COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-13237

MARTIN EL KOUSSA, MELODY CUNNINGHAM, JULIET SCHOR, COLTON ANDREWS, DORCAS BETHSAIDA GRIFFITH, ALCIBIADES VEGA, JR., GABRIEL CAMACHO, EDWARD MICHAEL VARTABEDIAN, FRED TAYLOR, RENEELEONA DOZIER, JANICE GUZMAN, AND YAMILA RUIZ,

Plaintiffs/Appellants

v.

ATTORNEY GENERAL and SECRETARY OF THE COMMONWEALTH,

Defendants/Appellees

CHRISTINA M. ELLIS-HIBBET, KATHERINE MARYWITMAN, ABIGAIL KENNEDY HORRIGAN, RICHARD M. POWER, MEGHAN J. BOROWSKI, CHAD B. CHOKEL, DANIEL SVIRSKY, MICHAELSTRICKMAN, MARCUS ALAN COLE, and JAMES WILLIAM ISAAC HILLS,

Intervenors

On Reservation and Report from the
Supreme Judicial Court for Suffolk County

BRIEF OF PLAINTIFFS/APPELLANTS

Dated: March 7, 2022

Thomas O. Bean, BBO #548072
Sarah Grossnickle (admitted pro hac vice)
VERRILL DANA, LLP
One Federal Street – 20th Floor
Boston, Massachusetts 02110
(617) 309-2600
tbean@verrill-law.com
sgrossnickle@verrill-law.com

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STATEMENT OF THE ISSUES

I. Whether the Attorney General erred in certifying two Initiative Petitions entitled, "A Law Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers" (the "Petitions" or "Proposed Laws"), for inclusion on the State election ballot in November 2022, when the Petitions contain multiple subjects that are not related to or mutually dependent on each other.

II. Whether the Attorney General's summaries of the Petitions are invalid because the summaries are devoid of discussion of how the main features of the Petitions would repeal and replace existing law.

STATEMENT OF THE CASE

Proponents filed the Petitions with the Attorney General on or before the first Wednesday in August of 2021, pursuant to amendment Art. 48 of the Massachusetts Constitution. (Record Appendix ("R.A.") 0007, ¶ 3.) The Petitions propose "A Law Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers," Petitions 21-11 and 21-12.[1] (R.A. 0010, 0023.)

[1] The only substantive difference between Petition 21-11 and 21-12 is that Petition 21-11 contains a provision for "training" – section 4 - while Petition 21-12 does not. Thus, the word "training" does not appear in the purpose clause of section 2 in 21-12, and sections 4-11 are numbered differently in 21-12 than they are in 21-11. The references in this brief will be to the section numbers in 21-11 beginning at R.A. 0010.

On September 1, 2021, the Attorney General certified the Petitions as compliant with art. 48 (R.A. 0007, ¶ 5), and issued summaries with respect thereto. (R.A. 0035-38) (the "Summaries").

On December 22, 2021, the Secretary issued letters to proponents of the Petitions advising them that they had secured sufficient signatures to continue with the art. 48 process, (R.A. 0007, ¶ 6), and informing them that he would be submitting the Petitions to the Clerk of the House of Representatives, as required by the Constitution. (R.A. 0039- 42.) As of March 7, 2022, the House had not taken any action on the Petitions.

Plaintiffs, all of whom are registered voters in the Commonwealth (R.A. 0006, ¶ 1), commenced this action on January 18, 2022, by filing a Complaint with the Supreme Judicial Court for Suffolk County. (R.A. 0005, D.E. #1). The County Court allowed an unopposed motion to intervene by the original signers of the Petitions (R.A. 0005, D.E. #6), and reserved and reported the case without decision to the full Supreme Judicial Court (R.A. 0005A, D.E. #21).

The Secretary needs to know by early July 2022 whether the laws proposed by the Petitions should appear on the November 2022 state election ballot, to include it in the ballot materials.

STATEMENT OF FACTS

I. Background

A. The Network Companies' Contracts with Their Drivers.

As noted above, the Petitions propose "A Law Defining and Regulating the Contract-Based Relationship Between ***Network Companies*** and ***App-Based Drivers***." (emphases added). "Network Companies" consist of "Transportation Network Companies" ("TNC"),[2] such as Uber and Lyft, which typically transport "people," and "Delivery Network Companies" ("DNC"),[3] such as DoorDash and GrubHub, which typically transport "goods." (TNCs and DNCs, together, "Network Companies")[4] "App-based drivers" are individuals who log into the Network Company's online-enabled application or platform and use their own motor vehicles to transport customers and/or deliver goods ("Drivers").[5]

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[2] The Petitions define TNC by reference to G.L. c. 159A½ § 1 to mean an entity "that uses a digital network to connect riders to drivers to pre-arrange and provide transportation." (R.A. 0012, "Transportation Network Company.")

[3] The Petitions define "DNC" to mean an entity "that (a) maintains an online-enabled application or platform used to facilitate delivery services within the Commonwealth and (b) maintains a record of the amount of engaged time and engaged miles accumulated by DNC couriers." (R.A. 0011, "Delivery Network Company.")

[4] R.A. 0012, section 3, Definitions, "Network company."

[5] R.A. 0010, section 3, Definitions, "App-based driver" or "driver".

Drivers contract to work for one or more Network Companies by signing up through the companies' websites.[6] The Network Companies present Drivers with

[6] *See* driver sign-up pages for Uber at https://www.uber.com/us/en/drive/?city=boston (last visited March 3, 2022); Lyft at https://www.lyft.com/driver/cities/boston-ma (last visited March 3, 2022); GrubHub at https://driver.grubhub.com/?utm_source=grubhub_webdinerapp&utm_medium=content_owned&utm_campaign=product_footer-link (last visited March 3, 2022); and DoorDash at https://www.doordash.com/dasher/signup/?utm_source=dx_signup_midtile_cx_home (last visited March 3, 2022).

In reviewing the AG's certification decision, the Court reviews "matters of which the Attorney General may properly take official notice" including "matters subject to judicial notice, as well as additional items of which an agency official may take notice due to the agency's established familiarity with and expertise regarding a particular subject area." *Bogertman v. Attorney Gen.*, 474 Mass. 607, 619 (2016) (citation omitted); *see infra*, pp. 29. Under Mass. R. Evid. 201(c), "[a] court may take judicial notice at any stage of the proceeding . . . ." Courts have taken judicial notice of the Network Companies' publicly available websites, both for their contents and for the truth of statements made in them. *See, e.g., Lowell v. Lyft, Inc.*, 352 F. Supp. 3d 248, 263 & n.5 (S.D.N.Y. 2018) (drawing conclusions about the availability of certain Lyft services based on information on Lyft's website and application); *Gonzales v. Uber Techs., Inc.*, 305 F. Supp. 3d 1078, 1094 (N.D. Cal. 2018), *on reconsideration*, 2018 WL 3068248 (N.D. Cal. June 21, 2018) (granting request for judicial notice of Lyft's terms of service); *O'Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 993-4 & n. 2, 100-01 & n. 4 (N.D. Cal. 2014) (granting request for judicial notice of Uber's Terms and Conditions).

With respect to "official notice," because the Attorney General "exercises broad powers to investigate and enforce Massachusetts laws governing wages, hours, and other aspects of the employment," has "deemed the problem of worker misclassification to be one of her office's top priorities, and [] has led nationwide efforts to combat it," Brief for the Attorney General as Amicus Curiae in Support of Plaintiffs-Appellants at 7-8, *Patel v. 7-Eleven Inc., et al.*, No. SJC-13166 (Supreme Judicial Court Nov. 17, 2021), D.E. # 26, she has "established familiarity with and expertise regarding" wage enforcement. *Bogertman*, 474 Mass. at 619. *See Smith v. Winter Place LLC*, 447 Mass. 363, 367–68 (2006) ("the

non-negotiable agreements that contain the companies' terms and conditions, which drivers may accept by clicking a button indicating their assent or by affixing their electronic signatures to be "hired."[7]

Attorney General's office is the department charged with enforcing the wage and hour laws, its interpretation of the protections provided thereunder is entitled to substantial deference, at least where it is not inconsistent with the plain language of the statutory provisions.") She is using that familiarity and expertise to seek a declaration that Uber and Lyft drivers are "employees" entitled to protections under Massachusetts wage and hours laws. *Healey v. Uber Technologies, Inc. and Lyft, Inc*., 2084CV01519 (Mass. Super. Court) (the "Civil Action"). She cited to Uber's sign-up page from this same URL as Exhibits 24-24.11 to her Statement of Material Facts in Support of Motion for Summary Judgment (the "Statement") in the Civil Action. The Statement is attached as Exhibit 3 to the Affidavit of Felicia H. Ellsworth in the Civil Action in support of Lyft, Inc.'s Motion to Deny as Premature Plaintiff's Motion for Summary Judgment Pursuant to Mass. R. Civ. P. 56(f), D.E. # 53 (the "Ellsworth Aff"). As such, the Court may consider it in this case. *Bogertman*, 474 Mass. at 619. The Statement is included in the Addendum for the convenience of the Court at 115.

[7] *See, e.g*., *McGrath v. DoorDash, Inc*., 2020 WL 6526129, at *2 (N.D. Cal. Nov. 5, 2020), *reconsideration denied*, 2020 WL 7227197 (N.D. Cal. Dec. 8, 2020) (DoorDash sign-up process included clicking on a button on the DoorDash website to indicate consent to the Independent Contractor Agreement); *Wickberg v. Lyft, Inc*., 356 F. Supp. 3d 179, 181-82 (D. Mass. 2018) (Lyft driver sign-up process included clicking a checkbox on Lyft's website to indicate acceptance of terms of services); *Archer v. GrubHub, Inc*., 2021 WL 832132, at *1-2, 5 (Mass. Super. Jan. 13, 2021) (GrubHub's driver sign-up process included providing an electronic signature and clicking "E-Sign," "acknowledging that you have read, understand, and/or agree to be bound by the terms of any . . . document(s) provided here within.").

B. Under Their Existing Contracts with Drivers, The Network Companies Classify Their Drivers as "Independent Contractors," and Do Not Provide Them a "Guaranteed Minimum Wage" or Any "Benefits."

Uber and Lyft, among other Network Companies, classify their Massachusetts Drivers as independent contractors. *Healey v. Uber Techs., Inc.*, No. 2084CV01519-BLS1, 2021 WL 1222199, at *2 (Mass. Super. Mar. 25, 2021) ("Uber and Lyft expressly deny that their drivers should be treated as employees under the independent contractor statute (G.L. c. 149, § 148B), and thus implicitly contend that their drivers are not entitled to minimum wage, overtime, or earned sick leave payments that under Massachusetts law need only be paid to employees.") In its 2020 Form 10-K filed with the Securities and Exchange Commission, Uber wrote, "[i]f, as a result of legislation or judicial decisions, we are required to classify Drivers as employees, we would incur significant additional expenses for compensating Drivers, including expenses associated with the application of wage and hour laws (including minimum wage, overtime, and meal and rest period requirements), employee benefits, social security contributions, taxes (direct and indirect), and potential penalties."[8] Lyft, GrubHub,

[8] *See* Uber Technologies Inc., Annual Report (Form 10-K) (Feb. 26, 2021) at 13-14, https://www.sec.gov/Archives/edgar/data/1543151/000154315121000014/uber-20201231.htm. Excerpts from Uber's 10-K filing containing this quotation appears for the Court's convenience in the Addendum at 141.

and DoorDash similarly reported in their 2020 10-K filings with the SEC exposure under federal, state and local tax laws, and workers' compensation, unemployment benefits, labor, and employment laws, if they are required to reclassify their Drivers as employees.[9]

"Courts may take judicial notice of matters of public record, *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000), such as SEC filings." *Healey*, 2021 WL 1222199, at *3, n.3 citing, *inter alia*, *Fire & Police Pension Ass'n of Colorado v. Abiomed, Inc.*, 778 F.3d 228, 232 n.2 (1st Cir. 2015); *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014); *Yates v. Municipal Mortg. & Equity, LLC*, 744 F.3d 874, 881 (4th Cir. 2014).

Uber and Lyft's 2020 Form 10-Ks are subject to the AG's official notice, *see supra*, n. 6. The Attorney General relied on the truth of various statements that Uber and Lyft made in these same Form 10-Ks in her Addendum in Support of her Motion for Summary Judgment submitted in the Civil Action. The Attorney General's references to statements in these Form 10-Ks appear at paragraphs 74, 77(b), 78, 79, 137, and 199 of her Addendum, which was filed as part of Exhibit 2 to the Ellsworth Aff. and cited to as exhibits 44 and 92 to her Statement in the Civil Action. *See supra*, n. 6. In her opposition to defendants' motions to dismiss that action, the AG requested that the Superior Court take judicial notice of Uber and Lyft's SEC filings. The Court did so and relied on the truth of statements in Uber and Lyft's Form 10-Ks in denying their motions to dismiss. *Healey*, 2021 WL 1222199, at *3 & n. 3-5.

[9] Lyft, Inc., Annual Report (Form 10-K) (March 1, 2021) at 44-45, https://www.sec.gov/Archives/edgar/data/1759509/000175950921000011/lyft-20201231.htm; GrubHub Inc., Annual Report (Form 10-K) (February 26, 2021) at 16, https://www.sec.gov/ix?doc=/Archives/edgar/data/1594109/000156459021009522/grub-10k_20201231.htm ; DoorDash Inc., Annual Report (Form 10-K) (March 5, 2021) at 39, https://www.sec.gov/ix?doc=/Archives/edgar/data/1792789/000162828021004032/dash-20201231.htm. Copies of relevant excerpts from the Lyft, GrubHub and DoorDash 2020 10-K filings are included in the Addendum for the convenience of the Court at 134-40.

C. Uber and Lyft Acknowledge Torts Committed in Connection with Their Platforms.

Uber and Lyft have each recently issued "safety reports" in which they report that thousands of "critical safety incidents," *i.e.*, one of five types of sexual assault, a fatal motor-vehicle crash, or a fatal physical assault,[10] have occurred on their platforms. These numbers do ***not*** include automobile accidents that did not result in a fatality.

Massachusetts residents have sued Uber and Lyft for torts committed by their Drivers. These include passengers and third parties injured in motor vehicle

[10] *See* Uber, Inc., *2017-2018 U.S. Safety Report*, https://www.uber.com/us/en/about/reports/us-safety-report/, and Lyft, Inc., *Community Safety Report* and *Appendix*, https://www.lyft.com/blog/posts/lyfts-community-safety-report. The Court may take judicial notice of documents on publicly available websites. *See supra*, n. 6.

accidents,[11] and passengers who were sexually assaulted by Drivers.[12] Plaintiffs have alleged in their complaints that the Drivers were the employees and/or agents of Uber or Lyft.[13] In their answers to these complaints, Uber and Lyft have denied that the Drivers were their employees and/or agents.[14]

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[11] *See, e.g.*, Complaint and Demand for Jury Trial, *Williams v. Kawaf and Lyft, Inc*., No. 2084CV02822, ¶¶ 19-20 (Suffolk Super. Dec. 7, 2020); Complaint and Demand for Jury Trial; *Mullen v. Bullock and Lyft, Inc*., No. 2084CV0454, ¶¶ 19-20 (Suffolk Super. Feb. 18, 2020); Complaint and Demand for Jury Trial, *Nunez v. Abdelnour, Uber Technologies, Inc. and Rasier, LLC*, No. 1981CV1056, ¶¶ 3, 22, 26 (Middlesex Super. Apr. 16, 2019).

This Court may take judicial notice of the fact that plaintiffs have made these allegations in complaints filed in Massachusetts Superior Court—not that their allegations are true—but that plaintiffs have made the allegations. *Home Depot, Inc. v. Kardas*, 81 Mass. App. Ct. 27, 28 (2011) (Court may take judicial notice of "papers filed in separate cases."); *Skandha v. Farag*, 99 Mass. App. Ct. 1119, *1 n.2 (2021) (unpub.) (taking judicial notice that a complaint in an unrelated lawsuit asserted certain claims); *see also supra*, n. 6. These documents are relevant to show that Massachusetts residents have sued Network Companies for torts committed by Drivers under agency and respondeat superior theories of liability.

[12] *See, e.g.*, Complaint and Demand for Trial by Jury, *Murray v. Uber Technologies, Inc. and Amfo*, No. 2082CV00371 ¶¶ 27, 32-33, 36, 38, 42, 46 (Norfolk Super. Apr. 6, 2020). *See supra*, n. 11, for reasons Court may take judicial notice of allegations in complaints.

[13] *See, e.g.*, complaints cited in n. 11 and 12.

[14] *See, e.g.*, Answer, Affirmative Defenses, and Jury Demand of Defendant Lyft, Inc., *Williams v. Kawaf and Lyft, Inc*., No. 2084CV02822, ¶¶ 7-9, 19-21 (Suffolk Super. March 1, 2021); Uber Technologies, Inc.'s Answer, Affirmative Defenses, and Jury Demand in Response to Plaintiff's Complaint, *Murray v. Uber Technologies, Inc. and Amfo*, 1:20-cv-11250-NMG, ¶¶ 33, 38, 41-42, 45-46, Third Affirmative Defense (D. Mass. Sept. 24, 2020). Again, this Court may take judicial notice of the denials and affirmative defenses asserted – not that they are true – but that Uber and Lyft have made them. *See supra*, n. 11.

D. Classifying Drivers as Independent Contractors Costs Drivers and the Commonwealth Substantial Amounts.

The Attorney General has argued to this Court that misclassification of workers as independent contractors rather than as employees costs state and local governments billions of dollars in revenue, and deprives Social Security, Medicare, unemployment insurance, and workers' compensation funds of money that would otherwise go to vital public benefits.[15] *See Somers v. Converged Access, Inc.*, 454 Mass. 582, 593 (2009) ("Misclassification not only hurts the individual employee; it also imposes significant financial burdens on the Federal government and the Commonwealth in lost tax and insurance revenues."). Two studies estimated that Massachusetts loses between $259 and $278 million in revenue to misclassification of workers as independent contractors annually, of which approximately $87 million is unpaid unemployment insurance taxes.[16]

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[15] *See* Brief for the Attorney General as Amicus Curiae in Support of Plaintiffs-Appellants in *Patel, supra*, n. 6, at 18-19.

[16] *See id.* at 19, citing Françoise Carré & Randall Wilson, *The Social and Economic Costs of Employee Misclassification in the Construction Industry, Construction Policy Research Center, Labor & Worklife Program*, Harvard Law School & Harvard School of Public Health, at 2 (2004), https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1042&context=csp_pubs; James B. Rebitzer & David Weil, *Technical Advisor Board Report: Findings and Implications of the RSI Report to the Joint Task Force on Employee Misclassification and the Underground Economy: Contractor Use, Analysis, and Impact Results*, at 17-19 (Mar. 31, 2014), https://www.mass.gov/files/2017-07/technical-advisory-board-report_0.pdf.

The UC Berkeley Institute for Research on Labor and Employment evaluated the Petitions and concluded that, if they were adopted, Massachusetts Drivers could earn as little as the equivalent of a $4.82 hourly wage, taking into account unpaid waiting time, un- and under-reimbursed expenses, and unpaid payroll taxes and benefits.[17]

II. The Stated Purpose, Main Features, and Two Additional Features, of the Proposed Laws

A. The Stated Purpose of the Proposed Laws

The purpose of the Proposed Laws is stated expressly in section 2 of Petition 21-11:

> The purpose of this Act is to define and regulate the contract-based relationship between network companies and app-based drivers as independent contractors with required minimum compensation, benefits, and training standards that will operate uniformly throughout the commonwealth, guaranteeing drivers the freedom and flexibility to choose when, where, how, and for whom they work.

(R.A. 0010.) Consistent with this stated purpose, section 11(a) of that Petition provides: "[t]his chapter shall govern the contract-based civil relationship between network-companies and app-based drivers." (R.A. 0021.) Thus, the sole stated

[17] Ken Jacobs & Michael Reich, *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage*, Institute for Research on Labor and Employment, Berkeley University of California (Sept. 2021), https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage/#:~:text=Massachusetts%20Uber%2FLyft%20Ballot%20Proposition,Hour%20%2D%20UC%20Berkeley%20Labor%20Center.

purpose of the Proposed Laws is "defin[ing] and regulat[ing] the contract-based relationship between network companies and app-based drivers as independent contractors with required minimum compensation, benefits", etc. As discussed more fully below, this "purpose" clause contains three subjects: independent contractor status, minimum compensation, and minimum benefits, but these are ***not*** the only subjects of the Proposed Laws.

With respect to "independent contractor status," buried at the end of the 194-word definition of "app-based driver" is the following sentence:

> Notwithstanding any other law to the contrary, a DNC courier and/or TNC driver who is an app-based driver as defined herein shall be deemed to be an independent contractor and not an employee or agent for all purposes with respect to his or her relationship with the network company.

(R.A. 0010.) As will be discussed below, this sentence is noteworthy in two respects: first, by deeming app-based drivers to be independent contractors and not employees of the Network Companies, the Proposed Laws would reverse the presumption under the Massachusetts Independent Contractor statute, G.L. c. 149, §148B, that Drivers are "employees" of the Network Companies. Second, in addition, it states that Drivers are not "agents" of the Network Company with respect to their relationship to that company. As the law stands now, independent contractors may or may not be agents of their principals depending on the facts of the matter. *See* cases cited in section I(C)(2) at p. 40, *infra*.

B. The Main Features of the Proposed Laws

The Proposed Laws have two main features. First, they create the rebuttable presumption that Network Company drivers are independent contractors; in so doing, they reverse the rebuttable presumption under the Independent Contractor Law that their Drivers are their employees. The Proposed Laws accomplish this purpose by, in section 3, defining the characteristics of an "app-based driver," defining app-based drivers to be independent contractors and then, in section 11(b), placing the burden of proving that a driver is not an "app-based driver," and thus not an independent contractor, on any "party" seeking to prove otherwise.

Second, the Proposed Laws set the minimum guaranteed compensation and benefits that Network Companies are required to pay Drivers based on the Drivers' "engaged time." The Proposed Laws define "engaged time" as "the period of time, as recorded in a network company's online-enabled application or platform, from when a driver accepts a request for delivery or transportation services to when the driver fulfills that request." *Id*., section 3, Definition of "Engaged Time." Thus, under the Proposed Laws, drivers would ***not*** be paid for time "between" finishing one driving assignment and beginning another; in addition, this time would not be counted toward the minimum pay and benefits Drivers would be guaranteed.

By basing compensation on a Driver's "engaged time," the Proposed Laws would change the existing rule that a worker's pay is based on all "working time,"

which includes "[a]ll on-call time," such as the time between when a Driver has completed one delivery and is waiting for the next, and "all time during which an employee is required to be . . . on duty . . . including rest periods of short duration." 454 CMR 27.02; 454 CMR 27.04(2). This distinction between "engaged time" and "working time" is particularly important because the Proposed Laws calculate not only Drivers' guaranteed minimum compensation based on "engaged time," but the amount of the proposed health care stipend (section 6), the rate at which Drivers accrue paid sick time, (section 7), and the applicability of occupational accident insurance (section 9).

C. Two Additional Features of the Proposed Laws

Section 11, entitled "Interpretation of this Chapter," reads:

> Notwithstanding any general or special law to the contrary, compliance with the provisions of this chapter shall not be interpreted or applied, either directly ***or indirectly***, in a manner that treats network companies as employers of app-based drivers, or app-based drivers as employees of network companies, and ***any party*** seeking to establish that a person is not an app-based driver bears the burden of proof.

(R.A. 0021, emphases added). While the stated purpose of the Act is "to define and regulate the contract-based relationship between network companies and app-based drivers as independent contractors with minimum compensation, benefits," etc., the use of the words "indirectly" and "any party" in section 11(b), and the declaration in the definition of "app-based driver" that Drivers are not the "agents" of the Network Companies, address an additional and unrelated subject that will be

discussed in detail in part I(C)(2) *infra*: regulation of the civil legal relationship between Network Companies and members of the public injured by torts committed by Drivers.

SUMMARY OF ARGUMENT

There are three independent reasons the Petitions do not satisfy art. 48's requirement that all subjects of a proposed law be "related to or mutually dependent on each other." *Weiner v. Attorney Gen.*, 484 Mass. 687, 693 (2020). First, and most simply, being an independent contractor is not mutually dependent on receiving guaranteed minimum compensation or minimum benefits. The Network Companies classify their Drivers in Massachusetts as independent contractors today. Yet, they do not offer Drivers minimum guaranteed compensation or benefits. Thus, a Driver's status as an independent contractor exists independently from whether the Driver receives minimum guaranteed compensation or benefits. The guaranteed minimum compensation and benefits are simply "sweeteners" designed to induce the electorate into voting for Drivers to be classified as independent contractors. (pp. 29-36.)

Second, while the stated purpose of the Proposed Laws is to regulate the contract-based relationship between Network Companies and Drivers, the Proposed Laws also seek to regulate the civil legal relationship between Network Companies and members of the public who are injured by torts committed by

Drivers. Not only do the Proposed Laws declare that Drivers are not "agents" of Network Companies, but Section 11(b) thereof provides that "[n]otwithstanding any general or special law to the contrary, compliance with . . . this chapter shall not be interpreted or applied, either directly ***or indirectly***, in a manner that treats network companies as employers of app-based drivers, or app-based drivers as employees of network companies, and any ***party*** seeking to establish that a person is not an app-based driver bears the burden of proof." While the word "directly" implicates the Driver-Network Company relationship, the word "indirectly" does not. It implicates a Network Company's vicarious liability to a member of the public injured by a tort committed by a Driver. Similarly, because the proposed law uses the broad word, "party," rather than the specific word "Driver," the proposed law addresses the subject of litigation by a member of the public against a Network Company for a tort committed by a Driver. Regulating a Network Company's potential liability to a member of the public is not mutually dependent on or related to regulating the Network Company-Driver contract-based relationship. (pp. 36-42)

Third, section 8 of the Petitions amends the Paid Family and Medical Leave ("PMFL") social entitlement program administered by the Commonwealth. It provides that Drivers are "covered individuals" eligible for benefits under PFML on the same basis as "covered contract workers" "unless the driver declines

coverage via a written notification, which may be electronic, to the network company." Network Companies, in turn, are "covered business entities" under the law for the purposes of making contributions for Drivers who have "not declined coverage." This "opt-out" feature amends the PMFL. While an initiative petition may amend multiple laws, this amendment proposes to regulate the relationship between the Commonwealth and its citizens, a subject unrelated to and not mutually dependent on regulation of the Driver-Network Company contract-based relationship. (pp. 42-45.)

Separately, the Attorney General's Summaries of the Petitions are invalid because they are not "fair." While the Petitions repeal and replace two provisions of Massachusetts law, the Summaries are devoid of discussion of (a) the provisions they would repeal and replace; and (b) the fact that they would repeal and replace existing law. Plaintiffs appreciate that deference is given to the Attorney General in the form and content of the Summaries, and that she is not required to analyze or interpret a proposed law, but she ***is*** obliged "to insure . . . that the voters understand the law upon which they are voting." *Opinion of the Justices*, 357 Mass. 787, 800 (1970). Voters cannot understand whether they prefer a proposed law to an existing law if the Attorney General fails to explain how the main features of the proposed law would change existing law. (pp. 45-54.)

ARGUMENT

I. The Petitions Do Not Comply With Art. 48 Because They Contain Multiple Subjects That Are Not Related To or Mutually Dependent On One Another.

A. This Court Reviews the Attorney General's Certification Decisions De Novo.

This Court reviews the Attorney General's certification decisions *de novo*. *Weiner*, 484 Mass. at 690 (citing *Abdow v. Attorney Gen.*, 468 Mass. 478, 487 (2014)). When reviewing the "facts" considered by the Attorney General in reviewing a petition, this Court "consider[s] anew what facts are implicit in the language of the petition or are subject to judicial notice," as well as "facts subject to the Attorney General's official notice." *Associated Indus. of Mass. v. Attorney Gen.*, 418 Mass. 279, 286 (1994). "Official notice includes matters subject to judicial notice, as well as additional items of which an agency official may take notice due to the agency's established familiarity with and expertise regarding a particular subject area." *Yankee Atomic Elec. Co. v. Sec'y of Comm.*, 402 Mass. 750, 759 n.7 (1988).

B. Article 48 Bars Initiative Petitions that Contain Subjects that are not Related or Mutually Dependent on Each Other.

Article 48, The Initiative, II, § 3, as amended by art. 74, requires that initiative petitions "contain[] only subjects . . . which are related or which are mutually dependent." *Weiner*, 484 Mass. at 690. These requirements "of art. 48

are mandatory rather than directory. . . . [W]hen [the people] . . . seek to enact laws by direct popular vote they must do so in strict compliance with those provisions and conditions." *Anderson v. Attorney Gen.*, 479 Mass. 780, 785-86 (2018) (citations omitted).

To satisfy the "relatedness" requirement, the subjects of the initiative must be "related to or mutually dependent on *each other*." *Weiner*, 484 Mass. at 693 (emphasis in original). In concluding that the subjects of an initiative must be *both* "related" *and* "mutually dependent" on each other, the *Anderson* Court reasoned, "[t]o construe the phrase 'or which are mutually dependent' as eliminating the requirement of relatedness would be to vitiate the purpose of protecting the voters from misuse of the petitioning process for which it was enacted." 479 Mass. at 793.

The "related subjects requirement is met where 'one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane.'" *Hensley v. Attorney Gen*., 474 Mass. 651, 657 (2016) (quoting *Abdow*, 468 Mass. at 499). In deciding whether this requirement is met, the Court asks two questions: "First, '[d]o the similarities of an initiative's provisions dominate what each segment provides separately so that the petition is sufficiently coherent to be voted on "yes" or "no" by the voters?' . . . Second, does the initiative petition 'express an operational relatedness among its substantive parts that would permit a

reasonable voter to affirm or reject the entire petition as a unified statement of public policy'?" *Id*. at 658 (citations omitted).

The Court has "held that two provisions that 'exist independently' of each other are not mutually dependent." *Oberlies v. Attorney Gen*., 479 Mass. 823, 829 (2018). Thus, for the Petitions to satisfy the "related subjects" requirement, each and every provision in the Petitions must be related to and mutually dependent upon the subjects in the purpose clause, and the subjects in the purpose clause must themselves be related and mutually dependent on each other. *Id*. at 836–837 (rejecting petition that contained single, unrelated provision regarding financial disclosure); *Opinion of the Justices*, 422 Mass. 1212, 1220–21 (1996) (rejecting petition that contained single, unrelated provision regarding records of the commissioner of veterans' services).

C. The Petitions Fail art. 48's Relatedness Test for Three Independent Reasons.

The Petitions do not satisfy art. 48's "relatedness" test because: (1) the subject of Drivers being independent contractors is not mutually dependent upon the Network Companies providing minimum compensation and/or benefits to them; (2) the Petitions seek to regulate the civil legal relationship between Network Companies and members of the public who are injured by torts committed by drivers, a subject different from and not mutually dependent on regulation of the contract-based relationship between Network Companies and

Drivers; and (3) the Petitions amend the state's Paid Family and Medical Leave Act, an Act that regulates the relationship between the Commonwealth and Drivers, not the contract-based relationship between Network Companies and Drivers.

1. The Proposed Laws' Provision Deeming Drivers to be Independent Contractors is not Mutually Dependent on its Provisions Offering Minimum Compensation and Benefits to Drivers.

Drivers may be classified as independent contractors irrespective of whether Network Companies pay them guaranteed minimum compensation and/or minimum benefits. If receiving guaranteed minimum compensation and/or benefits were mutually dependent on Drivers being independent contractors, Network Companies would necessarily offer such compensation and benefits to their Drivers now—who as noted above, they now classify as "independent contractors."[18] Yet, they admit in their 2020 SEC 10-K filings that they do not guarantee minimum wage or provide job-related benefits to their Drivers.[19] Thus, the issue of whether Drivers are independent contractors exists independently from, and is not operationally contingent upon, Drivers receiving guaranteed minimum compensation or benefits.

[18] *See supra*, n. 8-9.
[19] *Id.*

Indeed, the Proposed Laws are similar to those advanced by the Millionaire's Tax addressed in *Anderson*. There, the Court concluded that the proposed law "contains three provisions on three distinct subjects presented as a single ballot question." *Anderson*, 479 Mass. at 794.

> First, the petition would amend the flat tax rate mandated by art. 44 to impose a graduated income tax on certain high-income taxpayers. Second, the petition would prioritize spending for public education by earmarking revenues raised by the new tax for 'quality public education and affordable public colleges and universities.' Third, the petition would prioritize spending for transportation by earmarking revenues raised by the new tax for 'the repair and maintenance of roads, bridges and public transportation.'

Id. The Court concluded, "[i]t is immediately apparent, however, that the three provisions are not mutually dependent." *Id*.

