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## **Testimony of the National Women's Law Center**

### **Joint Committee on Financial Services**

### **Matters relating to App-Based Drivers**

**October 13, 2021**

Dear Chair Murphy, Chair Crighton, and members of the Joint Committee on Financial Services:

The National Women's Law Center strongly opposes HB1234, "An Act establishing portable benefit accounts for app-based drivers." This bill will enshrine the misclassification of app-based drivers as independent contractors; relieve employers such as Uber, Lyft, DoorDash, and Instacart of a wide array of responsibilities to the drivers upon whom their businesses depend; and cut off app-based drivers from the protection and benefits of labor and employment laws.<sup>1</sup>

The National Women's Law Center (the Center) has worked for nearly 50 years to advance and protect women's equality and opportunity—with a focus on women's employment, education, income security, health, and reproductive rights—and has long worked to promote and protect the rights of women at work. We seek to remove barriers to equal treatment of women in the workplace—particularly those in low-paid jobs and those who face barriers, like misclassification, that make it more difficult for women to access or enforce their rights when they have suffered from illegal and abusive treatment at work.

### **The False Promise of Flexibility**

HB1234 trades away the rights, wages, benefits and legal protections of app-based drivers in Massachusetts based on a false premise that this trade-off is the necessary price of flexibility for drivers. Proponents of this bill and similar measures, like Proposition 22 in California, have heavily marketed their business model as good for women and women of color, who are often the primary caregivers in their families, and may therefore have family obligations that make it difficult to work during the traditional workday. But employers can give employees choices in setting work schedules; schedule flexibility is not contingent on independent contractor status. Nor is providing the option to log into and out of an app at all hours a fair trade for individuals who are relying on driving to support themselves and their families. Misclassifying workers as independent contractors provides maximum flexibility for employers while simultaneously denying workers any meaningful control<sup>2</sup> over their working conditions, as access to work, pay rates, and more are all pre-set through the companies. Even the "flexibility" to make a living by driving only during an individual's preferred hours is a mirage, as workers who cannot drive long hours or during more lucrative peak hours—like women juggling caregiving or other obligations—face even greater obstacles to economic survival.<sup>3</sup> Even if these jobs truly offered the flexibility they promise, flexibility alone does not make a good, family sustaining job. Working women also need living wages, access to benefits, and protection from discrimination, among other protections.

The companies pushing this false promise of flexibility posit that it is the unique nature of independent contractor status that allows women workers to balance their family responsibilities with their work hours. However, this reasoning obscures the reality that there is no requirement for workers who are

classified as employees to work a standard 9-5 workday. Any app-based driver could still work hours of their choosing as employees, if only Uber, Lyft, Instacart, Doordash or other app-based services decided to implement that policy.

Misclassification hurts workers by allowing employers to shirk their responsibilities and transfer business risks to individuals who are less well equipped to bear the risks, in a system not designed to provide independent contractors with support.<sup>4</sup> Lawmakers should instead be seeking opportunities to build an economy that supports caregivers and all workers as we rebuild our economy from the fallout of the COVID-19 pandemic. We urge lawmakers to reject the false promise of HB1234 and any other similar measures. As detailed below, misclassifying workers as independent contractors in HB1234 will particularly hurt women workers by entrenching gender wage gaps, undermining social insurance programs, providing inadequate protections against discrimination, and preventing worker organizing.

### **Subminimum Wages and Further Entrenched Wage Gaps**

Codifying the misclassification of app-based drivers through HB1234 will exempt working women from minimum wage protections, putting them at risk of making subminimum wages and further entrenching gender and racial wage gaps. Minimum wage in Massachusetts is currently \$13.50 per hour, and is set to rise to \$15.00 per hour by 2023.<sup>5</sup> In stark contrast, a recent study from the Berkeley Labor Center found that under HB1234, the majority of Massachusetts drivers could earn as little as the equivalent of a \$4.82 wage, while the minority of drivers who qualify for a health care stipend could earn the equivalent of just \$6.74 per hour.<sup>6</sup> Another study of 1.87 million Uber drivers found that women, who make up about 27.3% of drivers, earn on average 7% less than men per hour.<sup>7</sup> Women workers make up six in ten low-paid workers in the United States,<sup>8</sup> and their overrepresentation in low-paid jobs is one driver of a gender wage gap that is particularly pronounced for many women of color. Women in Massachusetts who work full-time, year-round are typically paid only 81 cents for every dollar paid to their male counterparts.<sup>9</sup> Black women in Massachusetts working full-time, year-round typically make only 57 cents for every dollar paid to their white, non-Hispanic male counterparts, and Latinas working full-time, year-round typically make only 51 cents for every dollar paid to their white, non-Hispanic male counterparts.<sup>10</sup> The absence of real minimum wage protections under HB1234 threatens to deepen these inequities.

