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Warren M. Anderson Legislative Seminar Series

The Gig Economy

May 28, 2020

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2020 WARREN M. ANDERSON LEGISLATIVE SERIES

The Gig Economy
May 20, 2020

SPEAKER BIOGRAPHIES

PROF. VEENA DUBAL is Assistant Professor of Law at UC Hastings Law, San Francisco. Prof. Dubal's research focuses on the intersection of law, technology, and precarious work. Within this broad frame, she uses empirical methodologies and critical theory to understand the impact of digital technologies and emerging legal frameworks on the lives of workers, the co-constitutive influences of law and work on identity, and the role of law and lawyers in solidarity movements. Professor Dubal has been cited by the California Supreme Court, and her scholarship has been published in top-tier law review and peer-reviewed journals, including the *California Law Review*, *Wisconsin Law Review*, *Berkeley Journal of Empirical and Labor Law*, and *Perspectives on Politics*. Based on over a decade of ethnographic and historical study, Professor Dubal is currently writing a manuscript (Driving Freedom, Navigating Neoliberalism) on how five decades of shifting technologies and emergent regulatory regimes changed the everyday lives and work experiences of ride-hail drivers in San Francisco. Complementing her academic scholarship, Professor Dubal's writing has also been published in *The Los Angeles Times*, *The Guardian*, and *Slate*. Her commentary and research on the intersections of technology, low-wage work, and organizing (particularly in the so-called "sharing" or platform economy) are regularly featured both in the local and national media and in a number of documentaries, including *When Rules Don't Apply*, *City Rising*, and *Gig – A Uberização do Trabalho*. Professor Dubal joined the Hastings faculty in 2015, after a post-doctoral fellowship at Stanford University (also her undergraduate alma mater). Prior to that, Professor Dubal received a J.D. and Ph.D. from UC Berkeley, where she conducted an ethnography of the San Francisco taxi industry. The subject of her doctoral research arose from her work as a public interest attorney and Berkeley Law Foundation fellow at the Asian Law Caucus, where she founded a taxi worker project and represented Muslim Americans in civil rights cases.

TERRI GERSTEIN, ESQ., is the Director of the State and Local Enforcement Project at the Harvard Law School Labor and Worklife Program. She is also a Fellow in the Program. She recently completed an Open Society Foundations Leadership in Government fellowship. Previously, Ms. Gerstein worked for over 17 years enforcing labor laws in New York State, including as the Labor Bureau Chief for the New York State Attorney General's Office and as a Deputy Commissioner in the New York State Department of Labor. Before her government service, Ms. Gerstein was a nonprofit lawyer in Miami, Florida, where she represented immigrant workers and also co-hosted a Spanish-language radio show on workers' rights. Her work has appeared in publications including *The New York Times*, *The Washington Post*, *The Nation*, *The Guardian*, and *The Hill*, among others; a complete listing can be found here. She has also appeared on *Democracy Now* and the Spanish-language television networks

Univision and Telemundo. Ms. Gerstein is a graduate of Harvard College and Harvard Law School.

JOSH GOLD, ESQ., is the policy director at Uber. Prior to becoming policy director, he was Director of Public Affairs and Senior Manager of Public Affairs at Uber. Previously, Mr. Gold was Director of Communications, Political & Strategic Affairs at the New York Hotel Trades Council. His extensive experience as a campaign and communications strategist and a political and issue campaign consultant includes serving as Campaign Manager for UPKNYC (Universal Pre-k Campaign for NYC*)*; Director for NY Progress Independent Expenditure for Bill de Blasio; Advisor for Scott Stringer for NYC Comptroller, and Senior Staff for Grace Meng for Congress. He was also Deputy Director of the Healthcare Education Project at 1199 SEIU. Mr. Gold received a B.A. from Tufts University and a J.D from Fordham Law School.

FRANK KERBEIN is Director of the Center for Human Resources at the Business Council of New York State, Inc. He is responsible for advocacy on labor/human resource, unemployment insurance, and workers' compensation issues, and for providing human resources consulting services to Council members. Mr. Kerbein comes to The Business Council from the New York State Funeral Directors Association, where he provided human resource and OSHA (Occupational Safety and Health Administration) consulting services to employers of all sizes. His prior work experience includes human resources staff and leadership positions in the financial services and health care arenas. Mr. Kerbein is a graduate of Cornell University's School of Industrial and Labor Relations with nearly 35 years of experience in human resource management. He is a certified Senior Professional in Human Resources (SPHR), a Certified Association Executive (CAE), and a frequent presenter of human resource topics across the state and nationally.

DR. LAURA SCHULTZ is Executive Director of Research at the Rockefeller Institute of Government. Previously, she was Director of Fiscal Analysis and Senior Economist at the Rockefeller Institute of Government. Dr. Schultz has an extensive research portfolio studying how innovation creates economic opportunity. While at the Bureau of Economic Analysis, she developed measures used to assess levels of innovation in the U.S. economy and their contribution to gross domestic product. As a faculty member at SUNY Polytechnic Institute, she worked with collegiate entrepreneurs as a commercialization adviser to guide them through the early stages of validation and venture formation. She has studied how university and state policies can foster or hinder an entrepreneurial ecosystem. At the Rockefeller Institute, she explores how state and local governments can support innovation and generate economic growth. As director of fiscal analysis, Dr. Schultz evaluates the fiscal and economic impacts of federal, state, and local policies and emerging economic trends. She is working to develop new channels to communicate her team's research findings to a broader audience through blog posts, interactive data visualization tools, and podcasts.

POLICY BRIEF

Defining and Measuring Gig Work

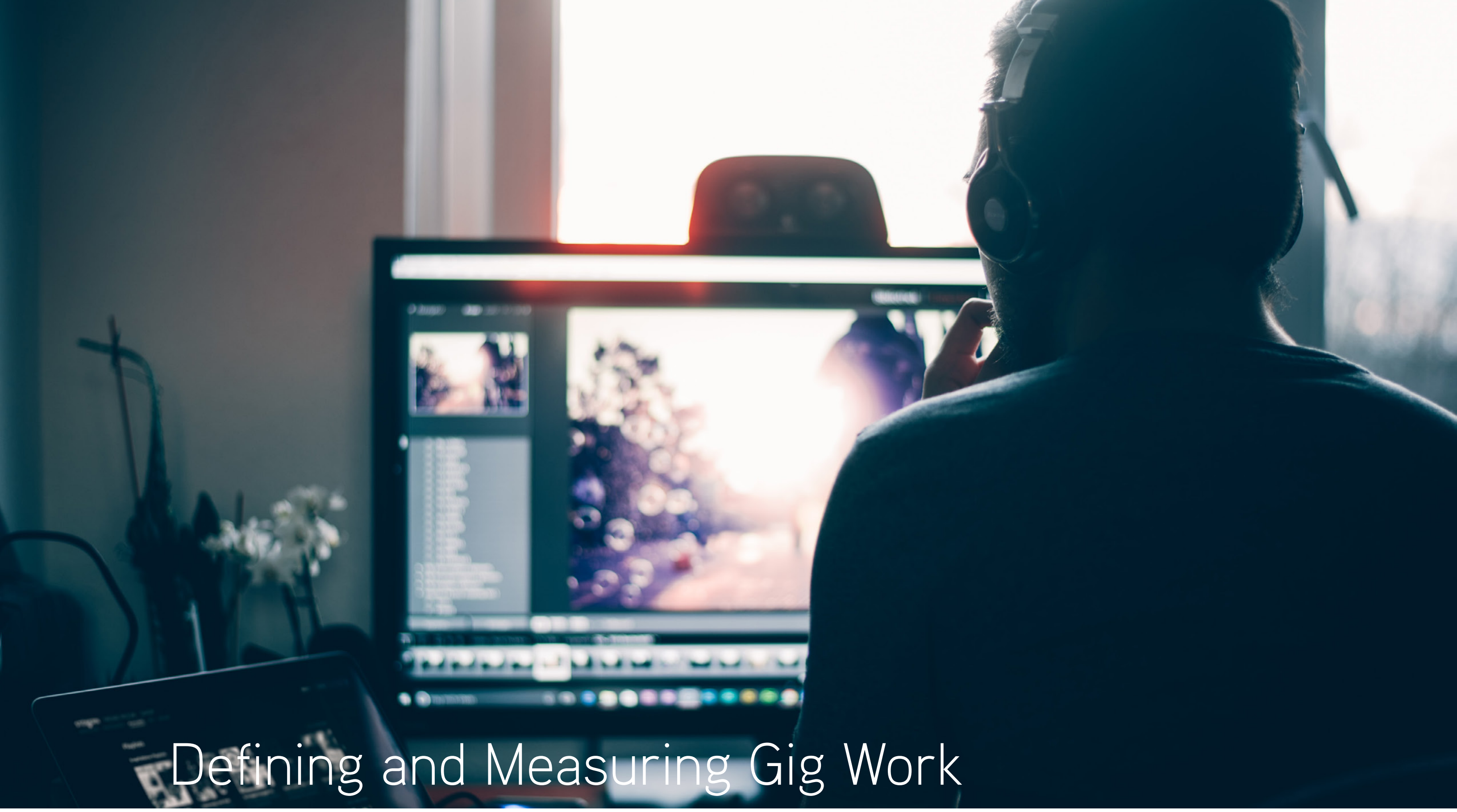
Laura Schultz

March 2020

Rockefeller Institute of Government

ABOUT THE AUTHOR

Laura Schultz is the director of fiscal analysis and senior economist at the Rockefeller Institute of Government



Defining and Measuring Gig Work

Traditionally, workers have fallen into one of two categories: employees or self-employed. Employees report to work during hours designated by the employer and do work as directed by the employer. The terms of the employment include a set rate of pay, benefits, and labor protections. Self-employed workers are individuals who run their own business.

The increased demand for flexibility from both workers and firms, the shift into the service-oriented economy, and advancements in technology have expanded the range of possible employment arrangements beyond employer-employee or self-employed. Workers can now provide labor as independent contractors, freelancers, on-call workers, temporary agency or contract firm employees, and online platform workers (e.g., Uber and Grubhub drivers). Economists refer to this growing type of work as alternative work arrangements.[1] The media has dubbed these arrangements "gig work."

While there is abundant anecdotal evidence of the changing nature of work, reliable and complete data related to these shifts are harder to find. There is a great deal of interest in understanding the scale and scope of the gig workforce as can be seen by the large number of recent studies producing estimates using household surveys or financial transaction data. However, there is no standard definition for gig work and relevant data are not collected on a regular schedule. This makes it difficult to use existing data to quantify the scale of these changes. Recent estimates of the gig workforce range from as low as 10 percent to as high as 36 percent. To illustrate the large range of findings, here is a sample of gig workforce estimates published since 2016:

- 10.1 percent of workers participated in alternative employment arrangements.[2]
- 11.8 percent of earners in 2016 received a 1099-MISC or 1099-K suggesting they earned income from a firm through a nonemployee relationship.[3]
- 30 million Americans (18.5 percent of workforce) get primary income from gig work and an additional 15 million (9.2 percent) supplement their full-time work with gig work.[4]
- 13 percent of Americans earn their primary income from the independent workforce and an additional 14 percent supplement employment income as independent workers.[5]
- 3 in 10 workers participated in gig work in the past month. This included providing services (babysitting, handywork, driving) or selling goods (online marketplaces, craft fairs, etc.)[6]
- 35 percent of American workers freelance (9.8 percent full-time, 15.4 percent part-time, and 8.8 percent to supplement employment income).[7]
- 36 percent of all US workers participate in the gig economy in some capacity, including part-timers and multiple jobs holders.[8]

There is a big difference between a 10th and a third of the workforce. A deeper read of the available studies finds that it is likely that 10-15 percent of the workforce relies on nontraditional employment as their primary job. When including people who earn secondary income from gig work, the share increases by another 10-15 percent. The largest segment of the gig workforce are independent contractors (4-12 percent of workers). The online platform workforce is still relatively small (1-4 percent of workers) but growing. The limited data available on New York suggests that the state's workforce is less reliant on gig work than the national average. But given the size of New York's workforce, a large share of the nation's gig workforce is located within the state.