The same is true here. In the same way that "petitions seeking to impose a graduated tax rate or a tax on specific high-income earners previously have been presented to the voters of the Commonwealth as stand-alone initiatives,"[20] Drivers as independent contractors exists on a stand-alone basis today, *i.e.*, without minimum compensation or benefits. Further, in the same way that "funds for 'quality public education' . . . could be raised . . . separately from any expenditures on transportation, and . . . raising funds for . . . transportation could proceed without any expenditures on education,"[21] Network Companies could offer Drivers

[20] *Anderson*, 497 Mass. at 794.
[21] *Id.*

minimum guaranteed compensation without offering ***any*** benefits. Similarly, they could offer benefits without offering minimum guaranteed compensation. This demonstrates that the three elements—independent contractor status, minimum compensation, and minimum benefits—exist independently of each other. As such, they are like the three subjects of the Millionaire's Tax proposal in *Anderson.*

Rather than being mutually dependent on the Driver being an independent contractor, the guaranteed minimum compensation and benefits are in the Proposed Laws as "sweeteners" to entice voters into voting for the Proposed Laws.[22] Inclusion of "sweeteners" is precisely the practice delegates to the 1917-1918 Constitutional Convention that adopted art. 48 sought to prevent by including the "related subjects" requirement: to "protect against petitions that include 'as

[22] That these are simply sweeteners is reinforced by juxtaposing them with section 10(b) of the Proposed Laws. Section 10(b) provides, "[e]very contract between an app-based driver and a network company with regard to delivery services or transportation services shall be deemed to include terms incorporating the requirements in sections 4 through 9 of this chapter. ***The parties to such contracts may agree to supplemental terms which do not conflict with the terms deemed to be included by this chapter."*** (R.A. 0020, emphasis added.) This section allows Network Companies to impose additional Network Company-sided contract provisions, including requiring Drivers to indemnify the companies for any claims or damages arising out of or related to the delivery or transportation services, class-action waivers, and mandatory arbitration clauses that hinder Drivers' ability to enforce any compensation and benefits provisions in the Proposed Laws – further demonstrating that the minimum compensation and benefits expressly included in the Petitions are just "sweeteners" for voters.

alluring a combination of what is popular with what is desired by selfish interests as the proposers of the measures may choose," a practice known as "log-rolling." *Anderson*, 479 Mass. at 787 (citing *Carney I*, 447 Mass. at 226–227 (quoting 2 Debates in the Massachusetts Constitutional Convention 1917–1918, at 12 (1918) (Constitutional Debates)) and *Dunn v. Attorney Gen*., 474 Mass. 675, 679–680 (2016)).

Moreover, these "sweeteners" prevent the Proposed Laws from presenting a unified statement of public policy on which the electorate may vote "yes" or "no." In *Anderson*, the Court wrote, "[a] voter who favored a graduated income tax but disfavored earmarking any funds [for education and transportation]," or who "favored designating specific State funds for schools and transportation . . . but not a graduated income tax," would be placed in an "untenable position." *Anderson*, 479 Mass. at 799. The same is true here. Voters who favor Drivers being independent contractors because they believe that classification would give drivers the flexibility to choose for whom and when to work, but who reject the proposed compensation and benefits perhaps because they believe those benefits are inferior to those mandated for employees under state law, would be placed in an untenable position – as would voters who favor classifying drivers as independent contractors but not for legislating any particular compensation or benefits due to fears that they would raise consumer costs or decrease the availability of services. *Id*. at 801

("art. 48 was designed to safeguard the rights of the voters to be presented with a coherent, single statement of public policy, rather than be misled by efforts to 'wheedle or deceive [them] into granting the privileges that our representatives never would permit'"). Accordingly, because the Proposed Laws contain multiple subjects that are not mutually dependent on one another, the Proposed Laws do not satisfy the requirements of art. 48.

2. The Petitions Proposed Regulation of the Civil Legal Relationship Between Network Companies and Members of the Public Who are Injured by Drivers is Unrelated to and Not Mutually Dependent on Regulating the Contract-based Relationship between Network Companies and Drivers.

While the Proposed Laws' stated purpose is regulating the contract-based relationship between Network Companies and Drivers, the Proposed Laws also seek to regulate a second, unrelated and not mutually dependent, subject: the civil legal relationship between Network Companies and members of the public who are injured by torts committed by Drivers. Two of the three provisions that seek to regulate the latter appear in section 11(b). That section, containing five clauses, with the number of each clause added for the convenience of the Court, reads as follows:

> [1] Notwithstanding any general or special law to the contrary, [2] compliance with the provisions of this chapter shall not be interpreted or applied, [3] either directly *or* ***indirectly***, [4] in a manner that treats network companies as employers of app-based drivers, or app-based drivers as employees of network companies, [5] and ***any party*** seeking

> to establish that a person is not an app-based driver bears the burden of proof.

(R.A. 0021, emphases added).

The section begins with the prefatory phrase, "Notwithstanding any general or special law to the contrary . . . ." The Legislature commonly uses that phrase "when it intends 'to displace or supersede related provisions in all other statutes.'" *Harmon v. Comm'r of Correction*, 487 Mass. 470, 480 (2021) (quoting *Camargo's Case*, 479 Mass. 492, 498 (2018)). Thus, the language that follows this phrase is expressly intended to apply to ***all*** other laws, *i.e.*, not only to laws regulating the contractual relationship between Drivers and Network Companies.

Clauses 2-4 of sub-section 11(b) read: "compliance with the provisions of this chapter shall not be interpreted or applied, either directly ***or indirectly***, in a manner that treats network companies as employers of app-based drivers, or app-based drivers as employees of network companies . . ." These clauses mean that the Drivers should not be classified as employees and Network Companies as employers. But, the language goes further than that. If the subject of these clauses were limited to the Driver-Network Company relationship, there would have been no need to include the phrase "or indirectly" because the word "directly" covers application of the Proposed Laws to a suit brought by a Driver directly against a Network Company. Inclusion of the phrase, "or indirectly," is thus intended to ensure that the section applies to actions brought "indirectly" against a Network

Company, such as a suit by a member of the public seeking to hold a Network Company vicariously, *i.e.*, "indirectly," liable for torts committed by a Driver. *Dias v. Brigham Med. Assocs.*, 438 Mass. 317, 319–320 (2002) ("Broadly speaking, respondeat superior is the proposition that an employer, or master, should be held *vicariously* liable for the torts of its employee, or servant, committed within the scope of employment.") (emphasis added); *Elias v. Unisys Corp.*, 410 Mass. 479, 481 (1991) (the employer of driver who injured Ms. Elias in an automobile accident was without fault; "the liability of the principal arises simply by the operation of law and is only *derivative* of the wrongful act of the agent." (emphasis added)). Because the Act expressly applies to "indirect" actions, and it applies "notwithstanding any general or special law to the contrary," the phrase "or indirectly" seeks to regulate the civil legal relationship between a Network Company and a member of the public who sues a Network Company to hold the Network Company vicariously liable for the negligent acts of a Driver.

The last clause supports this conclusion. It reads: "***any party*** seeking to establish that a person is not an app-based driver bears the ***burden of proof***." The phrases, "any party" and "burden of proof," contemplate a lawsuit. In addition, the phrase "any party" makes clear that it applies to a lawsuit brought by "any" party, such as a member of the public or a third-party entity, and not just one brought by a Driver against the Network Company. If the section were to apply only to suits

by Drivers against Network Companies, the Petitions would have used the word "Driver" instead of the much broader phrase, "any party," and read:

> (b) [1] Notwithstanding any general or special law to the contrary, [2] compliance with the provisions of this chapter shall not be interpreted or applied, [3] ~~either~~ directly ~~*or indirectly*~~, [4] in a manner that treats network companies as employers of app-based drivers, or app-based drivers as employees of network companies, [5]and *any* *driver* ~~*party*~~ seeking to establish that s/he is ~~a person is~~ not an app-based driver bears the burden of proof.

Returning to the phrase, "Notwithstanding any general or special law to the contrary," the foregoing parsing demonstrates that a purpose and subject of section 11(b) is to cause the Proposed Laws to take precedence over any contrary law, including the law of respondeat superior. Because that section seeks to regulate ***both*** the contractual relationship between a Network Company and its Drivers ***and*** the unrelated and not mutually dependent civil legal relationship between a Network Company and members of the public who are injured by their Drivers, the Proposed Laws fail to comply with art. 48.

The Proposed Laws contain a third provision demonstrating its effort to regulate the civil legal relationship between Network Companies and members of the public. The last sentence of the definition, "App-based driver" or "driver" in section 3 of the Act reads:

> Notwithstanding any other law to the contrary, a DNC courier and/or TNC driver who is an app-based driver as defined herein shall be deemed to be an independent contractor and not an employee ***or agent***

> for all purposes with respect to his or her relationship with the network company.

(R.A. 0010, emphasis added). Again, the sentence begins with the phrase, "[n]otwithstanding any other law to the contrary," indicating that the language that follows is intended to supersede any other law.

Under current law, independent contractors may or may not be agents of the parties for whom they provide services. *Cable Mills, LLC v. Coakley Pierpan Dolan & Collins Ins. Agency, Inc.*, 82 Mass. App. Ct. 415, 421 (2012) quoting subsection 3 of *Restatement (Second) of Agency*, § 2 ("An independent contractor . . . may or may not be an agent."). Whether they do depends on the facts of the case. *State Police Ass'n of Massachusetts v. Comm'r*, 125 F.3d 1, 7 (1st Cir. 1997) ("[A]n independent contractor can be an agent if, and to the extent that, the contractor acts for the benefit of another and under its control in a particular transaction."). The Network Companies, knowing that Massachusetts residents have sued them for torts committed by their Drivers alleging that the Drivers were the "agents" of the Network Companies,[23] have again sought to regulate the civil legal relationship between themselves and members of the public by defining Drivers ***not*** to be their agents.

[23] *See supra*, n. 11-12.

The foregoing demonstrates that the Petition does not constitute a unified statement of public policy. On its face, and consistent with its stated purpose and subject, the Proposed Laws "define and regulate the contract-based relationship between network companies and app-based drivers . . ." (R.A. 0010.) However, section 11(b) and the last sentence of the definition of "app-based driver" in section 3 have a second purpose and subject: to seek to regulate the relationship between the Network Companies and members of the public who are injured by torts committed by drivers. That the language and subject exist independently of the stated subject and purpose is evident from the fact that section 11(b) could readily have been drafted to delete the offending language indicated above, and the last sentence of section 3 could have been drafted to delete the phrase, "or agent." *Oberlies*, 479 Mass. at 829 ("two provisions that 'exist independently' of each other are not mutually dependent.") (emphasis added). Because the Petitions contain two unrelated subjects that exist independently of one another, they are invalid under art. 48.

Indeed, having two such disparate policies in the Petitions places voters in an untenable position. A voter might, for example, support Drivers' job flexibility

by deeming them to be independent contractors but oppose any effort to regulate suits by members of the public against Network Companies for Drivers' torts.[24]

3. The Petitions Regulate a Driver's Eligibility Under the Massachusetts Paid Family and Medical Leave Law—a Social Welfare Program Mediating the Commonwealth's Relationship with its Citizens—a Subject Unrelated to and Not Dependent on the Contract-based Relationship between Network Companies and Drivers.

The Petitions also establish eligibility requirements for Drivers under the Massachusetts Paid Family and Medical Leave Act ("PFMLA").[25] This Act is a state entitlement program that provides workers up to 26 weeks of paid, job-protected leave per year to recover from a serious health condition, to care for a sick or injured family member, or to care for a new child, among other reasons. G.L. c. 175M, § 2. It provides a safety net for workers who would otherwise be required to quit their jobs or take unpaid leave because they are unable to work for

[24] Whether the language in those sections will succeed in their apparent purpose of limiting the Network Companies' liability for torts committed by their Drivers is immaterial to the question of whether the Act complies with art. 48. *Abdow.*, 468 Mass. at 507 & n. 20. For art. 48 purposes, it is sufficient that the Act contains a second subject of public policy that exists independently of the stated subject. *Oberlies*, 479 Mass. at 829.

[25] As noted earlier at p. 24, however, the Drivers will not accrue credit under this program the way employees would, because the Petitions do not count all working time toward eligibility accrual; instead, only "engaged time" is counted.

family or medical reasons. It is a benefit provided and administered by the Commonwealth, ***not*** by employers.[26]

Eligible workers apply directly to the Commonwealth's Department of Family and Medical Leave (the "Department") for weekly benefits, which are paid out of a state-administered trust fund. *Id*. §§ 5, 7-8. The program is funded through worker and employer contributions at a rate determined annually by the Department.[27] *Id*. § 6. Under the PFML, eligibility for paid leave is based on the length of employment within Massachusetts prior to leave, ***not*** employment with a single or specific employer. G.L. c. 175M § 1 (definition of a covered individual). All employers of covered individuals[28] in the Commonwealth are required to send

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[26] *See generally* Catherine Albiston & Catherine, Catherine, *Precarious Work And Precarious Welfare: How The Pandemic Reveals Fundamental Flaws Of The U.S. Social Safety Net*, 42 Berkeley J. Emp. & Lab. L. 257 (2021) (discussing development of statutory unemployment insurance and family and medical leave and distinguishing them from employment benefits).

[27] *See, e.g., Paid Family and Medical Leave employer contribution rates and calculator*, https://www.mass.gov/info-details/paid-family-and-medical-leave-employer-contribution-rates-and-calculator#calendar-year-2022- (last accessed March 3, 2022).

[28] "Covered individuals" include W2 employees, self-employed, and certain 1099-MISC contract workers. All individuals classified as independent contractors under G.L. c. 149 s. 148B are excluded from coverage. G.L. c. 175M § 1; *Paid Family and Medical Leave exemption requests, registration, contributions, and payments*, https://www.mass.gov/info-details/paid-family-and-medical-leave-exemption-requests-registration-contributions-and-payments (last accessed March 3, 2022). Independent contractors and other self-employed workers may opt into

a fixed minimum rate of contributions to the Department on behalf of their workers. *Id.* § 6. Employers are exempt from sending contributions to the program only if they provide workers with comparable paid leave benefits through an approved private plan. *Id*. § 11.

Section 8 of Petition 21-11 proposes to regulate Network Companies' and Drivers' participation in the PFML program, in at least two respects. First, it provides that Drivers are "covered individuals" eligible for benefits under PFML on the same basis as "covered contract workers"[29] "unless the driver declines coverage via a written notification, which may be electronic, to the network company." (R.A. 0018.) This "opt-out" feature is novel and amends the PFML.[30] Second, Section 8 provides that a Driver shall not be eligible for benefits under PFML "until contributions have been made on the driver's behalf for at least 2 quarters of the driver's last 4 completed quarters" – setting an additional eligibility

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the program, and they are responsible for their own contributions. G.L. c. 175M §§ 2, 6.

[29] A "covered contract worker" is defined in the PFML as "a self-employed individual for whom an employer or covered business entity is: (i) required to report payment for services on IRS Form 1099-MISC; and (ii) required to remit contributions" into the trust. G.L. c. 175M § 1.

[30] Under current law, employers may opt out of remitting contributions to the state on behalf of their covered workers only if they provide a comparable private plan. G.L. c. 175M, § 11.

requirement from the those set forth in the PFML for other workers. G.L. c. 175M § 11.

Thus, section 8 of the Proposed Laws would amend the PFML by legislating that Drivers are covered workers under the PFML (while other independent contractors are not covered under the law), providing a mechanism for Drivers to "opt out" of the program, and establishing higher eligibility requirements for Drivers to receive PFML benefits. By proposing to amend the statute governing a state social entitlement program, the Proposed Laws thus seek to regulate the relationship between the Commonwealth and its citizens, not the "contract-based relationship" between Network Companies and Drivers. As such, it seeks to regulate two unrelated and not mutually dependent subjects.

II. The Summaries of the Petitions Are Not "Fair" Because They Fail to Inform Voters that the Main Features of the Proposed Laws Would Repeal and Replace Existing Law. Because they are "Unfair," the Summaries are Invalid.

A. For a Summary to be "Fair," It Must Inform Voters of How the Main Features of a Proposed Law Would Repeal and Replace Existing Law.

Article 48 requires the Attorney General to prepare a "fair, concise summary" of a proposed law. Amend. art. 48, The Initiative, II, § 3, as appearing in art. 74. "The summary is one of the key pieces of information available to voters both when they are asked to sign an initiative petition and when they ultimately vote on an initiative that has made its way onto the ballot." *Hensley v.*

Attorney Gen., 474 Mass. 651, 659–60 (2016). It is "intended to insure . . . that the voters understand the law upon which they are voting." *Opinion of the Justices*, 357 Mass. 787, 800 (1970).

"To be 'fair,' a summary . . . must be complete enough to serve the purpose of giving the voter who is asked to sign a petition or who is present in a polling booth a fair and intelligent conception of the ***main outlines*** of the measure." *Abdow*, 468 Mass. at 505 (emphasis added, internal quotation marks and citation omitted); *First v. Attorney Gen.*, 437 Mass. 1025, 1026 (2002) ("mention must be made of at least the ***main features*** of the measure" in the summary) (emphasis added, citation omitted). It must "accurately inform the voters of precisely what they are being asked to do[.]" *Abdow*, 468 Mass. at 507.

To understand "precisely what they are being asked to do," a summary must advise voters whether the main features of the proposed law would change existing law and, if so, how those features would change existing law. Absent such information, voters would not know whether they preferred the existing law or the proposed law. Plaintiffs are ***not*** suggesting that the Attorney General engage in legal analysis or interpretation of a proposed law: they simply maintain that when a proposed law would change existing law, the Attorney General is obliged to inform voters in her summary of that change so voters may decide whether they prefer the existing law or the proposed law.

Plaintiffs appreciate that the Court will not substitute its judgment as to the form and content of a summary for that of the Attorney General's where the question is "a matter of degree." *Mass. Teachers Ass'n v. Sec'y of the Comm.*, 384 Mass. 209, 230 (1981). But the issue here is ***not*** a matter of degree. Here, the issue is that the Summaries, as described more fully in part II(C) below, are ***devoid*** of discussion of how the main features of the proposed law would change existing law. The result is that the Summaries are significantly misleading and likely to have a major impact on voters, and therefore should be invalidated. *First*, 437 Mass. at 1026 ("[T]he language of a summary will be invalidated where, in the context of the entire proposal, it is significantly misleading and likely to have a major impact on voters.")

This Court and the Attorney General have long recognized the importance of informing voters in the summary of how the main features of a proposed law would change existing law. In *Sears v. Treas. & Rec. Gen.*, 327 Mass. 310, 326 (1951), this Court found that the Attorney General's summary of a law was not "fair" because the "'summary' [] used does not mention the fact that the measure is a repeal of and substitute for existing law." The Court acknowledged that it "may sometimes be possible to draft a 'fair' summary merely by pointing out the difference between a proposed measure and the existing law, but at least where that is not done, we can see no way to avoid summarizing the entire proposed measure.

. ., so that the voter may get a fair comprehension of what the law will be if the measure is adopted." *Id*. at 326.

Perhaps using *Sears* as her guide, the Attorney General has quite properly and regularly advised voters when the main features of a proposed law would change existing law and, if so, how it would change that law. For example, in *Abdow*, the Attorney General's summary explained: the "proposed law would change the definition of 'illegal gaming' under Massachusetts law to include wagering on the simulcasting of live greyhound races, as well as table games and slot machines at Commission-licensed casinos, and slot machines at other Commission licensed gaming establishments." 468 Mass. at 505. Similarly, her summary of initiative 19-11 began with the statement: "This proposed law would change how reimbursement rates for nursing homes and rest homes paid by the state are established by the state Executive Office of Health and Human Services." (R.A. 0125.) The Attorney General then described specifically some of the ways in which rates would be set under the proposed law as compared with how they were set under existing law:

> The proposed law would eliminate the Executive Office's ability to make adjustments for reasonableness, remove the current restriction against providers using costs from years other than the chosen base year to appeal the reimbursement rates established by the Executive Office, and set the occupancy standard for nursing homes used in calculating a nursing home's reimbursement rate as the statewide average from the base year.

Id. The Attorney General's summary of initiative 21-29, issued contemporaneously with the Summaries, also explained how a proposed constitutional amendment would change existing law. It read,

> This proposed constitutional amendment would repeal the provision authorizing the Legislature to permit absentee voting only for reasons of absence, physical disability, or religious conflict and would give the Legislature the power to make laws governing voting by qualified voters.

(R.A. 0124.) In her summaries of the above initiatives, and numerous others she has issued over the past dozen years,[31] the Attorney General properly placed the provisions of the proposed measures in the context of existing law to enable voters to make an informed decision on whether to vote to maintain existing law, or to vote to adopt the proposed change(s) to existing law.

[31] The Attorney General has issued numerous summaries of initiatives she has certified in the past twelve years in which she explained how the proposed law would or would not change existing law. Indeed, it appears that in substantially all cases where a proposed law would or would not change existing law, the Attorney General has referenced that change or non-change in her summary. In addition to those examples discussed in the text above, *see, e.g.,* Summary of Petition 19-14, fourth paragraph (R.A. 0127-28); Summary of Question 3 in 2018, first paragraph (R.A. 0062); Summary of Question 2 in 2016, first paragraph (R.A. 0068); Summary of Question 4 in 2016, first paragraph and first sentence of seventh paragraph (R.A. 0074); Summary of Question 1 in 2014 (R.A. 88); Summary of Question 2 in 2014, third paragraph (R.A. 0090); Summary of Question 3 in 2012, first paragraph, first sentence, seventh paragraph (R.A. 0111); Summary of Question 1 in 2010 (R.A. 0117); Summary of Question 2 in 2010, first paragraph (R.A. 0118); Summary of Question 3 in 2010, first paragraph (R.A. 0120).

B. The Main Features of the Proposed Law Would Change Existing Law.

In her Summaries of the Petitions, the Attorney General broke with *Sears* and her own well-established precedent by failing to advise voters that the Petitions' main features would change existing law, and by failing to explain how they would change existing law. The main features of the proposed law that would change existing law are: (1) reversing the presumption established in the Independent Contractor Law that Drivers are employees rather than independent contractors; and (2) calculating minimum compensation and benefits based on Drivers' "engaged time" rather than "working time."

1. Classifying Drivers as Independent Contractors Would Reverse the Presumption under Existing Law That They are Employees.

Under G.L. c. 149, § 148B – the Massachusetts "Independent Contractor Law" – "an individual who performs services shall be considered to be an employee, for purposes of G.L. c. 149 and G.L. c. 151, unless the employer satisfies its burden of proving by a preponderance of the evidence that" it is able to satisfy three statutory criteria. *Somers v. Converged Access, Inc.*, 454 Mass. 582, 589 (2009).[32] "The failure of the employer to prove all three criteria . . . suffices to establish that the individual in question is an employee." *Id*.

[32] Those three criteria are: "'(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and (3) the individual is customarily

The Petitions would reverse that presumption. Specifically, the definition of "app-based driver" in section 3 of the Petitions lists four job characteristics of an app-based driver, and then states:

> Notwithstanding any other law to the contrary, a DNC courier and/or TNC driver who is an app-based driver as defined herein shall be deemed to be an independent contractor and not an employee or agent for all purposes with respect to his or her relationship with the network company.

(R.A. 0010.) In reversing the presumption, the Petitions' proposal to classify drivers as independent contractors "repeals and replaces" the Independent Contractor Law as applied to Drivers.

2. Paying Drivers for and Providing Benefits Based on "Engaged Time" Would Change the Existing the Rule that Drivers are to be Paid for All "Working Time" and Receive Benefits Based on "Working Time."

Workers such as Drivers are to be paid for "working time," which includes "[a]ll on-call time," such as the time between when a Driver has completed one delivery and is waiting for the next, and "all time during which an employee is required to be . . . on duty . . . including rest periods of short duration" 454 CMR 27.02; 454 CMR 27.04(2). In contrast, under the Proposed Laws, Drivers are

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engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.'" *Somers*, 454 Mass. at 589, quoting G.L. c. 149, §148B.

required to be paid only for "engaged time."[33] Network Companies would also calculate the benefits the laws provide based on the Driver's "engaged time."[34] The Proposed Laws would "repeal and replace" the above regulations as applied to Drivers.

C. The Summaries are Incomplete and Misleading Because They are Devoid of Discussion of How the Main Features of the Proposed Law Would Repeal and Replace Existing Law.

The first paragraph of the Summaries demonstrates their failure to address reversing the presumption that drivers are employees. It reads:

> This proposed law would classify drivers for rideshare and delivery companies who accept requests through digital applications as "independent contractors," and not "employees" or "agents," for all purposes under Massachusetts law. This proposed law would establish alternative minimum compensation and benefits for these "independent contractors."

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[33] *See* R.A. 0014, Petition 21-11 § 5(c)(4)("Net earnings floor", means, for any earnings period, a total amount that consists of: (i) For all engaged time, the sum of 120 per cent of the minimum wage for that engaged time. (ii)(A) The per-mile compensation for vehicle expenses set forth in this clause multiplied by the total number of engaged miles.")

[34] *See,* R.A. 0015, Petition 21-11, § 6 – Healthcare Stipend ("a network company shall provide a quarterly healthcare stipend to app-based drivers" based on the average number of hours of *engaged time* each week per quarter); § 7(c) – "Paid Sick Time ("A network company shall provide a minimum of one hour of earned paid sick time for every 30 hours of *engaged time*."); § 9(e) "Occupational Accident Insurance" ("Occupational accident insurance . . .shall not be required to cover an accident that occurs while online but outside of *engaged time* where the injured driver is in engaged time on one or more other network company platforms or where the driver is engaged in personal activities.") (emphases added). (R.A. 0015, 0017, 0020.)

(R.A. 0035.) The first sentence makes clear that the law would classify drivers as independent contractors and not as employees or agents; it does not, however, state that drivers are presumed to be employees under current law, and that reclassifying them as independent contractors would, as in *Sears*, "repeal and replace" the Independent Contractor Law, c. 149, § 148B, with respect to Drivers.

The first paragraph of the Summaries could and should readily have been written to say:

> This proposed law would change existing law by reversing the presumption that ~~classify~~ drivers for rideshare and delivery companies who accept requests through digital applications are employees, and classify them as "independent contractors," ~~and not "employees" or "agents,"~~ for all purposes under Massachusetts law. This proposed law would also establish ~~alternative~~ minimum compensation and benefits for these "independent contractors" as an alternative to the benefits they would receive under state law as employees.

With respect to the second main feature of the law—changing existing law to calculate compensation based on "engaged time" rather than "working time"—the Summaries are silent. The first two sentences of the third paragraph read:

> The proposed law would require rideshare and delivery companies to provide drivers with a guaranteed amount of minimum compensation, equal to 120% of the Massachusetts minimum wage for time spent completing requests for transportation or delivery, plus an inflation-adjusted per-mile amount (starting at 26 cents) for each mile driven in a privately-owned vehicle while completing a request. The minimum compensation calculation would not include time spent by a driver between requests.

(R.A. 0035-36.) To inform voters of how this main feature of the proposed law would change existing law, the above paragraph could and should easily have been written as follows:

> The proposed law would change existing law with respect to calculation of drivers' guaranteed compensation. Because drivers are presumed to be employees under existing law, rideshare and delivery companies are required to pay drivers minimum compensation equal to the Massachusetts minimum wage for working time. Working time includes "on-call" time such as time spent by a driver between requests. The proposed law would require rideshare and delivery companies to provide drivers with a guaranteed amount of minimum compensation, equal to 120% of the Massachusetts minimum wage for time spent completing requests for transportation or delivery, but not including "on-call" time such as time between requests, plus an inflation-adjusted per-mile amount (starting at 26 cents) for each mile driven in a privately-owned vehicle while completing a request.

Thus, it would not have been difficult for the Attorney General to provide a "fair" summary that described how the main features of the law would change existing law, and still have the summary be "concise."

Because the Summaries deprive voters of being "accurately inform[ed] . . . of precisely what they are being asked to do," *Abdow*, 468 Mass. at 507, by not presenting voters with an explanation as to how the main features of the Proposed Laws would change existing law, the Summaries are invalid.

D. Because the Summaries are Invalid, the Court Must Bar the Secretary from Placing the Petitions on the Ballot.

This Court in *Hensley* rejected the plaintiffs' request that the Court order changes be made to the summary of the law proposed in that case. 474 Mass. at

668 n.26. The Court concluded that it had not been granted the authority to enter such an order under art. 48 or a statute, and "that any revision of the summary at this late stage of the initiative process would pose formidable practical problems because the summary has appeared at the top of the petition forms that have been used to collect tens of thousands of signatures, so any revision would call into question the validity of those signatures." *Id*. Accordingly, because this Court may not order the Attorney General to amend the Summaries, amend. art. 48 requires a "fair, concise summary," and the Summaries are not "fair" for the reasons set forth above, this Court must bar the Secretary from placing the Petitions on the November 2022 ballot.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court declare that the Petitions and Summaries thereof do not comply with art. 48 of the Massachusetts Constitution, and bar the Secretary from placing the Petitions on the November 2022 ballot.

Dated: March 7, 2022

Respectfully submitted,

MARTIN EL KOUSSA, MELODY CUNNINGHAM, JULIET SCHOR, COLTON ANDREWS, DORCAS BETHSAIDA GRIFFITH, ALCIBIADES VEGA, JR., GABRIEL CAMACHO, EDWARD MICHAEL VARTABEDIAN, FRED TAYLOR, RENEELEONA DOZIER, JANICE GUZMAN, AND YAMILA RUIZ,

By their attorneys,

*/s/ Thomas O. Bean*_____

Thomas O. Bean, BBO #548072
Sarah Grossnickle, admitted pro hac vice
Verrill Dana, LLP
One Federal Street – 20th Floor
Boston, MA 02110
(617) 309-2600 (Tel)
(617) 309-2601 (Fax)
tbean@verrill-law.com
sgrossnickle@verrill-law.com

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ART. LXXIV. Amendments of Forty-eighth Article of Amendment relating to initiative and referendum.

SECTION 1. Article XLVIII of the amendments to the constitution is hereby amended by striking out section three, under the heading "THE INITIATIVE. *II. Initiative Petitions.*", and inserting in place thereof the following: — SECTION 3. *Mode of Originating.* — Such petition shall first be signed by ten qualified voters of the commonwealth and shall be submitted to the attorney-general not later than the first Wednesday of the August before the assembling of the general court into which it is to be introduced, and if he shall certify that the measure and the title thereof are in proper form for submission to the people, and that the measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections, and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a fair, concise summary, as determined by the attorney-general, of the proposed measure as such summary will appear on the ballot together with the names and residences of the first ten signers. All initiative petitions, with the first ten signatures attached, shall be filed with the secretary of the commonwealth not earlier than the first Wednesday of the September before the assembling of the general court into which they are to be introduced, and the remainder of the required signatures shall be filed not later than the first Wednesday of the following December.

149:148B. Persons performing service not authorized under this chapter deemed employees; exception

Section 148B. (a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:—

(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(2) the service is performed outside the usual course of the business of the employer; and,

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

(b) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section.

(c) An individual's exercise of the option to secure workers' compensation insurance with a carrier as a sole proprietor or partnership pursuant to subsection (4) of section 1 of chapter 152 shall not be considered in making a determination under this section.

(d) Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be subject to all of the criminal and civil remedies, including debarment, as provided in section 27C of this chapter. Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter. Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section.

(e) Nothing in this section shall limit the availability of other remedies at law or in equity.

CHAPTER 175M

FAMILY AND MEDICAL LEAVE

175M:1. Definitions

Section 1. For the purposes of this chapter, the following words shall have the following meanings, unless the context clearly requires otherwise:—

"Average weekly wage", shall have the same meaning as provided in subsection (w) of section 1 of chapter 151A; provided, however, that "average weekly wage" shall be calculated using earnings from the base period, as that term is defined in subsection (a) of said section 1 of said chapter 151A; and provided further, that in the case of a self-employed individual, "average weekly wage" shall mean one twenty-sixth of the total earnings of the self-employed individual from the 2 highest quarters of the 12 months preceding such individual's application for benefits under this chapter.

"Benefit year", the period of 52 consecutive weeks beginning on the Sunday immediately preceding the first day that job-protected leave under this chapter commences for the covered individual.

"Child", a biological, adopted or foster child, a stepchild or legal ward, a child to whom the covered individual stands in loco parentis, or a person to whom the covered individual stood in loco parentis when the person was a minor child.

"Contributions", the payments made by an employer, a covered business entity, an employee or a self-employed individual to the Family and Employment Security Trust Fund, as required by this chapter.

"Covered business entity", a business or trade that contracts with self-employed individuals for services and is required to report the payment for services to such individuals on IRS Form 1099–MISC for more than 50 per cent of its workforce.

"Covered contract worker", a self-employed individual for whom an employer or covered business entity is: (i) required to report payment for services on IRS Form 1099–MISC; and (ii) required to remit contributions to the Family and Employment Security Trust Fund pursuant to section 6.

"Covered individual", either: (i) an employee who meets the financial eligibility requirements of subsection (a) of section 24 of chapter 151A; provided, however, that all such employment shall have been with an employer in the commonwealth; (ii) a personal care attendant, as defined in section 70 of chapter 118E, whose wages from working as a personal care attendant meet the financial eligibility requirements of said subsection (a) of said section 24 of said chapter 151A; (iii) a family child care provider, as defined in subsection (a) of section 17 of chapter 15D, whose payments from working as a family child care provider meet the financial eligibility requirements of said subsection (a) of said section 24 of said chapter 151A; (iv) a self-employed individual: (A) who has elected coverage under subsection (j) of section 2; and (B) whose reported earnings to the department of revenue from self-employment meet the financial eligibility requirements of said subsection (a) of said section 24 of said chapter 151A as if the individual were an employee; (v) a covered contract worker: (A) for whom at least 1 employer or covered business entity is required to remit contributions to the Family and Employment Security Trust Fund pursuant to section 6; and (B) whose payments from such employer or covered business entity satisfy the financial eligibility requirements of said subsection (a) of said section 24 of said chapter 151A as if the covered contract worker were an employee; or (vi) a former employee who has: (A) met the financial eligibility requirements of said subsection (a) of said section 24 of said chapter 151A at the time of the former employee's separation from employment; provided, however, that all such employment shall have been with an employer in the commonwealth; and (B) been separated from employment for not more than 26 weeks at the start of the former employee's family or medical leave.

