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Cover Page Footnote

Allison Laughner, Creating a Good Gig for App-based Workers in Massachusetts: Letting Companies Draft Employment Law Is Not the Answer, 45 W. New Eng. L. Rev. 207 (2023)

CREATING A GOOD GIG FOR APP-BASED WORKERS IN MASSACHUSETTS: LETTING COMPANIES DRAFT EMPLOYMENT LAW IS NOT THE ANSWER

*Allison Laughner**

There is significant debate surrounding the classification of app-based drivers in the United States. Companies with app-based drivers, such as Uber, Lyft, and DoorDash, have been classifying their workers as independent contractors, rather than employees, despite state laws. In November 2020, with the support of the companies mentioned above, the California legislature passed Proposition 22, defining app-based drivers as independent contractors.

What about Massachusetts? There is a debate as to whether app-based drivers are currently employees or independent contractors under Massachusetts law. These app-based drivers should be classified as employees under Massachusetts law but are misclassified as independent contractors. A Massachusetts ballot initiative defined app-based drivers, who met specific criteria, as independent contractors. After the Massachusetts legislature approved the initiative for the November 2022 ballot, the Massachusetts Supreme Judicial Court declared the initiative unconstitutional, preventing the initiative's placement on the ballot.

Then, the United States Department of Labor released a proposed rule in October of 2022 that would revise the federal analysis for determining if a worker is an employee or independent contractor. The Department of Labor accepted written comments from the public until November 28, 2022. It will likely take months for the Department of Labor to read the comments and decide if the rule will be implemented. Implementation of this rule would impact Massachusetts employment law.

This Note argues that the initiative in Massachusetts would not have provided app-based drivers with enough benefits and protections, including fair wages and the employer's obligation to pay and

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withhold taxes on behalf of the worker. This Note also proposes legislation that Massachusetts should consider, with the Department of Labor's proposed rule in mind, since the initiative did not make it to the ballot. The legislation proposed in this Note intends to protect and benefit app-based workers in Massachusetts and influence employment law so initiatives like this do not succeed in other states.

INTRODUCTION

Picture Richard: a husband, father of four, and Uber¹ driver. He drives an average of fifteen hours a week, and the money he makes is spent on his kids so they can play basketball in a travel league. His husband has a full-time job that provides benefits, including health insurance for the family. Richard's main goal in working for Uber is to make extra money. His favorite part about working for Uber is that he can choose the hours he works—allowing him to always attend his kids' basketball games.

Richard is a worker in the gig economy.² The gig economy is made up of workers who frequently work in short-term, part-time positions, rather than the permanent positions considered the norm for many years.³ These workers enjoy the freedom to choose when they work and—depending on the companies they work for—which ride or delivery requests they accept,⁴ which means more flexibility than traditional businesses.⁵

But there is a downside to freedom and flexibility. The benefits these app-based workers receive depend on how they are classified.⁶ Under current state and federal employment laws, a worker's access to fair wages, workers' compensation, and much more only exists if they are classified as employees.⁷ If they are classified as independent contractors, there are fewer protections and benefits.⁸ All workers, whether app-based

1. Uber Technologies, Inc. is a ride-hailing company that provides transportation to customers who request rides through its mobile app. The request for a ride is sent to a nearby Uber driver, who accepts the request and then picks up the customer and gives the customer a ride to their destination. See UBER, <https://www.uber.com/> [<https://perma.cc/MQP2-TMWG>]. Uber operates in more than 10,000 cities around the world. *Id.*

2. This description of Richard is a hypothetical based loosely on the life of an Uber driver in Massachusetts. Richard is meant to be representative of many individuals working for companies like Uber.

3. See, e.g., Liya Palagashvili, *Disrupting the Employee and Contractor Laws*, 2017 U. CHI. LEGAL F. 379, 380–83 (2017).

4. *Id.* at 380, 383.

5. *Id.* at 383.

6. Travis Clark, *The Gig Is Up: An Analysis of the Gig-Economy and an Outdated Worker Classification System in Need of Reform*, 19 SEATTLE J. FOR SOC. JUST. 769, 769–71 (2021).

7. *Id.*; 29 U.S.C. §§ 157–158.

8. Jacob Passy, *Uber Doesn't Want Its Drivers to Be Employees – Here's Why That Matters*, MARKETWATCH (Apr. 15, 2019, 7:30 PM), <https://www.marketwatch.com/story/uber->

or not, deserve to be fairly compensated for their work and receive benefits that protect themselves and their families. Therefore, workers need to be classified correctly.

Companies with app-based workers want to classify their workers as independent contractors because it is cheaper, it reduces their liability, and they are not obligated to pay or withhold taxes for these workers as they would be if the workers were properly classified as employees.⁹ This is why companies such as Uber, Lyft, and DoorDash choose to misclassify their workers as independent contractors.¹⁰

The correct classification of app-based workers is important because so many workers across the United States are affected. Between Uber and Lyft alone, there are over one million app-based drivers in the United States.¹¹ The number of Uber and Lyft drivers is greater in states with large cities where people rely on transportation other than their own cars, such as in California and New York.¹² This means that the rights of millions of workers—especially those living in or near big cities—are affected when employment laws are unclear or ignored, and misclassification occurs.

Due to pushback from state officials about worker misclassification,¹³ gig economy companies have joined forces to create ballot propositions, frequently called initiatives, to change existing employment law.¹⁴ These

doesn't-want-its-drivers-to-be-employees-heres-why-that-matters-2017-11-13 [https://perma.cc/7CM7-76CP]; see MASS. GEN. LAWS ch. 151A, § 2.

9. See MASS. GEN. LAWS ch. 151A, § 2.

10. See COMMONWEALTH OF MASS. EXEC. OFF. OF LAB. & WORKFORCE DEV., PUZZLED ABOUT THE COST OF EMPLOYEE MISCLASSIFICATION? (Aug. 27, 2017), <https://www.mass.gov/doc/misclassification-brochure/download> [https://perma.cc/5EQK-JDFZ]. Massachusetts is fighting against misclassification in court. See, e.g., *Healey v. Uber Techs., Inc.*, No. 2084CV01519-BLS1, 2021 Mass. Super. LEXIS 28, at *1 (Mar. 25, 2021).

11. Brett Helling, *How Many Uber Drivers Are There in 2021?*, RIDESTER (Sept. 9, 2021), <https://www.ridester.com/how-many-uber-drivers-are-there/> [https://perma.cc/36CZ-ESBP]. To put this into perspective, there are about 160 million civilian workers in the United States labor force. *Employment Status of the Civilian Population by Sex and Age*, U.S. BUREAU OF LAB. STATIS. (Aug. 5, 2022), <https://www.bls.gov/news.release/empsit.t01.htm> [https://perma.cc/82Q3-88EQ].

12. Helling, *supra* note 11.

13. *Healey*, 2021 Mass. Super. LEXIS 28, at *1, *9. The Attorney General alleged that Uber had misclassified their drivers as independent contractors and therefore, drivers had not received the benefits they should have. *Id.* Uber and Lyft filed Motions to Dismiss, which were denied because the facts were sufficient to show that the drivers “perform services for Uber and Lyft that are within the usual course of the companies’ businesses and the drivers are subject to Uber or Lyft’s control and direction.” *Id.* at *8.

14. See generally *California Quick Guide to Propositions, November 3, 2022, Proposition 22*, CAL. SEC’Y OF STATE, <http://quickguidetoprops.sos.ca.gov/propositions/2020-11-03/22> [https://perma.cc/FZ2P-N4A7] [*hereinafter* CAL. SEC’Y OF STATE]; *Massachusetts App-Based Drivers as Contractors and Labor Policies Initiative (2022)*, BALLOTPEDIA, https://ballotpedia.org/Massachusetts_App-

initiatives aim to change the laws about classification so that app-based workers can be legally classified as independent contractors. This goal is attainable by drafting initiatives which focus specifically on app-based drivers.¹⁵

California passed the first initiative, Proposition 22, in 2020.¹⁶ Three parts of Proposition 22 have since been struck down as unconstitutional.¹⁷ These three parts were ruled unconstitutional because they included language that limited the Legislature's right to exercise its power to pass future legislation and language that prevented app-based drivers from unionizing.¹⁸ The California proposition greatly influenced the creation and wording of the initiative in Massachusetts.¹⁹

After the Massachusetts initiative was approved to be on the November 2022 ballot, the Massachusetts Supreme Judicial Court struck down the entire initiative²⁰ as unconstitutional.²¹ This Note argues that the initiative would not have provided app-based workers, like Richard, with fair compensation and benefits, and that Massachusetts should take steps to ensure that app-based workers are protected. Analyzing what the impact of the initiative would have been is important because a similar initiative that would negatively impact app-based workers could be brought in Massachusetts in the future. Other states, where similar initiatives could also be brought, can learn how to prevent the loss of rights for app-based workers from the Massachusetts initiative as well.

Part I of this Note explains the recent growth of the gig economy across the United States and the resulting worker misclassification

Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2022) [https://perma.cc/639N-LZQV] [hereinafter *Massachusetts Initiative*].

