

# MASSACHUSETTS HIGH COURT NIXES APP-BASED DRIVER BALLOT QUESTION

Insights

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As we reported [last month](#) and back in [January](#), the Massachusetts Supreme Judicial Court (SJC) was considering whether voters in the state could weigh in on a ballot initiative classifying app-based drivers (those using platforms such as Uber, Lyft, DoorDash, and Instacart) as independent contractors rather than employees. Much to the dismay of the more than [80% of drivers who supported the measure](#), the SJC just [denied](#) that opportunity to voters, at least for now. That said, the SJC's decision in *Koussa v. Attorney General* provides some guidance on how the ballot question may – and almost certainly will – be revised to pass constitutional muster for a future election.

## Ballot Initiative Background

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. The proposed November ballot question specifically would have classified such drivers as independent contractors – while affording them certain protections and benefits. A group of voters, backed by the Coalition to Protect Workers' Rights, filed a complaint with the SJC against the Attorney General and Secretary of State, claiming they erred in certifying the ballot questions.

Article 48 of the Massachusetts Constitution requires that all provisions of a ballot initiative contain only subjects that are related or mutually dependent. The SJC has interpreted this requirement to allow an initiative petition to include multiple

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subjects so long as they have a “common purpose to which each element is germane.” Such inquiry generally involves two considerations:

1. Whether the provisions’ similarities dominate what each one separately provides, such that the whole is “sufficiently coherent” to be voted on “yes” or “no”; and
2. Whether the petition expresses an “operational relatedness among its substantive parts that would permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy.”

### **‘Two Substantively Distinct Policy Decisions’**

In reviewing the ballot initiative at issue against this standard, the SJC noted that “[m]ost of the petitions’ provisions are devoted to defining a new contract-based relationship between network companies and app-based drivers, including an associated wage and benefit scheme that the companies will provide to the drivers.” Indeed, both versions of the petition would have provided 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 preventing sexual assault and misconduct.

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But the SJC got hung up on two provisions it said would go beyond the relationship between the companies and drivers and extend to the relationship between the company and third-parties. The two provisions, which the SJC implies may have purposely been “buried” in the petitions, are as follows:

- “Notwithstanding any other law to the contrary,” a driver “shall be deemed to be an independent contractor and not an employee or agent for all purposes with respect to his or her relationship with the network company,” and
- “Notwithstanding any general or special law to the contrary, compliance with the provisions of this chapter shall not be interpreted or applied, either directly or indirectly, in a manner that treats network companies as employers of app-based drivers, or app-based drivers as employees of network companies, and any party seeking to establish that a person is not an app-based driver bears the burden of proof.”

The SJC read these provisions to apply to the relationship between the companies and injured third parties seeking to hold them accountable for drivers’ torts. According to the SJC, these provisions would make it significantly more difficult for an injured member of the public to sue the company for injuries sustained as a result of accidents or assaults. Thus, the SJC concluded, the petitions violated the “related subjects” requirement because they presented voters with “two substantively distinct policy decisions,” and voters may support one (providing better wages and benefits for drivers) but not the other (limiting their own rights to recover damages for drivers’ torts) yet have to answer “yes” or “no” to the whole.

### **What’s Next?**

The ballot initiative is dead for now, and the petition, in whatever form, will not appear on the November 2022 ballot. That said, the SJC’s decision certainly suggests that, in the court’s view, if the language didn’t go beyond the relationship between the driver and company, the question would have been appropriately certified and put to the voters. And if polling and results in California are any guide, the initiative likely would have passed. We can certainly expect supporters of the petition to go back to the drawing board with this guidance and try again in the next election.

In the meantime, the Attorney General's lawsuit against Uber and Lyft – seeking a declaration that drivers who use their platforms are employees – marches on in Suffolk Superior Court. Ongoing discovery battles are now slated to conclude on September 15. Of course, the war is far from over, as whoever loses at the Superior Court will no doubt appeal.

Accordingly, for now and for the foreseeable future, the question of whether app-based drivers are independent contractors or employees will remain unanswered.

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](#).