"Covered servicemember", either: (i) a member of the Armed Forces, as defined in section 7 of chapter 4, including a member of the National Guard or Reserves, who is (A) undergoing medical treatment, recuperation or therapy; (B) otherwise in outpatient status; or (C) is otherwise on the temporary disability retired list for a serious injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces, or a serious injury or illness that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces; or (ii) a former member of the Armed Forces, including a former member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy for a serious injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces, or a serious injury or illness that existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed

Forces and manifested before or after the member was discharged or released from service.

"Department", the department of family and medical leave established in section 8.

"Director", the director of the department of family and medical leave.

"Domestic partner", a person not less than 18 years of age who: (i) is dependent upon the covered individual for support as shown by either unilateral dependence or mutual interdependence that is evidenced by a nexus of factors including, but not limited to: (A) common ownership of real or personal property; (B) common householding; (C) children in common; (D) signs of intent to marry; (E) shared budgeting; and (F) the length of the personal relationship with the covered individual; or (ii) has registered as the domestic partner of the covered individual with any registry of domestic partnerships maintained by the employer of either party, or in any state, county, city, town or village in the United States.

"Employee", shall have the same meaning as provided in clause (h) of section 1 of chapter 151A; provided, however, that notwithstanding said clause (h) or any other special or general law to the contrary and solely for the purposes of section 6 and the notice provisions set forth in subsections (a) and (b) of section 4, "employee" shall include (i) a personal care attendant, as defined in section 70 of chapter 118E; and (ii) a family child care provider, as defined in subsection (a) of section 17 of chapter 15D.

"Employer", shall have the same meaning as provided in subsection (i) of section 1 of chapter 151A; provided, however, that an individual employer shall be determined by the Federal Employer Identification Number; provided further, that, notwithstanding any general or special law to the contrary, the PCA quality home care workforce council established in section 71 of chapter 118E shall be the employer of personal care attendants, as defined in section 70 of said chapter 118E, solely for the purposes of section 6 and consumers, as defined in said section 70 of said chapter 118E, shall be considered the employers of personal care attendants solely for the purposes of the notice requirements set forth in subsections (a) and (b) of section 4 and subsection (d) of section 8; provided further, that, notwithstanding any general or special law to the contrary, the department of early education and care shall be the employer of family child care providers, as defined in subsection (a) of section 17 of chapter 15D, solely for the purposes of section 6 and the notice provisions set forth in subsections (a) and (b) of section 4 and subsection (d) of section 8; provided further, that any employer not subject to this chapter may become a covered employer under this chapter by

notifying the department of family and medical leave and completing the procedure established by the department; and provided further, that a municipality, district, political subdivision or its instrumentalities shall not be subject to this chapter unless it adopts this chapter under section 10.

"Employment", shall have the same meaning as provided by clause (k) of section 1 of chapter 151A.

"Employment benefits", all benefits provided or made available to employees by an employer, including, but not limited to, group life insurance, health insurance, disability insurance, sick leave, annual or vacation leave, educational benefits and pensions.

"Family leave", leave taken pursuant to paragraph (1) of subsection (a) of section 2 or pursuant to subsection (b) of said section 2.

"Family leave benefits", wage replacement paid pursuant to section 3 and provided in accordance with section 2 to a covered individual while the covered individual is on family leave.

"Family member", the spouse, domestic partner, child, parent or parent of a spouse or domestic partner of the covered individual; a person who stood in loco parentis to the covered individual when the covered individual was a minor child; or a grandchild, grandparent or sibling of the covered individual.

"Health care provider", an individual licensed to practice medicine, surgery, dentistry, chiropractic, podiatry, midwifery or osteopathy or any other individual determined by the department to be capable of providing health care services.

"Medical leave", leave taken pursuant to paragraph (2) of subsection (a) of section 2.

"Medical leave benefits", wage replacement paid pursuant to section 3 and provided in accordance with section 2 to a covered individual while the covered individual is on medical leave.

"Qualifying exigency", a need arising out of a covered individual's family member's active duty service or notice of an impending call or order to active duty in the Armed Forces, including, but not limited to, providing for the care or other needs of the military member's child or other family member, making financial or legal arrangements for the military member, attending counseling, attending military events or ceremonies, spending time with the military member during a rest and recuperation leave or following return from deployment or making arrangements following the death of the military member.

"Self-employed individual", a sole proprietor, member of a limited liability company or limited liability partnership or an individual

whose net profit or loss from a business is required to be reported to the department of revenue; provided, however, that such individual resides in the commonwealth.

"Serious health condition", an illness, injury, impairment or physical or mental condition that involves (i) inpatient care in a hospital, hospice or residential medical facility; or (ii) continuing treatment by a health care provider.

"State average weekly wage", the average weekly wage in the commonwealth as calculated under subsection (a) of section 29 of chapter 151A and determined by the commissioner of unemployment assistance.

"Trust fund", the Family and Employment Security Trust Fund established in section 7.

"Wages", shall have the same meaning as provided in clause (s) of section 1 of chapter 151A.

"Weekly benefit amount", the amount of wage replacement paid to a covered individual on a weekly basis while the covered individual is on family or medical leave, as provided in section 3.

175M:2. Leave requirements

Section 2. (a)(1) Family leave shall be available to any covered individual for any of the following reasons: (i) to bond with the covered individual's child during the first 12 months after the child's birth or the first 12 months after the placement of the child for adoption or foster care with the covered individual; (ii) because of any qualifying exigency arising out of the fact that a family member is on active duty or has been notified of an impending call or order to active duty in the Armed Forces; or (iii) in order to care for a family member who is a covered servicemember.

(2) Medical leave shall be available to any covered individual with a serious health condition that makes the covered individual unable to perform the functions of the covered individual's position. This provision shall be construed consistent with the equivalent provision of the federal Family and Medical Leave Act of 1993, codified at 29 U.S.C. 2612(a)(1)(D). A covered individual who is a former employee shall be considered unable to perform the functions of the covered individual's position if the covered individual is unable to perform the functions of the covered individual's most recent position or other suitable employment as that term is defined under subsection (c) of section 25 of chapter 151A.

[Subsection (b) added by 2018, 121, Sec. 29 effective July 1, 2021. See 2018, 121, Sec. 34.]

(b) Family leave shall be available to any covered individual to care for a family member with a serious health condition.

(c)(1) A covered individual shall not be eligible for more than 12 weeks of family leave in a benefit year; provided, however, that a covered individual taking family leave in order to care for a covered servicemember pursuant to clause (iii) of paragraph (1) of subsection (a) shall not be eligible for more than 26 weeks of family leave in a benefit year. A covered individual shall not be eligible for medical leave for more than 20 weeks in a benefit year. A covered individual shall not take more than 26 weeks, in the aggregate, of family and medical leave under this chapter in the same benefit year. Nothing in this section shall prevent a covered individual from taking a medical leave during pregnancy or recovery from childbirth if supported by documentation by a health care provider that is immediately followed by family leave, in which case the 7 day waiting period for family leave shall not be required.

(2)(A) Leave under clause (i) of paragraph (1) of subsection (a) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Leave under clause (iii) of paragraph (1) of subsection (a) or under paragraph (2) of said subsection (a) or under subsection (b), may be taken intermittently or on a reduced leave schedule by an employee when medically necessary. Leave under clause (ii) of said paragraph (1) of said subsection (a) may be taken intermittently or on a reduced leave schedule by an employee.

(B) Leave under paragraphs (1) or (2) of subsection (a), or under subsection (b) of this section may be taken intermittently or on a reduced leave schedule by a self-employed individual or former employee.

(C) The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the covered individual is entitled under this chapter beyond the amount of leave actually taken.

(d) While on family or medical leave, a covered individual shall receive a weekly benefit amount, as provided in section 3.

(e) An employee who has taken family or medical leave shall be restored to the employee's previous position or to an equivalent position, with the same status, pay, employment benefits, length-of-service credit and seniority as of the date of leave. An employer shall not be required to restore an employee who has taken family or medical leave to the previous or to an equivalent position if other employees of equal length of service credit and status in the same or equivalent positions have been laid off due to economic conditions or other changes in operating conditions affecting employment during

the period of leave; provided, however, that the employee who has taken leave shall retain any preferential consideration for another position to which the employee was entitled as of the date of leave.

(f) The taking of family or medical leave shall not affect an employee's right to accrue vacation time, sick leave, bonuses, advancement, seniority, length-of-service credit or other employment benefits, plans or programs. During the duration of an employee's family or medical leave, the employer shall provide for, contribute to or otherwise maintain the employee's employment-related health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously for the duration of such leave.

(g) Subsections (e) and (f) shall not apply to a self-employed individual taking family or medical leave under this chapter or a person who was a former employee who satisfies the conditions set forth in clause (iv) of the definition of "Covered individual" in section 1 when that person began taking family or medical leave under this chapter.

(h)(1) This chapter shall not: (i) obviate an employer's obligations to comply with any company policy, law or collective bargaining agreement that provides for greater or additional rights to leave than those provided for by this chapter; (ii) in any way curtail the rights, privileges or remedies of any employee under a collective bargaining agreement or employment contract; or (iii) be construed to allow an employer to compel an employee to exhaust rights to any sick, vacation or personal time prior to or while taking leave under this chapter.

(2) An employer may require that payment made pursuant to this chapter be made concurrently or otherwise coordinated with payment made or leave allowed under the terms of disability or family care leave under a collective bargaining agreement or employer policy such that the employee will receive the greater of the various benefits that are available for the covered reason. Any leave provided under a collective bargaining agreement or employer policy that is used by the employee for a covered reason and paid at the same or higher rate than leave available under this chapter shall count against the allotment of leave available under this chapter. The employer shall give employees written notice of this requirement.

(i) Leave taken under this chapter shall run concurrently with leave taken under section 105D of chapter 149 or under the Family and Medical Leave Act of 1993, codified at 29 U.S.C. section 2611, et seq. Employees who take leave under this chapter while ineligible for leave under the Family and Medical Leave Act of 1993 may take leave under the Family and Medical Leave Act of 1993 in the same

benefit year only to the extent they remain eligible for concurrent leaves under this chapter.

(j) A self-employed individual may elect coverage under this chapter and become a covered individual for an initial period of not less than 3 years by filing a notice of election in writing with the department and making contributions as required in section 6 to the Family and Employment Security Trust Fund established in section 7; provided, however, that a self-employed individual who elects coverage shall not be eligible for benefits until that individual has made such required contributions for at least 2 calendar quarters of the individual's last 4 completed calendar quarters. The election shall become effective on the date of filing the notice. The department shall establish a process by which self-employed individuals may elect coverage under this chapter.

175M:3. Determination of weekly benefit amount

Section 3. (a) No family or medical leave benefits shall be payable during the first 7 calendar days of such leave; provided, however, that an employee may utilize accrued sick or vacation pay or other paid leave provided under an employer policy during the first 7 calendar days of such leave. Employees taking family or medical leave for which benefits are not payable under this subsection shall be entitled to the protections of subsections (e) and (f) of section 2 and section 9.

(b)(1) The weekly benefit amount for a covered individual on family or medical leave shall be determined as follows: (i) the portion of the covered individual's average weekly wage that is equal to or less than 50 per cent of the state average weekly wage shall be replaced at a rate of 80 per cent; and (ii) the portion of the covered individual's average weekly wage that is more than 50 per cent of the state average weekly wage shall be replaced at a rate of 50 per cent. For purposes of the calculation specified in this paragraph, a covered individual's average weekly wage shall include only those wages or payments subject to the contribution requirements of section 6.

(2) The maximum weekly benefit amount calculated pursuant to paragraph (1) shall be not more than $850 per week; provided, however, that annually, not later than October 1 of each year thereafter, the department shall adjust the maximum weekly benefit amount to be 64 per cent of the state average weekly wage and the adjusted maximum weekly benefit amount shall take effect on January 1 of the year following such adjustment.

(3) For a covered individual who takes leave on an intermittent or reduced leave schedule, the weekly benefit amount shall be prorated as determined by the department.

(c) The weekly benefit amount shall be reduced by the amount of wages or wage replacement that a covered individual receives for that period under any of the following while on family or medical leave: (i) any government program or law, including but not limited to workers' compensation under chapter 152, other than for permanent partial disability incurred prior to the family or medical leave claim, or under other state or federal temporary or permanent disability benefits law, or (ii) a permanent disability policy or program of an employer.

The weekly benefit amount shall not be reduced by the amount of wage replacement that an employee receives while on family or medical leave under any of the following conditions, unless the aggregate amount an employee would receive would exceed the employee's average weekly wage: (i) a temporary disability policy or program of an employer; or (ii) a paid family, or medical leave policy of an employer. If an employer makes payments to an employee during any period of family or medical leave that are equal to or more than the amount required under this section, the employer shall be reimbursed out of any benefits due or to become due from the trust fund for family or medical leave benefits for that employee covering the same period of time as the payments made by the employer.

175M:4. Notice

Section 4. (a) Each employer and covered business entity shall post in a conspicuous place on each of its premises a workplace notice prepared or approved by the department providing notice of benefits available under this chapter. The workplace notice shall be issued in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian and any other language that is the primary language of at least 10,000 or ½ of one per cent of all residents of the commonwealth. The required workplace notice shall be in English and each language other than English which is the primary language of 5 or more employees or self-employed individuals of that workplace, if such notice is available from the department.

Each employer shall issue to each employee not more than 30 days from the beginning date of the employee's employment, the following written information provided or approved by the department in the employee's primary language: (i) an explanation of the availability of family and medical leave benefits provided under this chapter, including rights to reinstatement and continuation of health insurance; (ii) the employee's contribution amount and obligations under this chapter; (iii) the employer's contribution amount and obligations under this chapter; (iv) the name and mailing address of the

employer; (v) the identification number assigned to the employer by the department; (vi) instructions on how to file a claim for family and medical leave benefits; (vii) the mailing address, email address and telephone number of the department; and (viii) any other information deemed necessary by the department. Delivery is made when an employee provides written acknowledgement of receipt of the information, or signs a statement indicating the employee's refusal to sign such acknowledgement.

Each covered business entity shall provide to each self-employed individual with whom it contracts, at the time such contract is made, the following written information provided or approved by the department in the self-employed individual's primary language: (i) an explanation of the availability of family and medical leave benefits provided under this chapter and the procedures established by the department for self-employed individuals to become covered individuals; (ii) the self-employed individual's contribution amount and obligations under this chapter if the self-employed individual were to become a covered individual; (iii) the covered business entity's contribution amount and obligations under this chapter; (iv) the name, mailing address and email address of the covered business entity; (v) the identification number assigned to the covered business entity by the department; (vi) instructions on how to file a claim for family and medical leave benefits; (vii) the address and telephone number of the department; and (viii) any other information deemed necessary by the department. Delivery is made when a self-employed individual provides written acknowledgement of receipt of the information, or signs a statement indicating the self-employed individual's refusal to sign such acknowledgement.

An employer or covered business entity that fails to comply with this subsection shall be issued, for a first violation, a civil penalty of $50 per employee and per self-employed individual with whom it has contracted, and for each subsequent violation, a civil penalty of $300 per employee or self-employed individual with whom it has contracted. The employer or covered business entity shall have the burden of demonstrating compliance with this subsection.

(b) An employee shall give not less than 30 days' notice to the employer of the anticipated starting date of the leave, the anticipated length of the leave and the expected date of return or shall provide notice as soon as practicable if the delay is for reasons beyond the employee's control. If an employer fails to provide notice of this chapter as required under subsection (a), the employee's notice requirement shall be waived.

175M:5. Certification

Section 5. (a)(1) Covered individuals shall file a benefit claim pursuant to regulations issued by the department. If a claim is filed more than 90 calendar days after the start of leave, the covered individual may receive reduced benefits. All claims shall include a certification supporting a request for leave under this chapter. The department shall establish good cause exemptions from the certification requirement deadline in the event that a serious health condition of the covered individual prevents the covered individual from providing the required certification within the 90 calendar days.

(2) Certification for a covered individual taking medical leave shall be sufficient if it states the date on which the serious health condition commenced, the probable duration of the condition and the appropriate medical facts within the knowledge of the health care provider as required by the department, which shall include a statement by the health care provider that the covered individual is unable to perform the functions of the covered individual's position, a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule and, if applicable, the expected duration of the intermittent leave or reduced leave schedule.

(3) Certification for a covered individual taking family leave because of the serious health condition of a family member of the covered individual shall be sufficient if it states the date on which the serious health condition commenced, the probable duration of the condition, the appropriate medical facts within the knowledge of the health care provider as required by the department, a statement that the covered individual is needed to care for the family member, and, if applicable, include a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule and the expected duration of the intermittent leave or reduced leave schedule and an estimate of the amount of time that the covered individual is needed to care for the family member.

(4) Certification for a covered individual taking family leave because of the birth of a child of the covered individual shall be sufficient if the covered individual provides either the child's birth certificate or a document issued by the health care provider of the child or the health care provider of the person who gave birth, stating the child's birth date.

(5) Certification for a covered individual taking family leave because of the placement of a child with the covered individual for adoption or foster care shall be sufficient if the covered individual provides a document issued by the health care provider of the child, an adoption or foster care agency involved in the placement or by other individuals as determined by the department that confirms the

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placement and the date of placement. To the extent that the status of a covered individual as an adoptive or foster parent changes while an application for benefits is pending, or while the covered individual is receiving benefits, the covered individual shall be required to notify the department of such change in status in writing. The department of children and families may confirm in writing the status of the covered individual as an adoptive or foster parent while an application for benefits is pending or while a covered individual is receiving benefits.

(6) Certification for a covered individual taking family leave because of a qualifying exigency shall be sufficient if it includes: (i) a copy of the family member's active-duty orders; (ii) other documentation issued by the Armed Forces; or (iii) other documentation permitted by the department.

(7) Certification for a covered individual taking family leave to care for a family member who is a covered servicemember shall be sufficient if it includes: (i) the date on which the serious health condition commenced; (ii) the probable duration of the condition; (iii) the appropriate medical facts within the knowledge of the health care provider as required by the department, which shall include a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule and, if applicable, the expected duration of the intermittent leave or reduced leave schedule; (iv) a statement that the covered individual is needed to care for the family member; (v) an estimate of the amount of time that the covered individual is needed to care for the family member; and (vi) an attestation by the covered individual that the health condition is connected to the covered servicemember's military service as required by this chapter.

(b) Any medical or health information required under this section shall be confidential and shall not be disclosed except with permission from the covered individual who provided it unless disclosure is otherwise required by law. Nothing in this section shall be construed to require a covered individual to provide as certification any information from a health care provider that would be in violation of section 1177 of the Social Security Act, 42 U.S.C. 1320d–6, or the regulations promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996, Public Law 104–191.

(c) A covered individual shall not be eligible to receive family or medical leave benefits if the department finds, through a process it shall establish through regulations, that the covered individual, for the purpose of obtaining these benefits, willfully made a false statement or representation, with actual knowledge of the falsity thereof,

or willfully withheld a material fact concerning the facts required to be certified pursuant to this section.

175M:6. Contributions

Section 6. (a) For each employee or covered contract worker, an employer or a covered business entity shall remit to the Family and Employment Security Trust Fund established in section 7 contributions in the form and manner as determined by the department. The family leave and medical leave contribution rates set forth in this section shall be adjusted annually as specified in subsection (e) of section 7.

(a¼) Notwithstanding any general or special law to the contrary, for the purposes of this section, the PCA quality home care workforce council established in section 71 of chapter 118E shall be the employer of personal care attendants, as defined in section 70 of said chapter 118E, and the department of early education and care shall be the employer of family child care providers, as defined in subsection (a) of section 17 of chapter 15D.

(b) A self-employed individual who is electing coverage under subsection (j) of section 2 shall be responsible for all contributions set forth in subsection (a) of this section on that individual's income from self-employment.

(c)(1) For medical leave, an employer shall not deduct more than 40 per cent of the contribution required for an employee by subsection (a) from that employee's wages and shall remit the full contribution required under said subsection (a) to the trust fund.

(2) For family leave, an employer may deduct not more than 100 per cent of the contribution required for an employee by subsection (a) from that employee's wages, and shall remit the full contribution required under subsection (a) to the trust fund.

(d) Notwithstanding subsection (c), an employer employing less than 25 employees in the commonwealth shall not be required to pay the employer portion of premiums for family and medical leave; provided, however, that such employer shall remit, for each employee, 100 per cent of the family leave contribution and 40 per cent of the medical leave contribution as otherwise required under subsection (a). An employer or other business or trade that is a covered business entity shall count covered contract workers as employees for the purposes of this subsection.

(e)(1) For medical leave, a covered business entity shall not deduct more than 40 per cent of the contribution required under subsection (a) to the trust fund for the income paid to each covered contract worker.

(2) For family leave, a covered business entity shall not deduct more than 100 per cent of the contribution required under subsection (a) to the trust fund for the income paid to each covered contract worker.

(f) Contributions to the trust fund under this section shall not be required for employees' wages, earnings of a self-employed individual or payments for services to covered contract workers above the contribution and benefit base limit established annually by the federal Social Security Administration for purposes of the Federal Old–Age, Survivors, and Disability Insurance program limits pursuant to 42 U.S.C. 430.

175M:7. Family and Employment Security Trust Fund

Section 7. (a) There shall be a Family and Employment Security Trust Fund to be administered by the director exclusively for the purposes of this chapter. Any sums received under this section shall not be considered revenue of the commonwealth but shall be held in trust for the exclusive benefit of covered individuals eligible for benefits under this chapter and for the administration of the department and shall not be expended, released, appropriated or otherwise disposed of for any other purpose and shall be expended by the director as required by this chapter to pay family and medical leave program benefits to covered individuals eligible to receive benefits and to pay the administrative costs of the department. The trust fund shall consist of: (i) contributions collected pursuant to section 6 together with any interest earned thereon; (ii) property or securities acquired through the use of money belonging to the trust fund together with any earnings of such property and securities; (iii) fines and penalties collected under this chapter; and (iv) other money received from any source, including any grants, gifts, bequests or money authorized by the general court or other party specifically designated to be credited to the trust fund. Money remaining in the fund at the end of a fiscal year shall not revert to the General Fund. Amounts credited to the trust fund shall not be expended for any purpose other than the payment of benefits to covered individuals eligible for benefits under this chapter, and for the administration of the department and shall not be expended, released, appropriated, or otherwise disposed of for any other purpose. The trust fund shall maintain an annualized amount of not less than 140 per cent of the previous fiscal year's expenditure for benefits paid and for the administration of the department.

(b) The costs of administering the department under this chapter shall not exceed 5 per cent of the amount deposited under subsection (a) for each fiscal year following the initial year benefits have been paid under this chapter. Money in the trust fund may be deposited in any depository bank in which general funds of the commonwealth

may be deposited, but such money shall not be commingled with other commonwealth funds and shall be maintained in separate accounts on the books of the depository bank. Such money shall be secured by the depository bank to the same extent and in the same manner as required by the general depository laws of the commonwealth and any collateral pledged for this purpose shall be kept separate and distinct from any other collateral pledged to secure other funds of the commonwealth.

(c) The director shall expend money from the trust fund to provide weekly benefits under section 3. Family and medical leave benefits shall be paid from the trust fund to covered individuals eligible for benefits. An employer's bankruptcy or noncompliance with this chapter shall not interfere with an employee's ability to collect family and medical leave benefits under this chapter. Family or medical leave benefits paid from the trust fund to such an employee may be recovered through bankruptcy proceedings or from the noncomplying employer. The director shall institute administrative and legal action to recover family or medical leave benefits paid through the trust fund.

(d) To accumulate funds for the payment of family and medical leave benefits and administrative costs, employers, covered business entities and self-employed individuals shall, unless subject to provisions under section 11, make contributions as required under section 6 and transmit those contributions to the trust fund in the manner determined by the director.

(e) Annually, not later than October 1, the director shall fix the family leave and medical leave contribution rates set forth in subsection (a) of section 6 for the coming calendar year in the manner described in this subsection. The director shall first certify to the secretary of labor and workforce development and publish, pursuant to section 6 of chapter 30A, the following information: (i) the total amount of benefits paid by the department during the previous fiscal year; (ii) the total amount remaining in the trust fund at the close of such fiscal year; (iii) the total amount equal to 140 per cent of the previous fiscal year's expenditure for benefits paid and for the administration of the department; (iv) the amount by which the total amount remaining in the trust fund at the close of the previous fiscal year is less than or greater than 140 per cent of the previous fiscal year's expenditure for benefits paid and for the administration of the department; and (v) the amount by which the contribution rate set forth in subsection (a) of section 6 shall be adjusted to ensure that the trust fund shall maintain or achieve an annualized amount of not less than 140 per cent of the previous fiscal year's expenditure for benefits paid and for the administration of the department. The contribution rate adjustment, if any, made as the result of the direc-

tor's certification and report under this subsection shall supersede the rate previously set forth in said subsection (a) of said section 6 and shall become effective on January 1 of the following calendar year.

Annually, not later than October 1, the director shall publish a report providing the following information concerning the family and medical leave program for the previous fiscal year: (i) total eligible claims; (ii) the percentage of such claims attributable to medical leave; (iii) the percentage of such claims attributable to family leave other than the birth, adoption or fostering of a child; (iv) the percentage of such claims attributable to family leave attributable to the birth, adoption or fostering of a child; (v) the percentage of such claims attributable to military exigency leave; (vi) the percentage of such claims attributable to family leave for a covered service member; (vii) claimant demographics by age, gender, average weekly wage, occupation and the type of leave taken; (viii) the percentage of claims denied and the reasons therefor, including, but not limited to insufficient information and ineligibility and the reason therefor; (ix) average weekly benefit amount paid for all claims and by category of leave; (x) changes in the gross benefits paid compared to previous fiscal years; (xi) processing times for initial claims processing, initial determinations and final decisions; (xii) average duration for cases completed; and (xiii) the number of cases remaining open at the close of such year.

(f) An employer, covered business entity or self-employed individual to whom the director has sent a request for wage, earnings or employment information for an employee or covered individual claiming family or medical leave benefits shall complete and file that information not later than 10 calendar days after the date the request was sent. If such employer, covered business entity or self-employed individual does not respond within those 10 calendar days, then such employer, covered business entity or self-employed individual may be held liable for any related costs incurred by the director.

(g) Such monies in the trust fund as are in excess of the amount necessary for the payment of benefits for a reasonable future period may be invested in any form of investment listed in paragraphs (a) to (i), inclusive, of section 38 of chapter 29 or section 38A of said chapter 29. The investments shall at all times be made so that all the assets of the trust fund shall always be readily convertible into cash when needed for the payment of benefits.

175M:8. Department of family and medical leave

Section 8. (a) There shall be a department of family and medical leave within the executive office of labor and workforce development which shall be administered by a director appointed by the governor.

(b) The department shall pay medical leave benefits as specified in this chapter and family leave benefits to any covered individual for any of the following reasons: (i) to bond with the covered individual's child during the first 12 months after the child's birth or the first 12 months after the placement of the child for adoption or foster care with the covered individual; (ii) because of any qualifying exigency arising out of the fact that a family member is on active duty or has been notified of an impending call or order to active duty in the Armed Forces; or (iii) in order to care for a family member who is a covered service member. The department, by regulation, shall set time standards for application processing which shall provide for notifying applicants of their eligibility or ineligibility for benefits under this chapter within 14 days of receiving a claim under section 5 and shall pay benefits not less than 14 days after the eligibility determination unless that determination occurs more than 14 days before the onset of eligibility in which case benefits shall be paid as soon as eligibility begins. The department shall not require documentation of certification beyond the requirements established in this chapter.

(c) The department shall pay family leave benefits to any covered individual to care for a family member with a serious health condition as specified by this chapter. The department, by regulation, shall set time standards for application processing which shall provide for notifying applicants within 14 days of their eligibility for benefits under this chapter and shall pay benefits not less than 14 days after the eligibility determination unless that determination occurs more than 14 days before the onset of eligibility in which case benefits shall be paid as soon as eligibility begins. The department shall not require documentation of certification beyond the requirements established in this chapter.

(d) The department shall notify the employer not more than 5 business days after a claim has been filed under section 5, and shall use information sharing and integration technology to facilitate the disclosure of relevant information or records with the written consent of the individual applying for benefits. The department shall establish by regulation a system for appeals, pursuant to chapter 30A, in the case of a denial of family or medical leave benefits. In establishing such system, the department shall provide for administrative review in an adjudicatory proceeding held pursuant to section 10 of said chapter 30A and 801 CMR 1.02. Judicial review of any decision of the department rendered pursuant to administrative re-

view under this subsection shall be commenced pursuant to section 14 of said chapter 30A within 30 days of the date of the receipt of the notice of such decision, except that such judicial review under this section shall be filed in the district court within the judicial district in which the covered individual lives, or is or was last employed, or in which the individual has a usual place of business and, in such proceeding, the department shall be made a defendant.

(e) Information contained in the files and records pertaining to an individual under this chapter shall be confidential and not open to public inspection, other than to public employees in the performance of their official duties; provided, however, that an individual or authorized representative of an individual may review the individual's records or receive specific information from the records upon the presentation of the individual's signed and dated authorization, which shall remain in force and effect until revoked in writing by such individual.

(f) The department shall conduct a public education campaign to inform workers, employers, self-employed individuals and covered business entities about the availability of family and medical leave benefits, the requirements for receiving such benefits and family and medical leave, how to apply for such benefits and leave and all of the employer's and covered business entity's obligations under this chapter. The department shall prepare and disseminate model multilingual forms to be used by employers, covered business entities, employees and self-employed individuals in the languages required for the workplace notice under subsection (a) of section 4.

(g) The department shall enforce this chapter and shall promulgate rules and regulations pursuant to this chapter. An employer or covered business entity that fails or refuses to make contributions as required in section 6 shall be assessed an amount equal to its total annual payroll for each year, or the fraction thereof for which it failed to comply, multiplied by the then-current annual contribution rate required under subsection (a) of said section 6, in addition to the total amounts of benefits paid to covered individuals for whom it failed to make contributions. The rate of assessment imposed by this subsection shall be adjusted annually consistent with subsection (a) of said section 6 and subsection (e) of section 7. The department may delegate the administration and collection of contributions required by this chapter to the department of revenue, subject to the agreement of the commissioner of revenue. Such contributions shall be treated as taxes for administration and collection purposes and shall be subject to chapter 62C. Such contributions shall also be treated as debts owed to the department under chapter 62D. The department may issue refunds if the contributions required in section 6 have resulted in duplicative charges.

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(h) This chapter shall be liberally construed as remedial law to further its purpose of providing job-protected family and medical leave and family and medical leave benefits. All presumptions shall be made in favor of the availability of leave and the payment of family and medical leave benefits under this chapter.

175M:9. Prohibited acts

Section 9. (a) It shall be unlawful for any employer to retaliate by discharging, firing, suspending, expelling, disciplining, through the application of attendance policies or otherwise, threatening or in any other manner discriminating against an employee for exercising any right to which such employee is entitled under this chapter or with the purpose of interfering with the exercise of any right to which such employee is entitled under this chapter.

(b) It shall be unlawful for any employer to retaliate by discharging, firing, suspending, expelling, disciplining, through the application of attendance policies or otherwise, threatening or in any other manner discriminating against an employee who has filed a complaint or instituted or caused to be instituted a proceeding under or related to this section, has testified or is about to testify in an inquiry or proceeding or has given or is about to give information connected to any inquiry or proceeding relating to this section.

(c) Any negative change in the seniority, status, employment benefits, pay or other terms or conditions of employment of an employee which occurs any time during a leave taken by an employee under this chapter, or during the 6 month period following an employee's leave or restoration to a position pursuant to this section, or of an employee who has participated in proceedings or inquiries pursuant to this section within 6 months of the termination of proceedings shall be presumed to be retaliation under this section. Such presumption shall be rebutted only by clear and convincing evidence that such employer's action was not retaliation against the employee and that the employer had sufficient independent justification for taking such action and would have in fact taken such action in the same manner and at the same time the action was taken, regardless of the employee's use of leave, restoration to a position or participation in proceedings or inquiries as described in this subsection. An employer found to have threatened, coerced or taken reprisal against any employee pursuant to this subsection shall rescind any adverse alteration in the terms of employment for such employee and shall offer reinstatement to any terminated employee and shall also be liable in an action brought under subsection (d).

(d) An employee or former employee aggrieved by a violation of this section or subsections (e) and (f) of section 2 of this chapter may,

not more than 3 years after the violation occurs, institute a civil action in the superior court. A party to the action shall be entitled to a jury trial. All remedies available in common law tort actions shall be available to prevailing plaintiffs and shall be in addition to any legal or equitable relief provided in this section. The court may: (i) issue temporary restraining orders or preliminary or permanent injunctions to restrain continued violations of this section; (ii) reinstate the employee to the same position held before the violation or to an equivalent position; (iii) reinstate full fringe benefits and seniority rights to the employee; (iv) compensate the employee for 3 times the lost wages, benefits and other remuneration and the interest thereon; and (v) order payment by the employer of reasonable costs and attorneys' fees.