15. See generally CAL. SEC'Y OF STATE, *supra* note 14; *Massachusetts Initiative*, *supra* note 14.

16. CAL. SEC'Y OF STATE, *supra* note 14; Idrian Mollaneda, *The Aftermath of California's Proposition 22*, CAL. L. REV.: BLOG (May 2021), <https://www.californialawreview.org/the-aftermath-of-californias-proposition-22/> [https://perma.cc/6S6A-NGFF].

17. *Castellanos v. State*, No. RG21088725, 2021 Cal. Super. LEXIS 7285, at *18 (Aug. 20, 2021). Notice of Appeal was filed in the California Court of Appeal, First Appellate District, Division Four (A163655) on October 12, 2021. *Id.*

18. *Id.*

19. See Michael Jonas, *California Ruling on Gig Workers Latest Flashpoint in Mass. Debate*, COMMONWEALTH (Aug. 23, 2021), <https://commonwealthmagazine.org/economy/california-ruling-on-gig-workers-latest-flashpoint-in-mass-debate/> [https://perma.cc/5RZK-PR25].

20. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

21. *El Koussa v. Att'y Gen.*, 188 N.E.3d 510, 523 (Mass. 2022).

problem.²² This Part will also discuss California's Proposition 22,²³ the attempted initiative in Massachusetts,²⁴ current Massachusetts laws relevant to worker classification, and the United States Department of Labor's proposed rule.²⁵ Part II breaks down three main issues with the attempted Massachusetts initiative and how it would have negatively impacted Massachusetts workers. The three main issues include the lack of any employer obligation to withhold and pay state and federal taxes; the lack of employer liability for its workers; and a low requirement for the benefits that must be provided to workers—such as hourly wages and mileage.²⁶ Part III proposes legislation aimed at creating a consistent standard for the classification of app-based workers, not just drivers, that supports the gig economy and, most importantly, protects workers. The legislation proposed would create an exception for app-based workers working under twenty-five hours a week and makes suggestions for how to better protect app-based workers. Regardless of how or why the legislation is passed, it must intend to protect the rights of app-based workers to be fairly compensated and receive the benefits necessary to live a happy, healthy, and productive life.

I. WORKER MISCLASSIFICATION IN THE GIG ECONOMY

App-based companies, like Uber, Lyft, and DoorDash, misclassify their workers as independent contractors because it saves them money and reduces their liability.²⁷ Subpart A discusses the history of the gig economy and the misclassification of workers. The first successful app-based driver initiative, California's Proposition 22, is described in Subpart B. Subpart C analyzes current Massachusetts law regarding worker classification and the attempted Massachusetts initiative. The United States Department of Labor's proposed rule on worker classification is

22. See, e.g., Palagashvili, *supra* note 3, at 379; Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 343 (2016).

23. CAL. BUS. & PROF. CODE § 7451; CAL. SEC'Y OF STATE, *supra* note 14.

24. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass.2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass.2022).

25. MASS. GEN. LAWS ch. 151A, § 2.

26. *Gig Employee Solidarity MA: Giant App-Based Corporations Are Leading an Effort to Undermine Basic Workplace Protections and Workers' Rights in Massachusetts*, CMTY. LAB. UNITED, <https://www.massclu.org/gig-employee-solidarity-ma/> [<https://perma.cc/6NYL-Q8TA>] [hereinafter *Gig Employee Solidarity MA*]; COMMONWEALTH OF MASS. EXEC. OFF. OF LAB. & WORKFORCE DEV., *supra* note 10.

27. See MASS. GEN. LAWS ch. 151A. Companies must pay federal and state taxes and pay workers compensation premiums for workers classified as employees under this chapter. *Id.* Companies with workers classified as independent contractors are not responsible for as many taxes and costs. *Id.*

described in Subpart D. This section provides the background for why app-based companies use initiatives to influence employment law to permanently classify app-based drivers as independent contractors and how the initiatives have and could negatively impact workers.

A. *Growth of the Gig Economy and Worker Misclassification*

In recent years, app-based platforms for ridesharing and delivery jobs have become increasingly popular through companies like Uber,²⁸ Lyft,²⁹ Grubhub,³⁰ DoorDash,³¹ and more. The jobs provided through these apps are different than what is typically considered “normal work,” and this new type of work is known as the gig economy.³² Workers in the gig economy frequently work in short-term, part-time positions, rather than the historically more common permanent positions—whether part-time or full-time.³³

App-based work, which mostly includes transportation-oriented work, is appealing to workers because of the freedom or flexibility these positions offer.³⁴ In the gig economy, workers control when they work, how many hours they work, and which ride or delivery requests they accept using the app-based platform created and operated by the company.³⁵ The rideshare or delivery companies do not schedule shifts for their employees.³⁶ Instead, workers log on and off work through the app whenever they want to.³⁷ This means that companies must hire enough workers in an area so that a driver will always be available to accept a ride or delivery request.³⁸

This freedom or flexibility is the reason companies, such as Uber and Lyft, believe their workers should be classified as independent contractors rather than employees.³⁹ The problem with this is that the work performed

28. UBER, <https://www.uber.com/> [https://perma.cc/EN3F-JK5H].

29. LYFT, <https://www.lyft.com/> [https://perma.cc/FZA6-CK5R].

30. GRUBHUB, <https://www.grubhub.com/> [https://perma.cc/A3ZQ-UB26].

31. DOORDASH, <https://www.doordash.com/> [https://perma.cc/2XMK-NHSC].

32. Palagashvili, *supra* note 3, at 379–80.

33. *Id.* at 380–83.

34. When Uber and Lyft drivers were asked in a survey what the most important thing to them was, many said pay and flexibility. Harry Campbell, *Lyft & Uber Driver Survey 2020: Uber Driver Satisfaction Takes a Big Hit*, RIDE SHARE GUY (Feb. 24, 2021), <https://therideshareguy.com/uber-driver-survey/> [https://perma.cc/FB56-XYUW].

35. Palagashvili, *supra* note 3, at 380, 383.

36. *Id.*

37. *Id.*

38. *Id.* at 396.

39. Victoria Antram, *Initiative Filed in Massachusetts to Classify App-Based Drivers as Independent Contractors*, BALLOTPEDIA NEWS (Aug. 6, 2021, 3:45 PM), <https://news.ballotpedia.org/2021/08/06/initiative-filed-in-massachusetts-to-classify-app-based-drivers-as-independent-contractors/> [https://perma.cc/U3V4-B965].

by app-based drivers is different than the types of work performed when independent contractor laws were created.⁴⁰ Unlike true independent contractors, many app-based workers are “controlled by and economically dependent on a single employer” and therefore do not have the “entrepreneurial opportunity, and autonomy of true independent contractors.”⁴¹ The difference between an independent contractor and an employee is best described by how much control the employer has over the details of the service provided. For example, a plumber hired to fix a sink who brings her own tools and sets her own timeline for the completion of the repair is an independent contractor, whereas a plumber who is hired to fix a sink and is given a uniform and tools, and is told how and when to fix the sink is more likely to be an employee.⁴² With app-based drivers, although the drivers choose which rides or deliveries they accept, the companies still control much of the service—the app must be used during the drive, and the companies set regulations for interactions with the customers. Despite this difference, app-based companies want their workers to be classified as independent contractors so they can save money on taxes and avoid liability. For such reasons, companies misclassify them as such.⁴³

This deliberate misclassification matters because of the difference between being an employee and being an independent contractor. Professor Keith Cunningham-Parmeter from Willamette University College of Law explained the difference by stating “[d]epending on which side of the line you fall on, you either get this huge basket of rights or basically nothing.”⁴⁴ Most rights that employees receive are not guaranteed to independent contractors.⁴⁵ These include withholding taxes, minimum wage, overtime, breaks, and more.⁴⁶ Employment laws changed over the years to provide employees with these benefits because

40. See *Independent Contractors*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/independent-contractors> [<https://perma.cc/H693-GR3M>].

41. Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 907 (2017); see, e.g., Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKLEY J. EMP. & LAB. L. 295, 340 (2001).

42. See Carlson, *supra* note 41.

43. Ben Z. Steinberger, *Redefining 'Employee' in the Gig Economy: Shielding Workers from the Uber Model*, 23 FORDHAM J. CORP. & FIN. L. 577, 577 (2018); Sherrod Brown, U.S. Sen., Working Too Hard for Too Little: A Plan for Restoring the Value of Work in America, (Mar. 3, 2017), at 6, (transcript available at https://www.brown.senate.gov/imo/media/doc/Value%20of%20Work%20Speech_Sherrod%20Brown_03032017.pdf [<https://perma.cc/R6UH-HB8N>]) (arguing that companies classify their workers as independent contractors in order to reduce employment costs).

44. Passy, *supra* note 8.

45. *Id.*; Clark, *supra* note 6, at 775–80.

46. Clark, *supra* note 6, at 775–80; see generally Alexander, *supra* note 41 (discussing independent contractors' lack of access to federal antidiscrimination laws).

society finds it important that employees are treated fairly and can afford to live. Deliberately misclassifying workers as independent contractors to avoid providing them with the benefits afforded to employees is a complete injustice.