This brief reviews these recent reports that estimate the scale and scope of the gig economy. The next sections explore methods used to collect the data and the categories of workers included when measuring the gig economy. Breaking workers and estimates into different categories, independent contractor versus contract firm employee versus online platform worker, provides greater insights into the current composition of the gig workforce. The final section presents measures related to the gig economy in New York.

Measuring the Gig Economy

The reports measuring the gig economy have generally used two approaches: household surveys and financial data from tax records or online payments.

The primary source of data for understanding labor force trends is the Bureau of Labor Statistics (BLS). To track employment and unemployment, BLS conducts the *Current Population Survey*, a monthly survey of 60,000 US households. BLS periodically includes the Contingent Worker Supplement (CWS) that asks respondents a series of questions related to contingent and alternative employment arrangements. The most recent CWS was conducted in 2017. The BLS survey is the largest survey of its kind and is considered the most reliable source of data on alternative work arrangements. One limitation of the CWS is the focus on the respondent's main job. Workers using alternative work arrangements to supplement their income are not captured in the BLS data.

In 2017, the CWS included four questions related to electronically mediated employment. Respondents were asked about any work found through websites or mobile apps. The survey asked about main jobs, second jobs, and additional work-for-pay. The results from the electronically mediated employment were released separately from its contingent and alternative employment arrangement. Two additional federally sponsored surveys, the *General Social Survey* and *Survey of Household Economics and Decision Making* have recently incorporated questions related to alternative work arrangements. Private organizations such as Gallup, McKinsey, and MetLife have commissioned household surveys to better understand the rise of gig employment including as supplemental income. These surveys have smaller sample sizes but provide more insight into part-time gig work.

A handful of organizations have access to financial transaction data that can provide direct insights into the gig economy. The Internal Revenue Service (IRS) collects annual data on workers' sources of income. Firms are required to file 1099-MISC and 1099-Ks to report payments above a threshold to individuals. The income should then be reported as income on individuals' income taxes. Recent IRS reports have used these data to track the evolution of alternative work. J.P. Morgan Chase has used account holder data to track payments into checking accounts from online platforms.

In general, studies to date have broken down the gig economy into five categories of workers: independent contractors, on-call workers, employees placed by temporary agencies, employees of contract firms, and digital platform workers. The following section reviews each of these alternative work arrangements, the definitions used, and recent estimates of their prevalence.

Alternative Work Arrangements

Independent Contractors

Independent contractors are also referred to as independent consultants or freelance workers. BLS identifies these individuals as "someone who obtains customers on their own to provide a product or service." Studies have found that 4 to 12 percent of the workforce lists independent contracting as their primary employment. When secondary employment is included, the number of individuals identified as independent contractors expands. These could be individuals who primarily earn income through a traditional employment arrangement but supplement through freelance work, such as adjunct professors, freelance graphic artists, or part-time childcare providers.

TABLE 1. **Independent Contractors**

Report	Share of Workforce	Timeframe	Method
Bureau of Labor Statistics (2018)[9]	6.9% main job	In previous week (May 2017)	Contingent Worker Supplement to Current Population Survey
Katz and Krueger (2016)[10]	8.4% main job	In previous week (May 2015)	RAND Household Survey
Gallup (2018)[11]	10.9% primary job 14.7% all workers	In previous week (October 2017)	Gallup Household Survey
IRS (2019)[12]	4.0% primary income 8.1% of all tax workforce	2016	IRS Administrative Data
General Social Survey[13]	12.5% main job	2018	General Social Survey

On-Call Workers

These are people who work for an employer as needed. They can be scheduled to work for a single shift or for an extended time period. Substitute teachers are the prime examples of the category. Over a third of on-call workers are employed by the education and health sectors. The share of people with these employment arrangements range from 2 to 4 percent.

TABLE 2. **On-Call Workers**

Report	Share of Workforce	Timeframe	Method
Bureau of Labor Statistics (2018)[14]	1.5% main job	In previous week (May 2017)	Contingent Worker Supplement to Current Population Survey
Katz and Krueger (2016)[15]	2.6% main job	In previous week (May 2015)	RAND Household Survey
Gallup (2018)[16]	4.4% primary job 6.4% all workers	In previous week (October 2017)	Gallup Survey
General Social Survey[17]	1.5% as main job	2018	General Social Survey

Contract Firm Workers

Companies often contract with external firms to provide services instead of creating internal capabilities. This arrangement is most common in the sectors of professional business services, educational and health services, and public administration. Contract firms frequently provide on-sight janitorial, landscaping, security, or IT services. While workers would report to work at the client company, they would be employees of the contract firm and would receive W-2s and benefits from the contract firm. This sector of the gig economy has the widest range of estimates, from less than 1 to over 8 percent. This variation may be dependent on the language used in the question. Respondents who work for contract firms may consider themselves in a traditional employment arrangement and not self-identify as participating in the gig economy.

TABLE 3. **Contract Firm Workers**

Report	Share of Workforce	Timeframe	Method
Bureau of Labor Statistics (2018)[18]	0.6% main job	In previous week (May 2017)	Contingent Worker Supplement to Current Population Survey
Katz and Krueger (2016)[19]	3.1% main job	In previous week (May 2015)	RAND American Life Pane Survey
Gallup (2018)[20]	8.5% primary job 9.1% all workers	In previous week (October 2017)	Gallup Survey
General Social Survey[21]	3.0% as main job	2018	General Social Survey

Temporary Help Agency Workers

This category focuses on workers whose short-term services are contracted through a temporary help agency. There are minor variations in the questions asked in the surveys. BLS, Katz and Krueger, and the General Social Survey (GSS) all ask about work specifically facilitated by a temporary help agency. The Gallup survey asked about short-term work arrangements. These could include individuals engaged in seasonal work or other temporary positions they acquired independently. Approximately 1 to 2 percent of workers have been placed by a temporary agency.

TABLE 4. **Temporary Help Agency Workers**

Report	Share of Workforce	Timeframe	Method
Bureau of Labor Statistics (2018)[22]	0.9% main job	In previous week (May 2017)	Contingent Worker Supplement to Current Population Survey
Katz and Krueger (2016)[23]	1.6% main job	In previous week (May 2015)	RAND American Life Pane Survey
Gallup (2018)[24]	4.5% primary job 6.8% all workers	In previous week (October 2017)	Gallup Survey
General Social Survey[25]	1.5% as main job	2018	General Social Survey

Digital Marketplace/Online Platform Workers/Electronically Mediated Employment

The header shows the various terms used to refer to individuals who rely on online platforms to find short-term employment. These platforms enable workers to earn income by providing goods and services directly to individuals. There are now more than 100 platforms that fall into four general categories: transportation of individuals and products (Uber or GrubHub), other types of work (Handy, TaskRabbit), selling of goods (Etsy, eBay), or leasing of property (Airbnb).

While evidence of the growth of these platforms is everywhere, data are hard to come by. Estimates measuring this sector of the workforce vary widely as can be seen in Table 5. Variation in these results are driven by the definition on online platform work used when surveying and the timeframe of the analysis. Some studies focus exclusively on labor/employment provided through online platforms while others include information from individuals who sold goods through platforms such as eBay. When the survey was conducted appeared to be a factor as well. The numbers obtained through surveys conducted in 2018 are higher than those in 2015, likely driven by the growth of the platforms. Analyses that focus on the previous week find lower participation than those focusing on the previous year. Overall, the share of the workforce participating in the digital marketplace is likely in the range of 1 to 4 percent.

TABLE 5. **Online Platform Workers**

Report	Share of Workforce	Timeframe	Method
Katz and Krueger (2016)[26]	0.5%	Previous week	RAND survey
Bureau of Labor Statistics (2018)[27]	1.0% primary or supplemental	Previous week (May 2017)	Supplement to Current Population Survey
IRS[28]	1.0%	During 2016	Administrative tax data
Farrell, Greig, and Hamoudi (2018)[29]	1.6% (1.1% labor)	Past month (March 2018)	Sample of customer checking account data
	4.5% (2.6% labor)	Past year (March 2018)	
MetLife[30]	2.5%	Currently (October 2018)	Household Survey
Gallup[31]	7.3%	Previous week	Household survey
Federal Reserve Board (2019)[32]	3%	Last month	Survey of Household Economics and Decision Making

The Gig Economy in New York

As New York explores policies that will protect gig economy workers, there are questions about the size and scope of the gig workforce in New York. In this section we review data from these studies related to New York. A handful of studies have published state and regional results relevant to New York.

Study	Findings
Holtz-Eakin, Gitis, and Rinehart (2017)[33]	A regional analysis of 2014 GSS data found the Middle Atlantic region (NY, NJ, and PA) has fewer gig workers than the national average: • 11.7 percent are independent contractors, consultants, or freelancers (14.1 percent nationally). • 1.9 percent are temporary agency and on-call workers (3.7 percent nationally). • 2.6 percent are contract company workers (2.7 percent). • The region is home to 13 percent of the national workforce but only 10 percent of the gig workforce.
Farrell, Greig, and Hamoudi (2018)[34]	Analysis of checking accounts: • 1.8 percent of New Yorkers in the study generated income from online platforms in October 2017. • 1.05 percent in transportation, 0.09 percent from nontransport work, 0.47 percent from selling, 0.21 percent from leasing.
Collins et al. (2019)[35]	IRS Administrative Tax Data (2016): • 10.39 percent of the New York's tax workforce participated in the gig economy (12.29 percent nationally). • New Yorkers made up 5.78 percent of the country's gig workforce. • New York's share of the workforce participating in the gig economy grew from 8.9 percent to 10.4 percent between 2000-16. • 86,949 New Yorkers received a 1099 form from an online platform (0.8 percent share). New York ranks fifth in number of platform workers but 21st in share of the workforce participating in platform work.
Moe et al. (2020)[36]	Census Data and Tax Data (2015-17): • 1.6 percent of New York's workforce are app-based independent contractors (2018). • 917,900 (9.6 percent) New York's workforce list self-employment as their primary job (ACS). • 1,752,200 (18.3 percent) New York's workforce are self-employed in primary or supplemental work (Census Nonemployer Statistics (NES)).

Conclusion

As the nature of work changes, it is important to have consistent data collected on regular intervals. Surveys of workers should be updated or supplemented more frequently. Tools need to integrate measures of secondary employment to better understand how individuals make labor decisions.

State-level data is also critical as individual states are considering how to legislate the gig economy and digital workforce. Lawmakers must know who comprises the gig economy and the nature of their work in order to develop policies that will adequately protect workers.