175M:10. Local adoption

Section 10. A municipality, district, political subdivision or authority may adopt this chapter upon a majority vote of the local legislative body or the governing body. For the purposes of this section, a vote of the legislative body shall take place in a city by a vote of the city council subject to its charter, in a town by a vote at town meeting, for an authority by a vote of its governing body, in a district, by a vote of the district in a district meeting and by any other political subdivision or instrumentality, by a vote of its legislative body in accordance with its charter or enabling act.

175M:11. Private plans

Section 11. (a)(1) Employers may apply to the department of family and medical leave for approval to meet their obligations under this chapter through a private plan. In order to be approved as meeting an employer's obligations under this chapter, a private plan must confer all of the same rights, protections and benefits provided to employees under this chapter, including but not limited to: (i) providing family leave to a covered individual for the reasons set forth in paragraph (1) of subsection (a) and subsection (b) of section 2 for the maximum number of weeks required in paragraph (1) of subsection (c) of section 2, in a benefit year; (ii) providing medical leave to a covered individual for the reasons defined in paragraph (2) of subsection (a) of section 2 for the maximum number of weeks required in paragraph (1) of subsection (c) of section 2, in a benefit year; (iii) allowing covered individuals to take, in the aggregate, the maximum number of weeks of family and medical leave in a benefit year as required by paragraph (1) of subsection (c) of section 2; (iv) allowing family leave to be taken for all purposes specified in paragraph (1) of subsection (a) and subsection (b) of section 2; (v) allowing family leave under paragraph (1) of subsection (a) of section 2 to be taken to

care for any family member; (vi) allowing medical leave to be taken by a covered individual with any serious health condition; (vii) providing a wage replacement rate during all family and medical leave of at least the amount required by paragraph (1) of subsection (b) of section 3; (viii) providing a maximum weekly benefit during all family and medical leave of at least the amount specified in paragraph (2) of subsection (b) of section 3; (ix) allowing family or medical leave to be taken intermittently or on a reduced schedule as authorized by paragraph (A) of paragraph (2) of subsection (c) of section 2; (x) imposing no additional conditions or restriction on the use of family or medical leave beyond those explicitly authorized by this chapter or regulations issued pursuant to this chapter; (xi) allowing any employee covered under the private plan who is eligible to take family or medical leave under this chapter to take family or medical leave under the private plan; and (xii) providing that the cost to employees covered by a private plan shall not be greater than the cost charged to employees under the state program.

(2) In order to be approved as meeting an employer's obligations under this chapter, a private plan must also comply with the following provisions: (i) if the private plan is in the form of self-insurance, the employer must furnish a bond running to the commonwealth, with some surety company authorized to transact business in the commonwealth as surety, in such form as may be approved by the department and in such amount as may be required by the department; (ii) the plan must provide for all eligible employees throughout their period of employment; and (iii) if the plan provides for insurance, the forms of the policy must be issued by an approved insurer.

(b) An employer may provide both family and medical leave coverage through an approved private plan or may provide medical leave coverage using an approved private plan and provide family leave coverage using the public plan or vice versa.

(c) The department may withdraw approval for a private plan granted under subsection (a) when terms or conditions of the plan have been violated. Causes for plan termination shall include, but not be limited to the following: (i) failure to pay benefits; (ii) failure to pay benefits timely and in a manner consistent with the public plan; (iii) failure to maintain an adequate security deposit; (iv) misuse of private plan trust funds; (v) failure to submit reports as required by regulations promulgated by the department; or (vi) failure to comply with this chapter or the regulations promulgated hereunder or both.

(d) An employee covered by a private plan approved under this section shall retain all applicable rights under subsections (e) and (f) of section 2 and under section 9.

(e) A denial of family or medical leave benefits by a private plan shall be subject to appeal before the department and district court as provided by subsection (d) of section 8.

454 CMR 27.00: MINIMUM WAGE

Section

27.01: Purpose and Scope

(1) Purpose. To clarify practices and policies in the administration and enforcement of the Minimum Fair Wages Act.

(2) Scope. 454 CMR 27.00 applies to any employer who employs any person in an occupation in accordance with M.G.L. c. 151.

27.02: Definitions

Basic Minimum Wage. The minimum wage rate in effect under M.G.L. c. 151, § 1 to be paid to an employee in an occupation as defined in M.G.L. c. 151, § 2.

Bona Fide Educational Institution. A secondary school system or an institution of higher education that has received accreditation from a recognized source.

Director. The Director of the Department of Labor Standards.

Employ. To suffer or permit to work.

Employer. An individual, corporation, partnership or other entity, including any agent thereof, that employs an employee or employees for wages, remuneration or other compensation.

Minor. A person younger than 18 years old.

Regular Hourly Rate. The amount that an employee is regularly paid for each hour of work. When an employee is paid on a piece work basis, salary, or any basis other than an hourly rate, the regularly hourly rate shall be determined by dividing the employee's total weekly earnings by the total hours worked during the week. Regardless of the basis used, an employee shall be paid not less than the applicable minimum wage each week.

The regular hourly rate shall include all remuneration for employment paid to, or on behalf of, the employee, but shall not include:

(a) sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production; or

(b) sums excluded under 29 U.S.C. § 207(e).

Service Rate. The hourly rate an employer pays to a tipped employee, which may not be less than the cash wage set forth in M.G.L. c. 151, § 7.

Tipped Employee. An employee who regularly receives gratuities of more than $20 a month.

Uniform. All special apparel, including footwear, which is worn by an employee as a condition of employment. It shall be presumed that a uniform worn by an employee of any establishment is worn as a condition of employment if the uniform is of similar design, color, or material, or it forms part of the decorative pattern of the establishment to distinguish a person as an employee of the place of work. Where an employer requires a general type of basic street clothing, permits variation in details of dress, and the employee chooses the specific type and style of clothing, this clothing shall not be considered a uniform.

(MA REG. # 1328, Dated 12-16-16)

27.02: continued

Working Time. Includes all time during which an employee is required to be on the employer's premises or to be on duty, or to be at the prescribed work site or at any other location, and any time worked before or after the end of the normal shift to complete the work. Working time does not include meal times during which an employee is relieved of all work-related duties. Working time includes rest periods of short duration, usually 20 minutes or less.

27.03: Minimum Wage and Overtime Rates

(1) Basic Minimum Wage. At least the basic minimum wage in effect under M.G.L. c. 151, § 1 must be paid to an employee in an occupation as defined in M.G.L. c. 151, § 2, unless a lesser wage is expressly permitted by law or a waiver of the basic minimum wage is granted in writing by the Director in accordance with M.G.L. c. 151, § 7 or 9.

(2) Minimum Wage for Tipped Employees. The minimum wage rate for a tipped employee may be comprised of both:

(a) the service rate paid by the employer; and

(b) tips actually received and retained by the employee. The sum of the service rate and the tips received by the employee must equal or exceed the basic minimum wage. The service rate shall be not less than the cash wage required to be paid to a tipped employee in M.G.L. c. 151, § 7. An employer may pay the service rate to the employee only if:

1. the employer informs such employee in writing of the provisions of M.G.L. c. 151, § 7, paragraph three;

2. the employee actually receives tips in an amount which, when added to the service rate, equals or exceeds the basic minimum wage; and

3. all tips received by the employee are either retained by him or her or are distributed to him or her through a tip-pooling arrangement. If the employee is engaged in the serving of food or beverages, a tip-pooling arrangement must conform with the requirements of M.G.L. c. 149, § 152A. Unless all three of the foregoing requirements are met, the employer must pay a tipped employee at least the full basic minimum wage.

(3) Overtime Rate. One and one half times an employee's regular hourly rate, such regular hourly rate not to be less than the basic minimum wage, for work in excess of 40 hours in a work week, except as set forth in M.G.L. c. 151, § 1A. The terms "*bona fide* executive, or administrative or professional person" in M.G.L. c. 151, § 1A(3), and "professional service" in M.G.L. c. 151, § 2, shall have the same meaning as set forth in 29 CFR Part 541.

Whether a nonexempt employee is paid on an hourly, piece work, salary, or any other basis, such payments shall not serve to compensate the employee for any portion of the overtime rate for hours worked over 40 in a work week, except that this limitation only applies to the "one-half" portion of the overtime rate (one and "one-half" times an employee's regular hourly rate) when overtime is determined on a *bona fide* fluctuating workweek basis.

The overtime rate for a tipped employee receiving the service rate shall be computed at one and one half times the basic minimum wage, except where exempted by M.G.L. c. 151, § 1A.

27.04: Hours Worked

(1) Reporting Pay. When an employee who is scheduled to work three or more hours reports for duty at the time set by the employer, and that employee is not provided with the expected hours of work, the employee shall be paid for at least three hours on such day at no less than the basic minimum wage. 454 CMR 27.04 shall not apply to organizations granted status as charitable organizations under the Internal Revenue Code.

(2) On-call Time. All on-call time is compensable working time unless the employee is not required to be at the work site or another location, and is effectively free to use his or her time for his or her own purposes.

(3) Sleeping Time and Working Shifts.

(a) An employee required to be on duty at the work site for less than 24 hours is working even if the employee is permitted to sleep or engage in other personal activities when not busy.

27.04: continued

(b) Where an employee is required to be on duty at the worksite for 24 hours or more, the employer and employee may agree in writing prior to performance of the work to exclude *bona fide* meal periods and a *bona fide* regularly scheduled sleeping period of not more than eight hours from working time, provided the employer provides adequate sleeping quarters and the employee can enjoy an uninterrupted period of sleep. If no prior written agreement is made, sleeping time and meal time will constitute compensable working time. If the sleeping period is interrupted by a call to duty, all time on duty must be counted as working time. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable period of sleep, the entire period must be counted as working time.

(c) If an employee resides on an employer's premises on a permanent basis or for extended periods of time, not all time spent on the premises is considered working time. The employer and the employee may make any reasonable written agreement as to hours worked which takes into consideration all of the pertinent facts; provided, however, that the employee shall be compensated for all time in which job-related duties are actually performed, and on-call time shall be compensated in accordance with 454 CMR 27.04(2).

(4) Travel Time.

(a) Ordinary travel between home and work is not compensable working time.

(b) If an employee who regularly works at a fixed location is required to report to a location other than his or her regular work site, the employee shall be compensated for all travel time in excess of his or her ordinary travel time between home and work and shall be reimbursed for associated transportation expenses.

(c) If an employer requires an employee to report to a location other than the work site or to report to a specified location to take transportation, compensable work time begins at the reporting time and includes subsequent travel to and from the work site.

(d) An employee required or directed to travel from one place to another after the beginning of or before the close of the work day shall be compensated for all travel time and shall be reimbursed for all transportation expenses.

(e) Travel that keeps an employee away from home overnight shall be compensated in a manner consistent with 29 C.F.R. § 785.39.

27.05: Wage Payments and Deductions From Wages

(1) Deductions from Basic Minimum Wage. No deduction, other than those required or expressly allowed by law, and those allowed for lodging and meals listed in 454 CMR 27.05(2) and (3), shall be made from the basic minimum wage.

(2) Deductions for Lodging. An employer may deduct from the basic minimum wage of an employee a sum per week as set forth in 454 CMR 27.05(2)(a) through (c) for lodging that is safe and sanitary, and meets the standards for housing established by 105 CMR 410.000: *Minimum Standards of Fitness for Human Habitation (State Sanitary Code, Chapter II)*, including heat, potable water, and light. If an employee is paid less than the basic minimum wage for hours worked in a week in accordance with a waiver under M.G.L. c. 151, § 7 or 9, a deduction for lodging is not permitted.

A deduction for lodging is not permitted unless the employee voluntarily accepts and actually uses the room. Deductions for lodging shall not be made by the employer unless the employer has given the employee prior written notice describing the lodging, setting forth the amount to be charged to the employee for the lodging, and providing notice that the employee's acceptance of the lodging is voluntary, and the employee has provided voluntary written acceptance of the lodging and deductions.

Deductions for lodging shall not exceed the following rates.

(a) A sum not exceeding $35.00 per week for a room occupied by one person.

(b) A sum not exceeding $30.00 per week for a room occupied by two persons.

(c) A sum not exceeding $25.00 per week for a room occupied by three or more persons.

(3) Deductions for Meals. An employer may deduct from the basic minimum wage of an employee the cost of meals, but not to exceed the amount per day set forth in 454 CMR 27.05(3). If an employee is paid less than the basic minimum wage for hours worked in a week in accordance with a waiver under M.G.L. c. 151, § 7 or 9, a deduction for meals is not permitted.

27.05: continued

A deduction for meals is not permitted unless the employee voluntarily accepts and actually receives the meal. Deductions for meals shall not be made by the employer unless the employer has given the employee prior written notice describing the meal plan, setting forth the amount to be charged to the employee for the meals, and providing notice that the employee's acceptance of the meals is voluntary, and the employee has provided voluntary written acceptance of the meals and deductions.

The maximum deduction for meals per day shall be as follows: Breakfast, $1.50, Lunch, $2.25; Dinner, $2.25.

(a) A deduction for one meal may be made from the wages of an employee working three hours or more.

(b) A deduction for two meals may be made from the wages of an employee whose work entirely covers two meal periods, or eight hours of work.

(c) A deduction for three meals may be made from the wages of an employee if lodging is provided, or if special permission is granted by the Director.

(4) Uniforms. For employers requiring uniforms, the following shall apply:

(a) Where uniforms require dry-cleaning, commercial laundering, or other special treatment, the employee shall be reimbursed for the actual costs of such service. Where uniforms are made of "wash and wear" materials, that do not require special treatment, and that are routinely washed and dried with other personal garments, the employer need not reimburse the employee for uniform maintenance costs.

(b) No deposit shall be required by the employer from an employee for a uniform, except by application granted by the Director.

(c) An employee or prospective employee who is required to purchase or rent a uniform shall be reimbursed for the actual purchase or rental cost of the uniform.

(5) Indirect Deductions. An employer may not separately charge or bill an employee for fees or amounts not allowed as deductions.

(6) Deductions and the Calculation of Overtime. Where deductions are made from an employee's wages for meals or lodging, the employee's regular hourly rate used to calculate overtime compensation shall be the employee's hourly rate before any deductions are made.

(7) Student Housing/Household Services. Notwithstanding any provision of 454 CMR 27.00 to the contrary, an employer may provide lodging and meals in the employer's home to an employee who is a full-time student at a *bona fide* educational institution in exchange for household services, provided that such household services do not exceed 16 hours of working time per week in exchange for occupancy of a single room.

27.06: Employer Minimum Wage Waivers

(1) Student Workers.

(a) The Director may issue to any hospital or laboratory a waiver permitting payment of not less than 80% of the basic minimum wage to students whose employment for wages is part of a formal training program for such period of time as shall be fixed by the Director and stated in the waiver.

(b) The Director may issue to any *bona fide* educational institution, a waiver permitting payment of not less than 80% of the basic minimum wage, to students enrolled in and employed by said institutions for such period of time as shall be fixed by the Director and stated in the waiver.

(c) The Director may issue to any establishment which has been granted non-profit status under the Internal Revenue Code a waiver permitting payment of not less than 80% of the basic minimum wage to minors attending secondary school who work part-time in hospital wards, school and college dining rooms and dormitories, where the ratio of one minor to five adult persons working in these areas is maintained, for such period of time as shall be fixed by the Director and stated in the waiver.

27.06: continued

(2) Seasonal Camp Counselors and Counselor Trainees. The Director may, in accordance with M.G.L. c. 151, § 7, issue to any seasonal camp a waiver permitting payment of less than the minimum wage to seasonal camp counselors or counselor trainees for such period of time as shall be fixed by the Director and stated in the waiver. In order to receive a waiver, a camp must provide to DLS information regarding the seasonal nature of the business, the sub-minimum wage sought, and whether the camp will provide food and lodging to the employees, and the number of counselors for whom a waiver is sought. An employee shall be considered a seasonal camp counselor or counselor trainee if the employee is directly involved in camp programming and camper supervision. A waiver of the basic minimum wage shall not apply to employees who work as dish washers, kitchen workers, maintenance workers, life guards or other jobs that do not entail the direct supervision of campers. Seasonal camps seeking a minimum wage exemption must apply annually for a waiver from the Director.

(3) Special Certificate.

(a) No person whose earning capacity has been impaired may be paid less than the basic minimum wage unless and until the employer obtains from the Director a special certificate in accordance with the provisions of M.G.L. c. 151, § 9.

(b) The special certificate may be granted for a period not to exceed 24 months. The employer must obtain a special certificate for each work site where the employer will assign workers.

(c) The Director shall prescribe the application form and supporting documentation required to obtain a special certificate permitting the employer to pay an employee with a disability less than the minimum wage. A special certificate will not be issued unless the employer submits a current Certificate Authorizing Special Minimum Wage Rates under the Fair Labor Standard Act, § 214(c) issued by the U.S. Department of Labor, and all other documentation the Director may require.

27.07: Notice and Recordkeeping

(1) Workplace Notice. Every employer shall post, in a place conspicuous to employees, a workplace notice issued by the Commonwealth containing the basic minimum wage rates and such other provisions of M.G.L. c. 151 and 454 CMR 27.00 as the law or the Director may require. The workplace notice shall be posted in English, and in any other language that is spoken by 5% or more of the employer's workforce and for which a translated notice in that language is available from the Commonwealth.

(2) Records. For each employee, the employer shall keep a true and accurate record of the employee's name, complete address, social security number, occupation, amount paid each pay period, hours worked each day, rate of pay, vacation pay, any deductions made from wages, any fees or amounts charged by the employer to the employee, dates worked each week, and such other information as the Director or the Attorney General in their discretion shall deem material and necessary. Such records shall be kept on file for at least three years after the entry date of the record. Such records shall be maintained at the place of employment, at an office of the employer, or with a bank, accountant or other central location within the Commonwealth. All reports, schedules, books, records, and additional information that are filed or made available to the Department or the Attorney General shall be certified under pains and penalties of perjury as true, correct and accurate by the owner, chief financial officers, general counsel or chief executive officer of the employer.

All such records must be kept and furnished to the Director or Attorney General upon demand, in accordance with M.G.L. c. 151, §§ 3, 15 and 19(3). The term transcript, as used in M.G.L. c. 151, §§ 3, 15 and 19(3), shall include photocopies, printouts of electronic information and any reproduction of records, entries, or documents.

An employee who requests such records as they pertain to himself or herself shall be provided with a copy within ten business days, and, if the employee so requests, shall be allowed to inspect the original paper or electronic records at a reasonable time and place.

(3) Recording of Working Time. An employer may round an employee's starting and stopping time to the nearest five minutes, one-tenth, or quarter of an hour provided that this manner of computing working time averages out over a reasonable period of time so that an employee is fully compensated for all the time he or she actually worked.

27.08: Penalties for Violations

Violation of any provision of 454 CMR 27.00 shall be subject to the penalties provided in M.G.L. c. 151.

27.09: Severability

If any provision of 454 CMR 27.00 shall be held inconsistent with M.G.L. c. 151, or held unconstitutional, either on its face or as applied, the inconsistency or unconstitutionality shall not affect the remaining provisions of 454 CMR 27.00.

REGULATORY AUTHORITY

454 CMR 27.00: M.G.L. c. 23, § 1; M.G.L. c. 151.

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Immediato v. Postmates, Inc., D.Mass., March 4, 2021

2021 WL 832132
Only the Westlaw citation is currently available.
Superior Court of Massachusetts,
Suffolk County, Business Litigation Session.

Veronica ARCHER
v.
GRUBHUB, INC. et al.

1984CV03277BLS1
|
January 13, 2021

Memorandum of Decision and Order Regarding Defendant's Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or in the Alternative, to Stay Proceedings (Docket Entry No. 7)

Brian A. Davis, Associate Justice of the Superior Court

Introduction

***1** Plaintiffs Veronica Archer ("Ms. Archer"), Paul Girouard ("Mr. Girouard"), Andrea Krautz ("Ms. Krautz"), and Patrick Lee ("Mr. Lee") (collectively, "Plaintiffs"), on behalf of themselves and all others similarly situated, filed this action against defendant Grubhub, Inc. ("Grubhub") in October 2019. Plaintiffs worked as delivery drivers for Grubhub and allege, among other things, that Grubhub unlawfully retained service and delivery charges in violation of the Massachusetts Tips Act, G.L.c. 149, § 152A, and the Massachusetts Minimum Wage Act, G.L.c. 151. Plaintiffs also allege that Grubhub violated the Massachusetts Wage Act, G.L.c. 149, §§ 148, 150, by failing to reimburse Plaintiffs for travel expenses, and later retaliated against them for raising their wage-related concerns. Plaintiffs seek damages, attorneys fees, and costs from Grubhub for the violations alleged.

On May 19, 2020, Grubhub filed a Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or, in the Alternative, to Stay Proceedings (the "Motion"). Grubhub moves pursuant to 9 U.S.C. §§ 1 et seq., the Federal Arbitration Act ("FAA" or the "Act"), and G.L.c. 251, the Massachusetts Uniform Arbitration Act for Commercial Disputes, to compel arbitration of Plaintiffs' claims in this case. Grubhub argues that Plaintiffs entered into valid and binding written arbitration agreements with Grubhub covering all of the claims set out in Plaintiffs' Complaint (the "Complaint," Docket Entry No. 1). It requests the issuance of a court order compelling arbitration and dismissing Plaintiffs' Complaint, or, in the alternative, staying the case pending arbitration. Plaintiffs oppose the Motion. Both sides have thoroughly briefed all of the relevant issues.

The Court conducted a virtual hearing on Grubhub's Motion on October 1, 2020.

Counsel for all of the parties attended and participated in the hearing. Upon consideration of the written materials submitted by the parties, the information provided at the motion hearing, and the oral arguments of counsel, Grubhub's Motion will be *DENIED* for the reasons discussed below.

Factual Background

The unchallenged facts, taken from the Complaint and the other materials submitted by the parties, are as follows. See *Gove v. Career Sys. Dev. Corp.*, 689 F.3d 1, 2 (1st Cir. 2012) (recognizing that on a motion to compel arbitration made in connection with a motion to dismiss or stay, court draws relevant facts from complaint and the documents submitted to the court).

Grubhub is an online and mobile food ordering and delivery company that allows its customers to order food and other items from various restaurants throughout Massachusetts and in other states. Complaint, ¶13. Grubhub describes itself as "a leading online and mobile food-ordering and delivery marketplace with the largest and most comprehensive network of restaurant partners." Affidavit of Eric R. Leblanc, dated Apr. 6, 2020, *Exhibit F* (Grubhub—About Us). Grubhub features over 300,000 restaurants and partners, with more than 155,000 of those restaurants spread over 3,200 U.S. cities and in London, England. *Id.* In 2019, Grubhub provided nearly $6 billion in gross food sales to local takeout restaurants and processed more than 500,000 daily orders. *Id.* In the same timeframe, Grubhub served more than 22 million

active customers and sent more than $2.5 billion in total tips to drivers. *Id.*

*2 Plaintiffs worked, or continue to work, as delivery drivers for Grubhub in the Commonwealth of Massachusetts. Complaint, ¶16. Ms. Archer worked for Grubhub from September 19, 2016 through July 25, 2019, and signed a "Mutual Agreement to Arbitrate Claims" ("Arbitration Agreement") on March 27, 2017. Affidavit of Kelley Berlin in Support of Defendant's Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or, in the Alternative, to Stay Proceedings, dated Feb. 14, 2020 ("First Berlin Affidavit"), in 4, 16. [1] Mr. Girourad worked for Grubhub from February 6, 2017 through May 31, 2019, and signed an Arbitration Agreement on February 13, 2017. *Id.* Ms. Krautz worked for Grubhub from January 8, 2016 through September 27, 2019, and signed an Arbitration Agreement on March 27, 2017. *Id.* Mr. Lee worked for Grubhub from January 1, 2016 through June 11, 2019 and signed an Arbitration Agreement on February 13, 2017. *Id.* Each Plaintiff signed his or her Arbitration Agreement electronically. *Id.*, ¶¶6-16. Grubhub has submitted copies of all of Plaintiffs' electronically-signed signature pages, which include time and date stamps. *Id.* Each signature page includes an express acknowledgement that, "[b]y providing [his or her] Electronic Signature and clicking 'E-Sign,' " the relevant Plaintiff acknowledged that he or she had "read, understand[s], and/or agree[s] to be bound by the terms" of the Arbitration Agreement. *Id., Exhibits 5(a)-(d).* A copy of the 2017 version of GrubHub's employee Arbitration Agreement is attached to the Second Berlin Affidavit. Second Berlin Affidavit *Exhibit 3.* It states, in relevant part,

MUTUAL AGREEMENT TO ARBITRATE CLAIMS

This Mutual Agreement to Arbitrate Claims ("Agreement") is between you (hereafter "Employee") and Grubhub Holdings Inc. (hereafter "EMPLOYER"). Any reference to EMPLOYER will be a reference also to all parent, subsidiary, partners, divisions, and affiliated entities, and all successors and assigns of any of them.

The Federal Arbitration Act (9 U.S.C. § 1 et seq.) shall govern this Agreement. *All disputes covered by this Agreement will be decided by an arbitrator in arbitration and not by a judge or jury [in] a trial in court.*

1. This Agreement applies to any dispute, past, present or future, arising out of or related to Employee's application and/or employment and/or separation of employment with EMPLOYER and will survive after the employment relationship terminates. Except as otherwise provided in this Agreement, this Agreement applies to any claim that EMPLOYER may have against Employee or that Employee may have against: (1) EMPLOYER; (2) any of EMPLOYER's officers, directors, principals, shareholders, members, owners, employees, or agents; (3) any of EMPLOYER's benefit plans or the plan's sponsors, fiduciaries, administrators, affiliates, or agents; or (4) any successor or assign of any of the foregoing.

2. The only claims that are subject to arbitration are those that, in the absence of this Agreement, would have been resolved in a court of law under applicable law. Except as provided in Section 3, this Agreement applies, without limitation, to any claims based upon or related to discrimination, harassment, retaliation, defamation (including claims of post-employment defamation or retaliation), breach of contract or covenant, fraud, negligence, emotional distress, breach of fiduciary duty, trade secrets, unfair competition, wages or other compensation, breaks and rest periods, termination, tort claims, equitable claims, and all other statutory and common-law claims. The Agreement specifically covers, without limitation, all claims arising under the Civil Rights Act of 1964, the Americans With Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Genetic Information Non-Discrimination Act, and all state or local laws addressing the same or similar subjects.

6.*(a) Employee and EMPLOYER agree to bring any dispute in arbitration on an individual basis only, and not as a class action or collective action, which means there will be no right or authority for any dispute covered by this Agreement to be brought, heard, or arbitrated as a class action or collective action. This Section 6(a) is referred to in this Agreement as the "Class Action and Collective Action Waiver."*

(b) If Employee does not want the Class Action and Collective Action Waiver to be part of this Agreement, so it will not apply to Employee, Employee may opt out of the Class Action and Collective Action Waiver by causing EMPLOYER to receive, no later than 30 days after the Effective Date of this Agreement (as defined in Section 14), a written notice stating that Employee wants to opt out of the Class Action and Collective Action waiver ... If Employee timely opts out of the Class Action and Collective Action Waiver as just described, then the Class

and Collective Action Waiver will not be considered part of this Agreement, and Employee may pursue all available legal remedies against EMPLOYER without regard to the Class Action and Collective Action Waiver. If Employee does not timely opt out of the Class Action and Collective Action Waiver as just described, then the Class Action and Collective Action Waiver will be considered part of this Agreement. EMPLOYER will not treat Employee any differently based on whether or not Employee decides to opt out of the Class Action and Collective Action Waiver.

***3** 15. The Effective Date of this Agreement will be the date on which Employee signs or acknowledges it.

16. *Employee has the right to review this Agreement with counsel of Employee's choice before Employee signs it.*

17. This Agreement is the full and complete agreement relating to the resolution of disputes covered by this Agreement, and supersedes all prior and contemporaneous agreements relating to such disputes. Except as stated in section 6 above, in the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action and Collective Action Waiver is deemed to be unenforceable, EMPLOYER and Employee agree that this Agreement shall be enforced without regard to any party's ability to bring a class or collective action in arbitration.

Id. (emphasis in original).

As previously noted, each Plaintiff worked as a delivery driver for GrubHub in Massachusetts sometime in the 2016-2019 timeframe. Although GrubHub's primary business focuses on the delivery of locally-prepared food orders from area restaurants, GrubHub acknowledges (for present purposes at least) that its drivers also periodically deliver pre-packaged food items (e.g., canned or bottled soft drinks, chocolate bars, and chips) and various non-food products (e.g., toilet paper, cleaning products, personal care products, and flowers) to GrubHub's customers with GrubHub's knowledge and assent. See Plaintiffs' Affidavits appended as *Exhibits A* through *D* to Plaintiffs' Opposition to Defendant GrubHub Holdings, Inc.'s Motion to Compel Arbitration ("Plaintiffs' Opp."). For example, Ms. Krautz asserts in her affidavit, without contradiction by GrubHub, that she "frequently" picked up medication and other products at CVS for delivery to one of GrubHub's "good customer[s]" in Boston with GrubHub's express approval. Affidavit of Andrea Krautz, ¶3 (Plaintiffs' Opp., *Exhibit D*). Indeed, each Plaintiff has testified that he or she delivered both food and non-food items while working for GrubHub. See Affidavit of Veronica Archer, ¶2 (Plaintiffs' Opp., *Exhibit A*), Affidavit of Paul Girouard, ¶2 (Plaintiffs' Opp., *Exhibit B*) Affidavit of Patrick Lee, ¶2 (Plaintiffs' Opp., *Exhibit C*).

Discussion

I. The Applicable Standard

"Adjudication of a motion to compel arbitration, including a challenge to the validity of the arbitration agreement, is governed by G.L.c. 251, § 2(a)." *Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 781 (2014). See G.L.c. 251, § 2(a) ("A party aggrieved by the failure or refusal of another to proceed to arbitration under an agreement described in section one may apply to the superior court for an order directing the parties to proceed to arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall, if it finds for the applicant, order arbitration; otherwise, the application shall be denied"). "Such motions are treated akin to motions ... for summary judgment." *Chambers v. Gold Medal Bakery, Inc.*, 83 Mass.App.Ct. 234, 241 (2013). See also *Miller v. Cotter*, 448 Mass. 671, 676 (2007). The party moving for arbitration bears the burden of proving that the material facts are established and that it is entitled to arbitration as a matter of law. See *Barrow v. Dartmouth House Nursing Home, Inc.*, 86 Mass.App.Ct. 128, 131 (2014). See also *Augat, Inc. v. Liberty Mutual Ins. Co.*, 410 Mass. 117, 120 (1991).

***4** The Massachusetts Supreme Judicial Court ("SJC") also has explained that,

> Arbitration agreements in Massachusetts are governed by the MAA [Massachusetts Arbitration Act], G.L.c. 251, §§ 1 et seq., and where the contract involves a transaction affecting interstate commerce, by the FAA, 9 U.S.C. §§ 1 et seq. See *Wartield, supra* at 394. "In all relevant respects, the language of the FAA and the MAA providing for enforcement of arbitration provisions are similar, and we have interpreted the cognate provisions in the same manner." *Id.*, citing *Miller v. Cotter*, 448 Mass. 671, 678-79 (2007) (*Miller*). Under both G.L.c. 251, § 1, and

9 U.S.C. § 2 (2006), a written agreement (or provision in a written agreement) to submit to arbitration any dispute between the parties, whether existing or arising in the future, "shall be valid ... save upon such grounds as exist at law or in equity for the revocation of any contract." Under these statutory provisions, where the parties have executed an arbitration agreement and the agreement is not invalid on legal or equitable grounds, the agreement to arbitrate is enforceable against the parties. See *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740, 1745-46 (2011).

...

Although the MAA governs the procedures to be applied where an issue arises regarding the arbitrability of a dispute, where the underlying contract affects interstate commerce, the arbitration agreement is governed by the FAA and the substantive law to be applied is Federal. See *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984), quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 & n.32 (1983) (FAA "creates a body of federal substantive law" that is applicable in both State and Federal court). See also *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (FAA "rests on Congress' authority under the Commerce Clause" and "calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration"); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006).

McInnes v. LPL Fin., LLC, 466 Mass. 256, 260-62 (2013).

"While a court's authority under the [FAA] to compel arbitration may be considerable," however, "it isn't unconditional." *New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 537 (2019) ("*New Prime*"). Section 1 of the FAA expressly exempts from the Act's reach "contracts of employment of ... workers engaged in foreign or interstate commerce." 9 U.S.C.A. § 1. Thus, the FAA does not authorize a court to enforce an arbitration provision in an employment contract with an employee who is "engaged in foreign or interstate commerce." *New Prime*, 139 S.Ct. at 537. Employees "engaged in ... interstate commerce" for purposes of the FAA are "transportation workers, defined, for instance, as those workers actually engaged in the movement of goods in interstate commerce." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) ("*Circuit City*") (internal quotation marks and citation omitted). The question of whether the exemption applies is one that "a court should decide for itself ... before ordering arbitration." New *Prime*, 139 S.Ct. at 537.