As app-based companies have been called out for misclassifying workers, they have started to consider ways to avoid discipline for the mass misclassification.⁴⁷ Uber, Lyft, DoorDash, and other companies, have joined forces to draft and pass initiatives that change employment law on worker classification, so their workers can legally be classified as independent contractors rather than employees.⁴⁸ The first of these initiatives was popularly known as Proposition 22 in California.⁴⁹

B. *California's Proposition 22*

Companies created California's Proposition 22 as a response to regulations passed in California regarding worker classification.⁵⁰ The California Assembly passed Assembly Bill 5 (AB 5) in 2019.⁵¹ AB 5 established a three-part test to determine if a worker should be classified as an independent contractor.⁵² Under the test, a worker is considered an employee unless the hiring entity shows that the worker is "free from the control and direction of the hiring entity in connection with the performance of the work," the work performed is not in the usual course of hiring by the business, and the worker is "customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."⁵³

After AB 5 was enacted, officials from both Uber and Lyft released statements acknowledging that they would continue operating the way they had been and would continue to classify their workers as independent contractors, regardless of the new law.⁵⁴ In August of 2020, the Superior Court of San Francisco ruled that Uber and Lyft violated AB 5 by

47. See, e.g., *Healey v. Uber Techs., Inc.*, No. 2084CV01519-BLS1, 2021 Mass. Super. LEXIS 28, at *1 (Mar. 25, 2021).

48. See *An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers*, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); *An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers*, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022); *Massachusetts Initiative*, *supra* note 14.

49. CAL. SEC'Y OF STATE, *supra* note 14; CAL. BUS. & PROF. CODE § 7451.

50. Aarian Marshall, *Uber and Lyft Fight a Law They Say Doesn't Apply to Them*, WIRED (Oct. 31, 2019, 8:06 PM), <https://www.wired.com/story/uber-lyft-fight-law-say-doesnt-apply/> [https://perma.cc/CH9F-42Z5].

51. A.B. 5, 2019 Leg., Reg. Sess. (Cal. 2019).

52. *Id.* at 3-4.

53. *Id.* at 4.

54. Marshall, *supra* note 50.

misclassifying their workers.⁵⁵ In October, the California First District Court of Appeal upheld the Superior Court's ruling.⁵⁶

In response, Uber, Lyft, DoorDash, Instacart, and other app-based companies worked together to create an initiative to avoid the legal battles bound to ensue.⁵⁷ The initiative, Proposition 22, was the most expensive ballot measure in California's history with \$205 million spent on campaigning by companies, including Uber and Lyft.⁵⁸

Proposition 22 passed with over fifty-eight percent of the votes in November of 2020.⁵⁹ It granted app-based transportation and delivery companies the right to classify their drivers as independent contractors rather than employees,⁶⁰ which in turn exempted companies hiring app-based workers from providing their workers the same benefits that are required for employees.⁶¹

The "initiative defined app-based drivers as workers who (a) provide delivery services on an on-demand basis through a business's online-enabled application or platform or (b) use a personal vehicle to provide prearranged transportation services for compensation via a business's online-enabled application or platform."⁶² These newly defined app-based drivers lost the package of rights that comes with being an employee and instead received the package of rights designed by the app-based companies.⁶³

This new package of rights changed how workers are paid, the insurance benefits they receive, and the kinds of training and oversight they are subject to.⁶⁴ App-based workers are now receiving less than they would in a minimum wage job because the compensation is the "difference between a worker's net earnings, excluding tips, and a net earnings floor based on 120% of the minimum wage applied to a driver's

55. *People v. Uber Techs.*, No. CGC-20-584402, 2020 Cal. Super. LEXIS *152 (Cal. Super. Ct. Aug. 10, 2020).

56. *People v. Uber Techs.*, 270 Cal. Rptr. 3d 290, 296 (2020).

57. Lauren Hepler, *Uber, Lyft and Why California's War Over Gig Work Is Just Beginning*, CAL MATTERS (Aug. 21, 2020), <https://calmatters.org/economy/2020/08/california-gig-work-ab5-prop-22/> [<https://perma.cc/DYG7-H6XZ>].

58. Dara Kerr, *Proposition 22, Backed by Uber and Lyft, Passes. Drivers Say They'll Keep Fighting*, CNET (Nov. 4, 2020, 3:47 PM), <https://www.cnet.com/news/proposition-22-backed-by-uber-and-lyft-passes-drivers-say-theyll-keep-fighting/> [<https://perma.cc/FS3J-3W5E>]; *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)) [<https://perma.cc/A6RU-2CQM>] [hereinafter *California Proposition 22*].

59. CAL. SEC'Y OF STATE, *supra* note 14; *California Proposition 22*, *supra* note 58.

60. CAL. SEC'Y OF STATE, *supra* note 14; Kerr, *supra* note 58.

61. Kerr, *supra* note 58.

62. *California Proposition 22*, *supra* note 58.

63. Kerr, *supra* note 58.

64. *Id.*

engaged time and thirty cents, adjusted for inflation after 2021, per engaged mile.”⁶⁵ This compensation is less than a minimum wage job because the drivers are only being compensated for the time they are actively pursuing a ride or delivery, not when they are idling and waiting for the next request.

The initiative also requires that companies provide or make available health insurance, occupation accident insurance, and accidental death insurance.⁶⁶ The health insurance subsidies are conditioned on the number of hours worked.⁶⁷ This is problematic because app-based workers have to wait for ride or delivery requests and the time they spend waiting is not included in the total hours they work, unlike other jobs that count hours where no work is done as long as the worker is at work. The occupation accident insurance must cover at least one million dollars in medical expenses and lost income and provide disability payments of sixty-six percent of a driver’s average weekly earnings from the four weeks before the injuries occurred.⁶⁸

The initiative also created safety measures that limited the number of hours an app-based driver could work during a twenty-four-hour period, created various safety trainings on driving and sexual assault, criminalized false impersonation of an app-based driver, and developed anti-discrimination and sexual harassment policies.⁶⁹ Although these safety measures are important, classifying workers as independent contractors only removes employer liability for drivers’ actions and does not fix app-based worker liability issues.

Lastly, Proposition 22 stipulated specific requirements for its amendment once it was passed.⁷⁰ Although this initiative provided some rights and benefits for workers, the benefits and compensation provided are not enough, and are nowhere close to the benefits, compensation, and protection they would receive as employees.⁷¹

In August of 2021, the Superior Court of California ruled that Proposition 22 was unconstitutional and unenforceable based on three sections of the initiative.⁷² The first section that the Superior Court found unconstitutional limited the California Legislature’s right to exercise its

65. *California Proposition 22*, *supra* note 58. Put more simply, this means that the driver will receive payments if their net earnings for engaged time do not meet the earnings floor of 120% of minimum wage. *Id.* “Proposition 22 defined a driver’s engaged time as the time between accepting a service request and completing the request.” *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Kerr, *supra* note 58.

72. *Castellanos v. State*, No. RG21088725, 2021 Cal. Super. LEXIS 7285, at *18 (Aug. 20, 2021).

power to determine which workers will be covered by workers' compensation.⁷³ The second section that the court found unconstitutional impermissibly limited the legislature's ability to pass future legislation because it required approval by seven-eighths of the legislature for any amendment.⁷⁴ Lastly, the court recognized that California employs a single-subject rule that limits ballot initiatives to address a single subject, topic, or issue.⁷⁵ The court found that Proposition 22 failed to meet this requirement due to a section aimed at preventing the app-based drivers from unionizing.⁷⁶ This decision has been appealed and the litigation is ongoing, but the fight in California influenced companies in Massachusetts to attempt to pass a similar initiative.⁷⁷

C. *Massachusetts: Current Law and Initiative*

Much like in California, companies such as Uber and Lyft are unhappy with current employment laws in Massachusetts.⁷⁸ These companies drafted an app-based driver initiative in Massachusetts which collected enough signatures to be put on the ballot in November of 2022, but then the Massachusetts Supreme Judicial Court found the initiative unconstitutional.⁷⁹ This Subpart will include an analysis of current employment laws in Massachusetts and the Massachusetts initiative.

1. Current Massachusetts Law

Massachusetts General Law Chapter 151A, § 2 addresses worker classification in Massachusetts.⁸⁰ It states that all workers should be classified as employees unless they meet all three prongs of the following test:

73. The petitioners argued, and the court agreed, that the language of Proposition 22 exempted workers from workers' compensation, which only the California Legislature may limit. *Id.* at *1–6.

74. The California Constitution provides that the people have the power to enact laws with initiatives. *Id.* at *6. Language in this initiative took that right away by specifying an amending process. *Id.* at *6–15.

75. The court found that the provision of Proposition 22 that deals with collective bargaining rights did not relate to its stated common purpose of protecting the opportunity for app-based driving and providing minimum protections and benefits for those drivers. *Id.* at *15–18.

76. *Id.*

77. Jonas, *supra* note 19.

78. *Employment - Misclassification - Uber and Lyft drivers*, MASS. LAW. WKLY., Mar. 30, 2021.

79. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022); *Massachusetts Initiative*, *supra* note 14; *El Koussa v. Att'y Gen.*, 188 N.E.3d 510 (Mass. 2022).