ENDNOTES

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ABOUT THE ROCKEFELLER INSTITUTE

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Warren Anderson Program
Government Law Center
Albany Law School May 28, 2020

CLE materials on select state and local developments related to the gig economy

Terri Gerstein
Director, State and Local Enforcement Project, Harvard Labor and Worklife Program
Senior Fellow, Economic Policy Institute

Materials related to Uber/Lyft

1. NY Unemployment Appeals Board (UAB) decision on Uber: Uber 603937 (currently under appeal)
2. NY Unemployment Appeals Board decision on Uber: Uber 596723 (Uber's appeal withdrawn)
3. Seattle 2015 ordinance
4. (a) 2/15/19 Plaintiffs' summary judgment motion in Chamber of Commerce v Seattle
   (b) 4/26/19 Defendants' opposition to SJ motion
5. 9/19/19 Seattle Mayor announcement re Uber, Lyft, etc.
6. "An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment," James Parrott & Michael Reich
7. New York City Taxi and Limousine Commission driver income rules adopted December 4, 2018
8. Report by National Employment Law Project (NELP) about Uber lobbying influence at state level

Legislation

9. California's AB5
10. Massachusetts Paid Family Leave law covering some 1099 workers
11. New York City Council proposal to include independent contractors in coverage of human rights law

State AGs: general involvement in workplace issues and recent actions involving gig economy companies

12. Economic Policy Institute Report on state AG involvement in workers' rights
13. Complaint filed against Doordash by D.C. Attorney General's Office
14. Settlement by Mass AG's office and Stynt

Testimony

15. Congressional testimony 9/6/17 of Sharon Block, Director, Harvard Labor and Worklife Program

NYS unemployment insurance case involving Postmates, currently in Court of Appeals

16. Appellate Division decision
17. (a) Appellate Division claimant brief
    (b) Appellate Division employer brief
18. (a) Court of Appeals, Commissioner of Labor brief
    (b) Court of Appeals, employer brief
    (c) Court of Appeals, Commissioner of Labor reply brief
19. Court of Appeals decision

STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: APRIL 29, 2019
IN THE MATTER OF: Appeal Board No. 603937

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination (November 9, 2017) holding ("employer" or "Uber") liable for tax contributions effective 1st quarter 2014 based on employee remuneration paid to CL ("claimant") and to any other individual similarly working as a driver.

(Appeal Board No. 603937 and)

The Department of Labor deemed the claimant to be an employee with credited remuneration from the employer regarding the claim for benefits effective August 28, 2017.

(Appeal Board No. 603938 and 018-02832)

The employer requested a hearing, contending that the claimant and all other individuals similarly situated performed services as independent contractors.

The Administrative Law Judge held combined telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant, and on behalf of the employer and of the Commissioner of Labor.

By combined decisions filed November 1, 2018, the Administrative Law Judge overruled the employer's objection and sustained the initial determination. The employer appealed the Judge's decisions to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the employer and of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Uber is an on-demand transportation network company. In 2011, Uber entered the "Downstate" market in New York City where it has been regulated by the Taxi and Limousine Commission (TLC). Pursuant to article 44-B of the New York Vehicle and Traffic Law (§§ 1691-1700) (effective June 29, 2017), Uber entered the market in the remaining "Upstate" portions of New York State on or after June 29, 2017 where it exclusively used a digital network ("platform") to connect riders to its drivers who provide prearranged trips. Uber provides two types of service in Upstate: UberX (basic level) and UberXL (larger vehicle). In the Downstate market it also provides UberPOOL, UberBLACK, and UberSUV. In Upstate, Uber maintains a non-comprehensive list of sample vehicles for UberX and UberXL. The basic requirements of an UberX vehicle are that it be no more than 15-years old, have a minimum of four doors, have factory installed seats, have five factory installed seat belts, and have working windows and air conditioning. Uber's fares charged for UberXL are approximately 50 percent more than those charged for UberX, and an UberXL driver may accept an UberX dispatch at the UberX rate.

Uber developed, maintains and modifies the platform through which trips are requested by riders and accepted by drivers. Uber developed and maintains and modifies an app for riders ("rider app") and for drivers ("driver app") that are compatible with third-party smartphones. Riders download and set up a rider app account on their smartphones to electronically request and pay for prearranged trips. Drivers download and set up a driver app account on their smartphones to electronically accept and receive payment for prearranged trips.

Uber restricts access to the driver app until a driver satisfactorily undergoes a vetting process, including the completion of an application and submission of requisite documents (e.g. driver's license, vehicle registration, proof of insurance); the return of a satisfactory check on the driver's background and driving record; and the execution of Uber's Technology Service Agreement, which provides, in part, that:

* Uber recommends waiting at least ten minutes for a rider to show up at the pickup location (§ 2.2)

* Drivers may not transport individuals other than the rider and rider's authorized passengers during a trip (§ 2.3)

* Uber's driver app will prompt the driver to rate the rider upon completion of the trip (§ 2.5.1)

* Drivers who fail to maintain the set "minimum average rating" may lose access to the driver app

(§ 2.5.2) * Uber reserves the right to use, share and display driver and rider ratings and comments in any manner without approval or attribution (§ 2.5.3)

* While the driver is logged in, Uber will display to the rider the driver's "geo-location" before and during the trip, and Uber may monitor, track and share with third parties the "geo-location" information for safety and security purposes (§ 2.7)

* Drivers must maintain vehicles in good operating order and in a clean and sanitary condition (§ 3.2)

* Uber shall calculate the fare with the driver receiving the cost of tolls from riders (§ 4.1)

* Uber reserves the right to change the method of fare calculation at any time (§ 4.2)

* Uber reserves the right to adjust fares under multiple circumstances (§ 4.3)

* Uber sets and collects any cancellation fee charged to a rider for cancelling a booked trip before the trip is started (§ 4.5)

To find drivers, Uber conducts extensive online marketing and engages a referral rewards program. In 2012, the claimant sent Uber an email of his interest in becoming a driver. In 2017, he received an email to get ready to drive in the Upstate market with a link to file his application and upload requisite documents. The claimant completed his online application, signed the Agreement, and registered two vehicles. Upon passing the vetting process, Uber approved the claimant to be a driver and provided him with Uber stickers to place on the vehicle. When the claimant logged in to the driver app, he became available to accept dispatches of prearranged trips. Uber initially permitted the clamant to request a trip in a desired destination twice per day. Uber modified this permission to six times per day, and shortly thereafter, Uber returned to twice a day because the frequent use of this feature severely disrupted the platform's capability to match riders with drivers.

A rider requests a trip by entering requisite information on the rider app, e.g. the pickup location, time and destination. Uber's platform communicates the trip request solely to the logged-in driver closest to the rider. The driver's phone alerts the driver of the incoming dispatch. The driver may accept the dispatch within 15 seconds; or the driver may reject the dispatch by actively rejecting or by not accepting the dispatch within 15 seconds. If the dispatch is rejected, the platform routes the trip request to the next closest logged-in driver. This continues until the dispatch is accepted. When drivers are not logged in or affirmatively reject a trip, the rider's request is unanswered. Uber requires no minimum amount of time drivers must be logged in and available to accept a dispatch. Also, a driver may reject an unlimited number of dispatched trips without penalty. Upon accepting a dispatch, Uber provides the driver with certain details, for example the pickup location and the rider's rating, while simultaneously providing the rider with certain details, for example the location of the driver, the driver's rating, and the estimate of the fare. Also, a driver may cancel an accepted dispatch at any time for any reason without consequence.

Upon arrival at the pickup location, the rider enters the vehicle and the driver "starts" the trip on the driver app, at which time Uber discloses the rider's destination - Uber does not reveal to the driver the rider's destination before the driver starts the trip. On the driver app, Uber provides for a GPS navigation system to obtain the best route to complete the trip. A driver may use other third-party navigation apps, but the claimant used the Uber's GPS due to its superior functionality with the driver app. The driver app monitors certain features, including the driver's speed while completing a trip. On one occasion, the driver app warned the claimant of his excessive speed during a trip. Upon completing a ride, Uber sends a receipt to the rider who may include a tip and rate the driver on the rider app. The driver is also prompted to rate the rider and may review the earnings from the completed trip on the driver app. The driver is unaware of the earnings until the trip is completed. When any trip is completed, the driver may remain logged in for another dispatch or may log off the driver app.

Uber set the default pricing structure to calculate the fare, including a base fare with additional charges for distance and time. A rider may cancel a trip request at any time. If a rider cancels a dispatch within two minutes from booking the trip request, Uber does not charge the rider a cancellation fee. If a rider cancels a trip dispatch any time thereafter, Uber charges the rider a nominal cancellation fee (for example $4). Upon arrival at the pickup location, the driver app starts a countdown. In the event a driver waits more than five minutes at the requested pickup site for the rider, Uber charges the rider a "wait time" fee that is determined by Uber. If the rider fails to show up altogether or otherwise cancels the trip, Uber charges the rider a cancellation fee that is determined by Uber.

Depending on its analysis of supply and demand, Uber established a dynamic pricing system where a fare could increase by multiple times the regular rate. Times of high demand result in a "surge" in pricing that increases the fare by a surge multiplier placed in effect. Drivers are informed of the surge multiplier in effect at the time of the dispatch. Uber collects any expenses for tolls and any tips paid by riders. Uber does not increase the fare depending on the number of passengers. The claimant was not aware he could challenge fares. If he had been aware, he would have challenged several fares he believed were too low for the length of the trip. In the event a rider's account is fraudulently used, Uber will assume the risk by paying the driver for the completed trip.

Uber charges the rider's credit card on file. Uber sets the percent commission paid to the driver at about 70-80% of the fare. Uber also passes along to the driver any collected tolls and paid tips. Occasionally, Uber offered a financial promotion or "Quest" if a driver completed a threshold number of rides within a specified area during a specific period, for example an incentive to complete 30 rides and get $100, which Uber divides among the first 10 rides, the next ten rides, and the next ten rides, until the full $100 incentive is paid. "Boost" is another type of financial incentive offered to drivers to earn additional money for a trip in a particular place or time. Uber also provides drivers with a referral reward for getting a new driver signed up who then completes a set number of trips. Through the foregoing incentives, the claimant received (1) a $10 referral reward and $130 in promotions for the period ending July 10, 2017; (2) a $20 promotion for the period ending July 17, 2017; (3) a total "Boost" payment of $28.01 for the period ending August 6, 2017; and (4) a total "Boost" payment of $26.58 for the period ending September 4, 2017.

Drivers are responsible for fuel and maintenance of their vehicles. For those drivers who completed a set number of trips per month, Uber offered a gas credit card with a monetary limit (e.g. $200) to purchase gasoline at any gas station. The use of the gas credit card provided several benefits, including a discount of several cents per gallon of gas, and other discounts (for example car washes, Verizon cell phone, AutoZone). Uber reimbursed the gas credit card charges from the driver's ongoing earnings (i.e. commissions and tips) and toll reimbursements. Depending on the number of trips completed, Uber would activate and deactivate the gas credit card. Uber deposits a driver's earnings into the driver's bank account on a weekly basis. Also, for a nominal fee, a driver may request "instant pay" for one or more set of completed trips at any given time. In the event the gas credit card reimbursement exceeds a driver's earning for the week, a driver may not receive a deposit from week to week.

Uber's platform provides for the opportunity for riders and drivers alike to rate the other's performance based on a five-star rating system with comments. Uber sets all ratings and comments to be anonymous and prohibits drivers from knowing which rider made a specific rating or comment. Uber issued email blasts to drivers regarding the basis for riders giving five-star ratings, e.g. great service, great conversation, or choice of music. To maximize their five-star ratings, drivers communicated among themselves regarding amenities provided in their vehicles, e.g. water and candy. The claimant chose not to provide any amenities in his vehicle. The claimant occasionally received multiple bad reviews because the surge pricing drastically increased the fare, unknown to the rider. If a driver falls below a certain rating threshold, Uber may deactivate the driver's account. Further, a driver could potentially be deactivated for not meeting minimum business standards. Uber's customer support team reviewed and fielded complaints. In the event a rider complains about an excessive fare due to a driver's circuitous route, Uber often offers a partial refund. In the event a driver complained about a rider making a mess in the car, Uber attempts to reimburse the driver for the reasonable cleaning expense upon delivery of specified proof.

Uber has available resources online for both riders and drivers alike, including FAQs and a 2.5-minute video on how to use the driver app. Uber also has available online the community guidelines that lay out the minimum business standards. Violation of the standards may cause either rider or driver to be deactivated. Standards that may cause a driver to be deactivated include physical contact with riders, use of inappropriate and abusive language or gestures, unwanted contact with riders, fraud and discrimination. Uber does not direct or suggest drivers to review anything online.

In Upstate, Uber sets up temporary "greenlight spots" at various business locations during business hours to provide in-person assistance to drivers. Drivers have no dress code, no need for a substitute driver, and no traditional fringe benefits. Uber pays for the mandatory worker's compensation coverage (Black Car Fund) for drivers from the portion of the collected fare. Uber does not require drivers to modify their existing vehicle insurance. Uber's group liability policy is in effect for all logged-in drivers.