II. GrubHub's Motion

***5** Grubhub's Motion asks the Court to dismiss Plaintiffs' Complaint and compel arbitration of their claims in this action or, in the alternative, to stay the case pending arbitration. Grubhub argues that Plaintiffs are bound by the terms of the Arbitration Agreements they signed, discussed above, in which they agreed to have all of their employment-related disputes "decided by an arbitrator in arbitration and not by a judge or jury ..." See Memorandum of Law in Support of Defendant's Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or, in the Alternative, to Stay Proceedings (Docket Entry No. 7) ("Grubhub's Memo.") at 6-9. Grubhub contends that the Arbitration Agreement is valid and enforceable under both federal and state law and should be given effect by this Court.

Plaintiffs oppose Grubhub's Motion on effectively two grounds.

First, they contend that Grubhub has not met its burden to show that Plaintiffs actually agreed to arbitrate their claims in this action because the electronic signature pages provided by Grubhub do not specifically reference the Arbitration Agreement and do not unambiguously reference Plaintiffs' consent to arbitration. See *Ajemian v. Yahoo!, Inc.*, 83 Mass.App.Ct. 565, 574-75 (2013), quoting *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) ("Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility").

Second, Plaintiffs argue that, as GrubHub delivery drivers, they are (or were) "workers engaged in foreign or interstate commerce" who are exempt from the enforcement provisions of the FAA, and that Grubhub's related class action waiver is unenforceable under Massachusetts law. Plaintiffs' Opposition to Defendant Grubhub Holdings, Inc.'s Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or, in the Alternative, to Stay Proceedings ("Plaintiffs' Opp."), at

4-7. Plaintiffs argue that the Court should follow other courts which have held that "where plaintiffs are exempt under the FAA, Massachusetts law prohibiting class action[ ] ... [waivers] bars enforcement of arbitration agreements." Plaintiffs' Opp. at 5. See *Waithaka v. Amazon.com, Inc.*, 404 F.Sup.3d 335, 342, 351 (D. Mass. 2019), citing *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005).[2] See also *Cunningham v. Lyft, Inc.*, 450 F.Sup.3d 37, 47 (D. Mass. 2020) ("*Cunningham*").

The Court separately addresses each of Plaintiffs' arguments below.

A. Plaintiffs' "Lack of Consent" Argument

Plaintiffs assert that the electronic signature pages submitted by GrubHub in support of its Motion are insufficient to establish their consent to the terms of the Arbitration Agreement. The Court disagrees. As previously noted, GrubHub has supplied an executed electronic signature page for each Plaintiff. Each signature page is time and date stamped, each explicitly references the Arbitration Agreement, and each informs the signor that "[b]y providing your Electronic Signature and clicking 'E-Sign,' you are acknowledging that you have read, understand, and/or agree to be bound by the terms of any ... document(s) provided here within." First Berlin Affidavit, ¶¶6-17 & *Exhibits 2-5*. This evidence, viewed reasonably, is sufficient to demonstrate that Plaintiffs indeed signed and agreed to *be* bound by the conspicuous terms of the Arbitration Agreement. See *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018) ("Under Massachusetts law, 'conspicuous' means that a term[ ] is 'so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it.' ") (citation omitted). See also *Kauders v. Uber Techs., Inc.*, No. SJC-12883, 2021 WL 18927, at *10 (Mass. Jan. 4, 2021) (concluding that two-prong test "focusing on whether there is reasonable notice of the terms and a reasonable manifestation of assent to those terms, is the proper framework for analyzing issues of online contract formation"). Thus, Plaintiffs cannot avoid arbitration of their claims against GrubHub based upon a purported lack of consent.[3]

B. Plaintiffs' Section 1 Exemption Argument

***6** Plaintiffs' argument that their Arbitration Agreements with GrubHub are not enforceable under Section 1 of the FAA because they are "workers engaged in interstate commerce" is more persuasive. It is undisputed that each Plaintiff, while working as a delivery driver for GrubHub, periodically transported and delivered both prepackaged food items (e.g., canned or bottled soft drinks, chocolate bars, and chips) and non-food items (e.g., toilet paper, cleaning products, personal care products, and flowers) to his or her Massachusetts customers with GrubHub's knowledge and consent. Many, if not most of the pre-packaged food items and non-food items that Plaintiffs transported and delivered on GrubHub's behalf undoubtedly were manufactured, in whole or in part, outside of the Commonwealth of Massachusetts. Thus, the question this Court must decide is whether Plaintiffs, as the final participants in the moving stream of commercial transactions that delivered those products to their ultimate users and/or consumers, qualify as "workers engaged in foreign or interstate commerce" for purposes of the FAA. GrubHub, for its part, argues that Plaintiffs are not exempt from the FAA as "workers engaged in foreign or interstate commerce" simply because they "occasionally delivered prepackaged items in addition to prepared meals from local restaurants, making them analogous to so called 'last-mile' workers." Grubhub's Reply in Further Support of Defendant's Motion to Compel Arbitration ("Grubhub's Reply") at 2. Grubhub cites several cases in support of this argument, including the Seventh Circuit's recent decision in *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (7th Cir. 2020) ("*Wallace*") ("Section 1 of the FAA carves out a narrow exception to the obligation of federal courts to enforce arbitration agreements. To show that they fall within this exception, the plaintiffs had to demonstrate that the interstate movement of goods is a central part of the job description of the class of workers to which they belong. They did not even try do that, so both district courts were right to conclude that the plaintiffs' contracts with Grubhub do not fall within § 1 of the FAA"). See also *Austin v. Doordash, Inc.*, No. 1:17-cv-12498-IT, 2019 WL 4804781, *4 (D. Mass. Sept. 30, 2019) (Talwani, J.) ("*Austin*") (concluding that food delivery drivers were not transportation workers exempted from the FAA even though plaintiff argued that drivers delivered prepared food as well as packaged goods like sodas and other products that traveled interstate and had not been altered by restaurant); *Lee*

v. Postmates Inc., Case No. 18-cv-03421-JCS, 2018 WL 4961802, *8 (N.D. Cal. Oct. 15, 2018) (Spero, J.) ("The Court is aware of no authority holding that couriers who deliver goods from local merchants to local customers are 'engaged in ... interstate commerce' within the meaning of § 1 of the FM merely because some such deliveries might include goods that were manufactured out of state—a possibility that, while likely here, Lee has also provided no evidence to support").

Luckily, the United States Supreme Court long ago answered the question currently facing this Court in its decision in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943) ("*Walling*"). *Walling* involved an attempt by the U.S. Department of Labor to enforce the provisions of the Fair Labor Standards Act, 29 U.S.C. § 29 et seq., against Jacksonville Paper Co. (the "Company"), which was a wholesaler of paper products that distributed to customers in multiple states in the southeastern part of the country. *Id.* at 565. The products distributed by the Company came from "a large number of manufacturers and other suppliers located in other states and in foreign countries." *Id.* Although a portion of the products that the Company sold were shipped directly to the Company's customers by the Company's suppliers, the "bulk" were delivered first to one of the Company's twelve "branch warehouses," from which they delivered to Company's customers by the Company's employees. *Id.* at 565-66. Five of the Company's branch warehouses delivered products to customers in other states, while the seven remaining branch warehouses delivered products only to the Company's in-state customers. The "sole issue" presented in *Walling*, as described by the Supreme Court, was whether the FLSA,

> applies to employees at the seven ... branch houses which, though constantly receiving merchandise on interstate shipments and distributing it to their customers, do not ship or deliver any of it across state lines.

Id. The answer to that question hinged, in turn, on whether the employees who delivered merchandise solely to the defendant's in-state customers were "engaged in interstate commerce" notwithstanding the fact that they "[did] not ship or deliver any of it across state lines."[4] *Id.*

*7 The Supreme Court unanimously ruled that the employees who delivered products solely to the Company's in-state customers were nonetheless "engaged in interstate commerce." In explaining its ruling, the Court explicitly rejected the argument that "any pause at the [Company's] warehouse" of the products sold was "sufficient to deprive the remainder of the journey of its interstate status." *Id.* at 567. It said,

> [t]here is no indication that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the [FLSA]. As in the case of an agency ... if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.

Id. at 567-68.

The holding of *Walling* is clear. "Interstate commerce" encompasses the "entire movement of [goods] until their interstate journey was ended," which end occurs when "they reach the customers for whom they are intended."[5] *Id.* at 568. To conclude otherwise would improperly ignore "the

continuous nature of the interstate transit which constitutes commerce." *Id.*

The implications of *Walling* for this case also are clear. Plaintiffs' job duties for GrubHub included the transportation and delivery of both pre-packaged food items and non-food items to GrubHub's Massachusetts customers with GrubHub's knowledge and consent. It is undisputed that some portion of those pre-packaged food items and non-food items came from manufacturers located outside this Commonwealth. It also is beyond dispute that the ultimate "customers for whom ... [those items] are intended" are the GrubHub customers who consumed or used them, *Id.* Therefore, the prepackaged and non-food products delivered by Plaintiffs constitute part of the continuous flow of "interstate commerce," and Plaintiffs' function in physically transporting those products to their final destinations necessarily qualifies them as "transportation workers" who were "engaged in interstate commerce" for purposes of the exemption contained in Section 1 of the FAA. 9 U.S.C.A. § 1.

This Court does not stand alone in its conclusion that "last mile" delivery drivers such as Plaintiffs are exempt from the provisions of the FAA. For example, the U.S. Court of Appeals for the First Circuit recently considered whether certain AmFlex delivery workers who delivered packages for Amazon to consumers in the final miles of the packages' journeys were covered by the FAA. [6] The First Circuit held that,

> *8 Waithaka and other last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers "engaged in ... interstate commerce," regardless of whether the workers themselves physically cross state lines. By virtue of their work transporting goods or people "within the flow of interstate commerce," see *Circuit City*, 532 U.S. at 118, 121 S.Ct. 1302, Waithaka and other AmFlex workers are "a class of workers engaged in ... interstate commerce." Accordingly, the FAA does not govern this dispute, and it provides no basis for compelling the individual arbitration required by the dispute resolution section of the Agreement at issue here.

Waithaka v. Amazon.com, Inc., 966 F.3d at 26. See also *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 919 (9th Cir. 2020) (holding that Amazon "AmFlex delivery providers fall within the [FAA] exemption [for workers "engaged in interstate commerce"], even if they do not cross state lines to make their deliveries").

The Court recognizes, at the same time, that other courts have reached contrary conclusions in similar circumstances. See *Wallace*, 970 F.3d at 802-03; *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("*McWilliams*"); *Levin v. Caviar, Inc.*, 146 F.Sup.3d 1146, 1152-53 (N.D. Cal. 2015) ("*Levin*"); *Lee v. Postmates Inc.*, Case No. 18-cv-03421-JCS, 2018 WL 4981802, at *8. The courts' reasoning in these contrary cases generally falls into two categories.

First, in some cases, such as *Wallace*, the court has ruled that the exemption contained in Section 1 of the FAA applies only to transportation workers who directly participate in "the act of moving goods across state or national borders." *Wallace*, 970 F.3d at 802. See also *McWilliams*, 143 F.3d at 576 (construing Section 1 exemption "narrow[ly]" to include "only employees actually engaged in the channels of foreign or interstate commerce"); *Lee v. Postmates Inc.*, Case No. 18-CV-03421-JCS, 2018 WL 4961802, at *8 (rejecting application of exemption where plaintiff "presented no evidence that ... her job involved handling goods *in the course of interstate shipments*," or that the defendant "itself was in the business of transporting goods between states") (emphasis in original). These cases, however, directly contravene the Supreme Court's holding in *Walling* that goods "remain 'in [interstate] commerce" until they reach their "final destinations," and that workers who transport such goods solely within state boundaries nonetheless are engaged in "interstate commerce." *Id.* at 567-68. Accordingly, the Court declines to follow *Wallace* and any similarly-reasoned decisions in the circumstances of this case. [7]

In other cases, such as *Levin*, the court ruled that drivers who delivered locally-prepared meals to customers within the same state were not "engaged in interstate commerce" because "[i]ngredients contained in the food that Plaintiff [drivers] ultimately delivered from restaurants ended their interstate journey when they arrived at the restaurant where they were used to prepare meals." *Levin*, 146 F.Sup.3d at 1154. See also *Grice v. Uber Techs., Inc.*, No. CV18-2995 PSG (GJSx), 2020 WL 497487, at *6 (C.D. Cal. Jan. 7, 2020) ("There is broad consensus that intrastate deliveries of local goods do not fall within

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Superior Court of Massachusetts,
Department of the Trial Court, Suffolk County.

Maura HEALEY, in her official capacity as Attorney General for the Commonwealth of Massachusetts
v.
UBER TECHNOLOGIES, INC. and Lyft, Inc.

2084CV01519-BLS1
|
March 25, 2021

MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

Kenneth W. Salinger, Justice of the Superior Court

***1** Uber and Lyft pay people to use their own vehicles to transport passengers. The Attorney General claims that both companies misclassify their drivers as independent contractors, rather than as employees, and do not pay or provide all wages and related benefits required by State law. She seeks a judgment declaring that Uber and Lyft drivers are employees, and an injunction requiring the companies to treat their Massachusetts drivers as employees, for the purpose of applying wage-related statutes.

Uber and Lyft have moved to dismiss this action. They argue that the Attorney General may not seek a declaratory judgment because the complaint does not adequately allege that any drivers were denied benefits to which they would be entitled if they were employees, or that there is an actual controversy about the alleged misclassification. Uber, but not Lyft, also contends that the Attorney General lacks standing to seek declaratory relief.

The Court will **deny** both motions to dismiss.

There is no reason to dismiss the claim for declaratory relief. The Attorney General has identified an actual controversy that can be resolved by declaring whether Uber and Lyft have a duty to classify their Massachusetts drivers as employees. She has standing to seek such relief. And the allegations in the complaint plausibly suggest that Uber and Lyft misclassify their drivers and, as a result, deprive some drivers of required minimum wages, overtime, and sick leave. Nothing more is needed to state a claim for declaratory relief.

Though the request for injunctive relief is set out in a separate count, it is not actually a separate cause of action. The Court need not decide at this stage whether the Attorney General may obtain such additional relief if she proves the facts alleged in the complaint.

1. **Claim for Declaratory Judgment**. The complaint states a viable claim for declaratory relief because there is an actual controversy between these parties as to whether Uber and Lyft must treat their drivers as employees for the purposes of Massachusetts wage and hour laws, the Attorney General has standing to enforce those laws, all necessary parties have been joined, [1] and the facts alleged plausibly suggest that the Attorney General is entitled to the declaratory judgment she seeks. See generally *Buffalo-Water 1, LLC*, v. *Fidelity Real Estate Co., LLC*, 481 Mass. 13, 18-20 (2018).

The requirements that there be an "actual controversy," see G.L. c. 231A, § 1, and that a party seeking declaratory relief must have standing are both aspects of subject matter jurisdiction, without which a court has no power to issue a declaratory judgment. See, e.g., *Alliance, AFSCME/SEUI, AFL-CIO* v. *Commonwealth*, 425 Mass. 534, 536 (1997) (ordering dismissal because court lacked jurisdiction to issue declaratory judgment without actual controversy); *City of Revere* v. *Massachusetts Gaming Commission*, 476 Mass. 591, 607 (2017) (standing is issue of subject matter jurisdiction with respect to declaratory judgment claims, just as in other cases).

***2** The further requirement that "the facts alleged by the plaintiff in the complaint, if true, state a claim for declaratory relief that can survive a defendant's motion to dismiss" comes from Mass. R. Civ. P. Rule 12(b)(6), as applied to a claim seeking declaratory judgment. See *Buffalo-Water*, 481 Mass. at 18. To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts that, if true, would "plausibly suggest[ ] ... an entitlement to relief." *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012), quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). In applying this standard, the Court must assume the allegations in the complaint are true and "draw all reasonable inferences in plaintiff's favor." *Buffalo-Water*, 481 Mass. at 18.

The declaratory judgment statute must be "liberally construed and administered" to accomplish the goal of removing uncertainty about legal rights and duties. G.L. c. 231A, § 9; accord *Libertarian Ass'n of Massachusetts* v. *Secretary of the Commonwealth*, 462 Mass. 538, 547 (2012). Courts must keep this in mind in deciding whether a complaint states a viable claim for declaratory relief. See *Mitchell* v. *Secretary of Admin.*, 413 Mass. 330, 333 n.7 (1992); *Sun Oil Co.* v. *Director of Division on Necessaries of Life*, 340 Mass. 235, 239 (1960).

1.1. **Actual Controversy**. The complaint adequately describes an actual controversy. It alleges that Uber and Lyft misclassify their drivers as independent contractors rather than as employees, and that as a result many drivers have been not received minimum wage, overtime, and earned sick time payments that are required under Massachusetts law. In their memoranda, Uber and Lyft expressly deny that their drivers should be treated as employees under the independent contractor statute (G.L. c. 149, § 148B), and thus implicitly contend that their drivers are not entitled to minimum wage, overtime, or earned sick leave payments that under Massachusetts law need only be paid to employees.[2]

The Attorney General seeks to resolve a real dispute by seeking a declaration as to whether Uber and Lyft have a statutory duty to treat their drivers as employees. She did not file this action to seek an advisory opinion about an abstract question of law with no real-world consequences, as Uber and Lyft suggest. Instead, the Attorney General alleges that Uber and Lyft drivers have lost out on receiving very real benefits that Massachusetts law guarantees for all employees, but not for independent contractors. If Defendants' obligations under the independent contractor statute were not declared in this action, then the Attorney General would almost certainly move forward with an enforcement action seeking penalties and perhaps compensation on behalf of individual drivers.

This lawsuit therefore involves an "actual controversy" within the meaning of the declaratory judgment statute. See *Libertarian Ass'n*, 462 Mass. at 546–547. A dispute like this, about whether a party owes duties under a statute, may properly be resolved by a declaratory judgment. See *Service Employees Intern. Union, Local 509* v. *Department of Mental Health*, 469 Mass. 323, 334–336 (2014); G.L. c. 231A, § 2. And the allegations that Uber and Lyft will continue to violate the independent contractor statute and certain other wage and hour laws, if they keep doing business as they have been, show that an actual controversy exists between the Attorney General and the defendants. Cf. *St. George Orthodox Cathedral of Western Massachusetts, Inc.* v. *Fire Dept. of Springfield*, 462 Mass. 120, 124 (2012) (actual controversy "plainly exists" where continued operation of existing fire detection and signaling system would violate local ordinance).

***3** If the complaint left any doubt about the existence of an actual controversy, which it does not, Defendants' own public statements would make it clear. The Court takes judicial notice of disclosures by Uber and Lyft, in Form 10-Ks that they recently filed with the Securities and Exchange Commission, of what would happen if the Attorney General were to prevail in this case.[3] Just weeks ago, the defendants told current and potential investors that any declaration in this case that their Massachusetts drivers must be treated as employees either "would" (according to Uber) or "could" (according to Lyft) cause them to incur significant new costs to comply with minimum wage, overtime, and other employee wage and benefit statutes.[4, 5] Lyft has confirmed that this controversy is not merely hypothetical, stating in its memorandum of law that a finding that its Massachusetts drivers are employees "would require a root-and-branch reinvention of Lyft's business." Uber similarly states that such a declaration would "fundamentally reshape" the relationship between Uber and its drivers.

***4** Defendants' arguments that the complaint does not describe an actual controversy cannot be squared with their own admissions about the likely impact if the Attorney General were to prevail in this case and obtain the declaration she seeks.

1.2. **Standing**. The Attorney General has standing to seek declaratory relief for allegedly misclassifying drivers as independent contractors. Uber's argument to the contrary is without merit.

The Attorney General has broad rights to seek relief for a statutory violation "pursuant to the powers conferred by G.L. c. 12, § 10, and in accord with the Attorney General's common law duty to represent the public interest and to enforce public rights." *Lowell Gas Co.* v. *Attorney General*, 377 Mass. 37, 48 (1979). Under G.L. c. 12, § 10, the Attorney General is authorized and has a duty to "take cognizance of all violations

of law ... affecting the general welfare of the people," and to bring "such criminal or civil proceedings ... as he may deem to be for the public interest." And under the common law, the Attorney General has broad power under the ancient legal doctrine of *parens patriae*[6] to bring suit to protect or vindicate the interests of Massachusetts citizens, where it would be impractical for individual citizens to seek relief on their own behalf.[7]

In addition to these broad general powers, the Attorney General has been specifically granted "all necessary powers" to enforce G.L. c. 149, including § 148B, which is the independent contractor statute. See G.L. c. 149, § 2. Though someone who misclassifies an employee as an independent contractor may be subject to criminal and civil penalties, that does not "limit the availability of other remedies at law or in equity." See G.L. c. 149, § 148B(d)–(e). The declaratory judgment statute provides another "form of remedy" available to the Attorney General. Cf. *East Chop Tennis Club* v. *Massachusetts Comm'n Against Discrim.*, 364 Mass. 444, 449 (1973).

Section 148B(e) thus makes clear that the Attorney General has standing to seek declaratory relief if she believes that is the best way to enforce the independent contractor statute in a particular case. It preserves the Attorney General's broad discretion to seek "clarification of the situation" through a declaratory judgment before she tries to enforce a statute by seeking criminal sanctions, civil penalties, or compensatory damages. See *Attorney General* v. *Kenco Optics, Inc.*, 369 Mass. 412, 415 (1976).

***5** 1.3. **Adequacy of Factual Allegations**. The Attorney General has alleged facts sufficient to show that the drivers should be classified as employees because they 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. See G.L. c. 149, § 148B; *Weiss* v. *Loomis, Sayles & Co., Inc.*, 97 Mass. App. Ct. 1, 7, rev. denied, 484 Mass. 1106 (2020) (control and direction); *Carey* v. *Gatehouse Media Mass. I, Inc.*, 92 Mass. App. Ct. 801, 807–808 (2018) (usual course of business).

Though Uber and Lyft deny that their drivers are employees, they concede that the complaint adequately alleges that both companies misclassified drivers. But the companies say this is not enough to state a claim that they have violated the independent contractor statute.

Defendants' primary argument for dismissal is that the Attorney General was required to allege facts plausibly suggesting that individual drivers were harmed because they were not treated as employees, but she failed to do so. Both parts of this argument are unavailing.

Uber and Lyft start from a correct legal premise about the elements of a claim seeking relief directly under the independent contractor statute. If the Attorney General were seeking criminal or civil penalties against the defendants, she would have to allege and then prove not only that Uber and Lyft had misclassified drivers but also that as a result defendants failed to comply with some wage and hour statute. See G.L. c. 149, § 148B(d).

But the Attorney General is not seeking penalties under § 148B(d). She seeks a declaratory judgment that Uber and Lyft drivers are employees who are protected by certain wage and hour laws, including the Wage Act, minimum wage statute, overtime law, earned sick time law, and specific anti-retaliation statutes. As a result, the Attorney General need only allege facts sufficient to "state a claim for declaratory relief." See *Buffalo-Water*, 481 Mass. at 18.[8]

The Attorney General need not allege that any driver has suffered injury in order to state a viable claim for declaratory relief under G.L. c. 231A. See generally *City of Boston* v. *Keene Corp.*, 406 Mass. 301, 304 (1989) ("[A] party seeking declaratory judgment need not demonstrate an actual impairment of rights."). To the contrary, a party with standing may seek declaratory relief "either before or after a breach or violation" has occurred, "and whether any consequential judgment or relief" for actual damages "could be claimed ... or not." See G.L. c. 231A, § 1.

***6** The Attorney General may therefore seek a declaratory judgment without having to allege or show that any drivers have suffered actual injury from being misclassified. Cf. *Entergy Nuclear Generation Co.* v. *Department of Envtl. Prot.*, 459 Mass. 319, 324–325 (2011) (operator of Pilgrim Nuclear Power Station could seek declaratory judgment on whether it was subject to cooling water intake structure regulations, without waiting for enforcement action or

modification to facility or permit that would trigger oversight under the regulations).

In any case, the complaint does allege facts plausibly suggesting that some drivers had suffered real injury from being misclassified as independent contractors. The Attorney General alleges that "Uber and Lyft do not provide any compensation to drivers for their time spent while waiting or driving between fares," and that "[a]s a result ... many drivers receive less than minimum wage for the working time and ... do not receive overtime for their excess hours," all in alleged violation of G.L. c. 151, §§ 1 & 1A. And she further alleges that Uber and Lyft do not allow their drivers to seek or obtain paid sick leave—with limited, temporary exceptions for drivers diagnosed with COVID-19 or put under quarantine by a public health agency—in violation of the earned sick time law, G.L. c. 149, 148C.

These allegations, together with the rest of the complaint, are sufficient to state a claim for the requested declaratory relief, even if they would not provide sufficient detail to state a claim for non-payment of wages or for criminal or civil penalties under the independent contractor statute. [9]

2. **Claim for Injunctive Relief**. Count II of the complaint, which seeks an injunction, "states a claim for a remedy, not a cause of action." See *Unitrode Corp. v. Linear Tech. Corp.*, Middlesex Sup. Ct. civil action no. 98-5983, 11 Mass. L. Rptr. 145, 2000 WL 281688, at *5 (Mass. Sup. Ct. 2000) (Botsford, J.); accord, e.g., *Woods v. Wells Fargo Bank, N.A.*, 733 F.3d 349, 353 n.3 (1st Cir. 2013) ("injunctive relief is not a stand-alone cause of action in Massachusetts").

Since the Attorney General has stated a viable claim for declaratory relief, there is no need to decide whether the allegations in the complaint, if proved to be true, would justify granting injunctive relief. See *Kenco Optics*, 369 Mass. at 415. This action may proceed whether or not the Attorney General would be able to obtain injunctive relief. *Id.*

ORDER

Defendants' motions to dismiss this action are both **denied**. The Court will hold a scheduling conference with the parties on April 14, 2021, at 3:30 p.m.

All Citations

Not Reported in N.E. Rptr., 2021 WL 1222199

Footnotes

1 Neither Uber nor Lyft argues that the Attorney General failed to join any necessary parties as defendants. When the Attorney General seeks a declaratory judgment about whether Massachusetts statutory requirements apply in certain circumstances, there is no need to join everyone who could be affected by a decision "only as a precedent on an issue of law." *Attorney General v. Kenco Optics, Inc.*, 369 Mass. 412, 415 (1976).

2 See G.L. c. 151, § 1 (minimum wage); G.L. c. 151, §§ 1A–2 (overtime); G.L. c. 149, § 148C (earned sick leave).

3 In her memorandum of law, the Attorney General asked the Court to consider similar statements that Uber and Lyft made in the S-1 registration statements they filed with the SEC a year ago. Neither Defendant objected. The Court concludes it is appropriate to consider Defendants' more recent SEC disclosures as well. When deciding a motion to dismiss, a court may take judicial notice of matters of public record, *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000), including SEC filings that are publicly accessible. See, e.g., *Fire & Police Pension Ass'n of Colorado v. Abiomed, Inc.*, 778 F.3d 228, 232 n.2 (1st Cir. 2015); *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000); *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014); *Yates v. Municipal Mortg. & Equity, LLC*, 744 F.3d 874, 881 (4th Cir. 2014); *Hometown 2006-1 1925 Valley View, L.L.C. v.*

Prime Income Asset Mgmt., L.L.C., 847 F.3d 302, 307 (5th Cir. 2017); *Northstar Financial Advisors Inc.* v. *Schwab Investments*, 779 F.3d 1036, 1043 (9th Cir. 2015); *Bryant* v. *Avado Brands, Inc.*, 187 F.3d 1271, 1276-1277 (11th Cir. 1999); see also G.L. c. 233, § 76A (authenticated copies of SEC filings are admissible in evidence).

If Uber or Lyft were to object to the Court taking judicial notice of their recent 10-K filings, the Court would allow the Attorney General to amend her complaint to quote and attach relevant excerpts from these documents.

4 See Uber's Form 10-K for year ending Dec. 31, 2020, at 14 (filed Mar. 1, 2021), available at https://www.sec.gov/ix?doc=/Archives/edgar/data/1543151/000154315121000014/uber-20201231.htm (last visited Mar. 22, 2021) ("[I]n July 2020, the Massachusetts Attorney General filed a complaint against Uber and Lyft, alleging that drivers are misclassified, and seeking an injunction. If we do not prevail in current litigation ... [and] as a result ... we are required to classify Drivers as employees, we would incur significant additional expenses for compensating Drivers, including expenses associated with the application of wage and hour laws (including minimum wage, overtime, and meal and rest period requirements), employee benefits, social security contributions, taxes (direct and indirect), and potential penalties.").

5 See also Lyft's Form 10-K for year ending Dec. 31, 2020, at 44 (filed Mar. 1, 2021), available at https://www.sec.gov/ix?doc=/Archives/edgar/data/1759509/000175950921000011/lyft-20201231.htm (last visited Mar. 22, 2021) ("[O]n July 14, 2020, the Massachusetts Attorney General filed a lawsuit against us and Uber for allegedly misclassifying drivers on the companies' respective platforms as independent contractors under Massachusetts wage and hour laws, seeking declaratory and injunctive relief. We continue to maintain that drivers on our platform are independent contractors in such legal and administrative proceedings and intend to continue to defend ourself vigorously in these matters, but our arguments may ultimately be unsuccessful. A determination ... that classifies a driver of a ridesharing platform as an employee ... could harm our business, financial condition and results of operations, including as a result of: [1] monetary exposure arising from or relating to failure to withhold and remit taxes, unpaid wages and wage and hour laws and requirements (such as those pertaining to failure to pay minimum wage and overtime, or to provide required breaks and wage statements), expense reimbursement, statutory and punitive damages, penalties, ... and government fines; [and 2] injunctions prohibiting continuance of existing business practices....").

6 "*Parens patriae* means literally 'parent of the country.' " *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982). *Parens patriae* actions have their roots in the English common-law concept that the King or Queen had the right or responsibility or take care of people who were not legally competent to care for themselves or their property. *Id.* In this country, "[t]his prerogative of *parens patriae* is inherent in the supreme power of every State" and may be exercised to prevent "injury to those who cannot protect themselves." *Id.*, quoting *Mormon Church* v. *United States*, 136 U.S. 1, 57 (1890).

7 See *Commonwealth* v. *School Committee of Springfield*, 382 Mass. 665, 665 n.1 (1981) (suit as *parens patriae* for the citizens of Springfield, seeking injunction requiring school committee to contract with private schools to serve children with special needs); *Commonwealth* v. *Wiseman*, 356 Mass. 251, 259 (1969) (suit as *parens patriae* for inmates held at Massachusetts Correctional Institute at Bridgewater, seeking to enjoin release of documentary film "Titicut Follies").

8 The *Boston Medical Center* decision is not to the contrary, and Lyft's reliance on it is misplaced. That case concerned a statute that provided for judicial review of Medicaid rates but explicitly excluded certain hospital rates from that process. See *Boston Medical Center Corp.* v. *Executive Office of Health and Human Services*, 463 Mass. 447, 454–455 (2012). The Supreme Judicial Court held that the declaratory judgment act cannot be used "to circumvent a legislative judgment denying a provider the opportunity to seek ... judicial review of the reasonableness of payment rates" (citation omitted). *Id.* at 471. But declaratory judgment about a statutory scheme is available where, as in this case, the statutes "do not prohibit judicial review." *Nordberg* v. *Commonwealth*, 96 Mass. App. Ct. 237, 242 (2019) (distinguishing *Boston Medical Center*).

9 The Court agrees with the defendants that the complaint does **not** allege facts plausibly suggesting that Uber or Lyft have done anything that would violate the anti-retaliation statutes cited in the complaint, if their drivers were employees and thus protected by those laws. But such allegations are not required; the Attorney General has stated a viable claim without them.

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United States District Court, N.D. California.

Jacob MCGRATH, Plaintiff,
v.
DOORDASH, INC., Defendant.

Case No. 19-cv-05279-EMC
|
Signed 11/05/2020

Attorneys and Law Firms

Ricardo Jose Prieto, Pro Hac Vice, Shellist Lazarz Slobin LLP, Robert Randolph Debes, Jr., Debes Law Firm, Houston, TX, Melinda Arbuckle, Shellist Lazarz Slobin, LLP, San Diego, CA, for Plaintiff.

Joshua Seth Lipshutz, Gibson, Dunn and Crutcher LLP, San Francisco, CA, Michael J. Holecek, Theane Evangelis, Gibson Dunn Crutcher LLP, Los Angeles, CA, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION

Docket No. 116

EDWARD M. CHEN, United States District Judge

***1** Plaintiff Jacob McGrath has filed a FLSA collective action (nationwide in scope) against Defendant DoorDash, Inc. As of date, counsel for Mr. McGrath has filed approximately 4,000 consent forms. [1] Currently pending before the Court is DoorDash's motion to compel arbitration. Specifically, DoorDash asks that the Court compel arbitration for the vast majority of individuals who have filed consent forms and thus joined the litigation; the only exception would be for those persons who validly opted out of arbitration per the terms of their applicable arbitration agreements.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel and all other evidence of record, the Court hereby **GRANTS** the motion to compel arbitration.

I. FACTUAL & PROCEDURAL BACKGROUND

A. Second Amended Complaint (SAC)
In the operative SAC, Mr. McGrath alleges as follows.

DoorDash is a company that "provides takeout food delivery via a phone application and website." SAC ¶ 1. The persons who deliver the food are known as "Dashers." *See* SAC ¶ 1.