### **No Social Security Payments or Unemployment Benefits**

HB1234 ensures that companies pushing this bill will not be contributing to Social Security on behalf of their drivers, which will undoubtedly make it more cumbersome for women drivers to earn Social Security benefits. It is hard to overstate the importance of Social Security to women; Social Security benefits, which are lifelong, inflation-adjusted, and virtually universal, are the foundation for women's retirement security. For myriad reasons—including that women on average live longer than men and are more likely to live alone as they age<sup>11</sup>—Social Security's lifetime, inflation-adjusted benefits are critically important to older women's financial stability. They are especially important for women of color,<sup>12</sup> who face extremely high poverty rates as they age. Social Security also provides disability insurance and the equivalent of life insurance, both of which are important to the economic security of women throughout their lives, and that of their families.<sup>13</sup>

In addition, under the scheme set out in HB1234, app-based delivery companies will not be contributing to unemployment insurance on behalf of their drivers as they do for employees, and as independent

contractors, drivers are typically not eligible to access unemployment benefits.<sup>14</sup> In Massachusetts, women made up 54.1% of state unemployment insurance claimants as of September 2020.<sup>15</sup> For women—who typically experience lower earnings and a higher risk of poverty than their male peers and are more likely than men to be raising children on their own—this support is particularly vital, even when we are not in a pandemic-induced recession that has disproportionately harmed working women.<sup>16</sup> In cutting off drivers from access to unemployment insurance, HB1234 will leave women without a safety net if they become unemployed.

### **Weak Antidiscrimination Protections**

By codifying their status as independent contractors, HB1234 would exclude app-based drivers from protections against discrimination, including harassment, under the Massachusetts Civil Rights Act, MGL c. 151B. Robust antidiscrimination laws, including laws protecting workers from sexual harassment, are essential to create a workplace where women and all workers can work with safety, respect, and dignity. Sex harassment and assault are serious concerns for both riders and drivers: in 2019, Uber released its safety report,<sup>17</sup> finding that between 2017-2018, it received 5,981 reports of sexual assault, split between drivers and riders.

While HB1234 does provide some limited antidiscrimination protection for drivers, prohibiting companies from, “refuse[ing] to contract with, terminate the contract of, or deactivat[ing] from the network company’s online-enabled application or platform”<sup>18</sup> drivers on the basis of several protected categories, the Massachusetts Civil Rights Act is far more comprehensive. Current state law includes, among other things, more protected classes, protection against a much broader array of unlawful employment actions (including, for example, pay discrimination and sexual harassment), language ensuring pregnant workers can receive accommodations and continue to work safely, additional protections against retaliation, posting requirements to ensure workers know their rights, and the requirement that employers institute a policy against sexual harassment.<sup>19</sup> Under HB1234, platform drivers would enjoy none of these protections.

In addition, HB1234 provides no protection for riders who may experience discrimination or harassment. Four years after the #metoo movement went viral, companies should be working to bolster protections for employees and the public against discrimination and harassment, not weakening them.

### **No Ability to Unionize or Protection from Retaliation for Organizing**

Independent contractors are not covered by the protections of the National Labor Relations Act (NLRA); which means they are not able to legally form unions and are not protected from retaliation for engaging in concerted activity with other workers. In codifying drivers as independent contractors, HB1234 cuts off access for drivers to unionize under the NLRA. While HB1234 makes feeble attempts at providing some benefits to drivers, it does nothing to protect drivers’ right to organize. Through collective bargaining, union members, and particularly women in unions have been able to win economic security for themselves and their families, including higher and more equal wages, access to affordable benefits, and the right not to be fired without cause. The presence of a union in the workplace also makes it more likely that working people will raise safety concerns and have access to benefits—which is especially critical in light of COVID-19. While unions are beneficial for all workers, union membership is especially important for women workers.<sup>20</sup> Without the right to organize into

unions, women drivers lose out on the promise of better conditions achieved through collective bargaining and are being denied fundamental labor rights.