The Vehicle & Traffic Law, in relevant part, provides that: * Uber must disclose on the rider's app an estimated fare for the requested ride before the trip; and Uber must post the fair calculation method on its website (§ 1692[4])

* Uber shall display a picture of the driver, and provide the make, model, color and license plate number of the driver's vehicle to the rider before the trip (§ 1692[5])

* Uber must electronically transmit a detailed receipt to the rider upon completion of a trip (§ 1692[6])

* Drivers must not solicit or accept street hails (§ 1692[7]) * Drivers must not solicit or accept cash payments for fares (§ 1692[8]) * Uber must prevent Upstate drivers from accepting trips Downstate (§ 1692[9])

* Drivers, or Uber on behalf of drivers through a group policy, shall carry liability

insurance while a driver is logged onto Uber's platform and while a driver is engaged in a prearranged trip (§ 1693[1])

* Uber's group policy shall provide the requisite coverage and the duty to defend a claim in the event the driver's policy fails to meet the requisite coverage (§ 1693[5])

* Uber shall adopt a policy of non-discrimination based on several factors, including a rider's destination (§ 1696[3])

* Drivers shall attach, affix or display in a prescribed manner an Uber sticker on the vehicle (§ 1696[5])

OPINION: While a determination that an employer-employee relationship exists may rest upon evidence that an employer exercises either control over the results produced or over the means used to achieve the results, control over the means is the more important factor to be considered (Matter of Ted is Back Corp., 64 NY2d 725 [1984]). Incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship (Matter of 12 Cornelia St, 56 NY2d 895 [1982]).

Here, the credible evidence establishes that Uber exercises sufficient supervision, direction or control over the claimant and other similarly situated Upstate Uber drivers. The Agreement prohibits transporting anyone else other than the rider and rider's authorized passengers, reserves the right to use, share and display ratings and comments without approval, and reserves the right to monitor, track and share driver's "geo-location" information. It also requires vehicles to be clean, sanitary, and in good operating order, sets and collects cancellation fees, and recommends drivers to wait at least ten minutes. Additionally, Uber maintains and routinely modifies its platform and apps, sets the 15-second acceptance mandate as well as the type and specificity of details required to book a trip, determines when and what details are transmitted to riders and drivers, and provides a GPS navigation system.

Uber also exercises direction or control by calculating and setting the fare's default pricing structure and dynamic pricing system. It mandates not using the number of passengers as a metric to increase the fare. It sets the times and the amounts of a rider's wait time and cancellation fees; handles all the billing and collection; assumes the risk of paying the driver for a completed trip on a fraudulent rider's account; sets the driver's percent commission for each fare; offers drivers financial incentives, and provides and sets the minimum qualification for a credit card to purchase discounted gasoline and to take advantage of other discounts. Other factors weighing toward sufficient direction and control are the use of the anonymous five-star rating system as a means to monitor the driver's performance, especially where Uber fields complaints; the setting of the rating threshold to deactivate the driver's account; determination of other circumstances warranting deactivation of the driver's account; determination of when and how much to adjust rider's fare and driver's commission; issuance of email blasts to inform drivers of rider comments; the monitoring by the app that warns the driver of excessive speed while completing a trip; and the temporary "greenlight spots" that assist drivers.

The Court has held that "it is incumbent on the Board to decide like cases the same way or explain the departure" (Matter of Charles A. Field Delivery Service Inc., 66 NY2d 516 [1985], rev'g 112 AD2d 505 [3d Dept 1985]). The instant drivers are similar to those in other cases where the Court found sufficient evidence of employment relationships regarding limousine and luxury car drivers transporting riders. Uber's platform is effectively an electronic replacement for a traditional in-person dispatcher. See Matter of Kim (SUK Incorporated, DBA Rainbow Limousine), 127 AD3d 1487 (3d Dept 2015); Matter of Khan (Mirage Limousine Service Inc.), 66 AD3d 1098 (3d Dept 2009); Matter of Odyssey Transportation LLC, 62 AD3d 1175 (3d Dept 2009); Matter of Automotive Service Systems Inc., 56 AD3d 854 (3d Dept 2008); Matter of Spectacular Limo Link Inc., 21 AD3d 1172 (3d Dept 2005); and Matter of Eliraky (Crosslands Transportation Inc.), 21 AD3d 1197 (3d Dept 2005).

The Court also found sufficient evidence of employer-employee relationships involving other drivers (see Matter of Crystal [Medical Delivery Services], 150 AD3d 1595 [3d Dept 2017]; Matter of Garbowski [Dynamex Operations East Inc.], 136 AD3d 1079 [3d Dept 2016]; Matter of Mitchum [Medifleet Inc.], 133 AD3d 1156 [3d Dept 2015]; and Matter of Youngman [RB Humphreys Inc.], 126 AD3d 1225 [3d Dept 2015]).

The Board distinguishes Matter of Vega (Postmates Inc.), 162 AD3d 1337 (3d Dept 2018) holding on-demand delivery drivers not to be employees. Unlike Vega, Uber controls the driver's tools and methodology, such as Uber's vehicle classification (UberX and UberXL); Uber mandates the vehicle be maintained in good operating order, as well as be kept clean and sanitary; Uber prohibits anyone else in the vehicle other than Uber's authorized passengers during a trip; Uber imposes the 15-second timeframe to accept a trip; Uber determines what and when certain details are transmitted to drivers and riders; Uber recommends waiting a minimum of ten minutes at the pickup location; and Uber provides drivers with a GPS navigation system. Further, Uber controls the overall financial aspects of the work: setting and collecting the rider's fare and cancellation fee; excluding the number of passengers from the fare calculation; assuming the risk of liability for fraudulent trips; setting the nonnegotiable driver's commission percentage; solely adjusting the rider's fare and driver's commission based on complaints; and offering financial incentives to take certain trips. Additional factors present here but absent from Vega include Uber's fringe benefits in providing a credit card, discounted gasoline, and other discount coupons; Uber's fielding of complaints and use of the five-star anonymous rating system to actively monitor driver's performance; Uber's regular feedback of riders' comments; Uber's reserved right to deactivate a driver's account; Uber's monitoring and warning of excessive trip speed; and Uber's greenlight spots to provide in-person assistance.

The Board further distinguishes Matter of Walsh (Taskrabbit Inc.), 168 AD3d 1323 (3d Dept 2019) where the Court held that "TaskRabbit exercised absolutely no control over the manner in which the taskers completed the jobs that they obtained from clients." Significantly, in Walsh, taskers bid on the jobs posted on the platform and the clients awarded jobs to the taskers; the communications regarding the job were strictly between client and tasker; TaskRabbit did not review taskers' qualifications or evaluate their work performance; TaskRabbit's limited involvement was merely regarding taskers' use of the platform without penalty for noncompliance; both taskers and clients rated each other without TaskRabbit's involvement; and TaskRabbit used a third-party payment provider to facilitate payments between clients and taskers. In stark contrast, Uber actively matches riders to drivers who had no say in the fare price; Uber actively communicated and chose the extent of communications with driver and rider alike, and reviewed and approved drivers' qualifications, as well as evaluated performance by means of the five-star rating system. It was involved with much more than just assisting drivers how to use the platform in that it managed its five-star rating system. It also handled the billing and collection itself.

Next, the Board distinguishes Matter of Courto (SCA Enters. Inc.), 159 AD3d 1240 (3d Dept 2018) where the Court found that SCA negotiates a mutually acceptable fee with the independent appraisers who view on the dashboard assignments posted by insurance carriers. Upon accepting an assignment, the independent appraiser contacts the vehicle owner and conducts the appraisal without further involvement from SCA. The independent appraiser uploads the final appraisal report to the insurance carrier via the dashboard without SCA's review or involvement. The insurance carriers, not SCA, dictate the assignment's requirements. SCA merely passes on any appraisal report problems to the independent appraiser. The service agreement between SCA and independent appraisers designate them as independent contractors and "underscore their autonomy". Here, Uber sets a rider's fee and the driver's fee; communicates with driver and rider; reviews the completed trip information and invoices the rider; dictates the booking information required from the rider and communicates partial details to the driver; mandates rider feedback anonymity and shares the feedback with the driver with the intent to improve performance; and Uber's Technology Service Agreement recommends and directs certain actions be taken, which does not underscore the drivers' autonomy.

Lastly, the Board distinguishes Matter of Yoga Vida NYC Inc., 28 NY3d 1013 (2016) where the Court found, in part, that independent instructors chose how they were paid (either hourly or on a percentage basis); independent instructors were paid only if a certain number of students attended their classes; and Yoga Vida merely received feedback about the instructors from the students. In the instant case, however, Uber solely determined a host of factors (e.g. the driver's commission percentage, the cancellation fee charged to riders, the wait times, etc.); not only paid drivers for completed trips but also paid incentives and promotions; provided a credit card to purchase gas at a discounted rate; assumed the risk of liability for a fraudulent trip; and actively used rider feedback to gauge and improve driver's performance.

Moreover, although New York Vehicle and Traffic Law, article 44-B, has some mandates (e.g. prohibition of destination discrimination and requisite Uber sticker), the record contains ample evidence demonstrating that Uber exercises sufficient control beyond regulatory mandates (see Matter of Crystal [Medical Delivery Svcs.], 150 AD3d 1595 [3d Dept 2017]; and Matter of Wilder [RB Humphreys Inc.], 133 AD3d 1073 [3d Dept 2015]). Under the totality of the circumstances, the claimant and other similarly situated Upstate Uber drivers are covered employees for purposes of unemployment insurance.

DECISION: The combined decisions of the Administrative Law Judge are affirmed.

The initial determination, holding liable for tax contributions effective 1st quarter 2014 based on employee remuneration paid to the claimant and to any other individual similarly working as a driver, is sustained. (Appeal Board No. 603937 and)

The claimant is deemed an employee of and is credited with remuneration from this employer.

(Appeal Board No. 603938 and 018-02832)

The employer's objection is overruled.

The employer is liable for contributions with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER

STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 12, 2018
IN THE MATTER OF: Appeal Board No. 596723

PRESENT: RANDALL T. DOUGLAS, MEMBER

By initial determination dated October 31, 2016, the Department of Labor held . (hereinafter Uber) liable for contributions effective 1st quarter 2014 based on employee remuneration paid to JS (claimant-JS) and to any other individual similarly employed as a driver (Appeal Board No. 596722 and 016-23494). The Department of Labor deemed claimant-JS to be an employee and credited the claim for benefits effective July 18, 2016 with remuneration from Uber (Appeal Board No. 596725 and A.L.J. Case No. 016-23858).

By initial determination dated September 13, 2016, the Department of Labor held . liable for contributions effective 1st quarter 2013 based on employee remuneration paid to JH (claimant-JH) and to any other individual similarly employed as a driver (Appeal Board No. 596723 and A.L.J. Case No.). The Department of Labor deemed claimant-JH to be an employee and credited the claim for benefits effective May 2, 2016 with remuneration from Uber (Appeal Board No. 596726 and 016-20726).

By initial determination dated August 5, 2016, the Department of Labor held . liable for contributions effective 1st quarter 2013 based on employee remuneration paid to LA (claimant-LA) and to any other individual similarly employed as a driver (Appeal Board No. 596724 and A.L.J. Case No. 016-19075). The Department of Labor deemed claimant-LA to be an employee and credited the claim for benefits effective September 14, 2015 with remuneration from Uber (Appeal Board No. 596727 and 016-19369).

Uber requested hearings, contending that the claimants and all other individuals similarly employed performed services as independent contractors.

The Administrative Law Judge held combined hearings at which testimony was taken. There were appearances on behalf of all three claimants, of Uber, and of the Commissioner of Labor. Claimant-JH testified with the help of a Bengali interpreter.