Mr. McGrath began working as a Dasher in October 2018. *See* SAC ¶¶ 4, 19. He opted out of DoorDash's arbitration agreement in November 2018. *See* SAC ¶ 6.

According to Mr. McGrath, DoorDash has misclassified the Dashers as independent contractors rather than employees and thus has "fail[ed] to pay them for all hours worked." SAC ¶ 1; *see also* SAC ¶ 30 *et seq.* (making allegations regarding "economic realities"). Mr. McGrath charges DoorDash in particular with failing to pay a minimum wage. Mr. McGrath has offered several theories as to how DoorDash failed to pay a minimum wage:

(1) Mr. McGrath typically worked a 15-hour workweek and was paid delivery fees of approximately $60; thus, his hourly rate amounted to $4, which is below both the federal minimum wage ($7.25/hour) and the California minimum wage ($12.00/hour).

(2) DoorDash only counted as working hours the time spent driving between a restaurant and a customer's location; it did not compensate Mr. McGrath for the time he spent driving to restaurants and then waiting for food orders to be completed.

(3) DoorDash did not reimburse Mr. McGrath for business expenses such as the $100/week he spent on average for gas; this effectively lowered his wage.

B. Arbitration Agreements
In support of its motion to compel arbitration, DoorDash has provided the following evidence.

***2** In order for an individual to work as a Dasher for DoorDash, she is required to sign up for a DoorDash account. [2] Although the sign-up process has varied somewhat over time, the following is representative of the process. *See* Tang Decl. ¶ 10.

To sign up for a DoorDash account, an individual enters her email address, phone number, and zip code on a sign-up screen. *See* Tang Decl. ¶¶ 6, 10 & Ex. F (sign-up screen). The bottom half of the sign-up screen includes the following statement with a check box next to it:

> ☐ I consent to receive emails, calls, or SMS messages including by automatic telephone dialing system from DoorDash to my email or phone number(s) above for informational and/or marketing purposes. Consent to receive messages is not a condition to make a purchase or sign up. I agree to the Independent Contractor Agreement and have read the Dasher Privacy Policy.

Tang Decl., Ex. F (sign-up screen) (red text in original); *see also* Tang Decl. ¶ 10. It appears that the red text provides hyperlinks to the Independent Contractor Agreement ("ICA") and Dasher Privacy Policy. *See* Mot. at 2. At the very bottom of the sign-up screen, there is a "Sign Up" button.

Before agreeing to the ICA and signing up, an individual can scroll through the ICA without any time constraints. If she wishes to proceed with the sign-up process, however, she must manifest consent to the ICA by clicking/checking the box and then clicking the "Sign Up" button. If the individual clicks the "Sign Up" button without clicking/checking the box, she receives a message that states she must accept the ICA in order to continue. *See* Tang Decl. ¶ 11 & Ex. G (sign-up screen with message "You must accept this agreement to continue").

DoorDash has had five different ICAs over the years (from 2014 through the present). *See* Tang Decl., Exs. A-E (ICAs). The most recent ICA went into effect on November 9, 2019. *See* Tang Decl. ¶ 8. When Dashers logged on to the DoorDash platform on or after November 9, 2020, they were given notification of the "Updated Terms and Conditions Agreement." *See* Tang Decl. ¶ 12 & Ex. H (Updated Terms and Conditions Agreement). To proceed, the Dasher would have to check a box next to the phrase "I have read, understand, and agree to the Independent Contractor Agreement." *See* Tang Decl. ¶ 12 & Ex. H. "Existing [Dashers] could not continue using the DoorDash platform unless they agreed to the updated terms contained in the November 2019 ICA."[3] Tang Decl. ¶ 12.

Starting in September 2016, the various ICAs included the following as the second paragraph in the agreement:

> **IMPORTANT: PLEASE REVIEW THIS AGREEMENT CAREFULLY. IN PARTICULAR, PELASE REVIEW THE MUTUAL ARBITRATION PROVISION IN SECTION XI, AS IT REQUIRES THE PARTIES (UNLESS YOU OPT OUT OF ARBITRAITON AS PROVIDED BELOW) TO RESOLVE DISPUTES ON AN INDIVIDUAL BASIS, TO THE FULLEST EXTENT PERMITTED BY LAW, THROUGH FINAL AND BINDING ARBITRATION. BY ACCEPTING THE AGREEMENT YOU ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTOOD ALL OF THE TERMS, INCLDING SECTION XI, AND HAVE TAKEN THE TIME AND SOUGHT ANY ASSISTANCE NEEDED TO COMPREHEND THE CONSEQUENCES OF ACCEPTING THIS AGREEMENT.**

***3** Tang Decl., Ex. B (first page, second paragraph of ICA) (capitalization and bold in original). This language was also provided as part of the notification described above when the most recent ICA went into effect on November 9, 2019. *See* Tang Decl., Ex. H (Updated Terms and Conditions Agreement).

In addition, starting in September 2016, the various ICAs included the same or similar basic terms (§ XI):

- "This arbitration agreement is governed by the Federal Arbitration Act (9 U.S.C. §§ 1-16) ('FAA') and shall apply to any and all claims arising out of or relating

to this Agreement, CONTRACTOR's classification as an independent contractor, CONTRACTOR's provision of Contracted Services to consumers, the payments received by CONTRACTOR for providing services to consumers, the termination of this Agreement, and all other aspects of CONTRACTOR's relationship with DOORDASH, ... whether arising under federal, state or local statutory and/or common law, including without limitation ... Fair Labor Standards Act...." Tang Decl., Ex. B (§ XI.1).

- "The parties expressly agree that this Agreement shall be governed by the FAA even in the event CONTRACTOR and/or DOORDASH are otherwise exempted from the FAA. Any disputes in this regard shall be resolved exclusively by an arbitrator. In the event, but only in the event, the arbitrator determines the FAA does not apply, the state law governing arbitration agreements in the state in which the CONTRACTOR operates shall apply." Tang Decl., Ex. B (§ XI.1).

- "Class Action Waiver. CONTRACTOR and DOORDASH mutually agree that by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard or arbitrated as, or to participate in, a class action, collective action and/or representative action, and an arbitrator shall not have any authority to hear or arbitrate any class, collective or representative action ('Class Action Waiver').... [A]ny claim that all or part of this Class Action Waiver is unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.... All other disputes with respect to whether this Mutual Arbitration Provision[4] is unenforceable, unconscionable, applicable, valid, void or voidable shall be determined exclusively by an arbitrator, and not by any court." Tang Decl., Ex. B (§ XI.3).

- **"CONTRACTOR's Right to Opt Out of Arbitration Provision. Arbitration is not a mandatory condition of CONTRACTOR's contractual relationship with DOORDASH, and therefore CONTRACTOR may submit a statement notifying DOORDASH that CONTRACTOR wishes to opt out and not be subject to this MUTUAL ARBITRATION PROVISION.** ... In order to be effective, CONTRACTOR's opt out notice must be provided within 30 days of the effective date of this Agreement. If CONTRACTOR opts out as provided in this paragraph, CONTRACTOR will not be subject to any adverse action from DOORDASH as a consequence of that decision and he/she may pursue legal remedies without regard to this Mutual Arbitration Provision. If CONTRACTOR does not opt out within 30 days of the effective date of this Agreement, CONTRACTOR and DOORDASH shall be deemed to have agreed to this Mutual Arbitration Provision. CONTRACTOR has the right to consult with counsel of CONTRACTOR's choice concerning this Mutual Arbitration Provision (or any other provision of this Agreement." Tang Decl., Ex. B (§ XI.8) (capitalization and bold in original)).

*4 The Court notes that, under the more recent versions of the ICA,

> contractors may opt out of the arbitration provision within thirty days after agreeing to the ICA by *mailing* a signed letter to DoorDash indicating that they wish to opt out. Under earlier versions of the ICA, contractors were permitted to opt out of the arbitration provision within thirty days after agreeing to the ICA by sending an *email* to DoorDash indicating that they wished to opt out.

Tang Decl. ¶ 13 (emphasis added).

Another difference among the various ICAs is that all of the ICAs, except for the most recent version, are governed by the AAA Commercial Arbitration Rules (with certain exceptions). *See, e.g.*, Tang Decl., Ex. D (§ XI) (listing as one exception that "DOORDASH shall pay any costs uniquely associated with arbitration, such as payment of the costs of AAA and the Arbitrator, as well as room rental"). For the most recent ICA (in effect as of November 9, 2019), "[a]ny arbitration shall be governed by the CPR Administered Arbitration Rules and, when applicable, the CPR Employment-Related Mass-Claims Protocol ... of the International Institute for Conflict Prevention & Resolution" (with certain exceptions).[5] *See* Tang Decl., Ex. E (§ XI) (listing as one exception that "DOORDASH shall pay any costs uniquely associated with arbitration, such as payment of the fees of the Arbitrator, as well as room rental").

The Mass-Claims Protocol states that it applies "[a]ny time greater than 30 individual employment-related arbitration claims of a nearly identical nature are, or have been, filed with CPR against the same Respondent(s) in close proximity one to another." Pl.'s Ex. 3 (CPR Mass-Claims Protocol at 2). Under the Protocol, claims are randomly assigned numbers. In general, the claims numbered 1-10 "will be the initial Test Cases to proceed to arbitration." Pl.'s Ex. 3 (CPR Mass-Claims Protocol at 2-3). In general, these claims will be resolved within 120 days of the initial pre-hearing conference. *See* Pl.'s Ex. 3 (CPR Mass-Claims Protocol at 3). Thereafter, the results of the initial cases are given to a mediator who will try to resolve the remaining cases. After a mediation period of 90 days, the parties "may choose to opt out of the arbitration process and proceed in court with the remaining claims." Pl.'s Ex. 3 (CPR Mass-Claims Protocol at 4). There is no evidence at this point that those choosing to arbitrate will face inordinate delays.

II. DISCUSSION

A. Legal Standard

The Federal Arbitration Act ("FAA") provides as follows:

> A written provision in ... a contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

***5** 9 U.S.C. § 2.

In the instant case, it is debatable whether the contract at issue – the ICA – is one evidencing a transaction involving interstate commerce. According to DoorDash, the ICA falls under the FAA because the agreement "involves transactions and communications over email and the Internet" and "[c]ourts regularly apply the FAA" in such circumstances. Mot. at 8. But arguably the ICA is more about local delivery (local food delivery, in particular) than anything else.

The Court, however, need not decide this issue because DoorDash offers an independent reason as to why the FAA governs in the instant case; even if there is no interstate commerce connection, the ICA expressly provides that the FAA governs the agreement. *See* Tang Decl., Ex. B (§ XI.1) ("This arbitration agreement is governed by the Federal Arbitration Act (9 U.S.C. §§ 1-16) ('FAA')...."). *See, e.g.*, *Victrola 89, LLC v. Jaman Props. 8 LLC*, 46 Cal. App. 5th 337, 355, 260 Cal.Rptr.3d 1 (2020) (stating that "the presence of interstate commerce is not the only manner under which the FAA may apply[;] the parties may also voluntarily elect to have the FAA govern enforcement of the Agreement, as they did here"); *see also Ramirez v. LQ Mgmt., L.L.C.*, No. 2:19-CV-06507-ODW (JPRx), 2020 WL 2797285, at *5 n.3, 2020 U.S. Dist. LEXIS 93975, at *5 n.3 (C.D. Cal. May 29, 2020) (holding that the FAA applies "based on the Agreement's express invocation of the FAA and the nature of Ramirez's employment"); *Martinez v. Leslie's Poolmart, Inc.*, No. 8:14-cv-01481-CAS(CWx), 2014 WL 5604974, at *7 n.4, 2014 U.S. Dist. LEXIS 156218, at *8-9 n.4 (C.D. Cal. Nov. 3, 2014) (holding that the FAA's interstate commerce requirement was satisfied but also noting that "the arbitration agreement expressly provides that it is governed by the FAA"); *In re VeriSign, Inc., Derivative Litig.*, 531 F. Supp. 2d 1173, 1224 (N.D. Cal. 2007) (stating that "[t]he FAA governs the issue of arbitrability here because the agreement expressly so provides and because the agreement involves interstate commerce"). Notably, Plaintiffs do not challenge DoorDash's contention that the FAA governs.

B. Contract Formation

As noted above, DoorDash asks that the Court compel arbitration for the vast majority of individuals who have filed consent forms (*i.e.*, opted into this lawsuit). In response, Plaintiffs argue first that the Court should deny the motion because DoorDash has failed to provide evidence that it entered into an arbitration agreement with any of these individuals in the first place. *See* *Norcia v. Samsung Telcoms. Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017) (noting that "the party seeking to compel arbitration ... bears

'the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence' ").

Plaintiffs' argument is one of contract formation and thus is proper for this Court to address. *See Kum Tat Ltd. v. Linden Ox Pasture, LLC*, 845 F.3d 979 (9th Cir. 2017) (stating that, "[a]lthough challenges to the validity of a contract with an arbitration clause are to be decided by the arbitrator [based on a delegation clause], challenges to the very existence of the contract are, in general, properly directed to the court"). The problem for Plaintiffs is that DoorDash has offered evidence that there are arbitration agreements. In a nutshell, an individual cannot become a Dasher without signing up and, as part of the sign-up process, she is required to agree to the ICA, which includes an arbitration provision.

*6 Plaintiffs assert that their position is supported by *In re Uber Text Messaging*, No. 18-cv-02931-HSG, 2019 WL 2509337, 2019 U.S. Dist. LEXIS 102007 (N.D. Cal. June 18, 2019), but that case is distinguishable. In *Uber*, the plaintiffs brought a class action against Uber alleging that it violated the TCPA when it sent them unsolicited text messages. *See id.* at *1, 2019 U.S. Dist. LEXIS 102007, at *2, 2019 WL 2509337. Uber moved to compel arbitration. According to Uber, one of the plaintiffs agreed to arbitration when he registered for Uber on a mobile app and requested a trip on the same day. *See id.* at *7, 2019 U.S. Dist. LEXIS 102007, at *21-22, 2019 WL 2509337. The court, however, noted that the plaintiff expressly declared under oath that he did not recall ever completing the Uber registration process or ordering a ride. The plaintiff further testified that his cell phone lacked the technological capability to download the Uber app. *See id.* at *8, 2019 U.S. Dist. LEXIS 102007, at *23, 2019 WL 2509337. The court therefore declined to grant the motion to compel arbitration "based on the present record." *Id.* at *8, 2019 U.S. Dist. LEXIS 102007, at *25, 2019 WL 2509337 (noting that there was a genuine dispute of fact and Uber had the burden of proving the existence of the agreement to arbitrate).

The instant case is distinguishable from *Uber* because here, unlike *Uber*, Plaintiffs have not offered declarations from the approximately 4,000 "opt-in" plaintiffs disputing that they entered into arbitration agreements with DoorDash. Plaintiffs have presented no authority holding that under the circumstances of this case – where the Dasher must click the box indicating consent to the ICA which is readily accessible via visible hyperlink – there is no agreement.

Plaintiffs maintain still that there are some individuals who have opted out of arbitration, as permitted by the arbitration agreement. *See* Pl.'s Ex. 1 (identifying four individuals other than Mr. McGrath). But DoorDash has not disputed that there are some individuals who validly opted out; DoorDash seeks to compel arbitration only for those who did not validly opt out.

C. FAA Exemption from Arbitration

Plaintiffs argue next that, even if there were agreements to arbitrate (with respect to contract formation), the individuals cannot be compelled to arbitrate under the FAA because the FAA contains an exemption. Title 9 U.S.C. § 1 provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce.*" 9 U.S.C. § 1 (emphasis added). The Supreme Court has held that the phrase "any other class of workers engaged in foreign or interstate commerce" means transportation workers engaged in such commerce. *See Circuit City Stores v. Adams*, 532 U.S. 105, 119, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (stating that "Section 1 exempts from the FAA only contracts of employment of transportation workers"). Whether Dashers are transportation workers engaged in foreign or interstate commerce is an issue for the Court to decide, and not the arbitrator. *See Van Dusen v. United States Dist. Court for the Dist. of Ariz.*, 654 F.3d 838, 843-44 (9th Cir. 2011) (agreeing with petitioners that "the issue of whether a Section 1 exemption is not a 'question of arbitrability' that parties can legally delegate to an arbitral forum"; "a district court has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions").

In support of the argument that Dashers are a class of transportation workers engaged in interstate commerce, Plaintiffs point to declarations that were submitted in support of the motion for preliminary or conditional certification. Plaintiffs submitted about 22 declarations from Dashers in support of the motion for conditional certification. About 19 of those declarations include the following testimony:

> DoorDash permits its "partner" restaurants to solicit completion of

> deliveries of food productions within a 25-mile radius of each such restaurant. Consequently, if I were to make deliveries from a restaurant that bordered another state within that 25-mile radius, I could be called upon to make deliveries in interstate commerce. I reasonably expected that if a consumer in one state used the DoorDash app to place an order for delivery from a restaurant in another state, but also within a 25-miles radius of that consumer, I would be required to complete the delivery by crossing state lines or I would not receive pay.

*7 *See, e.g.*, Docket No. 48-1 (Barragan Decl. ¶ 13).

The remaining 3 Dasher declarations contain the same testimony, *plus* additional testimony that they did, in fact, cross state lines "on several occasions." Docket No. 48-1 (Cullen Decl. ¶ 14) ("In fact, on several occasions, I crossed state lines to make deliveries from a restaurant in one state to a consumer in another state. I traveled from Maryland to Pennsylvania and Delaware."); Docket No. 48-1 (Schratt Decl. Decl. ¶ 14) (same); Docket No. 48-1 (Shade Decl. ¶ 13) ("In fact, on several occasions, I crossed state lines to make deliveries in one state to a consumer in another state. I traveled from Delaware to Maryland and Pennsylvania.").

The above thus indicates that crossing state lines was theoretically possible for Dashers but most Dashers did not cross state lines and those who did cross state lines did so only "on several occasions."

This Court previously addressed the same basic factual scenario in *Capriole v. Uber Techs., Inc.*, 460 F.Supp.3d 919, 928 (N.D. Cal. 2020). There, the Court began its analysis by noting that the plaintiffs had to establish that the § 1 exemption applied and that "[t]he Supreme Court has counseled that the exception is to be interpreted narrowly." *Id.* at *20. Regarding the latter, the Court contrasted the language used for the § 1 exemption ("engaged in interstate commerce") with the language used in § 2 for applicability of the FAA ("involving commerce," *i.e.*, affecting commerce). The plaintiffs in *Capriole* argued that they were "engaged in commerce" because, *e.g.*, "Uber drivers sometimes cross state lines while transporting passengers." *Id.* at *21.

The Court noted that "the relevant inquiry is not whether an individual driver has crossed state lines" (only one plaintiff had alleged he had done so) but rather "whether the *class* of drivers crosses state lines." *Id.* at *22 (emphasis in original). And "[o]n that point, Uber has provided evidence that only 2.5% of 'all trips fulfilled using the Uber Rides marketplace in the United States between 2015 and 2019 ... started and ended in different states.' " *Id.* Although "[a] small number of courts have concluded that when transportation workers occasionally cross state lines, they may be 'interstate transportation workers within the meaning of § 1 of the FAA,' " *Id.* at *23 (quoting *Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012)), the Court ultimately sided with those courts that had held to the contrary. *See id.* at *26 (citing, *inter alia*, *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904 (N.D. Cal. 2007)). The Court indicated that it found persuasive the following reasoning: (1) finding that the § 1 exemption would apply whenever business dealings crossed state lines would threaten to swallow the general policy of enforcing arbitration agreements and (2) Supreme Court authority (*United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947)) suggested that a casual and incidental relationship to interstate transit would not be sufficient to invoke the § 1 exemption. *See also* *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289-90 (11th Cir. 2005) (stating that "[t]here is no indication that Congress would be any more concerned about the regulation of the interstate transportation activity incidental to Hill's employment as an account manager, that it would in regulating the interstate 'transportation' activities of an interstate traveling pharmaceutical salesman who incidentally delivered products in his travels, *or a pizza delivery person who delivered pizza across a state line to a customer in a neighboring town.*") (emphasis added); *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1154 (N.D. Cal. 2015) (noting that "a strike by local delivery drivers" would not, "by virtue of a strike, 'interrupt the free flow of goods to third parties *in the same way that a seamen's strike or railroad employee's strike would*") (emphasis added).

*8 In light of this Court's ruling in *Capriole*, Plaintiffs' argument that the § 1 exemption is applicable here lacks merit. [6] There is no indication that Dashers cross state lines to make deliveries significantly more often than do Uber drivers who cross state lines to transport passengers.

Moreover, the Ninth Circuit's recent decision in *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), confirms this result. In *Rittmann*, the Ninth Circuit held that delivery providers for Amazon's app-based delivery program, Amazon Flex (AmFlex) – who "occasionally cross state lines to make deliveries" but mostly make in-state deliveries – *did* fall within the § 1 exemption. *Id.* at 907. But this was because the goods delivered by AmFlex workers did not

> originate in the same state where deliveries take place. Rather, AmFlex workers pick up packages that have been distributed to Amazon warehouses, certainly across state lines, and transport them for the last leg of the shipment to their destination. Although Amazon contends that AmFlex delivery providers are "engaged in local, intrastate activities," the Amazon packages they carry are goods that remain in the stream of interstate commerce until they are delivered.

Id. at 915. Notably, in holding that the delivery providers did fall within the § 1 exemption, the Ninth Circuit expressly found

> cases involving food delivery services like Postmates or Doordash ... distinguishable. Those cases recognize that local food delivery drivers are not "engaged in the interstate transport of goods" because the prepared meals from local restaurants are not a type of good that are "indisputably part of the stream of commerce."

Id. at 916 (citing approvingly the Seventh Circuit's decision in *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020), which held that Grubhub drivers – who do local restaurant food delivery – are not covered by the § 1 exemption).

At the hearing, Plaintiffs argued that *Rittmann* is not directly on point and that a more analogous case is, *Rogers*, 452 F. Supp. 3d at 916 (holding that "Lyft drivers, as a class, are not engaged in interstate commerce" because "[t]heir work predominantly entails intrastate trips"; "[a]lthough we can safely assume that some drivers (especially those who live near state borders) regularly transport passengers across state lines," "[i]nterstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers"). Plaintiffs acknowledge that the trial court ruled against the drivers in *Rogers*. However, they note that the case has been appealed, and they assert that, if the Court is inclined to rule against application of the § 1 exemption as the *Rogers* trial court did (and as this Court did in *Capriole*), then it should stay the proceedings here to see what happens to *Rogers* on appeal before the Ninth Circuit. This argument is unavailing. Plaintiffs never argued in their opposition brief for a stay because of the *Rogers* appeal – or for that matter the appeal in *Capriole*. The argument, therefore, has been waived. In any event, in light of *Rittmann*, it appears unlikely that plaintiff will prevail in either *Rogers* or *Capriole* on this issue.

D. Partiality of Arbitrator

*9 Plaintiffs argue next that, even if the § 1 exemption is not applicable, there is still a basis to reject arbitration for (1) individuals who signed up with DoorDash on or after November 9, 2019 – *i.e.*, those subject to the most recent ICA – or (2) those who previously signed up with DoorDash but, when prompted, accepted the terms of the most recent ICA.

Plaintiffs note that, with the most recent ICA, DoorDash dropped AAA and moved over to CPR. *Compare, e.g.*, Tang Decl., Ex. D (§ XI) (providing that "[t]he arbitration shall be heard by one arbitrator selected in accordance with the AAA Rules" and the arbitration shall be governed by the AAA Commercial Arbitration Rules), *with* Tang Decl., Ex. E (§ XI) (providing that "[t]he arbitration shall be heard

by one arbitrator ... selected in accordance with the CPR Rules" and "[a]ny arbitration shall be governed by the CPR Administered Arbitration Rules and, when applicable, the CPR Employment-Related Mass-Claims Protocol"). According to Plaintiffs, DoorDash did this to deprive Dashers from a fair and impartial forum. Mr. McGrath notes that there is evidence that DoorDash worked together with CPR to create the Mass-Claims Protocol, as indicated through discovery taken in a case against DoorDash in which Judge Alsup was the presiding judge. The following is an excerpt from one of Judge Alsup's orders in that case:

> The materials sought to be sealed here all relate to email communications between CPR and [DoorDash's] counsel, Gibson Dunn, in 2019. In short, the emails track the following events: in May 2019, Gibson Dunn reached out to CPR to discuss issues DoorDash was having with filing fees for mass arbitrations, and to find a solution to prevent "an abuse of process." In October 2019, CPR provided Gibson Dunn with a draft of a mass arbitration protocol for discussion. A week later, CPR provided Gibson Dunn with another draft of the protocol based on their discussion. Gibson Dunn "interlineated comments, questions, and recommendations" in the new draft. CPR and Gibson Dunn traded additional drafts and revisions in the following weeks. On November 4, CPR notified Gibson Dunn that it had posted the finalized new protocol and asked to be notified when the new DoorDash contracts providing for arbitration under CPR were distributed.
>
> now, when mass arbitrations are filed in arbitration (more than 30 cases filed by one law firm), CPR will bellwether up to 10 of those cases at a time. Consequently, this protocol would force the thousands of the Opt-In Plaintiffs in this case (if compelled to arbitration with CPR) to delay their arbitration demand for years, while they wait their turn in the "queue."

Abernathy v. DoorDash, Inc., No. C-19-7545 WHA (N.D. Cal.) (Docket No. 177) (Order at 7).

Plaintiffs then argue that the Mass-Claims Protocol is problematic because,

Opp'n at 16-17.

As a preliminary matter, the Court must consider whether Plaintiffs have raised an issue for this Court to decide or whether the issue should be decided by the arbitrator because of the delegation clause in the arbitration agreement. *See* Tang Decl., Ex. E (§ XI) (providing that, other than the arbitration class action waiver, "[a]ll other disputes with respect to whether this Mutual Arbitration Provision is unenforceable, unconscionable, applicable, valid, void or voidable, and all disputes regarding the payment of arbitrator or arbitration-organization fees including the timing of such payments and remedies for nonpayment, shall be determined exclusively by an arbitrator, and not by any court").

***10** Plaintiffs argue that the issue is for the Court because it is one of contract formation. According to Mr. McGrath, contract formation is at issue because, where there is an agreement to arbitrate, presumptively, the parties are agreeing to a fair and impartial arbitral forum; if there is no fair and impartial arbitral forum, then there is no agreement to arbitrate in the first place. *Cf.* *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (noting that "parties agreed to submit their claims to arbitration – a system whereby disputes are fairly resolved by an impartial third party"; rescinding the contract since the process was not impartial thus defeating the object of the contracting parties).

Plaintiffs' position, however, is not persuasive as a factual matter. While Plaintiffs have a fair concern about Gibson Dunn's initiating contact with CPR and its involvement in the development of the Mass-Claims Protocol (which might give rise to a systemic bias), the record in *Abernathy* indicates that CPR did not work with Gibson Dunn exclusively and that

Gibson Dunn did not otherwise control the development of the Protocol. In discovery responses, CPR explained that,

> [i]n developing the Protocol, [it] invited and received input from a variety of stakeholders. These stakeholders included labor and employment counsel with experience representing management and employees on an individual and class basis, and attorneys with mass claims, complex commercial litigation, and arbitration experience, some of whom are also prominent arbitrators and mediators, including one of the foremost experts in facilitating the resolution of mass claims. CPR also consulted with particular members of its Board of Directors, who have served as an advisor to ALI's Restatement of Employment Law and who have chaired the New York Chief Judge's Advisory Committee on Alternative Methods of Dispute Resolution. While advising from the outset that the Protocol was being developed for the broader marketplace and to balance the interest of all parties, CPR received input from Gibson Dunn and in-house counsel at DoorDash to gain their perspective on the practical application of the Protocol, and whether and how the new approach improved upon the current market options available for resolving mass arbitration claims.
>
> ... Gibson Dunn did not write the terms of the Protocol. Rather, as set forth above, it was CPR that conceived of, wrote the terms of, and controlled the development of the Protocol.

Holocek Decl., Ex. E (CPR responses to subpoena in *Abernathy v. DoorDash, Inc.*, No. C-19-7545 WHA (N.D. Cal.)). It thus appears that the Mass-Claims Protocol is offered to the market – *i.e.*, it is not a one-off protocol tailored to DoorDash but is openly available to other companies.

Furthermore, even though Gibson Dunn's involvement in the development of the Mass-Claims Protocol may raise some concern, the ultimate question is whether the Protocol is fair and impartial – *i.e.*, one that is not predisposed more favorably to Gibson Dunn, its clients (including DoorDash), or defendants generally compared to other generally accepted conventional arbitration rules. At least as a facial matter, the Court is hard pressed to see any such catering or favoritism. There is little concrete evidence to support Plaintiffs' argument that the Mass-Claims Protocol would result in significant delay in resolution of the Dashers' claims.[7] In addition, the terms of the Mass-Claims Protocol appear fair. For example, the test cases are chosen randomly, and the claimant has a greater role in selecting the arbitrator than the respondent (the respondent can only object). Also, the respondent pays for the mediation fees in the mediation process that follows the test cases. Most important, after the mediation process, a claimant can choose to opt out of the arbitration process and go back to court – an option not generally available under, *e.g.*, AAA rules. *See* Pls.' Ex. 3 (CPR Mass-Claims Protocol at 3-4); *see also* Holocek Decl., Ex. G (in *Abernathy* case, CPR providing deposition testimony that Gibson Dunn and others provided feedback but, "[a]t the end of the day, that protocol was ours" and "there were things they, perhaps, didn't like in the protocol" – *e.g.*, "we built in a back-end opt-out procedure, something that they did not – they very much did not want"; "[t]his was for the general marketplace").

*11 The Court therefore rejects Plaintiffs' contract formation argument. The Protocol is not so biased that it negates the agreement to arbitrate. The Court does not address any argument that Plaintiffs may have on unconscionability as that would be a matter for the arbitrator to decide based on the delegation clause in the arbitration agreement. *See* Tang Decl., Ex. E (§ XI) (providing that, other than the arbitration class action waiver, "[a]ll other disputes with respect to whether this Mutual Arbitration Provision is unenforceable, unconscionable, applicable, valid, void or voidable, and all disputes regarding the payment of arbitrator or arbitration-organization fees including the timing of such payments and remedies for nonpayment, shall be determined exclusively by an arbitrator, and not by any court"). The Court also expresses no opinion here as to whether Plaintiffs could have a post-arbitration argument that the arbitration decision should be vacated because of a lack of impartiality on the part of the arbitrator.

E. DoorDash's Address

Finally, Plaintiffs argue that the arbitration agreement may be voidable because DoorDash has made misrepresentations about which address a Dasher should use to send notice that she is opting out of arbitration. Plaintiffs note that, in the ICA provided in support of the motion to compel, the following address is used: 901 Market Street, Suite 600, San Francisco, California 94103. *See, e.g.*, Tang Decl., Ex. E (§ XI). However, on DoorDash's website, the posted ICA has a different address: 303 2nd Street, Suite 800, San Francisco, California 94107.[8] *See* Arbuckle Decl., Ex. 1 (§ XI). Plaintiffs assert that "[t]he opt-out notices of Opt-In Plaintiffs Derrick Salmons, Lisa Benningfield, and Adrian Davis were all sent ... to 303 2nd Street, Suite 800" and

expresses concern that DoorDash may try to claim that opt-outs sent to this address are invalid because they were sent to the wrong address. Opp'n at 21.

This issue is moot.[9] DoorDash has acknowledged the opt-opts of the three individuals identified above are valid. *See* Tang Reply Decl. ¶ 6 (testifying that the opt-out letters of Mr. Salmons, Ms. Benningfield, and Mr. Davis are valid). DoorDash also confirms that opt-outs sent to *either* address above will not be rejected on the basis that they opt-outs were sent to the wrong place. *See* Tang Reply Decl. ¶ 7 (testifying that "DoorDash has honored, and will continue to honor, any timely opt out letter that it receives regardless of whether it was originally addressed to 901 Market Street or 303 Second Street"). DoorDash has also provided evidence that there is a non-nefarious reason for the two different addresses – *i.e.*, DoorDash recently moved office locations. *See* Tang Reply Decl. ¶ 7 (adding that "DoorDash has obtained mail forwarding ... and has received opt-out letters sent to both addresses").

F. Plaintiffs Who Validly Opted Out of Arbitration

For the foregoing reasons, the Court grants DoorDash's motion to compel to arbitration those Plaintiffs who did not validly opt out of the arbitration agreement. As to which Plaintiffs validly opted out of the arbitration agreement, DoorDash does not dispute Plaintiffs' contention that Mr. McGrath, Mr. Salmons, Ms. Benningfield, and Mr. Davis all validly opted out. Plaintiffs have claimed only one additional individual – Vickie Smiley – as an opt-out. DoorDash challenges Ms. Smiley's opt out on the basis that she opted out via email, *see* Pls.' Ex. 1 (email from Ms. Smiley, dated November 11, 2018), but her arbitration agreement required that her opt-out notice be provided by mail. *See* Tang Decl. ¶ 5 (testifying that Ms. Smiley accepted the ICA on November 13, 2018); Tang Decl., Ex. C (§ XI.8 of ICA in effect from October 22, 2018, through July 15, 2019) (requiring notice of opt-out to be mailed; "[a]ny attempt to opt out by email will be ineffective").

