resolution to determine the next step in this battle.

What's Next?

According to a Beacon Research poll, some 83% of Massachusetts drivers prefer to be independent contractors, rather than employees, with 87% citing flexibility in the number of hours worked as the top reason for engaging in such work. Those numbers (and the results of a similar ballot initiative in California in November 2020, which 59% of voters approved) suggest the ballot initiative, if put to Massachusetts voters, very well may pass. That said, opponents are likely to take any all measures — both leading up to any such vote and thereafter — to thwart these efforts.

At this point, the outcome of these various battles is uncertain. What is certain is that the stakes are very high for the companies at issue, those drivers who use their platforms, and those members of the public who rely on their services.

We will continue to monitor and report on any major developments on these issues, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, any attorney in [our Boston office](#), or any attorney in our [Gig Economy Team](#).