By combined decisions filed June 9, 2017, the Administrative Law Judge overruled Uber's objections and sustained the determinations. On June 29, 2017, Uber appealed the Judge's decisions to the Appeal Board.

The Board held further hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of two claimants, of Uber, and of the Commissioner of Labor. Claimant-LA testified via telephone.

Following the Board hearings, by letter dated May 31, 2018, Uber applied to withdraw its appeal of the Administrative Law Judge's decision. The claimants and the Commissioner each submitted written opposition to the application to withdraw, and Uber submitted a written response to the opposition.

The Board considered the arguments contained in all the written statements.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Uber has conducted operations in New York City since 2011. Drivers must be licensed pursuant to the NYC Taxi and Limousine Commission (TLC). Uber solicits Drivers by promoting a $500 sign-on reward for new Drivers and a $200 referral reward for Drivers who referred a new Driver. All three claimants

(JS, JH and LA) learned of Uber through its advertising and/or Drivers' referrals. One claimant saw advertisements claiming $1,500 per week in earnings. Each of the three claimants contacted Uber and visited a Greenlight Hub that provides in-person services to current and potential Drivers. They obtained assistance in procuring for-hire TLC licenses and TLC registered vehicles; they took Uber's roadmap test; they viewed Uber's onboarding video; and they received Uber's welcome packets, Uber's proprietary phones (Devices), Uber placards, and eventually Uber lights (U light) for vehicle display.

Uber outlines acceptable and unacceptable vehicles in Uber's "Full Vehicle List" that includes several categories such as standard-luxury (UberX), mid-luxury (UberXL), and high-luxury (UberBLACK and UberSUV). Uber further mandates UberBLACK and UberSUV vehicles to have black interiors and black exteriors (black-on-black). Based on the vehicle's luxury category, Uber sets the varying base fares charged to Riders. The claimants either owned an acceptable vehicle or leased a vehicle from several "Uber Vehicle Solutions Participating Dealerships". Uber had developed referral relationships with several leasing entities. Uber electronically deducted and remitted the Driver's weekly lease payments from collected fares.

Uber maintains a computerized communications platform to provide a medium for the public to electronically request rides. From at least the first quarter of 2013, Uber provided Drivers with its Devices to operate Uber's platform. Later, Uber developed Apps for Drivers ("Driver Apps") compatible with third-party smartphones that were used simultaneously with Uber's proprietary Devices. Drivers utilize Devices or download the Driver App onto their smartphones and enter their personal and bank information to accept rides and to receive direct deposit of their fares. Riders download onto their smartphones the Uber App for Riders ("Rider Apps") and enter their personal and credit card information to request rides and to pay for their fares. Uber activates Driver Apps once new Drivers complete the onboarding process, which includes taking Uber's map test to gauge knowledge of the roads of New York City, and completing TLC's application process to obtain for-hire Driver licenses and vehicle registrations.

From about February 2014, at Uber's Hub, Uber presented to interested Drivers the onboarding video that contains "ESSENTIAL information for new Uber (Drivers). You are responsible for understanding all information in the video before you accept your first trip." The video demonstrated how to use the Driver App and how to maintain a high-performance rating including maintaining a clean vehicle, having water available, and wearing professional attire. From about April 2015, Uber emailed all interested Drivers an electronic link to preview a revised version of the onboarding video.

Uber also published and distributed to Drivers a written handbook, updated February 23, 2015, entitled "Welcome to Uber" with the preamble: "This guide contains essential information for new Uber partners. Please read it carefully." The handbook advises Drivers how to obtain email, text and in-person assistance, how to handle trip requests, how to use the in-app navigation system ("GPS"), and how to request a fare review to collect an additional fee for such instances when a Rider's address was incorrectly provided or a Rider made a mess. For example, a Driver may claim, and Uber may determine and collect, a cleaning fee from a Rider. The handbook also instructs Drivers how to cancel a trip request and to wait at least 10 minutes if the Rider is not at the pick-up location and to call the Rider twice within the 10-minute waiting period.

The handbook also instructs that "Riders rate you on a scale of 1 to 5 stars", with the average rating being "4.7 out of 5"; that "You're likely to be deactivated" with a rating below 4.5; and that "Riders tell us they give 1-star ratings" when Drivers:

* call a rider unnecessarily * ask for a 5 Star Rating * ask for tips * take an inefficient route * quote Uber prices

The handbook further states that "Riders tell us they give 5-star ratings" when Drivers:

* open the door for a rider * help with luggage * politely greet the user and ask their name * always ask for their preferred route * engage in polite conversation

The handbook also instructs how to set up music to satisfy the Rider - "When you see a passenger with the [music note] next to their name, make sure to enable music and set your stereo to AUX so they can start playing their music right away." The handbook also contains fare pricing information and "Frequently asked iPhone Questions", as well as accessing the online dashboard and invoices, updating bank information, earning rewards, and using promo codes.

Uber also published and made available to Drivers its "CODE OF CONDUCT" that sets out Uber's "Standards so that everyone in the vehicle has a shared standard for respect, accountability, and common courtesy." This Code includes various subcategories, including non-discrimination, no aggressive behavior, human kindness, disabilities, following the rules, and emergencies.

When logging into Uber's Driver App, all Drivers must accept (electronically sign) Uber's terms and conditions, which include at least two agreements, i.e. Software License and Online Services Agreement, and Technology Services Agreement, and their addenda, as well as subsequent updated versions, that state,1 in part, as follows:

* Uber shall own and have all rights in and to the Device (Uber's proprietary smartphone), the Software, the Uber Service, the Driver ID and the Data (§ 2.4)

* Driver shall safeguard, protect and keep the Rider Information received from Uber, and the details of any Ride, at all times confidential and shall not disclose it to any person or store the information in any manner (§ 3.7)

* Driver will immediately notify Uber of any actual or suspected security breach or improper use of the Device, the Driver App, the Driver ID, the Data or of the Rider Information (§ 3.8)

* Uber may suspend or revoke the Driver App if Drivers unlawfully, unfairly or in bad faith disparage Uber (§ 3.9); Uber will issue a Driver ID for each Driver to access and use the Driver App and the Device (§ 4.1.1)

* Upon accepting a trip request, Uber will provide to Driver the Rider Information

(including Rider's location), and Uber will provide to Rider specific information (including the Driver's name, photo, geolocation, and phone number) (§§ 4.2.1 and 11.1)

* Driver shall accept a trip request at least once a month (§ 4.2.2) * Rider must comment on and rate the Driver on the App, and Uber reserves the right to post these comments and ratings on the App or the Website (§ 4.3.1)

* Driver must comment on and rate the Rider on the Driver App (§ 4.3.1) * Uber reserves the right to refuse, edit or remove unfavorable reviews (§ 4.3.2)

* Driver must maintain a high standard of professional attire (§ 4.3.3) * Driver must maintain Uber's minimum rating to continue to use the Driver App (§ 4.3.3)

* At Uber's sole discretion, Uber reserves the right to reclaim, prohibit, suspend, limit or otherwise restrict the Driver from accessing or using the Driver App or the Device (§§ 4.1.1 and 4.3.3)

* Uber reserves the right to advertise and market that tipping Drivers is "voluntary," "not required," and/or "included" in a Rider's fare (§ 5.1.3)

* Uber reserves the right to waive a Rider's cancellation fee (§ 5.1.4) * Uber reserves the unilateral right to set its fee per ride charged to the Driver (§ 5.2.1)

* Driver must always keep the vehicle in a clean and good operating condition (§ 6.1.1.vii)

* Driver is an independent contractor (§ 7.1) * Uber reserves the right to terminate this Agreement without notice when the Driver no longer qualifies under Uber's quality standards (§ 9.1)

* Uber shall monitor and trace the Driver's geolocation through the Driver App via GPS tracking (§ 11.1)

* Uber reserves the right to unilaterally modify the Agreements at any time (§ 12.1)

* Driver shall not assign, transfer, or encumber the agreements, but Uber may assign, transfer, or encumber the Agreements (§ 13.2)

Upon logging into the Driver App, a Driver becomes available to receive a dispatch. A Rider requests a trip by entering the pickup address and time, and the destination. Uber's platform locates and dispatches the Rider's trip request solely to the Driver closest to the

Rider. That Driver's phone beeps with an animation alert. The Driver must accept the dispatch within 15 seconds. An unwilling Driver may actively decline the dispatch or merely let the 15 seconds pass. If the dispatched trip request is declined, then the Uber platform dispatches the trip request to the next closest logged-in Driver. Also, the Driver's app has the capacity to cancel an accepted trip request before the trip commenced.

After a Driver accepts a trip request, Uber reveals to the Driver the pickup location, the Rider's photo, the Rider's first name, and the Rider's rating. Uber simultaneously reveals to the Rider the Driver's photo, the Driver's first name, and the vehicle's make/model and license plate number. While the Driver proceeds to the pickup location, the Rider App's built-in map permits the Rider to observe the Driver's location, movement, and estimated time of arrival. Upon the Driver's arrival, Rider and Driver concurrently verify each other's identity.

On or about April 2015, Riders were provided the option to enter the destination when requesting a trip. On or about October 2016, the Rider App required Riders to enter the destination when requesting a trip. Uber withholds the Rider's destination information from the Driver until the Rider enters the vehicle and the Driver activates the start-meter. The Driver takes the route provided by the Driver App's GPS or third-party GPS application. Unless a Rider requests a specific route, the Driver must take the most efficient route or risk a complaint and/or deduction in pay. For example, on the basis that claimant LA transported a Rider via an "inefficient route", Uber imposed a "trip adjustment" in LA's pay in August 2014. Upon arriving at the destination, the Rider exits the vehicle and the Driver activates the end-meter.

Uber also permits Riders and Drivers to participate in carpooling (UberPOOL) by which a Rider may share a ride and split the cost with one or more strangers who are headed in the same direction with various pick-up and drop-off points. When participating in UberPOOL, Uber dictates the order in which the Driver must drop off Riders.

The Rider must rate the trip experience and the Driver's performance using Uber's five-star rating system. Uber then calculates the fare and charges the Rider's credit card on file. Simultaneously, the Driver must rate the Rider using the same five-star rating system. Thereafter, the Driver is free to logoff or remain logged-in for another trip dispatch.

Uber updated its Driver App to "receive helpful reminders and see safe-driving stats based on your past trips", including "Smooth Brakes" and "Smooth Accelerations". Further, when logging in, the Driver App periodically performs an "ID check" by prompting the Driver to take "a clear, well-lit photo of your face" and comparing the photo to the

Driver's profile picture to "ensure you're the only one who can go online with your Uber account".

Uber maintains numerous data points regarding the Drivers' logged-in activities, including their times that they log in and out, their acceptance and cancellation rates, their Rider ratings, their trip start and end times, their trip GPS location and mapped route, their Riders, their trip fares, etc. Uber uses these data points to process weekly Drivers' payments, to verify or otherwise resolve complaints from Riders and Drivers alike, to verify a potential cause for deactivating the Driver App, to ensure that Drivers are taking the best route every time, etc.

Uber's Operations and Logistics Managers manage a staff of employees who utilize Driver data points "to monitor driver behavior and ensure efficiency." Within the timeframe of one claimant's association with Uber, Uber commenced "a pilot program to verify feedback using smartphone technology. Gyrometers in phones can measure small movements, while GPS and accelerometers show how often a vehicle starts and stops, as well as its overall speed." Uber uses this technology to verify a Rider's complaint that a Driver "accelerated too fast and braked too hard". Verified complaints result in Uber's feedback to the Driver and affect the Driver's rating, while unverified complaints result in no feedback and do not affect the Driver's rating.