### **We Urge the Committee to Oppose this Bill**

HB1234 creates a permanent underclass of misclassified independent contractor drivers with lesser rights than employees. As employees, these drivers would enjoy critical labor and employment law protections and women driving for these platforms— especially women of color, for whom these benefits and protections are particularly vital—would have safer, healthier, and more dignified work. We urge the Committee to oppose this bill.

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<sup>1</sup> Women make up a sizeable share of Uber and Lyft drivers. Lyft reported to the BBC that its workforce was about 29% female, based on internal figures. Dave Lee, *'Thrown to the wolves' - the women who drive for Uber and Lyft* (Jan. 29, 2019) <https://www.bbc.com/news/technology-46990533>; Uber data shows women drivers in the United States make up 27.3% of drivers. Cody Cook et al., *The Gender Earnings Gap in the Gig Economy: Evidence from Over a Million Rideshare Drivers*, (May 2020), p. 10, <https://web.stanford.edu/~diamondr/UberPayGap.pdf>.

<sup>2</sup> “The difference between ‘flexibility’ that benefits employees by offering them meaningful choices over their conditions of employment and ‘flexibility’ that benefits employers should not be confused: it is the latter kind of flexibility ‘that yields the precarious workforce: characterised by low pay, low status, and little by way of job security, training, or promotion prospects.’” SANDRA FREDMAN, *Precarious Norms for Precarious Workers*, PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY 177 (Judy Fudge & Rosemary Owens eds., 2006).

<sup>3</sup> “[T]he type of flexibility sought by working parents has more to do with working time autonomy and the possibility of adjusting work schedules around the inflexible operating hours of childcare and other institutions. In contrast, the evidence on platform work shows that the flexibility they entail is, in fact, illusory. To secure work through platforms, workers often need to be constantly available and to react promptly to clients’ requests. This further intensifies the spillover of work into family life.” Jan Drahokoupil & Agnieszka Piasna, *Work in the Platform Economy: Beyond Lower Transaction Costs*, 52 INTERECONOMICS 335 (2017).

<sup>4</sup> “[W]orkplace flexibility programs create individualized solutions that allow particular people to maneuver around workplace norms that create gender inequality. . . pushing flexibility in and of itself, without attending to its pitfalls, runs the risk of lending legitimacy to a larger neoliberal project of labor ‘flexibilization’ that is anything but friendly to women, families, or workers.” Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1212-13 (2010).

<sup>5</sup> Massachusetts law about minimum wage, <https://www.mass.gov/info-details/massachusetts-law-about-minimum-wage> (last updated April 20, 2021).

<sup>6</sup> Ken Jacobs and Michael Reich, *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage Drivers Could Earn as Little as \$4.82 an Hour*, UC Berkeley Labor Center (Sept. 29, 2021) <https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage/>.

<sup>7</sup> Authors attribute the gap to three factors; male drivers are more likely to drive near “lucrative” locations for fares, including areas with higher crime and more drinking establishments, are more likely to have more experience on the platform which allows them to earn more per hour, and are more likely to drive at a higher average speed. Cody Cook et al., *supra* note 1 at 2.

<sup>8</sup> Jasmine Tucker and Julie Vogtman, *When Hard Work Is Not Enough: Women in Low-Paid Jobs*, NAT’L WOMEN’S LAW CENTER (April 2020), <https://nwlc.org/resources/when-hard-work-is-not-enough-women-in-low-paid-jobs/>.

<sup>9</sup> Figures for women overall by state calculated by NWLC are based on [2019 American Community Survey Data](#). Figures for Black women and Latinas calculated by NWLC are based on 2015-2019 American Community Survey 5-

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year estimates. For the purposes of this analysis D.C. is considered a state. National Women’s Law Center, *The Wage Gap, State by State*, <https://nwlc.org/resources/wage-gap-state-state/> (published on March 16, 2021).

