

ADVISORY COMMITTEE'S RECOMMENDATION

Recommendation: The Advisory Committee recommends FAVORABLE ACTION on Warrant Article 31, as amended by the Advisory Committee and petitioner, by a vote of 12-1 with 7 abstentions.

Executive Summary	Warrant Article 31 is a resolution asking that Town Meeting express its opposition to a likely November 2022 state ballot initiative question that would legally classify app-based drivers for companies such as Uber, Lyft, and DoorDash as “independent contractors” rather than as “employees” entitled to worker protections under federal and state law (such as an hourly minimum wage, overtime, the right to unionize, and many others). This ballot initiative would provide some benefits and wage guarantees to drivers but not to the extent that employees have by law and, as independent contractors, the drivers would be barred from ever unionizing.
Voting yes will . . .	Encourage the opposition to the November 2022 state ballot initiative that seeks to define app-based drivers as independent contractors rather than as employees.
Voting no will . . .	Offer support to companies' efforts to continue to classify their drivers as independent contractors rather than as employees.
Financial impact	None to the Town's budget.
Legal implications	None to the Town. However, passage of the state ballot initiative may possibly result in the ride-share companies being shielded from tort liability for accidents in claims brought by passengers and other third parties, which is currently a question before the Massachusetts Supreme Judicial Court.

Introduction

WA 31 is a resolution that calls for Town Meeting to express its opposition to a likely November 2022 state ballot initiative that would legally classify app-based drivers for ride-share and delivery companies such as Uber, Lyft, and DoorDash as “independent contractors” rather than as “employees” entitled to worker protections under federal and state law.

Background Information

Ride-share transportation companies such as Uber and Lyft provide transportation services to their customers, who utilize the companies' dispatch apps to receive pre-arranged rides with drivers who have contracted with these companies and who provide their own cars. The companies classify their drivers as independent contractors and require drivers to enter into standardized service contracts that expressly state that the drivers are independent contractors, set non-negotiated terms and conditions, and contain arbitration provisions that prevent drivers from bringing litigation.

In July 2020 Massachusetts Attorney General Maura Healey filed a complaint for declaratory judgment against Uber and Lyft seeking (1) a court determination that Uber and Lyft drivers are employees and not independent contractors and (2) a court order requiring Uber and Lyft to reclassify their drivers as employees (and to stop misclassifying them as independent contractors), thereby making available to

the drivers the protections of Massachusetts Wage and Hour Laws, such as the Wage Act, the Minimum Wage Law, Overtime Law, Earned Sick Time Law, and Anti-Retaliation Statutes. On March 25, 2021, the Suffolk Superior Court denied the companies' motion to dismiss this lawsuit, finding that the Attorney General had plausibly suggested that Uber and Lyft misclassify their drivers and are in violation of the Independent Contractor Misclassification Statute, G.L. c. 149, sec. 148B.

The Attorney General's complaint alleges that Uber and Lyft are unable to meet the three-part test required under state law that would allow them to classify drivers as independent contractors.

- First, the drivers are not “free from control and direction in connection with the performance of the service.” Uber and Lyft unilaterally determine their drivers' pay structure according to the companies' formulas and closely monitor drivers' activities through their apps, and, although drivers can set their hours, they are penalized if they do not accept enough rides, cancel too many rides, or do not meet standards set by the companies.
- Second, rather than providing a service that is “outside the usual course of the business of the employer,” the drivers provide a service that is essential to the companies' core business as transportation service providers and without which, these companies would go out of business.
- Third, most drivers are not customarily engaged in ride-share driving as “an independently established trade, occupation, profession or business” that they seek to promote and grow in the marketplace.

The Ballot Initiative

In response to this lawsuit and in an effort to do an end run around it, the ride-share companies have begun a heavily funded lobbying campaign to place a voter initiative on the November 2022 ballot that would enact a state law that declares app-based drivers to be independent contractors. Alternatively, they are also lobbying the Massachusetts State Legislature to enact such legislation..

There are two versions of the ballot initiative, but they are virtually identical except for the absence of a section on safety training in Version B. Both seek to enact a state law that declares that app-based drivers and couriers are to be deemed independent contractors and not employees with respect to their relationship with the companies “notwithstanding any other law to the contrary.”

The initiative also would require the companies to provide a number of watered down, minimalist versions of some of the benefits and wage guarantees that drivers would be entitled to if they were deemed to be employees:

- A net earnings floor of 120% of the minimum wage during each pay period – but only for a driver's “engaged time” (the time between accepting a service request and completing that request) – plus 26 cents per engaged mile, adjusted every 5 years for inflation. This would not provide payment for any wait time between rides or for time spent getting gas or maintaining their car or doing any other job-related work. Further, there is explicit language [Sec. 5(D)] that companies would not be required to provide compensation above the driver's net earnings floor during an earnings period.