Uber's "Driver Deactivation Policy" places Drivers on notice of causes for suspension or deactivation of the Driver App, including low star ratings, high cancellation rates, low acceptance rates, use of a Driver's account by other individuals, use of an unapproved vehicle, etc. This Policy, in part, states that Uber "will alert you over time if your rating is approaching (the minimum) limit, and you'll also get information about quality improvement courses that may help you improve. If your average rating still falls below this minimum after multiple notifications, you will be deactivated. You may be reactivated on the platform after you provide proof of the steps you've taken to improve, for example by taking one of these quality improvement courses." Additionally, to maintain uninterrupted access to the Driver App, Uber expects Drivers to be polite and professional, to be neatly dressed, to have a clean vehicle with water and candy available for Riders, to promptly pick up Riders, and to safely transport Riders to their destination.

Uber communicates these expectations to Drivers in the onboarding video, as well as through additional informational videos and written communications available online and/or sent via emails. Uber repeatedly reminds Drivers to review videos (e.g. "USING A GPS Uber Driver Training: How to Get 5 Star Ratings"), to refrain from inappropriate conversations with riders, and to follow Uber's no-tip policy before accepting a monetary tip. For example, Uber emailed claimant LA a "Weekly Summary" on Monday, July 6, 2015, that provided the specific days and hours worked, the number of hours worked during Uber's calculated busiest hours, the current 4.94 Driver rating, Uber's commentary of "nice work, your Driver rating last week was above average", Uber's selected sample comment of a Rider's feedback, the methods to improve the rating (e.g., "Ask if the Rider has a preferred route"), the number of trips taken each of the last two weeks, the number of hours logged-in each of the last two weeks, the calculated fares per hour for each of the last two weeks, and the acceptance rate for each of the last two weeks. Also, within Uber's email congratulating a Driver for completing the first trip, Uber advises the Driver to not accept cash, to not harass a Rider, to not refuse a service animal, to contact Uber via email for non-urgent issues (24-48-hour response time), to contact Uber via text message for on-the-road urgent questions, to not fall below 4.5 stars to avoid the risk of deactivation, and to follow specific tips to maintain a high rating (e.g. open doors, offer water, keep car clean, use GPS, and wait patiently to pick up and not call or text the Rider right away).

Regarding claimant LA, Uber issued notices of potential deactivation for having a low rating. Unilaterally determining that his rating continued to be unsatisfactory, Uber deactivated his Driver App. Upon notice of Uber's distributed flyers for Quality Improvement Courses, LA paid for and took the requisite course provided by a third party. Within hours of completing the course, Uber reactivated his Driver App.

Drivers must inform Uber of accidents occurring during trips. Uber immediately deactivates the Driver App for a motor vehicle accident. Uber contacts the Rider soon after an accident. Uber verifies via submitted photos that the vehicle has been repaired and safe to drive before Uber reactivates the Driver App.

In addition to the foregoing reasons for deactivation, Uber suspends access to the Driver App for violation of other expectations. Uber expects Drivers to accept 90 percent of dispatched trips; if a Driver falls below this set standard, Uber temporarily deactivates access to the Driver App. Uber expects Drivers not to decline two consecutive dispatched trips. If a Driver does not meet this expectation, Uber temporarily deactivates the Driver App. For example, Uber deactivated claimant JS's access for 10-minute intervals for excessively declining dispatched trips. Uber expects Drivers not to cancel accepted trips; if a Driver's cancellation rate exceeds Uber's predetermined threshold, Uber temporarily deactivates the Driver App with a notice that you "rejected too many" accepted trips and an outline of the Driver's acceptance history. Uber deactivated claimant AK's access for 24 hours due to excessive cancellations.

Uber sets the prices of fares charged to the Riders. Approved by TLC, Uber has been utilizing a dynamic-pricing system where the fare prices fluctuate up and down almost instantly depending on the supply of Drivers and the demand by Riders. Occasionally, Uber provides incentives and promotions to Drivers and Riders alike. For example, Uber notified Drivers of surge pricing locations where sufficient demand increased the fares and informed Drivers to make themselves available at such locations to earn a higher income. Uber also notified Drivers of locations and/or time schedules at which to make themselves available in exchange for a promotional guaranteed income.

Uber handles all the marketing to get Riders to use its transportation services with the tagline "Everyone's Private Driver." Uber has developed the VIP program, which is like a customer loyalty program for top-rated frequent Drivers to have greater access to top-rated frequent Riders. Uber has further developed relationships with gasoline stations to provide fuel cards with $200 credit lines for Drivers to purchase gasoline, along with a host of available discount coupons, and for Uber to directly withhold fuel charges from fares to be turned over to these participating stations. Uber made available a support team to address Drivers' concerns.

Uber collects the fares from Riders. Before Uber made weekly direct-deposit payments to Drivers' personal bank accounts, Uber deducts various fees, including Uber's set fee, the Black Car Fund fee, the sales tax, the third-party vendor fee for accident insurance payments (if purchased), the third-party vendor fee for vehicle lease payments (if leased), fuel card purchases (if used), etc. Uber sets and collects cancellation fees if Riders cancel trips or fail to show at the pick-up location within Uber's established five-minute waiting period. The cancellation fee is passed along to the Driver like a collected fare. On one occasion, Uber reimbursed claimant JH for a $1,500 summons for operating in Nassau County without a local for-hire-vehicle registration. No governmental deductions are withheld from Drivers' earnings that were reported in their personal capacity as IRS Miscellaneous Income (1099-MISC) nonemployee compensation.

Claimant JS participated as an Uber Driver from about November 2015 through August 2016; claimant JH from about January through April 2016; and claimant LA from about August 2014 through September 2015. The claimants' relationships with Uber ended for various reasons. For example, on April 25, 2016, Uber emailed claimant JH to advise that he was "permanently deactivated" from the Driver App "due to repeated issues with low ratings or feedback received from riders. Providing quality trips to riders is extremely important. If you have a phone (Device) provided by Uber, please return your phone to us. Just fill out his form, put your device in a well-padded box, and click on this link to receive a paid shipping label."

OPINION: Neither the Labor Law nor the Appeal Board rules address whether a party has the right to withdraw its appeal of a decision of the Administrative Law Judge.

Pursuant to 12 NYCRR 463.2(b), "The board may decide any case appealed to it on the basis of the record and of evidence previously submitted in such case, or in its discretion, may hear argument or hold a further hearing." Although the Board has granted parties' applications to withdraw their appeal on many prior occasions, the Board, in its discretion, has denied requests to withdraw appeals (see e.g. Appeal Board Nos. 557383 and 552492). Here, Uber's application to withdraw was made over 11 months after its appeal of the Judge's decision and after the Board garnered voluminous evidence at two further hearings. In the interest of justice, the Board concludes that a decision on the merits should be issued. Accordingly, Uber's application to withdraw its appeal should be denied.

While a determination that an employer-employee relationship exists may rest upon evidence that an employer exercises either control over the results produced or over the means used to achieve the results, control over the means is the more important factor to be considered (Matter of Ted is Back Corp., 64 NY2d 725 [1984]). Incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship (Matter of 12 Cornelia St, 56 NY2d 895 [1982]).

The credible evidence establishes that Uber exercises sufficient supervision, direction or control over the three claimants and other similarly situated Drivers. Uber exercises control through its in-person assistance at its Hubs where Drivers are screened, are required to view the orientation onboarding video of essential information, and are required to take Uber's roadmap test. Uber also provides Drivers with its handbook and signage, and refers Drivers to specific dealerships to lease TLC licensed vehicles.

Uber also exercises control through its Driver App. Uber provides the Driver App and sets up the information that appears on the Driver App; sets the fares charged to Riders; sets the rate of pay to Drivers and the occasional income guarantee; sets the various incentives and promotions; and sets the music, tipping and deactivation policies. Uber assigns the work by dispatching trip requests to the closest individual Driver who must accept the dispatch within Uber's 15-second mandate. Uber also provides the requisite tools, such as built-in maps on the Driver App and Uber signage. Uber further conducts an occasional "ID check" on the Driver App, and sets the order of Riders' drop off for UberPOOL.

Uber also exercises control by providing in-person support to Drivers and monitoring Drivers' performance, solely determining when and how long to deactivate Drivers for failing to meet Uber's performance standards. Uber fielded complaints and regularly communicated feedback to the Drivers, including the minimum threshold star rating to avoid suspension, and communicated the trip's most efficient route and the Drivers' acceleration, braking, and overall speed. Occasionally, Uber reimburses Drivers. Uber handles all the bookkeeping needs, including collecting from Riders, adjusting for mandatory pay deductions, and paying Drivers directly.

The Court has held that "it is incumbent on the Board to decide like cases the same way or explain the departure" (Matter of Charles A. Field Delivery Service Inc., 66 NY2d 516 [1985], rev'g 112 AD2d 505 [3d Dept 1985]; see also, Matter of Casey [Larkfield Lottery], 140 AD2d 925 [3d Dept 1988]). The cases at hand are similar to others in which the Court found sufficient evidence of employment relationships regarding limousine and luxury car drivers (see Matter of Kim [SUK Incorporated, DBA Rainbow Limousine], 127 AD3d 1487 [3d Dept 2015]; Matter of Khan [Mirage Limousine Service Inc.], 66 AD3d 1098 [3d Dept 2009]; Matter of Odyssey Transportation LLC, 62 AD3d 1175 [3d Dept 2009]; Matter of Automotive Service Systems Inc., 56 AD3d 854 [3d Dept 2008]; Matter of Spectacular Limo Link Inc., 21 AD3d 1172 [3d Dept 2005]; and Matter of Eliraky [Crosslands Transportation Inc.], 21 AD3d 1197 [3d Dept 2005]).

The Court has also found sufficient evidence of employer-employee relationships involving other drivers (see Matter of Crystal [Medical Delivery Services], 150 AD3d 1595 [3d Dept 2017]; Matter of Garbowski [Dynamex Operations East Inc.], 136 AD3d 1079 [3d Dept 2016]; Matter of Mitchum [Medifleet Inc.], 133 AD3d 1156 [3d Dept 2015]; and Matter of Youngman [RB Humphreys Inc.], 126 AD3d 1225 [3d Dept 2015]).

Uber contends that the foregoing cases are not controlling because of the Court of Appeals' decision in Matter of Yoga Vida NYC Inc., 28 NY3d 1013 (2016). However, unlike Yoga Vida's distinct and different treatment between its staff and non-staff instructors, Uber engages only non-staff Drivers. And unlike non-staff instructors who were paid only if a certain number of students attended their classes, Uber not only guarantees payment for each trip, but occasionally guarantees a specified level of income. Also, unlike Yoga Vida, Drivers view the "essential" onboarding video; Uber provides Drivers with welcome packets, vehicle placards, and financial incentives and promotions; Uber maintains numerous Driver data and regularly communicates

expectations to the Drivers; Uber sets the minimum star-rating threshold performance and utilizes the performance scores and the Riders' feedback and complaints in deactivating Driver Apps as a result of inability to meet Uber's satisfactory level of quality; and Uber unilaterally determines whether to collect a Rider's cancellation fee.

With respect to several other cases cited by Uber, including Saleem v. Corp. Transp. Group, Ltd., 854 F.3d 131 (2d Cir. 2017), aff'g Saleem v. Corp. Transp. Group, Ltd., 52

F.Supp.3d 526 (SDNY 2014); Matter of Jarzabek (Carey Limousine, NY Inc.), 292 AD2d 668 (3d Dept 2002); Matter of Rukh (Batter City Car & Limousine Service Inc.), 208 AD2d 1105 (3d Dept 1994); and Matter of Pavan (UTOG 2-Way Radio Association Inc.), 173 AD2d 1036 (3d Dept 1991), these cases involved franchisors comprised of franchise owner-drivers, or a nonprofit corporation comprised of member-drivers, who imposed and enforced a set of rules on themselves. Although Uber contends that such distinction is insignificant, the Court has held otherwise (see Matter of Odyssey Transportation LLC, 62 AD3d 1175 [3d Dept 2009]; and Matter of Freidenberg (Limousine Resources Management Corp.), 235 AD2d 866 [3d Dept 1997]). Uber relies on Saleem, a decision unrelated to Unemployment Insurance Law, which is not binding on the Board (see e.g. Matter of Bartenders Unlimited Inc., 289 AD2d 785 [3d Dept 2001]; Matter of Enjoy the Show Management Inc., DBA Teasers, 287 AD2d 822 [3d Dept 2001]; and Matter of Simonelli (Adams Bakery Corp., 286 AD2d 805 [3d Dept 2001]).