80. MASS. GEN. LAWS ch. 151A, § 2.

- (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and
- (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
- (c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.⁸¹

Massachusetts courts have affirmed the validity of this statute through case law.⁸²

The Appeals Court of Massachusetts analyzed each prong of the test in *Weiss v. Loomis*.⁸³ The court explained the freedom from control and direction to mean if the company had “the right to supervise, direct, and control the details of [the worker’s] performance.”⁸⁴ Further, the court stated that in order to determine if services are performed outside of the usual course of business, “one relevant factor is whether the services are necessary or merely incidental to the business.”⁸⁵ Lastly, the court explained the independently established business prong writing “the question is whether, at the time the services were provided, the individual was ‘wearing the hat’ of the putative employer or the ‘hat of his own independent enterprise.’”⁸⁶ The three prongs of this test play an important role in the current legal battles in Massachusetts which call out companies for intentionally misclassifying their workers.

In July 2020, Attorney General Maura Healey filed a complaint in the Suffolk Superior Court against Uber Technologies Inc. and Lyft Inc.⁸⁷ Healey argued that under current Massachusetts law, app-based drivers are employees because they do not pass the three-part test under chapter 151A §2.⁸⁸ Uber and Lyft filed motions to dismiss, but the court denied the motions in March of 2021, and the lawsuit is ongoing.⁸⁹ As a result of this lawsuit, companies including Uber, Instacart, Doordash and Lyft,

81. *Id.*

82. *See, e.g.,* *Weiss v. Loomis*, Sayles & Co., 141 N.E.3d 122, 130 (2020).

83. *Id.* at 127–30.

84. *Id.* at 128–29 (citing *Athol Daily News v. Bd. of Rev. of the Div. of Emp. & Training*, 786 N.E.2d 365, 371 (2003)).

85. *Id.* at 129 (citing *Carey v. Gatehouse Media Mass. I, Inc.*, 94 N.E.3d 420, 425–26 (2018)).

86. *Id.* at 130 (quoting *Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Emp. & Training*, 778 N.E.2d 964, 970 (2002)).

87. *Healey v. Uber Techs., Inc.*, No. 2084CV01519-BLS1, 2021 Mass. Super. LEXIS 28 at *1 (Mar. 25, 2021).

88. *Id.* at *6 n.4–5.

89. *Id.* at *1.

drafted two versions of an app-based drivers initiative similar to California's Proposition 22.⁹⁰

2. Massachusetts Initiative

The Massachusetts app-based driver initiative, titled “A Law Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers,” would have classified app-based drivers as independent contractors, rather than employees, and would have enacted labor wage policies-written by the app-based companies specific to app-based drivers.⁹¹ The initiative was filed with two versions: Version A and Version B.⁹² The versions were the same except for one section on paid occupational safety trainings.⁹³ Both versions were filed with the Massachusetts Attorney General's office by the Massachusetts Coalition for Independent Work, which is supported financially by DoorDash, InstaCart, Lyft, Uber, and other app-based companies.⁹⁴ The initiative's supporters needed 80,000 signatures by December of 2021 for the initiative to be put on the ballot in November of 2022.⁹⁵ By the first of December, over 100,000 signatures for each version were submitted to the Secretary of State, and by the end of December, the Secretary of State certified the petition to the legislature.⁹⁶

The success of California's Proposition 22 influenced the drafting of this initiative, and the constitutional problems Proposition 22 faced were considered when the Massachusetts initiative was drafted.⁹⁷ Most of the sections of Proposition 22 that were ruled unconstitutional were either not

90. Antram, *supra* note 39; *Massachusetts Initiative*, *supra* note 14.

91. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

92. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

93. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

94. Antram, *supra* note 39; Spencer Buell, *What You Need to Know about the Gig Worker Ballot Question*, BOSTON MAGAZINE (Sept. 20, 2021, 5:04 PM), <https://www.bostonmagazine.com/news/2021/09/20/massachusetts-gig-worker-ballot-question/> [https://perma.cc/BX8A-XK8D].

95. Gregory Keating & Francesco A. DeLuca, *Proposed Massachusetts Law Classifying App-Based Drivers as Independent Contractors Clears First Step of Ballot Initiative Process*, 11 NAT'L L. REV. 251 (2021); Buell, *supra* note 94.

96. *Massachusetts Initiative*, *supra* note 14.

97. *Castellanos v. State*, No. RG21088725, 2021 Cal. Super. LEXIS 7285, at *1, *17–18 (Aug. 20, 2021); Jonas, *supra* note 19.

included in the Massachusetts initiative or are not applicable.⁹⁸ For example, the Massachusetts initiative does include language that addresses workers' compensation issues, like Proposition 22, but it is not an issue because the Massachusetts Constitution lacks language regarding the state's ability to control workers' compensation.⁹⁹ In addition, the Massachusetts initiative left out the unconstitutional sections of Proposition 22 relating to workers' rights to unionize and the provision that requires approval by seven-eighths of the legislature to amend the law.¹⁰⁰ Despite the Massachusetts drafters' intention to avoid these constitutional issues, a lawsuit was filed on January 18, 2022.¹⁰¹

The lawsuit claims that the Attorney General should not have certified the petitions and that the Secretary of State should not be allowed to put them before voters because they violate the state's constitution.¹⁰² The Massachusetts Constitution requires that subjects of initiatives be "related" or "mutually dependent," and sets the guidelines for the publication of summaries of the initiatives by the Attorney General.¹⁰³ The plaintiffs, a group of app-based drivers and activists, allege that the many subjects of employment law in the initiative are not related or mutually dependent.¹⁰⁴ Further, they allege that the summaries published by the Attorney General are not up to standard because they fail to describe whether this proposed law would change existing law and how it would do so, as required by the state constitution.¹⁰⁵

The plaintiffs were successful—in June of 2022, the Massachusetts Supreme Judicial Court found the initiative unconstitutional, and the Secretary of State was barred from placing the petitions on the ballot in

98. Jonas, *supra* note 19; see An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); see An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

99. *Castellanos*, 2021 Cal. Super. LEXIS 7285, at *1–6.; Jonas, *supra* note 19.

100. Jonas, *supra* note 19; An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

101. Complaint, *El Koussa v. Att'y Gen.*, 188 N.E.3d 510 (Mass. 2022) (No. SJC-13237).

102. *Id.* at 6–7.

103. MASS. CONST. art. XLVIII, § 3, *amended by* MASS. CONST. art. LXXIV, § 1. "Related" means that the subjects in the law must be considered a "unified" statement of public policy and "mutually dependent" means that the provisions cannot exist independently. *Anderson v. Att'y Gen.*, 99 N.E.3d 309, 318, 321 (Mass. 2018), *modified*, *Anderson v. Att'y Gen.*, 188 N.E.3d 955 (Mass. 2022).

104. Complaint, *supra* note 101, at 2.

105. *Id.*

November 2022.¹⁰⁶ The court found that the initiative petitions violated the “related subjects requirement because they present voters with two substantively distinct policy decisions: one confined for the most part to the contract-based and voluntary relationship between app-based drivers and network companies; the other—couched in confusingly vague and open-ended provisions—apparently seeking to limit the network companies’ liability to third parties injured by app-based drivers’ tortious conduct.”¹⁰⁷ The question of the petition summaries’ fairness was not addressed in the opinion, except in a footnote stating that the court would have found them to be unfair had they ruled on the issue.¹⁰⁸

Massachusetts needs to address the issues that app-based drivers would face if a similar initiative were passed in the future. App-based workers would not have been fairly compensated and would have lost out on many benefits had this initiative been passed. Analyzing the language of this initiative can provide Massachusetts, and possibly other states, with an idea of what needs to be done differently in the future to protect app-based workers.

If the initiative had passed, the initiative would have created a list of criteria that, if met, would define app-based drivers as independent contractors.¹⁰⁹ To be defined as independent contractors, the workers must have been “drivers for rideshare and delivery companies who use digital applications” and satisfy four additional requirements: that they must not be “(1) required to work specific days or hours; (2) required to accept specific requests; (3) restricted from working for multiple rideshare or delivery companies; or (4) restricted from working in any other lawful occupation or business.”¹¹⁰ The initiative then listed the labor and wage policies that would specifically apply to app-based drivers.¹¹¹

The newly defined app-based drivers would have only received the benefits and protections listed in the initiative, which are less than those afforded to employees, but more than those afforded to independent

106. *El Koussa*, 188 N.E.3d 510, 523 (2022).

107. *Id.* at 517.

108. *Id.* at 523 n.12.

109. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

110. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

111. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

contractors.¹¹² Both versions of the initiative included the same language for guaranteed earnings, healthcare stipend, paid sick time, paid family and medical leave, occupational accident insurance, and contract formation and termination.¹¹³ Version A of the initiative had a section regarding the paid occupational safety training requirement, which would have obligated the companies to require their app-based drivers to complete trainings on sexual assault and misconduct, and safety training relevant to the job, such as road safety training for drivers providing rides to passengers and food safety training for delivery drivers.¹¹⁴

Under the guaranteed earnings section, companies would have been responsible for paying app-based drivers 120% of the minimum wage for each hour of a driver's engaged time and twenty-six cents per engaged mile.¹¹⁵ Offering healthcare subsidies would have been required, with the amount depending on the number of hours worked.¹¹⁶ For drivers working an average of twenty-five engaged hours¹¹⁷ or more per week during a calendar quarter, the companies would have been required to provide healthcare subsidies equal to 100% of the average Affordable Care Act contribution for the applicable average monthly Health Connector premium for each month.¹¹⁸ For drivers working an average of fifteen to twenty-four engaged hours per week during a calendar quarter, the companies would have been required to provide healthcare subsidies equal to fifty percent of the average Affordable Care Act contribution for the applicable average monthly Health Connector premium for each

112. See *Gig Employee Solidarity MA*, *supra* note 26.

113. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

114. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 6–7 (Mass. 2022).

115. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 8–10 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 7–8 (Mass. 2022). For the Massachusetts initiative's definition of engaged time and engaged mile, see *infra* Part II.C.1–2.

116. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 10–12 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 8–11 (Mass. 2022).

117. See *infra* Part II.C.1.

118. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 10 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 8 (Mass. 2022).

month.¹¹⁹

In addition to healthcare subsidies, drivers would have been provided with earned, paid sick leave at a rate equal to either the driver's average hourly earnings or the guaranteed net earnings, whichever is more,¹²⁰ and would have been granted access to the Massachusetts Paid Family and Medical Leave.¹²¹ Lastly, this initiative would have required the companies to provide or make available accidental death insurance for the benefit of a driver's spouse, children, or other dependents if the driver died while using the app and occupational accident insurance. The insurance provided or made available would have had to (1) cover at least one million dollars in medical expenses for up to 156 weeks following the injury, and (2) provide disability payments of sixty-six percent of a driver's average weekly earnings before the injuries suffered (while the driver was online but not engaged in personal activities) for up to 156 weeks following the injury.¹²²

Though these benefits and protections may seem like a lot, they would not be enough to fairly compensate and protect app-based drivers.¹²³ The Massachusetts initiative was drafted in a way that benefited the company, not the worker, by relieving tax obligations and liability and reducing the amount of wages and benefits paid to workers.¹²⁴ Employment laws, specifically ones affecting app-based workers, must be more carefully drafted to ensure workers' rights are adequately protected and they are fairly compensated for their work.

119. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 10 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 8 (Mass. 2022).

120. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 12–14 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 11–12 (Mass. 2022).

121. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 14–15 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 12–13 (Mass. 2022).

122. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 16–18 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 15–16 (Mass. 2022).

123. Passy, *supra* note 8.

124. See An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

D. *United States Department of Labor's Proposed Rule*

The Wage and Hour Division of the United States Department of Labor released a proposed rule in October of 2022.¹²⁵ The proposed rule would revise the current rule for determining if a worker is an employee or independent contractor by adding standards to the analysis used and changing how factors, including required skills and how much money the worker spends on equipment and materials, are weighed.¹²⁶ The Department of Labor accepted written comments on the proposed rule from the public until November 28, 2022.¹²⁷ Once the Department of Labor assesses the comments, it will likely take months for the rule to go into effect if it is approved.¹²⁸ If in effect, it would be more difficult for companies to classify their app-based workers as independent contractors.¹²⁹

II. EMPLOYERS SHOULD NOT BE DRAFTING EMPLOYMENT LAW

Employment law navigates the complex relationships between employers and their workers, so laws should balance the interests of both employers and workers. When companies draft employment law without input from workers, they are focusing on what is best for the company, not what is best for the workers.¹³⁰ This focus on the company's benefit can be seen in the decisions companies make.¹³¹ For example, before Proposition 22, when California judges ruled that Lyft and Uber were misclassifying workers, they threatened to shut down operations in California.¹³² California politicians and residents argued that this decision would have left many workers without jobs.¹³³ Instead of thinking about those workers, Uber and Lyft thought about what was best for the

125. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795) (proposing to amend Wage and Hour Division Regulations to be more consistent with the Fair Labor Standards Act and judicial precedent).

126. *Id.*

127. *Id.*

128. Taylor Telford, *Biden Wants to Let Gig Workers Be Employees. Here's Why It Matters.*, WASH. POST (Oct. 17, 2022, 10:20 AM), <https://www.washingtonpost.com/business/2022/10/17/gig-workers-contractors-faq/> [<https://perma.cc/UE9Q-K5Y9>].

129. *Id.*

130. *See Passy, supra* note 8.

131. Kate Conger, *Uber and Lyft Get Reprieve After Threatening to Shut Down*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/technology/uber-lyft-california-shutdown.html> [<https://perma.cc/EK2U-F5CQ>].

132. *Id.*

133. *Id.*

company, financially.¹³⁴

This same thinking was likely applied when the Massachusetts initiative was drafted. The companies frame app-based work as more independent, with freedom and flexibility, but that independence comes with less accountability for the companies.¹³⁵ Companies are trying to sell the initiatives to voters by highlighting the independence and few seemingly good benefits it provides drivers. In the end, companies are creating ways to avoid taxes, to be without liability for their drivers, and to pay less in wages and benefits.

These problems with the initiative will be discussed in the next three Subparts. Subpart A analyzes the federal and state tax implications, and what the effect on individual workers would have been. Subpart B discusses how this initiative would have impacted employer liability for the actions of app-based drivers and how that would have affected the safety of individual workers and the public. Lastly, Subpart C argues that the benefits offered to app-based workers in this initiative would not have been enough.

Another initiative could be brought in Massachusetts at any time, so it is important to have discussions about what was wrong with this initiative. Other states could also see similar initiatives and can learn from California and Massachusetts. Once the problems with the initiative are understood, Massachusetts can work to address current law to protect workers and support the gig economy or, if another initiative is brought, know what needs to be done to make sure workers receive the compensations and benefits they deserve.

A. *The Massachusetts Initiative Would Have Improperly Relieved Companies Hiring App-Based Drivers of Tax Obligations*

Employers in a traditional employer-employee relationship are responsible for not only paying taxes, but also for withholding taxes for their employees.¹³⁶ This is not true for companies who hire independent contractors.¹³⁷ Those companies do not have the same obligation to withhold taxes and pay payroll taxes like unemployment, Medicare, and

134. *Contra* Dara Khosrowshahi, *The High Cost of Making Drivers Employees*, UBER NEWSROOM (Oct. 5, 2020), <https://www.uber.com/en-CA/newsroom/economic-impact/> [<https://perma.cc/K8NP-5Z8K>] [hereinafter *High Cost*].

135. Taraneh Azar, *As Gig Economy Booms, Accountability Is Harder to Pinpoint*, THE SCOPE: BOSTON (Feb. 17, 2020), <https://thescopeboston.org/3165/features/gig-economy-accountabilityharder-pinpoint/> [<https://perma.cc/ZT48-BBTX>].

136. Andrew G. Malik, *Worker Classification and the Gig-Economy*, 69 RUTGERS U.L. REV. 1729, 1735 (2017).

137. *Id.*

Social Security.¹³⁸ This change in tax filing responsibilities negatively affects not only the workers, but also the tax-paying public, while benefitting the companies.¹³⁹

Specifically, misclassifying workers as independent contractors or changing a worker's status means that local, state, and federal governments lose income for departments like unemployment, Medicare, and Social Security.¹⁴⁰ The misclassification of workers costs the federal and state governments billions of dollars each year.¹⁴¹ One study commissioned by the U.S. Department of Labor found that the misclassification of one percent of workers as independent contractors can cause unemployment insurance trust funds alone to lose around 198 million dollars a year.¹⁴² The misclassification of app-based workers in Massachusetts negatively impacts the income of state and federal treasuries. When the treasuries do not receive the amount of money they are supposed to, there is less money to support the public, including less money that can be given to any type of worker for unemployment. Permanently changing the law with an initiative like this would cause the treasuries to lose out on the revenue from employer taxes on app-based drivers.¹⁴³

Individual workers would have also been negatively impacted under this initiative because being an independent contractor means that workers are responsible for paying taxes on their own.¹⁴⁴ There are more mistakes in tax filings when taxes are not withheld by employers.¹⁴⁵ These mistakes not only cause the government to lose income, but can also put the workers at risk of owing unpaid taxes, being audited, or even being charged with crimes of fraud or tax evasion.¹⁴⁶ While the workers and public are being

138. Braden Seibert, *Protecting the Little Guys: How to Prevent the California Supreme Court's New "ABC" Test from Stunting Cash-Strapped Startups*, 12 J. BUS. ENTREPRENEURSHIP & L. 181, 184 (2019); Clark, *supra* note 6, at 770.

139. *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NELP (Oct. 26, 2020), <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/> [<https://perma.cc/43GF-XVSU>] [hereinafter NELP].

140. *Id.*; Clark, *supra* note 6, at 770.

141. NELP, *supra* note 139, at 2.

142. *Id.* at 2–3.

143. *Id.* at 3–5.

144. Clark, *supra* note 6, at 784.

145. *See 5 Tax Issues that Cause IRS Trouble for 1099 Workers*, 1-800 ACCOUNTANT (May 30, 2013), <https://1800accountant.com/blog/5-tax-issues-that-cause-irs-trouble-for-1099-workers> [<https://perma.cc/8HRQ-Z8KF>].