- Modest healthcare stipends provided by each company for any driver who averages in one quarter at least 15 hours per week of engaged time with that company and more for those with 25 or more hours per week of engaged time, subject to the driver showing proof of enrollment in a qualifying health plan.
- One hour of earned paid sick leave for every 30 hours of engaged time.
- Coverage under Massachusetts Paid Family and Medical Leave, unless declined by the driver.
- Occupational accident insurance for up to 156 weeks following an injury if the injury occurs while the driver is online with the app of that particular company.
- Disability payment of 66 percent of a driver's average weekly “engaged time” earnings for up to 156 weeks following an injury occurring while the driver is online with the app, as well as accidental death insurance equal to 66 percent of a driver's average weekly “engaged time” earnings for the benefit of driver's spouse, children, or other dependents.

Note that the earnings on which these above benefits are based include only the driver's engaged time and not all the other hours that they worked.

Unlike employees, the drivers under this law would not be entitled to overtime pay, personal and vacation days, or holidays. Unlike employees, they would be responsible for paying the 6.2 percent Social Security payroll tax that employers are required to pay, in addition to the 6.2 percent payroll tax that employees have to pay – a total of 12.4 percent of their income. And they would not be reimbursed for any job-related expenses, including the cost of gas and the upkeep of their car.

Additionally, as independent contractors, drivers would be barred by the National Labor Relations Act from forming a union.

The companies have donated millions of dollars to a coalition supporting the ballot initiative, including \$14 million from Lyft alone. This effort in Massachusetts is similar to a \$200 million campaign by ride-share companies in California in support of a similar ballot initiative (Proposition 22), which was passed in 2020, but has since been ruled unconstitutional by a California state trial court. The case is now pending before California's court of appeals.

Evaluation Methodology/Research

- Ballot Initiative: Version A (Version B is identical to A except that it does not contain a paid occupational safety training requirement.)
<https://www.mass.gov/doc/21-11-a-law-defining-and-regulating-the-contract-based-relationship-between-network-companies-and-app-based-drivers-version-a/download>
- Attorney General's Complaint (July 14, 2020): Healey v. Uber Technologies, Inc., and Lyft, Inc.

<https://www.mass.gov/doc/ride-sharing-complaint>

- News release and summary of complaint

<https://www.mass.gov/news/ag-healey-uber-and-lyft-drivers-are-employees-under-massachusetts-wage-and-hour-laws>

Discussion

The Human Services Subcommittee of the Advisory Committee held a (virtual) public hearing on April 20, 2022 at 5:00 pm via Zoom. The full Advisory Committee held a public meeting on May 5, 2022.

The petitioner explained that he had brought this article because he is concerned about the precedent that passage of the state ballot question would have both in Massachusetts and nationally in encouraging ride-share companies to continue to avoid their full legal responsibilities as employers by designating app-based drivers as independent contractors with fewer rights and benefits and lower compensation than employees. He believes that a vote in opposition to the ballot question by Brookline's Town Meeting would influence the views of voters in Brookline and throughout the state and would be helpful to opponents of the initiative. He also is concerned about the millions of dollars the ride-share companies are spending in lobbying for this ballot question.

Ride-share drivers are a diverse group. A majority only work a very limited number of hours per week and do not see driving as a full-time job. On the other hand, there are a significant minority of drivers who depend almost entirely on their earnings from driving to support their family. This can lead to a divergence in goals. People working only 10-15 hours a week may not think they need health insurance and other worker protections as much as someone working 35 or more hours. For many drivers, having flexible hours make having very minimal or no employee benefits or wage guarantees seem to be an acceptable tradeoff.

Additionally, some of the provisions of the initiative might be appealing to current ride-share drivers since, having been designated by their companies as independent contractors, they currently have no traditional employee benefits, and may be grateful for any improvement of their situation. However, because most current drivers do not work a sufficient number of “engaged time” hours to qualify for the newly proposed benefits, these new benefits may be more illusory than real.

Many Advisory Committee members expressed support of the petitioner's goals for this article and shared his concern about the detrimental effect on American workers if more and more companies are allowed to by-pass established state and federal laws about how to determine whether workers are “employees” (and therefore entitled to the legal protections and benefits of that status) by (1) misclassifying their workers as independent contractors and (2) supporting special ballot initiatives that designate their employees to be independent contractors irrespective of the requirements of any other laws.

