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CLIENT ALERT: SJC Strikes Down Two Initiative Petitions Proposing Laws Classifying Covered App-Based Drivers as Independent Contractors

The Massachusetts Supreme Judicial Court (the "SJC") recently ruled that two initiative petitions seeking to define and regulate the relationship between network companies and app-based drivers are not suitable for placement on the 2022 statewide election ballot. In *El Koussa v. Attorney General*, the plaintiffs were registered Massachusetts voters challenging the Attorney General's (the "AG") certification of two initiative petitions, each proposing laws to regulate the relationship between network companies and app-based drivers. SJC-13237 (Kafker, J. June 14, 2022). The plaintiffs challenged the petitions on technical grounds, alleging that they failed to meet Massachusetts constitutional requirements.

Both initiative petitions proposed laws that would classify any covered app-based driver as "an independent contractor and not an employee or agent" of a network company (which would include both companies maintaining online-enabled applications or platforms connecting couriers and customers to arrange and provide delivery services, and rideshare companies). This independent contractor classification, as proposed, would apply "for all purposes with respect to [the individual's] relationship with the network company. . . [n]otwithstanding any other law to the contrary." In other words, the independent contractor classification would apply regardless of how the courier or driver would be classified under existing law, including Massachusetts' strict Independent Contractor law. The initiative petitions also provided specifications for the courier or driver's compensation, benefits, and anti-discrimination protections.

In the final substantive section of each proposed law, however, were provisions directing that "[n]otwithstanding any general or special law to the contrary, compliance with the provisions of [the proposed laws] 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 that "any party seeking to establish that a person is not an app-based driver bears the burden of proof." Though vaguely worded, these provisions appear to extend the classification of app-based drivers as independent contractors (rather than as employees or agents of the network companies) to potential lawsuits involving third parties, such as those assaulted by drivers or injured in traffic accidents. In such lawsuits, the plaintiff (third party) would have to prove that the courier or driver was not a covered app-based driver in order to potentially extend tort liability to the network company.

The Massachusetts Constitution requires that measures proposed by an initiative petition contain "only subjects . . . which are related or which are mutually dependent." Mass. Const., Art 48, The Initiative, II, § 3, as amended by art. 74. The purposes behind this requirement are to protect voters from being placed in "the untenable position of casting a single vote on two or more dissimilar subjects," and to avoid voter confusion. *Weiner v. Attorney Gen.*, 484 Mass. 687, 691 (2020).

Following an in-depth analysis of the constitutional and corresponding case law, the SJC concluded that the initiative petitions each encompass at least two distinct public policy decisions, thus violating the requirement that they be "related" or "mutually dependent." Specifically, the Court found that while most of the provisions were devoted to defining a new contract-based relationship between network companies and app-based drivers and the associated statutory wages and benefits, the final provisions of each law extended the classification of app-based drivers as independent contractors to potential lawsuits involving third parties. These latter provisions, the Court reasoned, would apparently narrow the tort liability of network companies for drivers' misconduct or negligence. Accordingly, the SJC held that the petitions violate the "related subjects" requirement because they present voters with two substantively distinct policy decisions: one regarding the contract-based and voluntary relationship between app-based drivers and network companies, and the other apparently seeking to limit network company liability to third parties injured by app-based drivers' tortious conduct. In support of this conclusion, the Court stated "[v]oters may support one and not the other."

Given its conclusion that the petitions failed the "related subjects" constitutional requirement, the Court had no need to resolve the issue of whether the AG's summaries were "unfair" for purposes of the law, but noted that the absence of any discussion of the provisions narrowing third parties' tort recovery in the summaries would have rendered the summaries unfair.

It is possible that a more narrowly tailored petition seeking to define only the relationship between network companies and app-based drivers may surpass this particular constitutional hurdle. In the meantime, the existing laws surrounding employee classification, and penalties for misclassification, remain significant. Employers are strongly encouraged to consult their MBJ attorney with questions and concerns regarding proper employee classification.

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This alert was prepared on June 17, 2022.