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Jobs, Benefits, Flexible Hours at Stake In Driver Debate

With Lawsuit In Mix, Lawmakers Must Decide Whether To Intervene

Chris Lisinski | 3/30/22 6:37 PM

MARCH 30, 2022.....Making their pitch to an audience of somewhat skeptical lawmakers, gig economy power players fighting to make controversial changes to state labor law argued Wednesday that treating app-based drivers as employees could force them to rein in the flexible hours workers enjoy or cut jobs.

Supporters and opponents of a contentious ballot question campaign amending the classification, pay and benefits of drivers on platforms such as Uber, Lyft, DoorDash and Instacart made their case to lawmakers, who have only a few months to decide whether to intervene or leave it to voters -- and to the courts -- to decide.

The proposal would make some new benefits available to drivers while declaring in state law that they are independent contractors and not employees. All four companies currently classify their drivers as contractors, and Attorney General Maura Healey is suing Uber and Lyft over allegations that the designation is illegal.

A panel of representatives and senators probed the quartet of companies who so far have collectively supercharged the campaign with nearly \$18 million, asking pointed questions about why the platforms cannot offer drivers more benefits without simultaneously defining their workers as independent contractors.

"Right now, under Massachusetts law, there's nothing that keeps you from allowing the people that work on your apps to become employees," said Rep. James Murphy, a Weymouth Democrat who co-chairs the Financial Services Committee. "Technically, they could be

employees, and they could have flexibility. There's nothing precluding flexibility in the law. What I've heard you say today is that the way your model is set up, that status doesn't work for you."

"Maybe the business model has to evolve a little bit," Murphy added.

Josh Gold, Uber's senior director of policy and communications, replied by suggesting it would not make sense for any company to combine full employee status and benefits with the ability for drivers to decide when, where and how long they work.

"It's not that our models don't allow it, it's that no model allows it," Gold told Murphy's panel. "There isn't a company operating in the U.S. that deals with consumer-facing businesses that has that model, which is why it's important to explore these third ways that allow for independent contractor flexibility and benefits."

Pointing to both industry-funded and public polls finding that app-based drivers enjoy setting their own hours, lobbyists for the companies told lawmakers that their workforces of tens of thousands -- many of whom do not work full-time hours every week -- are not interested in trading their flexibility for employee status.

Sen. Paul Feeney, a Foxborough Democrat who co-chairs the committee alongside Murphy, asked the ballot question's backers to outline "plan B." What would happen to the companies and to their drivers, he asked, if lawmakers did not approve the proposal and voters rejected it in November?

DoorDash New England Government Relations Lead Christina Kennedy said reclassifying drivers as employees would lead to a "detrimental" loss of flexibility for those on the company's platform, which it refers to as "Dashers."

"Over 58 percent of our Dashers nationwide are women, and 88 percent of them say the reason they choose this work is because of the flexibility. They can be a parent, they can be a caregiver," Kennedy said. "If they are put into an employee traditional model, this is definitely something I fear they would not like to do this type of dashing work and they would not appreciate it any more."

Gold pointed to Uber's experience in Geneva, Switzerland. In 2020, he said, the city declared that UberEats couriers were employees and not independent contractors. Uber in response contracted with a delivery company, shrinking the 1,300 UberEats couriers in Geneva to a total of only 300.

"They now are assigned by the fleet operator and told by managers where to be available and when to be available," Gold said. "Couriers that fail to present themselves for an assigned shift or do not comply with the fleet rules while on shift or fail to meet performance targets risk being terminated by their new employer."

Feeney, a former organized labor leader, replied that "if the drivers want it, then their employers should want to maintain it, regardless of a ballot initiative."

"These are all the things that are in current state law for a reason," Feeney said of worker benefits. "It seems to me there's an argument made by the employer side to say 'if this doesn't happen, we will remove your flexibility.'"

Other lawmakers took more pointed, oppositional stances on Wednesday.

Financial Services Committee member Rep. Steve Owens, a Watertown Democrat, said he believes companies are "holding drivers hostage by saying 'the government's going to take your flexibility away, we have to change the law.'" Democrat Sen. Lydia Edwards of East Boston, who testified before the panel, told her colleagues that driving for one of the platforms amounts to "modern-day sharecropping."