146. Karen R. Harned et al., *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS., ENTREPRENEURSHIP & L. 93, 98 (2010); *5 Tax Issues that Cause IRS Trouble for 1099 Workers*, 1-800 ACCOUNTANT (May 30, 2013),

harm, the companies benefit by saving money because they pay fewer taxes. The taxes that Massachusetts employers are required to pay total over ten percent of each employee's annual income.¹⁴⁷ Although the total percentage will differ depending on the state in which the employees are located, with over one million app-based drivers in the United States, any percentage of each employee's annual income will quickly add up.¹⁴⁸

B. *The Initiative Would Have Improperly Relieved Companies Hiring App-Based Drivers of Liability for Driver Negligence*

The lack of a traditional employee-employer relationship means there is less accountability for the companies involved.¹⁴⁹ One piece of this lack of accountability is that app-based companies will no longer be liable for the actions of their drivers.¹⁵⁰ *Respondeat superior* is a legal doctrine that places vicarious liability on a third-party that had the right, ability, or duty to control the individual who caused a personal injury.¹⁵¹ Under vicarious liability, employers are liable for the negligent actions of an employee, as long as the employee was acting within the course and scope of their employment.¹⁵²

Independent contractors are at a greater risk than employees for serious health and safety issues because employers of independent contractors are not as concerned with the safety of independent contractors due to not being as legally or financially responsible for them.¹⁵³ When companies are not liable for the actions of their workers, they pay less attention to workplace safety.¹⁵⁴ Compared to employees, independent

<https://1800accountant.com/blog/5-tax-issues-that-cause-irs-trouble-for-1099-workers>
[<https://perma.cc/8HRQ-Z8KF>]; NELP, *supra* note 139.

147. Grace Ferguson, *How to Estimate Payroll Taxes in Massachusetts*, CHRON, <https://smallbusiness.chron.com/estimate-payroll-taxes-massachusetts-22178.html>
[<https://perma.cc/4RDC-MYFP>] (stating Massachusetts employers must pay Social Security and state and federal unemployment taxes for each employee).

148. Helling, *supra* note 11.

149. Azar, *supra* note 135.

150. See Mitchell Hedrick, *But I Didn't Do Anything Wrong, It Was My Employee! The Impact of Vicarious Liability on Employers*, 8 NAT. L. REV. 206 (Feb. 21, 2018), <https://www.natlawreview.com/article/i-didn-t-do-anything-wrong-it-was-my-employee-impact-vicarious-liability-employers> [<https://perma.cc/G9LM-ALJH>].

151. *Respondeat Superior*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/respondeat_superior [<https://perma.cc/GWS5-K2LW>].

152. RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006). For more information about employer liability see RESTATEMENT (THIRD) OF AGENCY (AM. L. INST. 2006); RESTATEMENT (SECOND) OF AGENCY (AM. L. INST. 1958).

153. See Molly Tran & Rosemary K. Sokas, *The Gig Economy and Contingent Work: An Occupational Health Assessment*, 59 J. OCCUPATIONAL & ENV'T MED. 63, 63–64 (2017).

154. Craig Simonsen, *Workplace Safety in the Gig Economy: New Hazards and Liabilities*, SEYFARTH (May 9, 2019), <https://www.environmentalsafetyupdate.com/oshacompliance/workplace-safety-in-the-gig-economy-new-hazards-and-liabilities/> [<https://perma.cc/X6M3-SEHG>].

contractors receive less structured workplace training, if they receive any at all.¹⁵⁵ Although providing trainings would likely reduce workplace risks and should be commonplace in the gig economy, they are insufficient compared to employer liability which forces the company to take safety more seriously because they could be financially responsible for harm that occurs.¹⁵⁶

C. *The Initiative Would Not Have Provided Adequate Benefits to App-Based Drivers*

The Massachusetts initiative offered workers more benefits than they would receive if they were classified as independent contractors, but much less than if they were employees.¹⁵⁷ These include, but are not limited to, access to health insurance and sick time, hourly minimum wage, mileage reimbursement, overtime, workers' compensation, regularly scheduled breaks, access to unemployment, and protection by federal anti-discrimination laws.¹⁵⁸ App-based drivers make clear that their top priority is wage and mileage reimbursement,¹⁵⁹ so this Note will focus on how the Massachusetts initiative would have affected the workers' hourly wage and mileage reimbursement. There are many other benefits and protections that are also extremely important to the fair treatment of app-based workers. To create a world where workers, like Richard, are fairly compensated and have access to necessary benefits, lawmakers should address all the benefits and protections that should be provided to all workers, despite the inability of this Note to address them all. If the employment laws change the way the initiative was framed, workers like Richard may not have the ability to seek medical care for themselves or their families; may not have access to scheduled breaks, sick time, or workers' compensation; and could be earning less than minimum wage.

The initiative would have set a guaranteed net earnings floor, which is the total amount of wage compensation and per-mile compensation.¹⁶⁰

155. *Id.*

156. See David Sparkman, *The Gig Economy Poses New Safety Threats and Liabilities*, EHS TODAY (June 17, 2019), <https://www.ehstoday.com/safety/article/21920204/the-gig-economy-poses-new-safety-threats-and-liabilities> [<https://perma.cc/A5CG-4MJE>].

157. See Passy, *supra* note 8; An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022).

158. Passy, *supra* note 8.

159. Uber and Lyft drivers consider pay and flexibility to be the most important aspects of gig work. Campbell, *supra* note 34. Other issues are also important and should be considered seriously by any legislative body considering changing employment law for app-based workers.

160. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., 8–10 (Mass.

The language of this section is as follows:

(d) Nothing in this section shall be interpreted to require a network company to provide a particular amount of compensation to a driver for any given transportation or delivery request, as long as the driver’s net earnings for each earnings period equals or exceeds that driver’s net earnings floor for that earnings period as set forth in subsection (b) of this section.¹⁶¹

The language of this section makes it clear that there does not need to be a minimum wage or fixed rate for mileage compensation, as long as the driver is meeting the net earnings floor.¹⁶² When broken down, the guaranteed wages and mileage compensation will not be high enough for workers to be adequately compensated.¹⁶³

1. Fair Wages

Under the Massachusetts initiative, app-based drivers would not have been adequately compensated. The wage compensation under the initiative would have been 120% of the state’s minimum wage for all engaged time.¹⁶⁴ Although at first glance this looks like a great wage, it is important to acknowledge that the earnings floor includes both wage and mileage and that the compensation is only guaranteed for “engaged time,”¹⁶⁵ which would have been defined as:

“Engaged time”, (a) subject to the conditions set forth in subsection (b) in this definition, the period [of time,] as recorded in a network company’s online-enabled application or platform, from when a driver

2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., 6–8 (Mass. 2022).

161. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., 9–10 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., 8 (Mass. 2022).

162. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., 9–10 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., 8 (Mass. 2022).

163. State House News Service, *Researchers See Driver Wage Floor of \$4.82 Under Ballot Question*, WBUR (Sept. 29, 2021), <https://www.wbur.org/news/2021/09/29/massachusetts-rideshare-ballot-question-earnings-study> [<https://perma.cc/EE6R-DX94>].

164. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 9 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 8 (Mass. 2022).

165. Chris Lisinski, *Uber, Lyft Drivers Could Make as Little as \$4.82 an Hour Under Ballot Measure, Researchers Say*, BOSTON BUS. J. (Sept. 29, 2021, 11:42 AM), <https://www.bizjournals.com/boston/news/2021/09/29/researchers-uc-berkeley-hourly-wage-mass-drivers.html> [<https://perma.cc/4B3V-3UMP>].

accepts a request for delivery or transportation services to when the driver fulfills that request. For requests that are scheduled in advance and for which the driver accepts the request but is not immediately en route to fulfill that request, a driver shall only be considered engaged on a network company's [platform] when the driver is en route to fulfill that scheduled request, regardless of when the driver accepted the request.

(b) Engaged time shall not include (1) any time spent performing delivery or transportation services after the request has been cancelled by the customer; or (2) any time spent on a request for delivery or transportation services where the driver abandons performance of the service prior to completion. Network companies may also exclude time if doing so is reasonably necessary to remedy or prevent fraudulent use of the network company's online-enabled application or platform.¹⁶⁶

Under the initiative drivers would only receive compensation for the hours they work between accepting a ride or delivery request and completing said request.¹⁶⁷ Any time spent waiting for requests would not be compensated.¹⁶⁸ This gets complicated because from the company's perspective, it would not make sense to pay drivers for times they are "not working"—especially when they have the right to deny requests that are sent to them for any reason.¹⁶⁹ However, from the employee's perspective, the companies would be paying app-based drivers less than they would be paying employees making minimum wage.¹⁷⁰ Researchers state that under this initiative, app-based drivers could make less than five dollars per hour.¹⁷¹ Using this calculation, the guaranteed wage would have been less than forty percent of the Massachusetts minimum wage.¹⁷²

2. Mileage

Compensation for miles driven by app-based drivers under this initiative would also not sufficiently cover the wear and tear on drivers'

166. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 5 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 5 (Mass. 2022).