***12** The Court finds Ms. Smiley's opt-out ineffective because she did not comply with requirements to opt out. Admittedly, prior versions of the ICA allowed for email notice. However, there is no indication that DoorDash changed the requirement from email notice to mail notice as a means to make opting out more difficult. The Court also notes that Ms. Smiley was represented by counsel at the time she opted out.

III. CONCLUSION

DoorDash's motion to compel arbitration is granted. Plaintiffs have offered evidence that only five individuals exercised the right to opt out. Those opt-outs are all deemed valid, except for that submitted by Ms. Smiley. Ms. Smiley and the remaining plaintiffs are all compelled to arbitration. Their cases in this Court are also stayed pending arbitration.

As to Mr. McGrath, Mr. Salmons, Ms. Benningfield, and Mr. Davis, the Court shall proceed with their claims. At this time, the Court administratively terminates the motion for conditional certification that was previously filed, *see* Docket No. 46 (motion), because events have significantly changed since that motion was filed, and the plaintiffs who are proceeding here indicated that they would likely want to file a new motion for conditional certification.

The Court sets a status conference for December 3, 2020 at 10:30 a.m. A joint status conference statement shall be filed one week prior thereto.

This order disposes of Docket No. 116.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 6526129

Footnotes

1 There has not been preliminary certification of a collective as of yet. However, that does not bar individuals from opting into this lawsuit now. *See* *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1101 (9th Cir. 2018) (noting that " '[t]he sole consequence' of a successful motion for preliminary certification is 'the sending

of court-approved written notice' to workers who may wish to join the litigation as individuals"; but workers may join litigation even before preliminary certification – i.e., "preliminary certification is 'neither necessary nor sufficient for the existence of a [collective] action' ") (emphasis omitted).

2 Implicitly, an individual signs up through DoorDash's mobile app or its website. *Cf.*, *e.g.*, Tang Decl. ¶ 4 (testifying that Dashers receive delivery opportunities through the DoorDash app).

3 DoorDash has filed a supplemental declaration (which the Court permitted), *see* Docket Nos. 187, 189 (motion and order), explaining that Plaintiffs have provided email addresses for about 3,000 of the individuals who filed consents in this action. According to DoorDash, the vast majority of these Dashers are subject to this most recent ICA.

4 Section XI of the ICA is titled "Mutual Arbitration Provision."

5 CPR is a 501(c)(3) not-for-profit organization formed in 1977. *See* Holocek Decl., Ex. E (CPR responses to subpoena in *Abernathy v. DoorDash, Inc.*, No. C-19-7545 WHA (N.D. Cal.)).

6 The Court acknowledges that *Capriole* is on appeal.

7 As noted above, the initial 10 test cases are generally to be resolved within 120 days of the initial pre-hearing conference. *See* Pls.' Ex. 3 (CPR Mass-Claims Protocol at 3). Thereafter, the results of the initial cases are given to a mediator who will try to resolve the remaining cases. After a mediation period of 90 days, the parties "may choose to opt out of the arbitration process and proceed in court with the remaining claims." Pls.' Ex. 3 (CPR Mass-Claims Protocol at 4).

8 According to Plaintiffs, they learned about the different address when they were monitoring DoorDash's webpage (which he does periodically). *See* Opp'n at 21.

9 The Court acknowledges DoorDash's position the issue should technically be resolved by the arbitrator because of the delegation clause. But given the mootness of the issue, the Court addresses the issue briefly, if only in the interest of moving the litigation forward.

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99 Mass.App.Ct. 1119
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).
Appeals Court of Massachusetts.

Bodhisattva **SKANDHA**

v.

Linda **FARAG**.

20-P-384

Entered: April 12, 2021.

By the Court (Milkey, Kinder & Sacks, JJ. [1])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

*1 The plaintiff, Bodhisattva Skandha, an inmate at the Massachusetts Correctional Institution at Norfolk, appeals from the judgment dismissing his complaint against the defendant, an employee of the Wellpath Corp. (Wellpath), for an alleged violation of the public records law (PRL), G. L. c. 66, § 10. Although the complaint was dismissed based on insufficient service of process, on appeal Skandha urges us not to lose sight of the merits of his PRL claim. Accepting that invitation, we conclude as a matter of law that the defendant is not subject to the PRL and thus that Skandha's complaint failed to state a claim upon which relief may be granted, an alternative ground for dismissal. See Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). Therefore, any error in dismissing the complaint for insufficient service of process was harmless.

Background. Skandha's purported public records request was directed at the defendant, an employee of Wellpath. The request sought the records of the "[n]ames of all officers, agents, and employees of the corporation, which has a contract with the Department [o]f Correction to provide medical services to prisoners in the Commonwealth of Massachusetts." The defendant allegedly denied the request.

Skandha then filed this action alleging that the defendant had violated her legal duty by refusing his request. The defendant moved to dismiss the complaint for insufficient service of process; a motion judge denied the motion "at this time" but ordered Skandha to make proper service within twenty days. Skandha amended the complaint to add a claim that the defendant had committed fraud by "scribbl[ing] a signature on the certified mail routing card," causing Skandha's proof of service to be rejected. But Skandha still did not make proper service, the defendant renewed her motion, the judge allowed it, and this appeal followed.

Discussion. The PRL generally allows access to "any public record as defined in clause twenty-sixth of section 7 of chapter 4." G. L. c. 66, § 10 (a). That definition, as relevant here, is limited to records "made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose." G. L. c. 4, § 7, Twenty-sixth.

"The public records law [is] applicable to documents held by public entities, not private ones." Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 751 (2006). Skandha cites no authority, nor do we know of any, to support his contention that Wellpath, by providing services under contract to the Department of Correction, was transformed into one of the public entities subject to the PRL. Skandha relies on West v. Atkins, 487 U.S. 42 (1988), which discusses whether a physician under contract to provide medical services to prisoners is acting under color of State law for purposes of a claim under 42 U.S.C. § 1983. But Skandha does not explain why Wellpath's status under that Federal statute governs whether Wellpath is subject to the PRL, a State statute serving quite different purposes. [2]

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***2** Skandha also errs in relying on Attorney Gen. v. Assessors of Woburn, 375 Mass. 430 (1978). There the court held that a local governmental board was required to comply with a public records request, directed to the board, for copies of documents furnished to it by a private contractor. Id. at 430-431, 434. Here, in contrast, Skandha seeks to enforce the PRL against a private contractor itself, not against a public entity to whom that contractor may have furnished the desired records. [3]

Accordingly, the complaint failed to state a PRL claim against the defendant. It also failed to state a fraud claim. Even if the scribbled signature on the certified mail card constituted a false representation, its only consequence was to delay Skandha's pursuit of what we have determined was a meritless PRL claim. This was insufficient harm to support the fraud claim.

Conclusion. Any error in dismissing the complaint for insufficient service of process was harmless, because in any event the complaint failed to state a claim upon which relief could be granted.

Judgment affirmed.

All Citations

99 Mass.App.Ct. 1119, 167 N.E.3d 898 (Table), 2021 WL 1343069

Footnotes

1 The panelists are listed in order of seniority.

2 Similarly, Skandha draws our attention to Wellpath's statement, in Superior Court litigation involving a separate party, that "the medical personnel were the functional equivalent of public officials." We take judicial notice that the complaint in that case asserted claims under § 1983 for violations of the Eighth and Fourteenth Amendments to the United States Constitution. Thus we fail to see the relevance of the statement to Wellpath's status under the PRL.

3 Skandha has included in his record appendix a copy of a PRL request he made to the Department of Correction, seeking the same records he sought from Wellpath, along with the Department's response stating that it did not keep such records.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO. 2084CV01519-BLS1

MAURA HEALEY, in her official capacity as ATTORNEY GENERAL for the COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

UBER TECHNOLOGIES, INC. and LYFT, INC.,

Defendants.

ATTORNEY GENERAL'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Mass. R. Civ. Pro. 56 and Superior Court Rule 9A(b)(5), Plaintiff Maura Healey, in her official capacity as Attorney General for the Commonwealth of Massachusetts, submits this Statement of Material Facts in Support of the Attorney General's Motion for Summary Judgment Against Defendant Uber Technologies, Inc. ("Uber") and Defendant Lyft, Inc. ("Lyft").

1. Exhibit 1 is a true and accurate copy of Uber's Foreign Corporation Certificate of Registration filed with the Secretary of the Commonwealth of Massachusetts on August 28, 2012 that was publicly available in Massachusetts on the Secretary of the Commonwealth's website on September 14, 2021 at https://corp.sec.state.ma.us/corpweb/CorpSearch/CorpSearch.aspx. (*See* Affidavit of Kevin Shanahan ("Shanahan Aff.") at ¶ 78).

2. Exhibit 2 is a true and accurate copy of Uber's Form S-1 Registration Statement as filed with the Securities and Exchange Commission on April 11, 2019 that was publicly available in Massachusetts on August 26, 2021 at

https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm. (*See* Shanahan Aff. at ¶ 79).

3. Exhibit 3 is a true and accurate copy of Uber's Transportation Network Company Permit Application Form (dated December 10, 2019) that was publicly available in Massachusetts on July 13, 2021 at https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/13755520. (*See* Shanahan Aff. at ¶ 80).

4. Exhibit 4 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://www.uber.com/blog/earn/drive/. (*See* Shanahan Aff. at ¶ 4).

5. Exhibit 5 is a true and accurate copy of Transportation Network Company Permit No. 2021-TNCDP-02 issued by the Department of Public Utilities to Uber's subsidiary company Rasier, LLC on July 27, 2021 that was publicly available in Massachusetts on September 14, 2021 at https://www.mass.gov/doc/rasier-2021-permit/download. (*See* Shanahan Aff. at ¶ 81).

6. Exhibits 6 through 6.03[1] is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 19, 2021 at https://www.uber.com/us/en/ride/. (*See* Shanahan Aff. at ¶ 5).

7. Exhibits 7 through 7.03 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 19, 2021 at https://www.uber.com/us/en/ride/ride-options/. (*See* Shanahan Aff. at ¶ 6).

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[1] Exhibits with a series (*e.g.*, "Ex. 6-6.03") indicate a webpage on Defendants' websites that contains either rotating content/images ("carousels") or content that users can manually expand or collapse ("collapsible"). For instance, "Ex. 6-6.03" is a webpage that contains four collapsible sections. Each exhibit within the series captures one of the four collapsible fields. Similarly, "Ex. 38-38.05" is a webpage containing a six-part carousel. Each exhibit within the series contains a capture of one of the six parts of the carousel.

8. Exhibit 8 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on July 13, 2020 at https://www.uber.com/us/en/ride/. (*See* Shanahan Aff. at ¶ 82).

9. Exhibit 9 is a true and accurate copy of a posting on Uber's Facebook page (dated March 31, 2020) that was publicly available in Massachusetts on August 18, 2021 at https://www.facebook.com/uber/photos/a.351657624874529/4141331565907097/?type=3&theater. (*See* Shanahan Aff. at ¶ 7).

10. Exhibit 10 is a true and accurate copy of a posting on Uber's Facebook page (dated December 31, 2019) that was publicly available in Massachusetts on August 20, 2021 at https://www.facebook.com/watch/?v=451703185716397. (*See* Shanahan Aff. at ¶ 8).

11. Exhibit 11 is a true and accurate copy of a posting on Uber's Facebook page (dated March 27, 2015) that was publicly available in Massachusetts on August 18, 2021 at https://www.facebook.com/uber/photos/a.143148432392117/943117469061872/?type=3&theater&form=MY01SV&OCID=MY01SV. (*See* Shanahan Aff. at ¶ 9).

12. Exhibit 12 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on January 22, 2021 at https://www.uber.com/blog/massachusetts/ driver-announcements/page/9. (*See* Shanahan Aff. at ¶ 83).

13. Exhibit 13 is a true and accurate copy of Uber's Word Mark Record, "EVERYONE'S PRIVATE DRIVER" (Serial No. 8581663), that was publicly available in Massachusetts on the United States Patent and Trademark Office's website on August 26, 2021 at https://www.uspto.gov/trademarks/search. (*See* Shanahan Aff. at ¶ 84).

14. Exhibit 14 is a true and accurate copy of Uber's Word Mark Record, "ONCE UPON A RIDE" (Serial No. 87828409), that was publicly available in Massachusetts on the

United States Patent and Trademark Office's website on August 26, 2021 at https://www.uspto.gov/trademarks/search. (*See* Shanahan Aff. at ¶ 85).

15. Exhibit 15 is a true and accurate copy of Uber's Word Mark Record, "UBER MOVEMENT" (Serial No. 87818737), that was publicly available in Massachusetts on the United States Patent and Trademark Office's website on August 26, 2021 at https://www.uspto.gov/trademarks/search. (*See* Shanahan Aff. at ¶ 86).

16. Exhibit 16 is a true and accurate copy of Uber's Word Mark Record, "WHAT MOVES US" (Serial No.88192044), that was publicly available in Massachusetts on the United States Patent and Trademark Office's website on August 26, 2021 at https://www.uspto.gov/trademarks/search. (*See* Shanahan Aff. at ¶ 87).

17. Exhibit 17 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on September 8, 2021 at https://www.uber.com/us/en/ride/safety/. (*See* Shanahan Aff. at ¶ 10).

18. Exhibit 18 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://www.uber.com/us/en/safety/uber-community-guidelines/. (*See* Shanahan Aff. at ¶ 11).

19. Exhibit 19 is a true and accurate copy of Uber's Community Guidelines (last modified February 13, 2021) that was publicly available on Uber's website in Massachusetts on August 21, 2021 at https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=general-community-guidelines. (*See* Shanahan Aff. at ¶ 12).

20. Exhibit 20 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://www.uber.com/us/en/ride/safety/driver-screening/. (*See* Shanahan Aff. at ¶ 13).

21. Exhibits 21 through 21.14 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 19, 2021 at https://www.uber.com/us/en/drive/insurance/. (*See* Shanahan Aff. at ¶ 14).

22. Exhibit 22 is a true and accurate copy of a Certificate of Liability Insurance issued to Uber's subsidiary company Raiser, LLC dated February 23, 2021 that was publicly available in Massachusetts on September 14, 2021 at https://uber.app.box.com/s/cr161kc4ipdhuaqaylsw8rq39hm74g2i. (*See* Shanahan Aff. at ¶ 88).

23. Exhibit 23 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://www.uber.com/blog/uber-us-insurance/. (*See* Shanahan Aff. at ¶ 15).

24. Exhibits 24 through 24.11 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on September 8, 2021 at https://www.uber.com/us/en/drive/?city=boston. (*See* Shanahan Aff. at ¶ 16).

25. Exhibit 25 is a true and accurate copy of Uber's U.S. Terms of Use (last modified July 12, 2021) that was publicly available on Uber's website in Massachusetts on August 24, 2021 at https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en. (*See* Shanahan Aff. at ¶ 17).

26. Exhibit 26 is a true and accurate copy of Uber's Privacy Notice (last modified August 9, 2021) that was publicly available on Uber's website in Massachusetts on August 24, 2021 at https://www.uber.com/legal/en/document/?name=privacy-notice&country=unitedstates. (*See* Shanahan Aff. at ¶ 18).

27. Exhibit 27 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://help.uber.com/driving-and-

delivering/article/agreeing-to-terms-and-conditions?nodeId=44cf1f0e-27ca-4919-9621-f1321a0381c1. (*See* Shanahan Aff. at ¶ 19).

28. Exhibit 28 is a true and accurate copy of Uber's Platform Access Agreement (updated as of Jan. 6, 2020) that was filed in this action as Exhibit A to the Declaration of Brad Rosenthal in Support of Defendant Uber Technologies, Inc.'s Motion to Dismiss Plaintiff's Complaint. (*See* Shanahan Aff. at ¶ 89).

29. Exhibit 29 is a true and accurate copy of Uber's Fare Addendum (updated as of Jan. 6, 2020) that was filed in this action as Exhibit A to the Declaration of Brad Rosenthal in Support of Defendant Uber Technologies, Inc.'s Motion to Dismiss Plaintiff's Complaint. (*See* Shanahan Aff. at ¶ 90).

30. Exhibit 30 is a true and accurate copy of Uber's California Uber Pro Terms and Conditions Non-California Uber Pro Terms and Conditions (last modified August 2, 2021) that was publicly available on Uber's website in Massachusetts on August 24, 2021 at https://www.uber.com/legal/en/document/?name=uber-pro-program-terms&country=united-states&lang=en. (*See* Shanahan Aff. at ¶ 20).

31. Exhibit 31 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 19, 2021 at https://www.uber.com/us/en/marketplace/matching/. (*See* Shanahan Aff. at ¶ 21).

32. Exhibit 32 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://help.uber.com/driving-and-delivering/article/cancellation-policy?nodeId=2f1bec45-b436-4272-a766-9f5b2cf757b8. (*See* Shanahan Aff. at ¶ 22).

33. Exhibit 33 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://help.uber.com/riders/article/requesting-a-specific-driver?nodeId=1aaf0913-484f-4695-9042-e61fc7613f24. (*See* Shanahan Aff. at ¶ 23).

34. Exhibit 34 is a true and accurate copy of the video *How Uber Matches Riders and Drivers* that was publicly available on Uber's website in Massachusetts on August 13, 2021 at https://www.uber.com/us/en/marketplace/matching/. (*See* Affidavit of Robert T. Ames ("Ames Aff.") at ¶ 3).

35. Exhibit 35 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 24, 2021 at https://www.uber.com/us/en/marketplace/pricing/surge-pricing/. (*See* Shanahan Aff. at ¶ 24).

36. Exhibit 36 is a true and accurate copy of Uber's Rider Refund Policy (last modified December 1, 2020) that was publicly available on Uber's website in Massachusetts on August 24, 2021 at https://uber.com/legal/en/document/?country=united-states&lang=en&name=refund-policy. (*See* Shanahan Aff. at ¶ 25).

37. Exhibit 37 is a true and accurate copy of Uber's Form 10-Q dated August 5, 2021 as filed with the Securities and Exchange Commission that was publicly available on August 26, 2021 at https://www.sec.gov/ix?doc=/Archives/edgar/data/1543151/000154315121000038/uber-20210630.htm. (*See* Shanahan Aff. at ¶ 91).

38. Exhibits 38 through 38.05 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 19, 2021 at https://www.uber.com/us/en/marketplace/pricing/. (*See* Shanahan Aff. at ¶ 26).

39. Exhibit 39 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://help.uber.com/driving-and-delivering/article/how-are-my-earnings-calculated?nodId=97b3cb4c-40da-4b01-a610-98d7e1276567. (*See* Shanahan Aff. at ¶ 27).

40. Exhibits 40 through 40.03 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 19, 2021 at https://www.uber.com/us/en/drive/how-much-drivers-make/. (*See* Shanahan Aff. at ¶ 28).

41. Exhibit 41 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 24, 2021 at https://www.uber.com/us/en/marketplace/pricing/driver-promotions/. (*See* Shanahan Aff. at ¶ 29).

42. Exhibit 42 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://help.uber.com/driving-and-delivering/article/why-am-i-not-receiving-weekly-promotion-offers?nodeId=c7bf81e1-fb90-49f5-ace8-92958f1e00e7. (*See* Shanahan Aff. at ¶ 30).

43. Exhibit 43 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://help.uber.com/driving-and-delivering/article/i-should-have-received-a-cancellation-fee-for-this-trip?nodeId=41fee0a6-8941-4418-bf25-3327db4f50aa. (*See* Shanahan Aff. at ¶ 31).

44. Exhibit 44 is a true and accurate copy of Uber's Form 10-K dated February 26, 2021 as filed with the Securities and Exchange Commission that was publicly available at https://www.sec.gov/ix?doc=/Archives/edgar/data/1543151/000154315121000014/uber-20201231.htm. (*See* Shanahan Aff. at ¶ 92).

45. Exhibit 45 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 24, 2021 at https://www.uber.com/us/en/marketplace/pricing/service-fee/. (*See* Shanahan Aff. at ¶ 32).

46. Exhibit 46 is a true and accurate copy of the video *How Ride Pricing Works* on Uber's website that was publicly available in Massachusetts on August 13, 2021 at https://www.uber.com/us/en/marketplace/pricing/. (*See* Ames Aff. at ¶ 4).

47. Exhibit 47 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 24, 2021 at https://help.uber.com/riders/article/booking-fee?nodeId=ab5837e4-8f55-442c-9894-15c1d4131fe9. (*See* Shanahan Aff. at ¶ 33).

48. Exhibit 48 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://help.uber.com/driving-and-delivering/article/what-is-a-booking-fee?nodeId=3cb756e0-b25f-4196-b3c0-5ea4bf727f26. (*See* Shanahan Aff. at ¶ 34).

49. Exhibit 49 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 24, 2021 at https://www.uber.com/us/en/marketplace/open-marketplace/marketplace-health/. (*See* Shanahan Aff. at ¶ 35).

50. Exhibit 50 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 24, 2021 at https://www.uber.com/us/en/drive/driver-app/how-surge-works/. (*See* Shanahan Aff. at ¶ 36).

51. Exhibit 51 is a true and accurate copy of the video *How Surge Pricing and the Uber Marketplace Work* on Uber's website that was publicly available in Massachusetts on August 13, 2021 at https://www.uber.com/us/en/marketplace/pricing/surge-pricing/. (*See* Ames Aff. at ¶ 5).

52. Exhibits 52 through 52.04 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 19, 2021 at https://www.uber.com/us/en/drive/basics/how-ratings-work/. (*See* Shanahan Aff. at ¶ 37).

53. Exhibit 53 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on September 8, 2021 at https://help.uber.com/riders/article/rating-a-driver?nodeId=478d7463-99cb-48ff-a81f-0ab227a1e267&uclick_id=17100402-3d3d-47de-93a1-5d1c21ea4c7e. (*See* Shanahan Aff. at ¶ 38).

54. Exhibit 54 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on September 14, 2021 at https://help.uber.com/driving-and-delivering/article/what-are-acceptance-rates?nodeId=5cccf675-778e-4495-94e7-27c619d20990. (*See* Shanahan Aff. at ¶ 93).

55. Exhibit 55 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://help.uber.com/driving-and-delivering/article/how-to-improve-ratings?nodeId=b7625579-3e02-42ae-b7ad-8795f0b36bd4. (*See* Shanahan Aff. at ¶ 39).

56. Exhibit 56 is a true and accurate copy of the video *How Ratings Work* on Uber's website that was publicly available in Massachusetts on September 13, 2021 at https://www.uber.com/us/en/drive/basics/how-ratings-work/. (*See* Ames Aff. at ¶ 6).

57. Exhibit 57 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on September 8, 2021 at https://www.uber.com/us/en/ride/how-it-works/driver-compliments/. (*See* Shanahan Aff. at ¶ 40).

58. Exhibits 58 through 58.02 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 19, 2021 at https://www.uber.com /us/en/drive/basics/5-star-pro-tips/#main. (*See* Shanahan Aff. at ¶ 41).

59. Exhibits 59 through 59.03 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 19, 2021 at https://www.uber.com/us/en /drive/basics/getting-your-car-ready/. (*See* Shanahan Aff. at ¶ 42).

60. Exhibit 60 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 24, 2021 at https://www.uber.com/us/en/drive /boston/vehicle-requirements/. (*See* Shanahan Aff. at ¶ 43).

61. Exhibit 61 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 24, 2021 at https://www.uber.com/us/en/drive /requirements/. (*See* Shanahan Aff. at ¶ 44).

62. Exhibit 62 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on August 21, 2021 at https://help.uber.com/driving-and-delivering/article/can-i-bring-someone-with-me-while-im-online-?nodeId=9db0159e-437e-4932-bbd2-59002f83adde. (*See* Shanahan Aff. at ¶ 45).

63. Exhibit 63 is a true and accurate copy of a page on Uber's website that was publicly available in Massachusetts on September 14, 2021 at https://help.uber.com/driving-and-delivering/article/can-i-share-my-account-with-friends---?nodeId=1d93388d-cf19-408f-9c41-743dbdd34d44. (*See* Shanahan Aff. at ¶ 94).

64. Exhibit 64 is a true and accurate copy of Lyft's Foreign Corporation Certificate of Registration filed with the Secretary of the Commonwealth of Massachusetts on July 9, 2013 that was publicly available in Massachusetts on the Secretary of the Commonwealth's website on

September 14, 2021 at https://corp.sec.state.ma.us/corpweb/CorpSearch/CorpSearch.aspx. (*See* Shanahan Aff. at ¶ 95).

65. Exhibit 65 is a true and accurate copy of Lyft Inc.'s Form S-1 Registration Statement as filed with the Securities and Exchange Commission on March 1, 2019 that was publicly available in Massachusetts on August 23, 2021 at https://www.sec.gov/Archives/edgar/data/1759509/000119312519059849/d633517ds1.htm. (*See* Shanahan Aff. at ¶ 96).

66. Exhibit 66 is a true and accurate copy of Transportation Network Company Permit No. 2021-TNCDP-04 issued by the Department of Public Utilities to Lyft, Inc. on May 27, 2021 that was publicly available in Massachusetts on September 14, 2021 at https://www.mass.gov/doc/lyft-2021-permit/download. (*See* Shanahan Aff. at ¶ 97).

67. Exhibit 67 is a true and accurate copy of an investor relations letter from Lyft, Inc.'s cofounders that was publicly available in Massachusetts on July 13, 2020 at https://investor.lyft.com. (*See* Shanahan Aff. at ¶ 98).

68. Exhibit 68 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 27, 2020 at https://www.lyft.com/rider. (*See* Affidavit of Christopher Kelly ("Kelly Aff.") at ¶ 3).

69. Exhibit 69 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 27, 2020 at https://www.lyft.com/gift. (*See* Kelly Aff. at ¶ 4).

70. Exhibit 70 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://www.lyft.com/rider/cities/boston-ma. (*See* Shanahan Aff. at ¶ 46).

71. Exhibit 71 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 12, 2021 at https://www.lyft.com /careers#openings. (*See* Shanahan Aff. at ¶ 47).

72. Exhibit 72 is a true and accurate copy of Lyft's Word Mark Record "YOUR FRIEND WITH A CAR" (Serial No. 85823014) that was publicly available in Massachusetts on the United States Patent and Trademark Office's website on August 26, 2021 at https://www.uspto.gov/trademarks/search. (*See* Shanahan Aff. at ¶ 99).

73. Exhibit 73 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 27, 2020 at https://www.lyft.com /safety?utm_medium=direct&utm_source=homepage. (*See* Kelly Aff. at ¶ 5).

74. Exhibit 74 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 27, 2020 at https://www.lyft.com/rider/safety. (*See* Kelly Aff. at ¶ 6).

75. Exhibits 75 through 75.04 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 12, 2021 at https://www.lyft.com/rider /safety. (*See* Shanahan Aff. at ¶ 48).

76. Exhibit 76 is a true and accurate copy of Lyft's Terms of Service (last updated April 1, 2021) that was publicly available on Lyft's website in Massachusetts on August 13, 2021 at https://www.lyft.com/terms. (*See* Shanahan Aff. at ¶ 49).

77. Exhibit 77 is a true and accurate copy of page that on Lyft's website that was publicly available in Massachusetts on August 26, 2021 at https://help.lyft.com/hc/e/articles /115013080548-Insurance-coverage-while-driving-with-Lyft#view. (*See* Shanahan Aff. at ¶ 50).

78. Exhibits 78 through 78.01 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 26, 2021 at https://www.lyft.com/driver/insurance. (*See* Shanahan Aff. at ¶ 51).

79. Exhibit 79 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 27, 2020 at https://www.lyft.com/driver/safety. (*See* Kelly Aff. at ¶ 7).

80. Exhibits 80 through 80.03 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 26, 2021 at https://www.lyft.com/drive-with-lyft?v=. (*See* Shanahan Aff. at ¶ 52).

81. Exhibit 81 is a true and accurate copy of Lyft's Driver Addendum (last updated December 9, 2020) that was publicly available on Lyft's website in Massachusetts on August 13, 2021 at https://www.lyft.com/terms/driver-addendum. (*See* Shanahan Aff. at ¶ 53).

82. Exhibit 82 is a true and accurate copy of Lyft's Privacy Policy (last updated June 30, 2021) that was publicly available on Lyft's website in Massachusetts on August 13, 2021 at https://www.lyft.com/privacy#privacy-the-information-we-collect. (*See* Shanahan Aff. at ¶ 54).

83. Exhibits 83 through 83.02 is a true and accurate copy of Lyft's Community Guidelines that was publicly available on Lyft's website in Massachusetts on August 26, 2021 at https://www.lyft.com/safey/community-guidelines. (*See* Shanahan Aff. at ¶ 55).

84. Exhibit 84 is a true and accurate copy of Lyft's Cancellation Policy for Passengers that was publicly available on Lyft's website in Massachusetts on August 26, 2021 at https://help.lyft.com/hc/en-us/articles/115012922687-Cancellation-policy-for-passengers. (*See* Shanahan Aff. at ¶ 56).

85. Exhibit 85 is a true and accurate copy of Lyft's Cancellation and No-Show Fee Policy For Drivers that was publicly available on Lyft's website in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles/115012922847-Cancellation-and-no-show-fee-policy-for-drivers. (*See* Shanahan Aff. at ¶ 57).

86. Exhibit 86 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/e/articles /115012926847. (*See* Shanahan Aff. at ¶ 58).

87. Exhibit 87 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles /115013080028. (*See* Shanahan Aff. at ¶ 59).

88. Exhibit 88 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/e/articles /115013080008-How-ride-earnings-are-calculated. (*See* Shanahan Aff. at ¶ 60).

89. Exhibit 89 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/e/articles /115012927407-Lyft-s-fees. (*See* Shanahan Aff. at ¶ 61).

90. Exhibit 90 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles /115013080108-Express-Drive-overview. (*See* Shanahan Aff. at ¶ 62).

91. Exhibit 91 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/e/articles /360001562247-Express-Drive-earnings-and-charges/. (*See* Shanahan Aff. at ¶ 63).

92. Exhibit 92 is a true and accurate copy of Lyft's Form 10-K dated March 1, 2021 as filed with the Securities and Exchange Commission that was publicly available on August 26, 2021 at https://www.sec.gov/ix?doc=/Archives/edgar/data/1759509/000175950921000011/lyft-20201231.htm. (*See* Shanahan Aff. at ¶ 100).

93. Exhibit 93 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 24, 2021 at https://www.lyft.com/driver/bonus. (*See* Shanahan Aff. at ¶ 64).

94. Exhibit 94 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles/115012926807-Personal-Power-Zones. (*See* Shanahan Aff. at ¶ 65).

95. Exhibit 95 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles/115015748908-Streak-Bonus. (*See* Shanahan Aff. at ¶ 66).

96. Exhibit 96 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles/360001943867-Ride-Challenges. (*See* Shanahan Aff. at ¶ 67).

97. Exhibit 97 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 12, 2021 at https://www.lyft.com/driver/pay. (*See* Shanahan Aff. at ¶ 68).

98. Exhibit 98 is a true and accurate copy of Lyft's Driver Rewards Terms and Conditions (last updated February 2, 2021) that was publicly available on Lyft's website in Massachusetts on August 13, 2021 at https://www.lyft.com/terms/driver-rewards. (*See* Shanahan Aff. at ¶ 69).

99. Exhibit 99 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles/115013079948-Driver-and-passenger-ratings. (*See* Shanahan Aff. at ¶ 70).

100. Exhibit 100 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles/115013077708-Acceptance-rate. (*See* Shanahan Aff. at ¶ 71).

101. Exhibit 101 is a true and accurate copy of page on Lyft's website that was publicly available in Massachusetts on August 24, 2021 at https://www.lyft.com/hub/posts/ratings-and-cancellations. (*See* Shanahan Aff. at ¶ 72).

102. Exhibit 102 is a true and accurate copy of Lyft's Community Guidelines website that was publicly available on Lyft's website in Massachusetts on July 13, 2020 at https://www.lyft.com/safety/community-guidelines. (*See* Shanahan Aff. at ¶ 101).

103. Exhibit 103 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 27, 2020 at https://www.lyft.com/driver/rewards. (*See* Kelly Aff. at ¶ 8).

104. Exhibit 104 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 12, 2021 at https://www/lyft.com/driver/rewards. (*See* Shanahan Aff. at ¶ 73).

105. Exhibit 105 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles/115013081708. (*See* Shanahan Aff. at ¶ 74).

106. Exhibit 106 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/e/articles

/115013081688-Ensuring-passenger-safety-as-a-driver#personal_info. (*See* Shanahan Aff. at ¶ 75).

107. Exhibit 107 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles/115013078468-Massachusetts-Driver-Information#need. (*See* Shanahan Aff. at ¶ 76).

108. Exhibit 108 is a true and accurate copy of a page on Lyft's website that was publicly available in Massachusetts on August 13, 2021 at https://help.lyft.com/hc/en-us/articles/115013077448-Vehicle-requirements?_gl=1*1u0yt7o*_gcl_aw*R0NMLjE2MjQ1NTExNTEuQ2owS0NRancydENHQmhDTEFSSXNBQkpHbVo1TnBicWNlZ0c0NXFtbTBRRm9rbmQxamNlMkRzMVBDNFFVZ0dpcUlwLUZNd1dkMzR6bjlrMGFBdjRkRUFMd193Y0I.#sub. (*See* Shanahan Aff. at ¶ 77).