<sup>10</sup> Figures for Black women and Latinas are NWLC calculations using CPS, 2021 ASEC, *supra* note 6, Table PINC-05. White, non-Hispanic women who work full time, year-round make 79 cents for every dollar made by their white, non-Hispanic male counterparts (CPS, 2021 ASEC, *supra* note 6, Table PINC-05). Black women refer to those who self-identified in the CPS as Black alone. Latinas may be of any race and are those who self-identified they are of Spanish, Hispanic, or Latino origin.

<sup>11</sup> Joan Entmacher & Amy Matsui, *Addressing the Challenges Women Face in Retirement: Improving Social Security, Pensions, and SSI*, 46 J. MARSHALL L. REV. 749 (2013), <https://repository.jmls.edu/lawreview/vol46/iss3/4/>; Social Security Administration, *Social Security Is Important to Women* (Jan. 2021); <https://www.ssa.gov/news/press/factsheets/women-alt.pdf> (According to Social Security Administration’s Office of the Chief Actuary, women reaching age 65 in 2019 are expected to live, on average, an additional 21.5 years compared with 18.9 years for men. Women represent 55.3 percent of all Social Security beneficiaries age 62 and older and approximately 63.9 percent of beneficiaries age 85 and older.)

<sup>12</sup> Kilolo Kijakazi, Karen Smith & Charmaine Rumes, *African American Economic Security and the Role of Social Security*, THE URBAN INSTITUTE (Jul. 2019), [https://www.urban.org/sites/default/files/publication/100697/african\\_american\\_economic\\_security\\_and\\_the\\_role\\_of\\_social\\_security.pdf](https://www.urban.org/sites/default/files/publication/100697/african_american_economic_security_and_the_role_of_social_security.pdf); James Palmieri, *Social Security: A Lifeline for Older Women and Minorities*, AARP PUBLIC POLICY INSTITUTE (2018), <https://www.aarp.org/content/dam/aarp/ppi/2018/social-security-a-lifeline-for-older-women-and-minorities.pdf>; Maya Rockey Moore & Meizhu Lui, *Plan for a New Future: The Impact of Social Security Reform on People of Color*, CENTER FOR GLOBAL POLICY SOLUTIONS (2011), <http://globalpolicysolutions.org/report/plan-for-a-new-future-the-impact-of-social-security-reform-on-people-of-color/>.

<sup>13</sup> Jasmine Tucker, *Disability Insurance Is Critical to Women’s Economic Security*, NAT’L WOMEN’S LAW CENTER (May 2017), <https://nwlc.org/wp-content/uploads/2017/05/SSDI-2017-Fact-Sheet.pdf>.

<sup>14</sup> While the CARES Act passed by Congress in response to the COVID-19 pandemic did allow self-employed individuals to qualify for benefits, that benefit program has since ended, and there is no sign that Congress will restore it. CARES Act and American Rescue Plan Act. CARES Act and American Rescue Plan Act, *Pandemic Unemployment Assistance (PUA)*, <https://www.mass.gov/info-details/cares-act-and-american-rescue-plan-act>.

<sup>15</sup> Ariane Hegewisch, *Women’s Share of Unemployment Insurance Claimants varies Strongly Across States*, INSTITUTE FOR WOMEN’S POLICY RESEARCH (Dec. 2020) <https://iwpr.org/iwpr-issues/employment-and-earnings/womens-share-of-unemployment-insurance-claimants-varies-strongly-across-states/>.

<sup>16</sup> In 2017, for example, unemployment insurance helped keep the incomes of more than 127,000 women across the country above the federal poverty line. Nat’l Women’s Law Center et al., *Unemployment insurance and protections are vital for women and families* (Nov. 2019). <http://www.georgetownpoverty.org/wp-content/uploads/2019/12/UI-Factsheet-20191029.pdf>.

<sup>17</sup> Uber, US Safety Report 2017-2018 (Dec. 2019), <https://www.uber.com/us/en/about/reports/us-safety-report/>.

<sup>18</sup> H.B. 1234, 192 Gen. Ct. (Ma. 2021). “An Act establishing portable benefit accounts for app-based drivers.” <https://malegislature.gov/Bills/192/HD2582>.

<sup>19</sup> Mass. Gen. Laws ch. 151B, <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/chapter151B>.

<sup>20</sup> Amanda Fins et. al., *Unions Are Good For Women*, NAT’L WOMEN’S LAW CENTER (Jul. 2021), <https://nwlc.org/resources/unions-are-good-for-women/>.