167. State House News Service, *supra* note 163.

168. Lisinski, *supra* note 165.

169. Sarah Kessler, *Could a Minimum Wage Work in the Gig Economy?*, FAST CO. (Apr. 6, 2016), <https://www.fastcompany.com/3058599/could-a-minimum-wage-work-in-the-gigeconomy> [<https://perma.cc/5Z2U-4T87>].

170. *Id.*

171. Lisinski, *supra* note 165.

172. State House News Service, *supra* note 163.

vehicles.¹⁷³ App-based drivers must pay for gas and maintenance of the car they are driving so frequently.¹⁷⁴ The initiative laid out the amount of mileage compensation until 2023 and then set guidelines for calculating mileage compensation in the following years.¹⁷⁵ Specifically, it stated “[a]fter the effective date of this chapter and for the 2023 calendar year, the per-mile compensation for vehicle expenses shall be twenty-six cents per engaged mile.”¹⁷⁶ For years following 2023, the rate will be adjusted every five years to reflect inflation.¹⁷⁷

The rate of twenty-six cents per mile, effective until the end of 2023, would have been nowhere close to enough to cover the amount of wear and tear done to the cars used by app-based drivers.¹⁷⁸ Each year the Internal Revenue Service (“IRS”) releases a table which summarizes the optional standard mileage rates for employees, self-employed individuals, and other taxpayers to use in computing the deductible costs of operating a vehicle in the course of business.¹⁷⁹ For 2022, the IRS stated that the standard amount of deduction for vehicles used in business is fifty-eight and half cents per mile.¹⁸⁰ This thirty-cent difference has a huge impact on the total compensation, especially since the initiative made it clear that the mileage compensation only covers “engaged miles”¹⁸¹ which are defined as:

“Engaged miles”, [all] miles driven during engaged time in a private passenger motor vehicle that is not owned, leased, or rented by the

173. See *The Real Cost, Wear, and Tear on Your Car from Doordash Uber Eats Instacart Grubhub*, ENTRECOURIER.COM (Feb. 14, 2019), <https://entrecourier.com/delivery/real-cost-wear-and-tear-car-delivery-doordash-uber-eats-instacart/> [<https://perma.cc/7HRW-WVG4>].

174. Kathleen Elkins, *A Day in the Life of an Uber, Lyft and Juno Driver Who Makes About \$6,000 a Month in NYC*, CNBC (Jan. 31, 2019, 12:19 PM), <https://www.cnbc.com/2019/01/30/a-day-in-the-life-of-a-full-time-uber-lyft-and-juno-driver-in-nyc.html> [<https://perma.cc/7MAJ-NRFC>].

175. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 9–10. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 8 (Mass. 2022).

176. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 9 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 8 (Mass. 2022).

177. *Id.*

178. See Elkins, *supra* note 174.

179. *Standard Mileage Rates*, IRS, <https://www.irs.gov/tax-professionals/standard-mileage-rates> [<https://perma.cc/X28B-Q7M7>].

180. *Id.*

181. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 9 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 8 (Mass. 2022).

network company, or any of its affiliates. Network companies may exclude miles if doing so is reasonably necessary to remedy or prevent fraudulent use of the network company's online-enabled application or [platform].¹⁸²

Similar to the language about “engaged time,” “engaged miles” are those miles driven between when the driver accepts a request and completes that request.¹⁸³ This means that any time the driver spends idling or driving around while waiting for the next ride would not have been compensated—even if the car was running and being worn down.¹⁸⁴ Therefore, the rate of twenty-six cents per mile would not have been enough to fully compensate for the wear and tear on app-based drivers' vehicles.¹⁸⁵

The protections and benefits offered in the Massachusetts initiative are not enough for the app-based workers. The initiative also would not have held companies responsible for their workers' negligence or for paying taxes. Massachusetts should address these issues through legislation.

III. MASSACHUSETTS SHOULD PASS LEGISLATION THAT IS WRITTEN TO PROTECT APP-BASED WORKERS

App-based driving jobs offer flexibility that our current employment structure does not allow.¹⁸⁶ Part-time gig workers, like app-based drivers, want the flexibility or freedom to choose the hours they work.¹⁸⁷ They are willing to give up employment status, and the rights that come along with that status, to have flexibility.¹⁸⁸ Although gig workers are willing to give up some rights for flexibility, their rights should not be eliminated completely and Massachusetts legislators should consider how to protect these employees from the self-serving initiative drafted by companies.

182. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 5 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 5 (Mass. 2022).

183. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 5 (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 5 (Mass. 2022).

184. See Elkins, *supra* note 174; see also Lisinski, *supra* note 165.

185. Lisinski, *supra* note 165.

186. Palagashvili, *supra* note 3, at 380-83.

187. Campbell, *supra* note 34.

188. Sam Sabin, *Lyft Releases Survey Showing Most Independent Contractors Don't Want to Be Classified as Employees*, MORNING CONSULT (Aug. 24, 2020, 6:00 AM), https://morningconsult.com/2020/08/24/lyft-survey-employee-classification/?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axio_sam&stream=top [<https://perma.cc/S2FA-X2R7>].

There are countless arguments on solutions to this problem.¹⁸⁹ Some considerations include whether legislatures should continue to classify app-based workers as employees—as state laws currently stand—or create a whole new category of workers.¹⁹⁰ The best solution will consider the workers’ and companies’ needs, so millions of workers can continue to be employed, but with fair protections.

As discussed in Part II, under the Massachusetts initiative, app-based drivers would have lost protections and benefits that they would otherwise have if they were employees.¹⁹¹ The best solution would be to create laws that include protections and benefits for app-based workers. These laws would also include sections that benefit the companies to encourage gig work, but the priority should be protecting the rights of workers.

Employers are subject to higher costs and more regulation than companies that hire independent contractors.¹⁹² App-based companies argue that the obligations and requirements that come with being an employer do not work with their business model.¹⁹³ They fear that the high cost of having employees would require the company to completely change the way they operate.¹⁹⁴ This has proven to be true.¹⁹⁵ App-based companies that treat their workers like employees had to change their policies to require their workers to sign up for shifts.¹⁹⁶ For example, Eaze, a marijuana delivery company, switched from independent contractors to employees and the flexibility tightened from being able to work at almost any time to having to sign up for blocks of shifts.¹⁹⁷

Although the companies claim that an initiative, like the Massachusetts initiative, is the “best” thing for their workers, these statements should be taken with a grain of salt. Companies argue that if workers like the gig economy the way it is, something about the current law must change. However, these companies are going too far by

189. See e.g., Eisenbrey & Lawrence Mishel, *Uber Business Model Does Not Justify a New ‘Independent Worker’ Category*, ECON. POL’Y INST. (Mar. 17, 2016), <https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/> [<https://perma.cc/3HNV-L37W>]; Andre Andoyan, *Independent Contractor or Employee: I’m Uber Confused! Why California Should Create an Exception for Uber Drivers and the “OnDemand Economy,”* 47 GOLDEN GATE U. L. REV. 153, 156 (2017).

190. See e.g., Eisenbrey & Mishel, *supra* note 189; Andoyan, *supra* note 189, at 168; Clark, *supra* note 6, at 769–72.

191. See *supra* Part II.

192. Myra H. Barron, *Who’s an Independent Contractor? Who’s an Employee?*, 14 LAB. LAW. 457, 457 (1999).

193. *High Cost*, *supra* note 134.

194. *Id.*

195. Sergio Avedian, *Here’s What Could Happen if Uber and Lyft Drivers Became Employees*, RIDE SHARE GUY (June 26, 2019), <https://therideshareguy.com/what-would-happen-if-drivers-became-employees/> [<https://perma.cc/3Q2Q-LSDN>].

196. *Id.*

197. *Id.*

reducing and removing so many worker rights.¹⁹⁸ App-based companies cannot continue to hire as many people and operate with flexibility if their workers will be classified as employees.¹⁹⁹ The solutions created by Uber, Lyft, and other companies, however, are not satisfactory and more benefits are needed.²⁰⁰

The following solutions aim to combine the best parts of being an employee and an independent contractor in order to create the best “gig” for all app-based workers. The goal in including all app-based workers, not just drivers, is so a new initiative will not need to be drafted each time a new app-based market emerges.

A. *Since the Initiative Was Unsuccessful, an Exception to Current Law Should be Passed*

Although the Massachusetts initiative was ruled unconstitutional, another initiative like it could be drafted. To avoid this, Massachusetts should pass legislation which sets a standard for the benefits and protections that all app-based workers will receive. The legislation should address the three issues raised in this Note: the lack of any employer obligation to withhold and pay state and federal taxes; the lack of employer liability for its workers; and the benefits that must be provided to workers—such as hourly wage and mileage. These issues, along with any other issues raised elsewhere, should be addressed for all app-based workers, not just drivers. As the gig economy continues to grow, more app-based companies will provide platforms for work, and a standard for benefits and protections is a must.²⁰¹

The legislation proposed in this Note would continue to classify all app-based workers using the three-part test under chapter 151A §2,²⁰² but

198. Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html> [https://perma.cc/GL2M-YBDS].