109. Exhibit 109 is a true and accurate copy of an audio recording of an NPR interview *Lyft, Uber Will Pay Drivers' Legal Fees if They're Sued Under Texas Abortion Law* dated September 8, 2021 and was publicly available in Massachusetts on September 13, 2021 at https://one.npr.org/?sharedMediaId=1035045952:1035045953. (*See* Ames Aff. at ¶ 7). In response to an interview question, John Zimmer, President and Co-Founder of Lyft, stated, "You know, being in transportation, being in a category that creates many jobs, there are many issues that are important to us, that are important to society, and we want to hold ourselves, and those that we work, with accountable." (*See* Shanahan Aff. at ¶ 106).

110. Exhibit 110 is a true and accurate copy of a page on Uber's website that was publicly available on September 16, 2021 at https://www.uber.com/us/en/safety/. (*See* Shanahan Aff. at ¶ 102).

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL

/s/ Matthew Berge
Matthew Q. Berge, BBO # 560319
Senior Trial Counsel
Erin K. Staab, BBO # 684560
Peter N. Downing, BBO # 675969
Trini Gao, BBO # 707204
Douglas S. Martland, BBO # 662248
Assistant Attorneys General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
617-963-2310/2565/2014/2062
matthew.berge@mass.gov
erin.staab@mass.gov
peter.downing@mass.gov
trini.gao@mass.gov
douglas.martland@mass.gov

September 20, 2021

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2020

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from to

Commission File Number: 001-39759

DOORDASH, INC.

(Exact name of registrant as specified in its charter)

Delaware	46-2852392
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)

303 2nd Street, South Tower, 8th Floor
San Francisco, California 94107
(Address of principal executive offices, including zip code)

(650) 487-3970
(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Class A common stock, par value of $0.00001 per share	DASH	New York Stock Exchange

Securities registered pursuant to section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☐ No ☒

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant: (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports); and (2) has been subject to such filing requirements for the past 90 days. Yes ☐ No ☒

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes ☒ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.:

Large accelerated filer	☐	Accelerated filer	☐
Non-accelerated filer	☒	Smaller reporting company	☐
		Emerging growth company	☐

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We are subject to claims, lawsuits, arbitration proceedings, administrative actions, government investigations, and other legal and regulatory proceedings at the federal, state, and municipal levels challenging the classification of Dashers that utilize our platform as independent contractors. The tests governing whether a Dasher is an independent contractor or an employee vary by governing law and are typically highly fact sensitive. Laws and regulations that govern the status and classification of independent contractors are subject to changes and divergent interpretations by various authorities, which can create uncertainty and unpredictability for us. As referenced above, we maintain that Dashers that utilize our platform are independent contractors. However, Dashers may be reclassified as employees, especially in light of the evolving rules and restrictions on service provider classification and their potential impact on the local logistics industry. A reclassification of Dashers or other delivery service providers as employees would adversely affect our business, financial condition, and results of operations, including as a result of:

- monetary exposure arising from, or relating to failure to, withhold and remit taxes, unpaid wages and wage and hour laws and requirements (such as those pertaining to failure to pay minimum wage and overtime, or to provide required breaks and wage statements), expense reimbursement, statutory and punitive damages, penalties, including related to the California Labor Code Private Attorneys General Act, or PAGA, and government fines;
- injunctions prohibiting continuance of existing business practices;
- claims for employee benefits, social security, workers' compensation, and unemployment;
- claims of discrimination, harassment, and retaliation under civil rights laws;
- claims under laws pertaining to unionizing, collective bargaining, and other concerted activity;
- other claims, charges, or other proceedings under laws and regulations applicable to employers and employees, including risks relating to allegations of joint employer liability or agency liability; and
- harm to our reputation and brand.

In addition to the harms listed above, a reclassification of Dashers or other delivery service providers as employees would require us to significantly alter our existing business model and operations and impact our ability to add and retain Dashers to our platform and grow our business, which we would expect to have an adverse effect on our business, financial condition, and results of operations.

We have been involved in and continue to be involved in numerous legal proceedings related to Dasher classification, and such proceedings have increased in volume since the California Supreme Court's 2018 ruling in Dynamex. We are currently involved in a number of putative class actions and representative actions brought, for example, pursuant to PAGA, and numerous individual claims, including those brought in arbitration or compelled pursuant to the terms of our independent contractor agreements to arbitration, challenging the classification of Dashers that utilize our platform as independent contractors. In addition, in June 2020, the San Francisco District Attorney filed a claim against us in the Superior Court of California, County of San Francisco, alleging that we misclassified Dashers as independent contractors as opposed to employees. This action is seeking both restitutionary damages and a permanent injunction that would bar us from continuing to classify Dashers as independent contractors. The San Francisco District Attorney also sought a preliminary injunction that would have barred us from continuing to classify Dashers in California as independent contractors during the pendency of this case. The request for the preliminary injunction was withdrawn on December 8, 2020. We believe we have meritorious defenses, despite the allegations of wrongdoing, and intend to defend ourselves vigorously in these matters. In addition, in 2017, we settled one classification matter in California on a class basis including claims raised under PAGA and are in the process of settling a similar classification matter in California. See the section titled "Legal Proceedings" for additional information about these types of legal proceedings.

An increasing number of jurisdictions are considering implementing standards similar to the test set forth in Dynamex to determine worker classification. Further, the California Legislature passed AB 5 and it was signed into law by Governor Gavin Newsom on September 18, 2019 and became effective on January 1, 2020. AB 5 codified the Dynamex standard regarding contractor classification, expanded its application, and created numerous carve-outs. We, along with certain other companies, supported a campaign for the 2020 California ballot initiative, or Proposition 22, to address AB 5 and preserve flexibility for Dashers, which passed in November 2020. As such, certain provisions regarding compensation, along with certain other requirements, are now applicable to us and Dashers in California and our costs related to Dashers have increased in California. To offset a portion of these increased costs, we will in certain circumstances charge higher fees and commissions, which could result in lower order volumes over time. Depending on whether and how much we choose to increase fees and commissions, these increased costs could also lead to a lower Take Rate, defined as revenue expressed as a percentage of Marketplace GOV. The provisions resulting from Proposition 22 that are now applicable to us include, but are not limited to, (i) net earnings (which excludes tips, tolls, and certain other amounts) to Dashers no less than a net earnings floor equal to (a) 120% of the minimum wage for a Dasher's engaged time and (b) for

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2020

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE TRANSITION PERIOD FROM TO

Commission File Number 1-36389

GRUBHUB INC.

(Exact name of Registrant as specified in its Charter)

Delaware	46-2908664
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)
111 W. Washington Street, Suite 2100 Chicago, Illinois (Address of principal executive offices)	60602 (Zip Code)

Registrant's telephone number, including area code: (877) 585-7878

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common Stock, $0.0001 par value per share	GRUB	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act:

None

Indicate by check mark if the Registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. YES ☒ NO ☐

Indicate by check mark if the Registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. YES ☐ NO ☒

Indicate by check mark whether the Registrant: (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. YES ☒ NO ☐

Indicate by check mark whether the Registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the Registrant was required to submit such files). YES ☒ NO ☐

Indicate by check mark whether the Registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act:

Large accelerated filer	☒	Accelerated filer	☐
		Smaller reporting company	☐
Non-accelerated filer	☐	Emerging growth company	☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Indicate by check mark whether the registrant has filed a report on and attestation to its management's assessment of the effectiveness of its internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act (15 U.S.C. 7262(b)) by the registered public accounting firm that prepared or issued its audit report. ☒

Indicate by check mark whether the Registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). YES ☐ NO ☒

The aggregate market value of the voting and non-voting common equity held by non-affiliates of the Registrant, based on the closing price of the shares of common stock on The New York Stock Exchange on June 30, 2020, was $5,297,564,059.

The number of shares of Registrant's Common Stock outstanding as of February 19, 2021 was 93,256,029.

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Internet search engines drive traffic to our platform and our new diner growth could decline and our business and results of operations would be harmed if we fail to appear prominently in search results.

Our success depends in part on our ability to attract diners through unpaid Internet search results on search engines like Google, Yahoo! and Bing. The number of diners we attract to our platform from search engines is due in large part to how and where our websites rank in unpaid search results. These rankings can be affected by a number of factors, many of which are not under our direct control and may change frequently. For example, a search engine may change its ranking algorithms, methodologies or design layouts. As a result, links to our websites may not be prominent enough to drive traffic to our websites, and we may not know how or otherwise be in a position to influence the results. In some instances, search engine companies may change these rankings in a way that promotes their own competing products or services or the products or services of one or more of our competitors. Search engines may also adopt a more aggressive auction-pricing system for keywords that would cause us to incur higher advertising costs or reduce our market visibility to prospective diners. Our websites have experienced fluctuations in search result rankings in the past, and we anticipate similar fluctuations in the future. Any reduction in the number of diners directed to our platform could harm our business and results of operations.

Risks Related to Laws and Regulations

Grubhub is expanding its independent contractor driver network. The status of the drivers as independent contractors, rather than employees, has been and will likely continue to be challenged. A reclassification of the drivers as employees could harm our business or results of operations.

We are involved or may become involved in legal proceedings and investigations that claim that members of the delivery network who we treat as independent contractors for all purposes, including employment tax and employee benefits, should instead be treated as employees. In addition, there can be no assurance that legislative, judicial or regulatory (including tax) authorities will not introduce proposals or assert interpretations of existing rules and regulations that would mandate that we change our existing practices, including the classification of the drivers. As an example, on January 1, 2020, California Assembly Bill 5 ("AB5") came into effect, which codified a test to determine whether a worker is an employee or independent contractor under California law. However, in November 2020, a California ballot initiative was passed to supersede AB5. Specifically, Proposition 22 ("Prop 22") exempts app-based workers, including delivery drivers, from being classified as employees and provides for certain minimum compensation levels, as well as certain other requirements. Prop 22 is now in effect, and therefore our costs related to drivers have increased in California. This cost increase could lead us to charge higher diner fees and higher restaurant commissions, which in turn could lower order volume. Legislation in this area continues to evolve, and in the event we were required to reclassify members of our independent contractor driver network as employees, we could be exposed to various liabilities and additional costs. These liabilities and costs could have an adverse effect on our business and results of operations and/or make it cost prohibitive for us to deliver orders using our driver network, particularly in geographic areas where we do not have significant volume. These liabilities and additional costs could include exposure (for prior and future periods) under federal, state and local tax laws, and workers' compensation, unemployment benefits, labor, and employment laws, as well as potential liability for penalties and interest.

We face potential liability, expenses for legal claims and harm to our business based on the nature of our business and the content on our platform.

We face potential liability, expenses for legal claims and harm to our business relating to the nature of the takeout food business, including potential claims related to food offerings, delivery and quality. For example, third parties could assert legal claims against us in connection with personal injuries related to food poisoning or tampering or accidents caused by the delivery drivers of restaurants in our network or drivers in our delivery network. Alternatively, we could be subject to legal claims relating to the delivery of alcoholic beverages sold by restaurants on our network to underage diners.

Reports, whether true or not, of food-borne illnesses (such as E. Coli, avian flu, bovine spongiform encephalopathy, hepatitis A, trichinosis or salmonella) and injuries caused by food tampering have severely injured the reputations of participants in the food business and could do so in the future as well. The potential for acts of terrorism on our nation's food supply also exists and, if such an event occurs, it could harm our business and results of operations. In addition, reports of food-borne illnesses or food tampering, even those occurring solely at restaurants that are not in our network, could, as a result of negative publicity about the restaurant industry, harm our business and results of operations.

In addition, we face potential liability and expense for claims relating to the information that we publish on our websites and mobile applications, including claims for trademark and copyright infringement, defamation, libel and negligence, among others. For example, non-partnered restaurants featured on our Platform may not want to be included on the Platform. Although we remove restaurants from the Platform upon request, restaurants may bring legal claims against relating to their inclusion on the Platform. There is also a risk that state or local law is enacted to prevent online food delivery businesses like ours from including non-partnered restaurants on their platforms. For instance, the California Legislature passed legislation, California Assembly Bill 2149 ("AB 2149"), which became effective on January 1, 2021. AB 2149 prohibits, among other things, food delivery logistics platforms from facilitating deliveries from restaurants in California without the restaurants' prior consent. Similar prohibitions have also been enacted or are being considered in other jurisdictions.

We have incurred and expect to continue to incur legal claims. Potentially, the frequency of such claims could increase in proportion to the number of restaurants and diners that use our platform and as we grow. These claims could divert management time

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2020

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE TRANSITION PERIOD FROM TO

Commission File Number 001-38846

Lyft, Inc.

(Exact name of Registrant as specified in its Charter)

Delaware	20-8809830
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)
185 Berry Street, Suite 5000 San Francisco, California	94107
(Address of principal executive offices)	(Zip Code)

Registrant's telephone number, including area code: (844) 250-2773

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Class A common stock, par value of $0.00001 per share	LYFT	Nasdaq Global Select Market

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark if the Registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the Registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the Registrant: (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the Registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the Registrant was required to submit such files). Yes ☒ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

imposed limitations on or attempted to ban ridesharing and bike and scooter sharing. For example, in December 2018, the New York City Taxi & Limousine Commission adopted rules governing minimum driver earnings calculations and utilization rates applicable to our ridesharing platform, as well as certain other ridesharing platforms. In January 2019, we filed an Article 78 Petition through two of our subsidiaries challenging these rules before the Supreme Court of the State of New York, which was denied in May 2019. In December 2019, we appealed this decision and in December 2020, our appeal was denied. The City of Seattle also adopted the Transportation Network Company Driver Minimum Compensation Ordinance effective January 1, 2021, which sets minimum driver earnings calculations for our rideshare platform as well as other rideshare platforms. Other jurisdictions in which we currently operate or may want to operate could follow suit. We could also face similar regulatory restrictions from foreign regulators as we expand operations internationally, particularly in areas where we face competition from local incumbents. Adverse changes in laws or regulations at all levels of government or bans on or material limitations to our offerings could adversely affect our business, financial condition and results of operations.

Our success, or perceived success, and increased visibility may also drive some businesses that perceive our business model negatively to raise their concerns to local policymakers and regulators. These businesses and their trade association groups or other organizations may take actions and employ significant resources to shape the legal and regulatory regimes in jurisdictions where we may have, or seek to have, a market presence in an effort to change such legal and regulatory regimes in ways intended to adversely affect or impede our business and the ability of drivers and riders to utilize our platform.

Any of the foregoing risks could harm our business, financial condition and results of operations.

Challenges to contractor classification of drivers that use our platform may have adverse business, financial, tax, legal and other consequences to our business.

We are regularly subject to claims, lawsuits, arbitration proceedings, administrative actions, government investigations and other legal and regulatory proceedings at the federal, state and municipal levels challenging the classification of drivers on our platform as independent contractors. The tests governing whether a driver is an independent contractor or an employee vary by governing law and are typically highly fact sensitive. Laws and regulations that govern the status and misclassification of independent contractors are subject to changes and divergent interpretations by various authorities which can create uncertainty and unpredictability for us. For example, Assembly Bill 5 (as codified in part at Cal. Labor Code sec. 2750.3) codified and extended an employment classification test in *Dynomex Operations West, Inc. v. Superior Court*, which established a new standard for determining employee or independent contractor status. The passage of this bill led to additional challenges to the independent contractor classification of drivers using the Lyft Platform. For example, on May 5, 2020, the California Attorney General and the City Attorneys of Los Angeles, San Diego, and San Francisco filed a lawsuit against us and Uber for allegedly misclassifying drivers on the companies' respective platforms as independent contractors in violation of Assembly Bill 5 and California's Unfair Competition Law, and on August 5, 2020, the California Labor Commissioner filed lawsuits against us and Uber for allegedly misclassifying drivers on the companies' respective platforms as independent contractors, seeking injunctive relief and material damages and penalties. On June 25, 2020, the California Attorney General and the City Attorneys of Los Angeles, San Diego, and San Francisco filed a motion for preliminary injunction against us and Uber. On August 10, 2020, the court granted the motion for a preliminary injunction, forcing us and Uber to reclassify drivers in California as employees until the end of the lawsuit. On August 12, 2020, we filed a notice of appeal of the court's order and on August 20, 2020, the California Court of Appeal stayed the preliminary injunction pending resolution of the appeal. The Court of Appeal affirmed the preliminary injunction on October 22, 2020. Subsequently, voters in California approved Proposition 22, a state ballot initiative that provides a framework for drivers utilizing platforms like Lyft to maintain their status as independent contractors under California law and Proposition 22 went into effect on December 16, 2020. We filed a petition for rehearing of our appeal with the California Court of Appeal on November 6, 2020, which was denied on November 20, 2020. On December 1, 2020, we filed a petition for review with the California Supreme Court, which was denied on February 10, 2021. The case will now proceed in San Francisco Superior Court. On January 12, 2021, a lawsuit was filed in the California Supreme Court against the State of California alleging that Proposition 22 violates the California Constitution. The Supreme Court denied review on February 3, 2021. Plaintiffs then filed a similar lawsuit in Alameda County Superior Court on February 12, 2021. Separately, on July 14, 2020, the Massachusetts Attorney General filed a lawsuit against us and Uber for allegedly misclassifying drivers on the companies' respective platforms as independent contractors under Massachusetts wage and hour laws, seeking declaratory and injunctive relief. We continue to maintain that drivers on our platform are independent contractors in such legal and administrative proceedings and intend to continue to defend ourself vigorously in these matters, but our arguments may ultimately be unsuccessful. A determination in, or settlement of, any legal proceeding, whether we are party to such legal proceeding or not, that classifies a driver of a ridesharing platform as an employee, could harm our business, financial condition and results of operations, including as a result of:

- monetary exposure arising from or relating to failure to withhold and remit taxes, unpaid wages and wage and hour laws and requirements (such as those pertaining to failure to pay minimum wage and overtime, or to provide required breaks and wage statements), expense reimbursement, statutory and punitive damages, penalties, including related to the California Private Attorneys General Act, and government fines;
- injunctions prohibiting continuance of existing business practices;
- claims for employee benefits, social security, workers' compensation and unemployment;

- claims of discrimination, harassment and retaliation under civil rights laws;
- claims under new or existing laws pertaining to unionizing, collective bargaining and other concerted activity;
- other claims, charges or other proceedings under laws and regulations applicable to employers and employees, including risks relating to allegations of joint employer liability or agency liability; and
- harm to our reputation and brand.

In addition to the harms listed above, a determination in, or settlement of, any legal proceeding that classifies a driver on a ridesharing platform as an employee may require us to significantly alter our existing business model and/or operations (including suspending or ceasing operations in impacted jurisdictions), increase our costs and impact our ability to add qualified drivers to our platform and grow our business, which could have an adverse effect on our business, financial condition and results of operations and our ability to achieve or maintain profitability in the future.

We have been involved in numerous legal proceedings related to driver classification. We are currently involved in several putative class actions, several representative actions brought, for example, pursuant to California's Private Attorney General Act, several multi-plaintiff actions and thousands of individual claims, including those brought in arbitration or compelled pursuant to our Terms of Service to arbitration, challenging the classification of drivers on our platform as independent contractors. We are also involved in administrative audits related to driver classification in California, Connecticut, Oregon, Wisconsin, Illinois and New Jersey. See the section titled "Legal Proceedings" for additional information about these types of legal proceedings.

The results of Proposition 22 in California have caused us to alter our operations and incur additional costs and we may face additional challenges as we implement these changes.

The recent passage of Proposition 22 in California led us to continue providing flexible earning opportunities to drivers in California. We expect that this transition will require additional costs and we expect to face other challenges as we transition drivers to this new model, including the logistics of providing the additional earning opportunities, as well as potential changes to our pricing. The change in model may also affect our ability to attract and retain drivers and riders. To the extent similar classification models are adopted in other jurisdictions, we may face similar costs and challenges. Notwithstanding the passage of Proposition 22, we continue to face litigation in California, including to overturn Proposition 22, and in other jurisdictions which may in the future require us to classify drivers as employees if we are unsuccessful in our ongoing litigation.

Claims by others that we infringed their proprietary technology or other intellectual property rights could harm our business.

Companies in the Internet and technology industries are frequently subject to litigation based on allegations of infringement or other violations of intellectual property rights. In addition, certain companies and rights holders seek to enforce and monetize patents or other intellectual property rights they own, have purchased or otherwise obtained. As we gain an increasingly high public profile and the number of competitors in our market increases, the possibility of intellectual property rights claims against us grows. From time to time third parties may assert, and in the past have asserted, claims of infringement of intellectual property rights against us. See the section titled "Legal Proceedings" for additional information about these types of legal proceedings. In addition, third parties have sent us correspondence regarding various allegations of intellectual property infringement and, in some instances, have initiated licensing discussions. Although we believe that we have meritorious defenses, there can be no assurance that we will be successful in defending against these allegations or reaching a business resolution that is satisfactory to us. Our competitors and others may now and in the future have significantly larger and more mature patent portfolios than us. In addition, future litigation may involve patent holding companies or other adverse patent owners who have no relevant product or service revenue and against whom our own patents may therefore provide little or no deterrence or protection. Many potential litigants, including some of our competitors and patent-holding companies, have the ability to dedicate substantial resources to assert their intellectual property rights. Any claim of infringement by a third-party, even those without merit, could cause us to incur substantial costs defending against the claim, could distract our management from our business and could require us to cease use of such intellectual property. Furthermore, because of the substantial amount of discovery required in connection with intellectual property litigation, we risk compromising our confidential information during this type of litigation. We may be required to pay substantial damages, royalties or other fees in connection with a claimant securing a judgment against us, we may be subject to an injunction or other restrictions that prevent us from using or distributing our intellectual property, or we may agree to a settlement that prevents us from distributing our offerings or a portion thereof, which could adversely affect our business, financial condition and results of operations.

With respect to any intellectual property rights claim, we may have to seek out a license to continue operations found to be in violation of such rights, which may not be available on favorable or commercially reasonable terms and may significantly increase our operating expenses. Some licenses may be non-exclusive, and therefore our competitors may have access to the same technology licensed to us. If a third-party does not offer us a license to its intellectual property on reasonable terms, or at all, we may be required to develop alternative, non-infringing technology or other intellectual property, which could require significant time (during which we would be unable to continue to offer our affected offerings), effort and expense and may ultimately not be successful. Any of these events could adversely affect our business, financial condition and results of operations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2020

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from_____ to _____

Commission File Number: 001-38902

UBER TECHNOLOGIES, INC.

(Exact name of registrant as specified in its charter)

Delaware	45-2647441
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)

1515 3rd Street

San Francisco, California 94158

(Address of principal executive offices, including zip code)

(415) 612-8582

(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common Stock, par value $0.00001 per share	UBER	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark whether the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark whether the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes ☒ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

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workers, seniors, and others in need.

Furthermore, as a result of the COVID-19 pandemic, we asked that all employees who are able to do so work remotely, and while we have since re-opened certain offices, it is possible that continued widespread remote work arrangements could have a negative impact on our operations, the execution of our business plans, and productivity and availability of key personnel and other employees necessary to conduct our business, and of third-party service providers who perform critical services for us, or otherwise cause operational failures due to changes in our normal business practices necessitated by the outbreak and related governmental actions. If a natural disaster, power outage, connectivity issue, or other event occurred that impacted our employees' ability to work remotely, it may be difficult or, in certain cases, impossible, for us to continue our business for a substantial period of time. The increase in remote working may also result in privacy, cybersecurity and fraud risks, and our understanding of applicable legal and regulatory requirements, as well as the latest guidance from regulatory authorities in connection with the COVID-19 pandemic, may be subject to legal or regulatory challenge, particularly as regulatory guidance evolves in response to future developments.

In addition, in response to the economic challenges and uncertainty resulting from the COVID-19 pandemic and its impact on our business, in May 2020 we announced reductions in workforce of approximately 6,700 full-time employee roles.

We have responded to the COVID-19 pandemic by launching new, or expanding existing, services, features, or health and safety requirements on an expedited basis, particularly those relating to delivery of food and other goods. Our understanding of applicable privacy, consumer protection and other legal and regulatory requirements, as well as the latest guidance from regulatory authorities in connection with the COVID-19 pandemic, may be subject to legal or regulatory challenge, particularly as regulatory guidance evolves in response to future developments. In addition, our launch of new, or expanding existing, services, features, or health and safety requirements in response to COVID-19 may heighten other risks described in this "Risk Factors" section, including our classification of Drivers. These challenges could result in fines or other enforcement measures that could adversely impact our financial results or operations.

The COVID-19 pandemic has adversely affected our near-term financial results and may adversely impact our long-term financial results, which has required and may continue to require significant actions in response, including but not limited to, additional reductions in workforce and certain changes to pricing models of our offerings, all in an effort to mitigate such impacts. In light of the evolving nature of COVID-19 and the uncertainty it has produced around the world, we do not believe it is possible to predict with precision the pandemic's cumulative and ultimate impact on our future business operations, liquidity, financial condition, and results of operations. The extent of the impact of the pandemic on our business and financial results will depend largely on future developments, including the duration of the spread of the outbreak and any future "waves" or resurgences of the outbreak or variants of the virus, both globally and within the United States, the impact on capital and financial markets, foreign currencies exchange, governmental or regulatory orders that impact our business and whether the impacts may result in permanent changes to our end-users' behaviors, all of which are highly uncertain and cannot be predicted. Moreover, even after shelter at home orders and travel advisories are lifted, demand for our Mobility offering may remain weak for a significant length of time and we cannot predict when and if our Mobility offering will return to pre-COVID-19 demand levels. Although the FDA approved the first two vaccines for COVID-19 in December 2020 and other countries have also approved vaccines, at this time, we cannot predict the timing of widespread adoption of vaccines against COVID-19 in the United States or internationally, nor their potential impact on our lines of business.

In addition, we cannot predict the impact the COVID-19 pandemic will have on our business partners and third-party vendors, and we may be adversely impacted as a result of the adverse impact our business partners and third-party vendors suffer. Additionally, concerns over the economic impact of the COVID-19 pandemic have caused extreme volatility in financial markets, which has and may continue to adversely impact our stock price and our ability to access capital markets. To the extent the COVID-19 pandemic adversely affects our business and financial results, it may also have the effect of heightening many of the other risks described in this "Risk Factors" section. Any of the foregoing factors, or other cascading effects of the pandemic that are not currently foreseeable, could adversely impact our business, financial performance and condition, and results of operations.

Operational Risks

Our business would be adversely affected if Drivers were classified as employees, workers or quasi-employees.

The classification of Drivers is currently being challenged in courts, by legislators and by government agencies in the United States and abroad. We are involved in numerous legal proceedings globally, including putative class and collective class action lawsuits, demands for arbitration, charges and claims before administrative agencies, and investigations or audits by labor, social security, and tax authorities that claim that Drivers should be treated as our employees (or as workers or quasi-employees where those statuses exist), rather than as independent contractors. We believe that Drivers are independent contractors because, among other things, they can choose whether, when, and where to provide services on our platform, are free to provide services on our competitors' platforms, and provide a vehicle to perform services on our platform. Nevertheless, we may not be successful in defending the classification of Drivers in some or all jurisdictions. Furthermore, the costs associated with defending, settling, or resolving pending and future lawsuits (including demands for arbitration) relating to the classification of Drivers have been and may continue to be material to our business. For example, in 2020, we paid $20 million (pursuant to a settlement agreement entered into in 2019) to settle

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class actions in which Drivers who contracted with us in California and Massachusetts but with whom we had not entered into arbitration agreements, sought damages against us based on misclassification, among other claims.

In addition, more than 100,000 Drivers in the United States who have entered into arbitration agreements with us have filed (or expressed an intention to file) arbitration demands against us that assert similar classification claims. We have resolved the classification claims of a majority of these Drivers under individual settlement agreements, pursuant to which we have paid approximately $155 million as of December 31, 2020. Furthermore, we are involved in numerous legal proceedings regarding the enforceability of arbitration agreements entered into with Drivers. If we are not successful in such proceedings, this could negatively impact the enforceability of arbitration agreements in other legal proceedings, which could have an adverse consequence on our business and financial condition.

Changes to foreign, state, and local laws governing the definition or classification of independent contractors, or judicial decisions regarding independent contractor classification, could require classification of Drivers as employees (or workers or quasi-employees where those statuses exist) and/or representation of Drivers by labor unions. For example, California's Assembly Bill 5 codified application of what has been commonly referred to as the "ABC Test" to the entire California Labor Code, California Wage Orders, and the Unemployment Insurance Code and became effective as of January 1, 2020. Government authorities and private plaintiffs have brought litigation asserting that Assembly Bill 5 requires Drivers in California to be classified as employees. For example, in May 2020, the California Attorney General, in conjunction with the city attorneys for San Francisco, Los Angeles and San Diego, filed a complaint in San Francisco Superior Court against Uber and Lyft, alleging that drivers are misclassified, and sought an injunction and monetary damages related to the alleged competitive advantage caused by the alleged misclassification of drivers. On August 10, 2020, following a hearing on the matter, the San Francisco Superior Court issued a preliminary injunction enjoining Uber and Lyft from classifying drivers as independent contractors during the pendency of the lawsuit. We appealed the decision and sought a stay of the preliminary injunction. On August 20, 2020, the California Court of Appeal granted an emergency stay of the injunction while an expedited appeal of the preliminary injunction decision is considered. On October 22, 2020, the California Court of Appeal affirmed the lower court's ruling and held that we must comply with the preliminary injunction order no later than 30 days after the case is returned to the trial court. We filed a Petition for Review to the California Supreme Court on December 1, 2020, which was denied.

In November 2020, California voters approved Proposition 22, a California state ballot initiative that provides a framework for drivers that use platforms like ours for independent work. Proposition 22 went into effect in December 2020 and we expect that Drivers will be able to maintain their status as independent contractors under California law and that we and our competitors will be required to comply with the provisions of Proposition 22. Although we do not expect that the California Attorney General's preliminary injunction will go into effect, that litigation remains pending, and we intend to move to dissolve the preliminary injunction. We also may face liability relating to periods before the effective date of Proposition 22. In addition, in January 2021, a petition was filed with the California Supreme Court by several drivers and a labor union alleging that Proposition 22 is unconstitutional, which was denied. The same drivers and labor union have since filed a similar challenge in California Superior Court, and it is possible that other legal challenges to Proposition 22 could be filed.

We face similar challenges in other jurisdictions. For example, in July 2020, the Massachusetts Attorney General filed a complaint against Uber and Lyft, alleging that drivers are misclassified, and seeking an injunction. If we do not prevail in current litigation or similar actions that may be brought in the future, we may be required to treat Drivers as employees and/or make other changes to our business model in certain jurisdictions. If, as a result of legislation or judicial decisions, we are required to classify Drivers as employees, we would incur significant additional expenses for compensating Drivers, including expenses associated with the application of wage and hour laws (including minimum wage, overtime, and meal and rest period requirements), employee benefits, social security contributions, taxes (direct and indirect), and potential penalties. In this case, we anticipate significant price increases for Riders to offset these additional costs; however, we believe that the financial impact to Uber would be moderated by the likelihood of all competitors raising prices. Additionally, we may not have adequate Driver supply as Drivers may opt out of our platform given the loss of flexibility under an employment model, and we may not be able to hire a majority of the Drivers currently using our platform. Further, any such reclassification would require us to fundamentally change our business model, and consequently have an adverse effect on our business, results of operations, financial position and cash flows.

In addition, reclassification of Drivers as employees, workers or quasi-employees where those statuses exist, could lead to groups of Drivers becoming represented by labor unions and similar organizations. If a significant number of Drivers were to become unionized and collective bargaining agreement terms were to deviate significantly from our business model, our business, financial condition, operating results and cash flows could be materially adversely affected. In addition, a labor dispute involving Drivers may harm our reputation, disrupt our operations and reduce our net revenues, and the resolution of labor disputes may increase our costs.

In addition, if we are required to classify Drivers as employees, workers or quasi-employees, this may impact our current financial statement presentation including revenue, cost of revenue, incentives and promotions as further described in our significant and critical accounting policies in the section titled "Critical Accounting Policies and Estimates" included in Part I, Item 7 of this Annual Report on Form 10-K and Note 1 in the section titled "Notes to the Consolidated Financial Statements" included in Part II, Item 8 of this Annual Report on Form 10-K.

We cannot predict whether legislation similar to Assembly Bill 5 may be enacted elsewhere. Other examples of recent judicial

CERTIFICATE OF SERVICE

I, Thomas O. Bean, hereby certify that on the 7th day of March 2022, I caused a true and accurate copy of the Brief of the Plaintiffs/Appellants to be served by email on all counsel of record.

/s/__Thomas O. Bean____
Thomas O. Bean

CERTIFICATE OF COMPLIANCE

I, Thomas O. Bean, hereby certify that this brief complies with the rules of Court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a) (13) (addendum); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 18 (appendix to the briefs); Mass. R.A.P. 20 (form of briefs, appendices, and other documents).

The brief is printed in Times New Roman, a proportionally spaced font, in 14-point type. The "word count" feature on Microsoft WORD 2019, determined that the sections of the brief required by Mass. R. App. P. 16(a)(5)-(11) contain 10,985 words.

/s/ *Thomas O. Bean*
Thomas O. Bean