NATIONAL EMPLOYMENT LAW PROJECT

Testimony of Sally Dworak-Fisher

National Employment Law Project

Opposition to H. 1848

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House Bill 1848 is a corporate attempt to codify a second class workforce of fake independent contractors to the detriment of Massachusetts workers, law-abiding businesses, and public funds.

Labor and employment laws require employers to comply with baseline standards—like the right to a guaranteed minimum wage and overtime pay, paid family leave, health and safety standards, and anti-discrimination protections—for their employees but not for independent contractors.

Yet bad actor employers, including many app-based corporations, illegally label their workers "independent contractors" to escape accountability. They allow their workers some scheduling flexibility but rob them of the fundamental protections they owe their employees.

With H. 1848, corporations hope to legalize their fake independent contractor model and replace bedrock employee protections with an inferior set of half-measures that lower standards for Massachusetts workers. ***NELP opposes H. 1848 and urges an unfavorable vote.***

Ridehail drivers are protected employees under Massachusetts law.

Massachusetts has chosen to broadly protect most individuals who perform work for pay as employees entitled to wage protections. The state's Independent Contractor Law, which creates civil and criminal liability for mislabeling employees as independent contractors, presumes that most individuals who provide their labor in exchange for payment are employees. Individuals are exempt as independent contractors only where each of three conditions is met. Under what is known as the "ABC test," an individual is an employee entitled to wage protections *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.

MASS. GEN. LAWS ch. 149, § 148B (emphasis supplied).[1]

None of the three conditions of the statute are met with respect to ridehail drivers, much less *all three* of them. Drivers are not free from control under the adhesion contracts the corporations force them to sign, nor in the daily performance of their driving services. Uber and Lyft hire and fire workers like any other employer. Their attempt to mask their power with euphemisms like 'activation' and 'deactivation' cannot hide the simple truth: drivers rely on Uber and Lyft for work, and they suffer grave economic losses when the companies suddenly and inexplicably suspend or terminate them via 'deactivation.'[2]

[1] Massachusetts unemployment insurance law uses a similar ABC test. *See* MASS. GEN. LAWS ch. 151A, § 2.
[2] *See*, *e.g.*, RIDESHARE DRIVERS UNITED (RDU) AND ASIAN AMERICANS ADVANCING JUSTICE - ASIAN LAW CAUCUS (ALC), *Fired by an App: The Toll of Secret Algorithms and Unchecked Discrimination on California Rideshare Drivers* (Feb. 28, 2023), https://www.advancingjustice-alc.org/news-resources/guides-reports/fired-by-an-app-report.

The companies also employ a host of algorithmic and behavioral tricks to manage their drivers' schedules, availability, and activities.[3] They subject their drivers to a range of pressure and penalties such that drivers are not "free" to work only or whenever they want.[4] More fundamentally, unlike true independent business owners, drivers cannot set their own fares or determine what rates will best maximize their profits. Indeed, far from setting their own rates, research shows that "digital, black-box structures through which wages are set among these workers results in unpredictable and variable pay, often changing from person to person and hour to hour."[5]

As for the second factor, it is beyond dispute that the drivers perform the transportation services that are nearly synonymous with Uber and Lyft. While the corporations have claimed that they are merely technology platforms, one only has to ask what Uber or Lyft would be without its ready pool of drivers? As David Weil, former head of the U.S. Department of Labor's Wage and Hour Division has pointed out, "If you provide a service whose corporate name is so dominant and pervasive that it has become a verb, it suggests you have created a very strong brand."[6] Not surprisingly, several courts have rejected corporate attempts to satisfy this prong.[7]

Finally, most drivers are not running independently established ridehail businesses. If they were, one would expect to see thousands of cars associated with small businesses other than cars displaying the well-known logos of Uber and Lyft.

The ABC test was designed to ensure that most workers are protected employees.

In the wake of the Great Depression, Congress sought to alleviate the effects of massive unemployment and enacted the Social Security Act of 1935. The Social Security Act set up a federal-state unemployment insurance system that incentivized states to establish programs to assist workers who had lost work through no fault of their own. Wisconsin first enacted the ABC test, with the aim of broadening the scope of employer-employee relationships with a "unique" approach that would reach

[3] *See, e.g.*, Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers' Buttons*, N.Y. Times (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html (describing Uber's use of "psychological inducements and other techniques unearthed by social science to influence when, where and how long drivers work"); Sarah Mason, *High Score, Low Pay: Why the Gig Economy Loves Gamification*, GUARDIAN (Nov. 20, 2018), https://www.theguardian.com/business/2018/nov/20/high-score-low-pay-gamification-lyft-uber-drivers-ride-hailing-gig-economy (detailing the "gamification" techniques and algorithms used to manage their drivers); Alex Rosenblat, *When Your Boss is an Algorithm*, N.Y. Times (Oct. 12, 2018), https://www.nytimes.com/2018/10/12/opinion/sunday/uber-driver-life.html (describing Uber's use of algorithms to manage its workforce).

