

MASSACHUSETTS HIGH COURT HEARS ARGUMENT ON GIG DRIVER BALLOT QUESTION

Insights
May 12, 2022

As we [wrote](#) back in January, Massachusetts is in the midst of a multi-fora battle over whether gig drivers (those using app-based platforms such as Uber, Lyft, DoorDash, and Instacart) should be treated as employees or independent contractors. One of those fights currently centers on whether Massachusetts voters will be given the opportunity to vote on the issue through a November 2022 ballot question. The state Supreme Judicial Court heard argument on that issue on May 4 – and we should know the outcome of this fight very soon.

The Attorney General Certified Ballot Question as Constitutional

In August 2021, the Massachusetts Coalition for Independent Work (backed by Uber, Lyft, and other rideshare entities) filed two versions of a ballot question. Both 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;

Related People



Jeffrey A. Fritz

Partner

617.532.9325



Joshua D. Nadreau

Regional Managing Partner
and Vice Chair, Labor
Relations Group

- eligibility for paid family and medical leave; accident insurance; and

617.722.0044

- statutory protection against discrimination and a right to appeal any termination of their contract.

Related Offices

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.

Boston

Under state law, the Attorney General's role in the ballot initiative process is limited. The Attorney General only certifies whether or not the initiative complies with the "single subject" rule in the Massachusetts Constitution — which only allows initiatives to cover changes in laws that are related or mutually dependent.

Substantively, the Attorney General takes the position that gig drivers should be treated as employees of these platforms. Indeed, she continues to press a lawsuit in the Massachusetts Superior Court against Uber and Lyft, with her motion for summary judgment on that claim currently pending. (Since our last writing, the Court postponed Uber's and Lyft's deadline to respond to that motion until the end of discovery, which has been pushed back to September 15.)

Even though she clearly does not support the substance of these ballot initiatives, the Attorney General certified them as constitutional on September 1, 2021.

Special-Interest-Backed Voters Sue Attorney General in Effort to Keep Question Off Ballot

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 (SJC) 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."

The voters filed their brief on March 7, the Attorney General and Secretary of State filed theirs on April 6, and the SJC heard argument on May 4. In their questioning, the justices seemed to focus heavily on the fact that, under the proposed law, the drivers would be deemed not to be the platforms' agents and asked whether and to what extent that would preclude passengers from suing the platforms for injuries sustained as a result of accidents or by drivers themselves. The Attorney General and Intervenors' counsel argued, generally and in effect, such individuals would not be without recourse (although perhaps not under a traditional agency theory, as would be the case with respect to other independent contractors).

What's Next?

We do not know when the SJC will issue its decision, but given the fact that it concerns a November 2022 ballot question, we expect it will do so relatively quickly. Should the SJC deny the petition and allow the question (in whichever form) to be put to Massachusetts voters in November, it is likely to pass. 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. And should the ballot question pass, it effectively would render moot the Attorney General's lawsuit.

Should the SJC grant the petition, however, the Attorney General's fight against Uber and Lyft in the Massachusetts Superior Court will continue. That said, regardless of the outcome of that lawsuit, given the interests and stakes at issue, one can reasonably expect modified versions of these ballot questions in future elections.

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](#).