The Board is mindful of the Court's recent decision in Matter of Vega (Postmates Inc.), ___ AD3d ___ (3d Dept June 21, 2018) holding on-demand delivery drivers not to be employees. In Vega, the Court relied on, in part, the driver's ability to reject or ignore a delivery request without penalty, the driver's freedom to choose the mode of transportation or the route to be taken, the driver's lack of a requirement to wear a uniform, the driver's lack of a provided logo, and the driver's lack of expense reimbursement. Here, however, Uber penalized the Driver if too many trip requests were rejected or ignored, Uber imposed a list of acceptable vehicles and the route requested by a Rider or the GPS route, Uber strongly suggested a dress code, Uber supplied placards and lights with its logo, and Uber made an extensive reimbursement of $1,500 to one of the claimants. Additional factors absent from Postmates include Uber's mandate to view the onboarding video and to take a roadmap test, Uber's distribution of its handbook, Uber's imposed tipping and deactivation policies, Uber's policing of Drivers' performance, Uber's continuous feedback to the Drivers, and Uber's occasional "ID check", income guarantee, and various incentives or promotions.

Although Uber contends that it is merely a technology platform that connects Riders to Drivers, its business is similar in many respects to other more traditional car service companies. Here, the technology merely replaces much of the duties of an employee-dispatcher to dispatch a trip request solely to the nearest Driver who may accept the dispatched assignment. Moreover, the record demonstrates that Uber markets its transportation services to Drivers and Riders alike, selects only qualified Drivers, monitors and supervises Drivers' performance, rewards high performing Drivers, disciplines Drivers who fail to meet Uber's standards on a temporary or permanent basis, sets the fare prices charged to Riders, and sets the Driver's fee paid to Uber.

Significantly, Uber mandates each Rider to rate their Driver under Uber's 5-star rating and give written feedback of the Driver's performance, which is then utilized to monitor and discipline Drivers, including suspending or terminating their relationship. Effectively, Uber utilizes Riders' ratings and feedback as one of various tools with which to gauge and otherwise monitor Drivers' performance including cleanliness, professional attire, and driving manner. The direct consequences and implications of the mandated 5-star rating and feedback demonstrate control.

Uber also contends that all controls were mandated by the TLC. However, the record contains ample evidence demonstrating that Uber, once the Drivers report for duty (logged in), exercises or reserves the right to exercise sufficient control beyond regulatory mandates, including its 5-star rating system and list of acceptable cars (see Matter of Crystal [Medical Delivery Svcs.], 150 AD3d 1595 [3d Dept 2017]; and Matter of Wilder [RB Humphreys Inc.], 133 AD3d 1073 [3d Dept 2015]).

Also, written agreements characterizing drivers as independent contractors are not dispositive of employer-employee relationships, but merely just one of many factors to be considered. See Matter of Isaacs (Speedy Media Associates LLC), 125 AD3d 1077 (3d Dept 2015); Matter of Wells (Madison Consulting Inc.), 77 AD3d 993 (3d Dept 2010); Matter of Chorba, 54 AD3d 1091 (2008); and Matter of Stuckelman (Blodnick, Gordon, Fletcher & Sibell PC), 16 AD3d 882 (3d Dept 2005).

Finally, the Board is not persuaded by Uber's contention that the claimants had an opportunity to become a business owner who in turn could pay its engaged drivers, like that of Uber's driver-witness (AS). Such individual is not similarly situated to the instant three claimants. The record, as a whole, demonstrates that the claimants and other similarly situated drivers were covered employees for purposes of unemployment insurance.

DECISION: Uber's application to withdraw its appeal is denied.

The combined decisions of the Administrative Law Judge are affirmed.

The initial determination, holding . liable for contributions effective 1st quarter 2014 based on employee remuneration paid to claimant-JS and to any other individual similarly employed as a driver, is sustained.

(Appeal Board No. 596722 and 016-23494)

Claimant-JS is deemed an employee of and is credited with remuneration from Uber regarding a claim for benefits effective July 18, 2016

(Appeal Board No. 596725 and 016-23858).

The initial determination, holding . liable for contributions effective 1st quarter 2013 based on employee remuneration paid to claimant-JH and to any other individual similarly employed as a driver, is sustained.

(Appeal Board No. 596723 and)

Claimant-JH is deemed an employee of and is credited with remuneration from Uber regarding a claim for benefits effective May 2, 2016.

(Appeal Board No. 596726 and 016-20726)

The initial determination, holding . liable for contributions effective 1st quarter 2013 based on employee remuneration paid to claimant-LA and to any other individual similarly employed as a driver, is sustained.

(Appeal Board No. 596724 and 016-19075)

Claimant-LA is deemed an employee of and is credited with remuneration from Uber regarding a claim for benefits effective September 14, 2015.

(Appeal Board No. 596727 and 016-19369)

Uber's objection in each case is overruled.

Uber is liable with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER

1 Of the various versions of the Agreements (Uber Exhibits 11, 12 and 13), the section citations are to the Agreement revised June 21, 2014 (Uber Exhibit 13).

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SEATTLE CITY COUNCIL

Legislative Summary

CB 118499

Record No.: CB 118499
Version: 4

Type: Ordinance (Ord)
124968

Status: Passed
In Control: City Clerk
File Created: 09/02/2015
Final Action: 12/23/2015

Title: AN ORDINANCE relating to taxicab, transportation network company, and for-hire vehicle drivers; amending Section 6.310.110 of the Seattle Municipal Code; adding a new Section 6.310.735 to the Seattle Municipal Code; and authorizing the election of driver representatives.

Notes: Waiting to bring forward after budget.

Sponsors: Licata,O'Brien

Attachments:

Drafter: jodee.schwinn@seattle.gov

	Date
Filed with City Clerk:	
Mayor's Signature:	
Vetoed by Mayor:	
Veto Overridden:	
Veto Sustained:	

Filing Requirements/Dept Action:

History of Legislative File **Legal Notice Published:** ☐ Yes ☐ No

Ver-sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	City Clerk	09/02/2015	sent for review	Council President's Office			

Action Text: The Council Bill (CB) was sent for review. to the Council President's Office
Notes:

Ver-sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	Council President's Office	09/02/2015	sent for review	Finance and Culture Committee			

Action Text: The Council Bill (CB) was sent for review. to the Finance and Culture Committee
Notes:

Ver-sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	Full Council	09/08/2015	referred	Finance and Culture Committee			

Action Text: The Council Bill (CB) was referred. to the Finance and Culture Committee
Notes:

Ver-sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	Finance and Culture Committee	09/09/2015	discussed				

Action Text: The Council Bill (CB) was discussed in Committee.
Notes:

1	Finance and Culture Committee	09/23/2015	discussed		

Action Text: The Council Bill (CB) was discussed.

1	Finance and Culture Committee	10/02/2015	pass as amended		Pass

Action Text: The Committee recommends that Full Council pass as amended the Council Bill (CB).

In Favor: 7 Chair Licata, Vice Chair Godden, Member Burgess, Alternate Bagshaw, O'Brien, Harrell, Sawant

Opposed: 0

3	Full Council	12/14/2015	passed as amended		Pass

Action Text: The Motion carried, the Council Bill (CB) was passed as amended by the following vote, and the President signed the Bill:

Notes: ACTION 1:

Motion was made by Councilmember O'Brien, duly seconded and carried, to amend CB 118499 by sustituting Version 5 for Version 4.

ACTION 2:

Motion was made by Councilmember O'Brien, duly seconded and carried, to amend CB 118499 by substituting Version 6 for Version 5.

ACTION 3:

Motion was made and duly seconded to pass the Bill as amended.

In Favor: 8 Council President Burgess, Councilmember Godden, Councilmember González , Councilmember Harrell, Councilmember Licata, Councilmember O'Brien, Councilmember Rasmussen, Councilmember Sawant

Opposed: 0

4	City Clerk	12/16/2015	submitted for Mayor's signature	Mayor	

Action Text: The Council Bill (CB) was submitted for Mayor's signature. to the Mayor

Notes:

4	Mayor	12/23/2015	returned unsigned		

Action Text: The Council Bill (CB) was returned unsigned.

Notes:

4	Mayor	12/23/2015	returned	City Clerk	

Action Text: The Council Bill (CB) was returned. to the City Clerk

Notes:

4	City Clerk	12/23/2015	attested by City Clerk		

Action Text: The Ordinance (Ord) was attested by City Clerk.

Notes:

December 23, 2015

Honorable Tim Burgess, President
Seattle City Council
600 4th Avenue, Floor 2
Seattle, WA 98104

Dear Council President Burgess,

I am transmitting Council Bill 118499 without my signature, understanding that it will become law.

The tremendous growth of Transportation Network Companies (TNCs) in Seattle, both in terms of popularity and the number of trips, demonstrates that this new business model is changing how people move around the city. These companies are providing valuable new tools for city residents and innovating at a tremendous pace.

I said consistently during this debate that I support the right of workers to organize to create a fair and just workplace. I remain concerned that this ordinance, as passed by the Council, includes several flaws, especially related to the relatively unknown costs of administering the collective bargaining process and the burden of significant rulemaking the Council has placed on City staff. My office has shared my concerns with the Council throughout the debate.

As this ordinance takes effect, my administration will begin its work to determine what it will take to implement the law. I believe it will be necessary to seek additional clarifying legislation from the Council. I look forward to working with councilmembers in 2016 on their ordinance.

Sincerely,

Edward B. Murray
Mayor, City of Seattle

cc: Honorable Members of the Seattle City Council
Monica Martinez Simmons, City Clerk

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CITY OF SEATTLE

ORDINANCE 124968

COUNCIL BILL 118499

AN ORDINANCE relating to taxicab, transportation network company, and for-hire vehicle drivers; amending Section 6.310.110 of the Seattle Municipal Code; adding a new Section 6.310.735 to the Seattle Municipal Code; and authorizing the election of driver representatives.

WHEREAS, the state of Washington, in Revised Code of Washington 46.72.001 and 81.72.200, has authorized political subdivisions of the state to regulate for-hire drivers and for-hire transportation services without facing liability under federal antitrust laws; and

WHEREAS, allowing taxicab, transportation network company, and for-hire vehicle drivers ("for-hire drivers") to modify specific agreements collectively with the entities that hire, direct, arrange, or manage their work will better ensure that they can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner and thereby promote the welfare of the people; and

WHEREAS, the new responsibilities for the Department of Finance and Administrative Services (FAS) contemplated in this legislation will require additional resources; and

WHEREAS, the Director of FAS has authority to adjust fees to cover the cost of the regulatory functions FAS performs on behalf of the public; and

WHEREAS, should this legislation go into effect, the Director may exercise that authority to raise additional revenue through fees to cover the additional costs; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Findings

A. In order to protect the public health, safety and welfare, The City of Seattle is granted express authority to regulate for-hire and taxicab transportation services pursuant to Chapters 46.72 and 81.72 RCW. This authority includes regulating entry, requiring a license, controlling rates, establishing safety requirements, and any other requirement to ensure safe and reliable transportation services.

B. Seattle Municipal Code (SMC) Chapter 6.310 is an exercise of The City of Seattle's power to regulate the for-hire and taxicab transportation industry. SMC Chapter 6.310, in subsection 6.310.100.A, states: "Some of its regulatory purposes are to increase the safety, reliability, cost-effectiveness, and the economic viability and stability of privately-operated for-hire vehicle and taxicab services within The City of Seattle."