[4] *See, e.g.*, Ross Eisenbrey and Larry Mishel, *Uber business model does not justify a new 'independent worker' category*, ECON. POL'Y INST. (Mar. 2016) (discussing control over drivers) https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/.

[5] Veena Dubal, *Algorithmic wage discrimination requires policy solutions that enforce predictability and the U.S. spirit of equal pay for equal work*, WASH. CTR. FOR EQUITABLE GROWTH (July 12, 2023), https://equitablegrowth.org/algorithmic-wage-discrimination-requires-policy-solutions-that-enforce-predictability-and-the-u-s-spirit-of-equal-pay-for-equal-work/.

[6] David Weil, *Op Ed: Call Uber and Lyft drivers what they are: employees*, LOS ANGELES TIMES (JULY 5, 2019), HTTPS://WWW.LATIMES.COM/OPINION/OP-ED/LA-OE-WEIL-UBER-LYFT-EMPLOYEES-CONTRACTORS-20190705-STORY.HTML.

[7] *See, e.g.*, *Cunningham v. Lyft, Inc.*, No. 1:19-CV-11974-IT, 2020 WL 2616302, at *11 (D. Mass. May 22, 2020), *aff'd*, 17 F.4th 244 (1st Cir. 2021) ("Drivers also are clearly not incidental to Lyft's business and Lyft does not argue that it could continue as a company without drivers."); *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 911 (N.D. Cal. 2020), *aff'd*, No. 20-15689, 2022 WL 474166 (9th Cir. Feb. 16, 2022) (noting that "drivers provide services that are squarely within the usual course of the company's business" and company's argument to the contrary was "frivolous"; collecting cases).

well beyond traditional master-servant frameworks.[8] The Social Security Board then included the ABC test in its draft unemployment insurance law just two years and by 1942, forty-two states had adopted the ABC test in some form.[9]

The idea then, as now, was to cover a broad swath of workers and ensure that rights and protections were not narrowly confined to the more limited pool of workers considered servants at common law. The idea then, as now, is that broad coverage delivers broad impact and meaningfully improves the lives of workers, their families, and their communities.

H.1848 will disproportionately hurt workers of color.

Corporate policies that strip employees of bedrock employment protections via fake independent contractor schemes are strikingly racialized, occurring in occupations in which Black, Latino, and Asian workers, are overrepresented.[10] H. 1848, which seeks to legalize corporate misclassification of ridehail employees as independent contractors, would disproportionately hurt workers of color.

Data on app-based drivers match the broader patterns in other misclassified industries: workers of color make up a majority of the Uber and Lyft's drivers, with Black workers particularly overrepresented. Uber's internal data indicate that the company's drivers nationwide are 37 percent white, 18 percent Black or African American, 16 percent Latino, 15 percent Asian or Pacific Islander, and 6 percent some other ethnic background.[11] According to a Bureau of Labor Statistics survey on the on-demand economy, Black and Latino workers make up almost 42 percent of workers for Uber, Lyft, and other "electronically mediated work" companies, although they comprise less than 29 percent of the overall U.S. workforce.[12]

These disparities are stark, but numbers alone do no tell the story of inequality. Any misclassified driver experiences an unjust deprivation of their employee rights. What *race* does, in its pernicious way, is underwrite the practice of misclassification. Race steps in to ensure that the whole unseemly business of enabling a subclass of precarious work is more easily accepted when its injustices are borne by poor people of color.[13] Indeed, as with *race-neutral* but *racist* exclusions of predominantly Black workers from the Fair Labor Standards Act, efforts to legalize corporate misclassification via bills like H. 1848 threaten to create "exacerbated racialized economic immiseration."[14]

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[8] Syed M. Q. Ali Khan, *The hiring entity's usual course of business*, 18 HASTINGS BUS. L.J. 109, 120-22 (2021).
[9] *Id.*
[10] Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 924 (2017) (finding that "seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color").
[11] *Uber: The Driver Roadmap, Where Uber Driver-Partners Have Been, And Where They're Going*, Benenson Strategy Group 9 (Jan. 2015), https://content.money.com/wp-content/uploads/2015/01/bsg_uber_report.pdf.
[12] *See* Bureau of Labor Statistics, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, U.S. DEP'T OF LAB., MONTHLY LAB. REV. (Sept. 2018), https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm (Table 4: total employed versus in person electronically mediated workers for Black and Latinx workers) (last accessed Oct. 6, 2023).
[13] *See also* Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1380 (1988) ("After all, [if] equal opportunity *is* the rule, and [if] the market *is* an impartial judge; if Blacks are on the bottom, it must reflect their relative inferiority. Racist ideology thus operates in conjunction with the class components of legal ideology to reinforce the status quo, both in terms of class and race.").
[14] Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. AND POL'Y REV. 511, 526 (2021), https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2022/05/3-Dubal.pdf.