There was also some discussion about the potential implications of a case currently pending before the Massachusetts Supreme Judicial Court concerning whether ride-share companies are shielded from tort liability for accident claims brought by passengers and other third parties if their drivers are classified as independent contractors and not employees. *El Koussa v. Attorney General, Mass.*, No. SJC-13237.

A number of Advisory Committee members stated that they did not believe this was an issue about which the AC needed to make a recommendation. However, other members pointed out that the state ballot initiative, if successful, would directly impact Brookline residents who are drivers for these companies and the large number of Brookline residents who use the services that these companies provide. Additionally, the Town receives 5 cents in revenue for every Uber and Lyft ride that originates in Brookline.

Recommendation: The Advisory Committee recommends FAVORABLE ACTION on the amended motion under Warrant Article 31 by a vote of 12-1-7.

The amended version of Warrant Article 31, agreed on by both the petitioner and Advisory Committee, appears below in clean form. A marked up version follows the voting summary, showing differences from the petitioner's original motion, with deletions indicated with strike-out and additions appearing in boldface, underlined type.

VOTED: That the Town adopt the following resolution:

Resolution opposing state ballot question on defining and regulating app-based drivers

WHEREAS, on the November 2022 ballot, there will be a state ballot question which if approved would define rideshare company drivers as independent contractors; and

WHEREAS, independent contractors are entitled to far fewer benefits and workplace protections than employees; and

WHEREAS, corporations like Uber, Lyft, and DoorDash are pushing for Massachusetts voters to make this change; and

WHEREAS, such a change in employment status and labor law would prevent ride-share drivers from legally being able to unionize in the future; and

WHEREAS, everyone should be entitled to a living wage, decent working conditions, and bargaining power in the workplace;

NOW THEREFORE BE IT RESOLVED THAT Brookline Town Meeting expresses its strong disapproval of defining rideshare company drivers as independent contractors; and

BE IT FURTHER RESOLVED that Brookline Town Meeting asserts that corporate interests shouldn't be allowed to dictate public policy by bankrolling campaigns that diminish workers' rights; and.

BE IT FURTHER RESOLVED that Town Meeting encourages the people of Brookline (and the larger Commonwealth) to vote no on the November 2022 ballot question seeking to make this change.

ARTICLE 31 ADVISORY COMMITTEE VOTES

Article Description	Opposition to state ballot question regarding app-based drivers
AC recommendation (Favorable Action unless indicated)	12-1-7
Scott Ananian	Y
Carla Benka	A
Ben Birnbaum	A
Harry Bohrs	
Cliff Brown	A
John Doggett	A
Katherine Florio	Y
Harry Friedman	
David-Marc Goldstein	Y
Neil Gordon	Y
Susan Granoff	Y
Kelly Hardebeck	
Anita Johnson	A
Georgia Johnson	Y
Alisa Jonas	Y
Janice Kahn	Y
Carol Levin	
Pam Lodish	Y
Linda Olson Pehlke	Y
Donelle O’Neal, Sr.	
David Pollak	Y
Stephen Reeders	N
Carlos Ridruejo	A
Lee Selwyn	A
Alok Somani	
Christine Westphal	Y
Dennis Doughty *	
* Chairperson does not vote except to break a tie	

APPENDIX: Markup showing differences from petitioner's original motion.

VOTED: That the Town adopt the following resolution:

Opposition to Big Tech ballot quest

Resolution opposing state ballot question on defining and regulating app-based drivers

WHEREAS, on the November 2022 ballot, there will be a **state** ballot question which if approved would define rideshare company drivers as independent contractors; **and**

WHEREAS, independent contractors are entitled to far fewer benefits and workplace protections than employees; **and**

WHEREAS, corporations like Uber, Lyft, and DoorDash are ~~the ones~~ pushing for Massachusetts voters to make this change; **and**

WHEREAS, such a change in **employment status and** labor law would result in **prevent ride-share drivers from legally being able to unionize in the future; and** greater exploitation of drivers by legally defining a group of gig workers as a subclass are to be paid less than minimum wage.

WHEREAS, everyone should be entitled to a living wage, **decent working conditions, and bargaining** and power in the workplace;

~~WHEREAS many argue corporate interests shouldn't be allowed to dictate public policy by bankrolling campaigns that diminish workers' rights.~~

NOW THEREFORE BE IT RESOLVED THAT Brookline Town Meeting expresses its strong disapproval of defining rideshare company drivers as independent contractors; **and**

BE IT FURTHER RESOLVED that Brookline Town Meeting asserts that corporate interests shouldn't be allowed to dictate public policy by bankrolling campaigns that diminish workers' rights; and.

BE IT FURTHER RESOLVED that Town Meeting encourages the people of Brookline (and the larger Commonwealth) to vote no on the November **2022** ballot question seeking to make this change.