The high-spending, pitched debate between app-based driving companies like Uber, Lyft and DoorDash on one side and labor interests with powerful allies such as U.S. Sen. Elizabeth Warren on the other emerged in the legislative arena with Wednesday's hearing. The committee must now decide if it wants to enact the industry-backed ballot question, craft a compromise, or take the Legislature out of the running as decision-makers.

Without action from lawmakers, voters would likely be asked to adopt or reject the take-it-or-leave-it initiative petition on pace to reach the Nov. 8 ballot, all with a lawsuit built atop the very section of state law it seeks to change still unfolding in the background.

In July 2020, Healey sued Uber and Lyft, alleging that the popular platforms were violating Massachusetts labor laws by treating their nearly 200,000 drivers like independent contractors rather than employees.

That designation, Healey contended, denies drivers access to a guaranteed minimum wage, guaranteed paid sick leave, workers' compensation or traditional unemployment insurance while boosting profits for the companies.

Healey and her deputies said Wednesday they received more than 500 complaints from Uber and Lyft drivers over the last several years about their lack of access to minimum wage, earned sick time and other employee protections.

"In Massachusetts, we have made and legislatures have made very considered, thoughtful, policy decisions that have been in the best interests of workers and families across the state when it comes to the treatment and classification of employees," Healey told lawmakers. "What Uber and Lyft are attempting to do is to upend that. I don't think it's fair to the other employers out there who have long paid into a certain system and who are playing by the rules for these entities to come in and suggest that they're entitled to an entirely different set of rules."

Eight months after Healey filed her suit, Uber, Lyft, DoorDash and Instacart joined with other business and community groups to launch a campaign pressing for changes to state law that would keep drivers classified as contractors and make some new benefits available.

The companies continue to back standalone legislation (H 1234), which was not on the agenda for Wednesday's hearing, as well as two versions of the potential ballot question (H 4375, H 4376). Both questions are nearly identical, and one features an additional section requiring companies to offer paid training to drivers on areas such as recognizing and preventing sexual assault and safe food handling.

Conor Yunits, a spokesperson for the Flexibility and Benefits for Massachusetts Drivers group backing the ballot question, said he remains "hopeful and confident that the Legislature will take action."

"We said from the beginning that we support any effort in the Legislature to create a modern framework that protects the independence and flexibility that drivers overwhelmingly prefer while also adding new benefits," Yunits said in an interview. "Those are the two goals that we have here, and I think we would listen to any solution that does both of those things."

The Legislature on past occasions has intervened to broker a deal between competing initiative petition campaigns and avert costly and bruising ballot fights.

On the pending issue, while opponents say they are willing to discuss options, they said they would rather see state lawmakers come out in strong opposition to the industry-backed proposal affecting tens of thousands of Massachusetts workers.

"We've met with the companies three times. We're willing to deal with them again, but every time, they've sort of embarrassed us and they don't show any inclination whatsoever for an

actual compromise. It's more of a dog and pony show," Wes McEnany, executive director of the Massachusetts is Not for Sale coalition, told the News Service.

"We're open to conversations, but like I said, we're not open to selling these drivers out and the legal rights and laws they're provided under the law now," McEnany said. "We're always open to dialogue. We don't see that coming from the other side at all. But we're also not interested in signing some deal or agreeing to a deal that's going to sell these workers out."

Opponents of the proposal tie it back to the still-unresolved lawsuit.

"The companies are being sued by the attorney general's office because they're misclassifying workers, but more importantly than misclassifying workers, what that really means is elimination of a ton of employment protections," McEnany said. "That's what they're trying to codify into law with this ballot initiative. They know that they're violating the law, so they're trying to change the law."

Healey's lawsuit remains tied up in Suffolk Superior Court with parties currently undergoing discovery, according to a spokesperson for the attorney general's office.

The attorney general told lawmakers on Wednesday that she has no insight into when the case will wrap up, leaving open the possibility that it could remain open until after voters weigh in on changing the law.

Lobbyists for the companies said Wednesday that they have been discussing reforms with lawmakers for years, but the lawsuit looms over their effort, too.

"People need to understand this ballot question is unlike a usual ballot question," Yunits told the News Service. "Usually, a ballot question is the status quo or this new thing. That is not the case here, because without this ballot question, if the attorney general's lawsuit is successful, it will completely upend life for drivers in ways that they may not even fully understand yet."

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