199. Avedian, *supra* note 195.

200. Alex Rosenblat, *Gig Workers Are Here to Stay. It's Time to Give Them Benefits*, HARV. BUS. REV. (July 3, 2020), <https://hbr.org/2020/07/gig-workers-are-here-to-stay-its-time-to-give-them-benefits> [https://perma.cc/6KFJ-ZUAX].

201. See Indeed Editorial Team, *10 App-Based Jobs*, INDEED (Nov. 1, 2022), <https://www.indeed.com/career-advice/finding-a-job/app-based-jobs> [https://perma.cc/8LJY-LHTG].

202. MASS. GEN. LAWS ch. 151A, § 2. The three prongs of the test are:

- (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and
- (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
- (c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the

would have an exception for app-based workers who work fewer than twenty-five hours a week, on average each quarter. This would create two groups of workers: those working an average of twenty-five engaged hours or more per week during a calendar quarter and those working an average of fewer than twenty-five engaged hours per week during a calendar quarter. App-based workers working an average of twenty-five engaged hours or more per week during a calendar quarter would be employees under Massachusetts law²⁰³ and companies would not be provided any breaks on tax obligations, liability, or hourly minimum wage requirements.

App-based workers working an average of fewer than twenty-five engaged hours per week during a calendar quarter would still be classified as employees. This is how these workers will remain to be classified anyway, since the initiative was not passed and Massachusetts caselaw holds that these app-based drivers do not pass the three-part test. However, the proposed legislation would provide a few breaks to the companies. These breaks would provide the companies with the capability to continue to offer flexible positions to app-based workers.²⁰⁴ Under this new legislation, the companies would receive a tax break for unemployment, would continue to be vicariously liable for their workers, and would be responsible for a net earnings floor of at least 150% of the minimum wage.

Since the app-based workers would still be employees, the company's tax obligations would be the same regarding paying and withholding federal payroll taxes like social security and Medicare, but the state could provide the companies a break on unemployment taxes for app-based workers working under an average of twenty-five hours a week during each quarter.²⁰⁵ The companies would be vicariously liable for the actions of these app-based workers, since they would still be employees.²⁰⁶ This liability would lead to companies creating safer working environments, which will benefit the workers, passengers, and all people on the roads.²⁰⁷

Lastly, if the new legislation does not mandate a minimum wage for

service performed.

Id.

203. *Id.*

204. See Avedian, *supra* note 195 (describing how other companies have had to change the way they operate, including limiting flexibility, when their workers become employees).

205. See NELP, *supra* note 139 (describing the tax obligations of companies with employees).

206. *Respondeat Superior*, *supra* note 151.

207. See James L. Curtis et al., *Workplace Safety in the Gig Economy: New Hazards and Liabilities*, FUTURE ENTERPRISE (May 9, 2019), <https://www.futureenterprise.com/blog/2019/5/9/workplace-safety-in-the-gig-economy> [<https://perma.cc/M4PV-Z5NK>] (stating independent contractors are more likely to face safety hazards due to a lack of training and/or experience and an inability or refusal to report safety concerns); Sparkman, *supra* note 156.

app-based workers, it must create a net earnings floor that is higher than what was offered in the Massachusetts initiative.²⁰⁸ The wage for each engaged hour should be 150% of the minimum wage, since the workers are not paid for the time spent waiting for a request.²⁰⁹ The net earnings floor should also include compensation for mileage that is equal to the standard set by the Internal Revenue Service, which is currently fifty-eight and a half cents per mile.²¹⁰

B. *If a Future, Similar Initiative Passes in Massachusetts, Despite the Department of Labor's Proposed Rule, Supplemental Laws Should be Passed*

If an initiative making app-based drivers independent contractors is put on a future ballot and passes, the Massachusetts legislatures should consider passing supplemental legislation that addresses the three issues in this Note and any others raised elsewhere so that app-based workers can receive fair benefits and compensation while continuing to have flexibility in their work hours. Regardless of whether the United States Department of Labor's proposed rule—which would make it more difficult for companies to classify their app-based workers as independent contractors—is approved, it is still important to address the possibility of companies using an initiative to try to circumvent the law like they have in the past.²¹¹

1. Tax Consequences

First, the supplemental legislation should make app-based companies liable for state and federal payroll taxes and be required to either withhold taxes or provide comprehensible information on the tax responsibilities of independent contractors to workers. Holding companies accountable for paying payroll taxes will mean that Social Security and Medicare will continue to be funded.²¹² Requiring companies to withhold taxes or to provide information about tax responsibilities to independent contractors would help lessen the number of mistakes made in these independent

208. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess., at 9–10. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess., at 8 (Mass. 2022). Though this Note only discusses wages and mileage, any drafting of laws for app-based workers should not be done without considering the importance of other benefits and protections such as workers compensation and access to anti-discrimination laws.

209. See Elkins, *supra* note 174; see also Lisinski, *supra* note 165.

210. *Standard Mileage Rates*, *supra* note 179.

211. Companies have been using initiatives as an attempt to avoid following the law. COMMONWEALTH OF MASS. EXEC. OFF. OF LAB. & WORKFORCE DEV., *supra* note 10; Aarian Marshall, *supra* note 50.

212. NELP, *supra* note 139; Clark, *supra* note 6, at 770.

contractors' tax filings and would ensure that government departments receive the tax money they should.²¹³

2. Vicarious Liability

App-based companies should also be vicariously liable for the negligence of their app-based workers through supplemental legislation. If companies are liable for their workers, they pay more attention to workplace safety.²¹⁴ Companies would be more likely to provide safety trainings that would protect app-based drivers, passengers, and other drivers on the road.²¹⁵

3. Appropriate Compensation

Lastly, the supplemental legislation should increase the amount of compensation app-based workers receive. Either the “net earnings floor” must be increased to at least 150% of the minimum wage or a minimum wage must be set.²¹⁶ App-based drivers deserve more than five dollars an hour.²¹⁷ The compensation for mileage should also be closer to, if not equal to, the standard set by the Internal Revenue Service—so that drivers are making enough to cover the wear and tear to their vehicles.²¹⁸

CONCLUSION

The recent app-based drivers initiative in Massachusetts would have changed worker classification laws.²¹⁹ App-based drivers would have been legally classified as independent contractors, rather than employees—as they currently are classified as under Massachusetts law.²²⁰ Massachusetts laws have been working to protect the rights of

213. Clark, *supra* note 6.

214. See Simonsen, *supra* note 154.

215. See Curtis et al., *supra* note 207 (explaining workers in the gig economy are exposed to workplace hazards at a higher rate than employees. These hazards include transportation accidents due to lack of experience driving and training and unaddressed safety issues due to an inability or refusal to report safety concerns.); Sparkman, *supra* note 156.

216. See An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022); Kessler, *supra* note 169.

217. Lisinski, *supra* note 165.

218. *Standard Mileage Rates*, *supra* note 179.

219. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022); *Massachusetts Initiative*, *supra* note 14.

220. An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022);

workers and hold companies accountable for many years.²²¹ This initiative would have greatly reduced the obligations and liability of the companies that hire app-based drivers.²²²

Although workers in Massachusetts, and throughout the United States, do not need to be labeled as gig workers to have flexible hours, if they and the people of Massachusetts support a gig economy because of that flexibility, the state must work to protect app-based workers and hold the companies that hire app-based workers accountable for providing basic workers' rights. This can be done whether an initiative passes or not.

Regardless of what happens with federal law or state initiatives, Massachusetts must create legislation that sets the standard for all app-based workers, not just app-based drivers, so there is no need for initiatives like this every time a new type of app-based work becomes popular. The legislation should consider the best interest of the workers, the state, and app-based companies. This would be different than the laws, such as the Massachusetts initiative, being drafted and backed by the companies that the laws would benefit the most.

This Note proposes legislation for if an initiative is not passed. The proposed legislation would create an exception to current Massachusetts law, keeping app-based workers as employees but giving some breaks to the companies for employees working under twenty-five hours a week.

If an initiative with similar provisions to the recent Massachusetts initiative does pass, Massachusetts must pass amendments or supplemental legislation increasing the benefits offered to workers and adding stipulations regarding the companies' liability and the obligation of the companies to withhold and pay taxes.

With either option, the app-based workers would receive more benefits than were being offered under the recent Massachusetts initiative and there would be a set standard for all app-based companies in Massachusetts to follow. Workers deserve fair compensation and access to benefits, such as healthcare, breaks, and sick leave, no matter what job they do. App-based drivers are no exception. Drivers like Richard should not lose benefits and protections, which will make it more difficult for him and his family to be fed and remain safe, because companies drafted

An Act Defining and Regulating the Contract-Based Relationship between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022); *Massachusetts Initiative*, *supra* note 14.

221. See MASS. GEN. LAWS ch. 151A, § 2; *Healey v. Uber Techs., Inc.*, No. 2084CV01519-BLS1, 2021 Mass. Super. LEXIS 28, at *1 (Mar. 25, 2021).

222. See An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4375, 192d Gen. Ct., Reg. Sess. (Mass. 2022); An Act Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers, H. 4376, 192d Gen. Ct., Reg. Sess. (Mass. 2022); *Massachusetts Initiative*, *supra* note 14.

employment law.