H.1848 will enshrine a lower caste of workers in Massachusetts.

Ridehail drivers are employees under Massachusetts law, entitled to minimum and overtime wages for all compensable work. H. 1848 would legalize their status as independent contractors and deprive them of such bedrock rights. Worse yet, the bill would enable corporations to avoid paying for the significant amounts of time that drivers are required to spend awaiting an assignment (engaged to wait). In compensating only for 'engaged time' after a driver accepts a ride that the corporation has decided to offer, H.1848 would result in non-payment of wages for roughly forty percent of a drivers' work time.[15] In other words, H. 1848 seeks to substitute Massachusetts' baseline wage protections with another, inferior set of guarantees, effectively relegating ridehail drivers to a new, lower caste of workers. Because ridehail drivers are disproportionately workers of color, this bill would have the particularly unacceptable result of legally enshrining a class of underpaid workers of color.

Massachusetts should look to California's Prop 22 for a preview of how H. 1848 would degrade conditions for its drivers. Research shows that, contrary to corporate promises, Prop 22 "depresses wages and deepens inequities for California workers."[16] After Prop 22, the wage floor for drivers dropped to just $4.10 per hour, which is nearly $10 per hour less than the state's minimum wage; net take home earnings are just $6.20 per hour.[17] California drivers would earn nearly three times more per hour if they were classified and compensated as employees.[18]

Moreover, the work is more precarious and even *less* flexible after Prop 22. Drivers report working more hours, having less flexibility, and having to rely more on unpredictable tips. Adding insult to injury, most drivers are not receiving the much-touted health insurance stipends.[19] Many are turning to public health options or foregoing care altogether.[20]

Carve outs like H.1848 hurt law-abiding businesses and public funds.

Corporations like Uber and Lyft pretend that they are special and need different rules. But there is nothing novel about their model of mislabeling their workforce as independent contractors and attempting to escape accountability, or, when pressured, offering a lesser 'third way.' Efforts like H. 1848, if successful, send a powerful message that, with enough lobbying funds, businesses can buy their way out of providing foundational minimums to their workers. These efforts also hurt law-abiding business that want to recognize their obligations to their employees but find it difficult to compete against those that cut corners, whether by lobbying for exemptions or simply violating the law. Finally, as corporations seek to legalize their misclassification or simply ignore the law, they deplete public coffers by failing to pay their share of employee payroll and other taxes. Massachusetts's Office of the State Auditor apparently recognizes the potential impact, having just announced an impact analysis of these models on state funds and programs.[21]

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[15] *See id.* at 533.

[16] Eliza McCullough, Brian Dolber, et al., *Prop 22 Depresses Wages and Deepens Inequities for California Workers*, NAT'L EQUITY ATLAS (Sept. 21, 2022), https://nationalequityatlas.org/prop22-paystudy#:~:text=pay%20adjustment%5D.%E2%80%9D-,Drivers%20would%20earn%20nearly%20%2411%20more%20per%20hour%20if%20they,health%20insurance%2C%20and%20worker's%20compensation (last visited Oct. 6, 2023).

[17] *Id.*

[18] *Id.*

[19] Eliza McCullough, Brian Dolber, *Most California Rideshare Drivers are not Receiving Health Care Benefits Under Prop 22*, NAT'L EQUITY ATLAS, https://nationalequityatlas.org/prop22#:~:text=Notes,per%20week%20in%20engaged%20time (last visited Oct. 6, 2023).

[20] *Id.*

[21] *Office of the State Auditor Launces Impact Analysis of Transportation and Delivery Network Companies on State Funds and Programs* (Aug. 15, 2023), Office of the State Auditor Launches Impact Analysis of Transportation and Delivery Network Companies on State Funds and Programs | Mass.gov.

Conclusion: Vote 'NO' on H. 1848.

H. 1848 is bad policy, plain and simple. The bill would legalize a massive fake independent contractor scheme and codify second class work for a workforce comprised disproportionately of workers of color. It would substitute current baseline protections for a lower floor, rendering the work more precarious and less flexible. The bill is bad for workers, their families and communities, law-abiding businesses, and public funds and programs. **NELP urges a NO vote on H. 1848**.