C. The purpose of this ordinance is to ensure safe and reliable for-hire and taxicab transportation service pursuant to RCW 46.72.160 and RCW 81.72.210, respectively, and to exercise the City's authority to regulate for-hire transportation pursuant to RCW 46.72.001, which states: "The legislature finds and declares that privately operated for hire transportation service is a vital part of the transportation system within the state. Consequently, the safety, reliability, and stability of privately operated for hire transportation services are matters of statewide importance. The regulation of privately operated for hire transportation services is thus an essential governmental function. Therefore, it is the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws." RCW 81.72.200, governing taxicab transportation, has a similar statement of legislative intent.

D. As the City is acting under specific state statutory authority, it is immune from liability under antitrust laws.

E. At present, entities that hire, contract with, or partner with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire transportation services to the public establish the terms and conditions of their contracts with their drivers unilaterally, and may impose changes in driver compensation rates or deactivate drivers from dispatch services without prior warning or discussion. Terms and conditions that are imposed without meaningful driver input, as well as sudden and/or unilateral contract changes, may adversely impact the ability of a for-hire driver to provide transportation services in a safe, reliable, stable, cost-effective, and economically viable manner.

F. Unilateral terms and working conditions established and imposed without driver input by entities that hire, contract with, or partner with for-hire drivers, as well as sudden and/or unilateral changes in those terms and conditions, have resulted in driver unrest and transportation service disruptions around the country.

G. There is currently no effective mechanism for for-hire drivers to meaningfully address the terms and conditions of their contractual relationship with the entity that hires, contracts with, or partners with them. For-hire drivers lack the power to negotiate these issues effectively on an individual basis.

H. Business models wherein companies control aspects of their drivers' work, but rely on the drivers being classified as independent contractors, render for-hire drivers exempt from minimum labor requirements established by federal, state, and local law.

I. Establishing a process through which for-hire drivers and the entities that control many aspects of their working conditions collectively negotiate the terms of the drivers' contractual relationships with those entities will enable more stable working conditions and better ensure that drivers can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner, and thereby promote the welfare of the people who rely on safe and reliable for-hire transportation to meet their transportation needs.

1. Drivers working under terms that they have negotiated through a collective negotiation process are more likely to remain in their positions over time, and to devote more time to their work as for-hire drivers, because the terms are more likely to be satisfactory and responsive to the drivers' needs and concerns. Such drivers accumulate experience that will improve the safety and reliability of the for-hire transportation services provided by the driver coordinator and reduce the safety and reliability problems created by frequent turnover in the for-hire transportation services industry.

2. Establishing the drivers' contractual terms through a collective negotiation process will also help ensure that the compensation drivers receive for their services is sufficient to alleviate undue financial pressure to provide transportation in an unsafe manner (such as by working longer hours than is safe, skipping needed breaks, or operating vehicles at unsafe speeds in order to maximize the number of trips completed) or to ignore maintenance necessary to the safe and reliable operation of their vehicles. Enabling driver participation in the formulation of vehicle equipment standards and safe driving practices will help ensure that those standards and practices are responsive to driver needs, including changing conditions, and that drivers will agree with and follow those standards and practices.

J. Collective negotiation processes in other industries have achieved public health and safety outcomes for the general public and improved the reliability and stability of the industries at issue including, but not limited to, job security provisions, scheduling predictability, job training, methods of communicating health and safety information and enforcing health and safety standards, processes for resolving disputes with minimal rancor or conflict, and reductions in industrial accidents, vehicular accidents, and inoperative or malfunctioning equipment. In other parts of the transportation industry, for example, collective negotiation processes have reduced accidents and improved driver and vehicle safety performance.

Section 2. Section 6.310.110 of the Seattle Municipal Code, last amended by Ordinance 124524, is amended as follows:

6.310.110 Definitions

* * *

<u>"Commencement date" means a calendar date set by the Director after the effective date of the ordinance introduced as Council Bill 118499 for the purpose of initiating certain processes pursuant to Section 6.310.735 and establishing timelines and deadlines associated with them.</u>

* * *

"Director" means the Director of Finance and Administrative Services or the director of any successor department and the Director's authorized designee.

<u>"Driver coordinator" means an entity that hires, contracts with, or partners with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public. For the purposes of this definition, "driver coordinator" includes but is not limited to taxicab associations, for-hire vehicle companies, and transportation network companies.</u>

<u>"Exclusive driver representative" (EDR) means a qualified driver representative, certified by the Director to be the sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator, and authorized to negotiate, obtain and enter into a contract that sets forth terms and conditions of work applicable to all of the for-hire drivers employed by that driver coordinator.</u>

* * *

"Personal vehicle" means a vehicle that is not a taxicab or for-hire vehicle licensed under this ((~~chapter~~)) Chapter 6.310. A personal vehicle that is used to provide trips via a transportation network company application dispatch system is subject to regulation under this ((~~chapter~~)) Chapter 6.310.

"Qualifying driver" means a for-hire driver, who drives for a driver coordinator and who satisfies the conditions established by the Director pursuant to Section 6.310.735. In establishing such conditions, the Director shall consider factors such as the length, frequency, total number of trips, and average number of trips per driver completed by all of the drivers who have performed trips in each of the four calendar months immediately preceding the commencement date, for a particular driver coordinator, and any other factors that indicate that a driver's work for a driver coordinator is significant enough to affect the safety and reliability of for-hire transportation. A for-hire driver may be a qualifying driver for more than one driver coordinator.

"Qualified driver representative" (QDR) means an entity that assists for-hire drivers operating within the City for a particular driver coordinator in reaching consensus on desired terms of work and negotiates those terms on their behalf with driver coordinators.

* * *

Section 3. A new Section 6.310.735 is added to the Seattle Municipal Code as follows:

6.310.735 Exclusive driver representatives

A. The Director shall promulgate a commencement date that is no earlier than 180 days and no later than 240 days from the effective date of the ordinance introduced as Council Bill 118499.

B. The process of designating a QDR shall be prescribed by Director's rule. The designation of a QDR shall be based on, but not limited to, consideration of the following factors:

1. Registration with the Washington Secretary of State as a not-for-profit entity;

2. Organizational bylaws that give drivers the right to be members of the organization and participate in the democratic control of the organization; and

3. Experience in and/or a demonstrated commitment to assisting stakeholders in reaching consensus agreements with, or related to, employers and contractors.

C. An entity wishing to be considered as a QDR for for-hire drivers operating within the City must submit a request to the Director within 30 days of the commencement date or at a later date as provided in subsection G of this section. Within 14 days of the receipt of such a request, the Director will notify the applicant in writing of the determination. Applicants who dispute the Director's determination may appeal to the Hearing Examiner within 10 days of receiving the determination. The Director shall provide a list of all QDRs to all driver coordinators.

1. An entity that has been designated as a QDR shall be required to establish annually that it continues to satisfy the requirements for designation as a QDR.

2. An entity that has been designated as a QDR and that seeks to represent the drivers of a driver coordinator shall notify the driver coordinator of its intent to represent those drivers within 14 days of its designation as a QDR. That notice may be provided by any means reasonably calculated to reach the driver coordinator, including by written notice mailed or delivered to a transportation network company or taxicab association representative at the mailing address listed with the City.

D. Driver coordinators who have hired, contracted with, partnered with, or maintained a contractual relationship or partnership with, 50 or more for-hire drivers in the 30 days prior to the commencement date, other than in the context of an employer-employee relationship, must, within 75 days of the commencement date, provide all QDRs that have given the notice specified in subsection 6.310.735.C.2 the names, addresses, email addresses (if available), and phone number (if available) of all qualifying drivers they hire, contract with, or partner with.

E. QDRs shall use driver contact information for the sole purpose of contacting drivers to solicit their interest in being represented by the QDR. The QDR may not sell, publish, or otherwise disseminate the driver contact information outside the entity/organization.

F. The Director shall certify a QDR as the EDR for all drivers contracted with a particular driver coordinator, according to the following:

1. Within 120 days of receiving the driver contact information, a QDR will submit statements of interest to the Director from a majority of qualifying drivers from the list described in subsection 6.310.735.D. Each statement of interest shall be signed, dated, and clearly state that the driver wants to be represented by the QDR for the purpose of negotiations with the driver coordinator. A qualifying driver's signature may be provided by electronic signature or other electronic means. The Director shall determine by rule the standards and procedures for submitting and verifying statements of interest by qualifying drivers choosing an EDR.

a. The methods for submitting and verifying statements of interest by qualifying drivers choosing an EDR may include, but not be limited to: signature verification, unique personal identification number verification, statistical methods, or third party verification.

2. Within 30 days of receiving such statements of interest, the Director shall determine if they are sufficient to designate the QDR as the EDR for all drivers for that particular

driver coordinator, and if so, shall so designate the QDR to be the EDR, except that, if more than one QDR establishes that a majority of qualifying drivers have expressed interest in being represented by that QDR, the Director shall designate the QDR that received the largest number of verified affirmative statements of interest to be the EDR.

3. Within 30 days of receiving submissions from all QDRs for a particular driver coordinator, the Director shall either certify one to be the EDR or announce that no QDR met the majority threshold for certification.

G. If no EDR is certified for a driver coordinator, the Director shall, upon the written request from a designated QDR or from an entity that seeks to be designated as a QDR, promulgate a new commencement date applicable to that driver coordinator that is no later than 90 days after the request, provided that no driver coordinator shall be subject to the requirements of Section 6.310.735 more than once in any 12-month period. The QDR, any other entity that seeks to be designated as a QDR, and the driver coordinator shall then repeat the processes in subsections 6.310.735.C, 6.310.735.D, and 6.310.735.F.

H. 1. Upon certification of the EDR by the Director, the driver coordinator and the EDR shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director, including, but not limited to, best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours of work, conditions of work, and applicable rules. If the driver coordinator and the EDR reach agreement on terms, their agreement shall be reduced to a written agreement. The term of such an agreement shall be agreed upon by the EDR and the driver coordinator, but in no case shall the term of such an agreement exceed four years.

2. After reaching agreement, the parties shall transmit the written agreement to the Director. The Director shall review the agreement for compliance with the provisions of this Chapter 6.310, and to ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance the public policy goals set forth in Chapter 6.310 and in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. In conducting that review, the record shall not be limited to the submissions of the EDR and driver coordinator nor to the terms of the proposed agreement. The Director shall have the right to gather and consider any necessary additional evidence, including by conducting public hearings and requesting additional information from the EDR and driver coordinator. Following this review, the Director shall notify the parties of the determination in writing, and shall include in the notification a written explanation of all conclusions. Absent good cause, the Director shall issue the determination of compliance within 60 days of the receipt of an agreement.

a. If the Director finds the agreement compliant, the agreement is final and binding on all parties.

b. If the Director finds it fails to comply, the Director shall remand it to the parties with a written explanation of the failure(s) and, at the Director's discretion, recommendations to remedy the failure(s).

c. The agreement shall not go into effect until the Director affirmatively determines its adherence to the provisions of this Chapter 6.310 and that the agreement furthers the provision of safe, reliable, and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

3. Unless the EDR has been decertified pursuant to subsection 6.310.735.L or has lost its designation as a QDR, the EDR and the driver coordinator shall, at least 90 days before the expiration of an existing agreement approved pursuant to subsections 6.310.735.H.2.c or 6.310.735.I.4.c, meet to negotiate a successor agreement. Any such agreement shall be subject to approval by the Director pursuant to subsection 6.310.735.H.2. If the parties are unable to reach agreement on a successor agreement within 90 days after the expiration of an existing agreement, either party must submit to interest arbitration upon the request of the other pursuant to subsection 6.310.735.I, and the interest arbitrator's proposed successor agreement shall be subject to review by the Director pursuant to subsections 6.310.735.I.3 and 6.310.735.I.4.

4. Nothing in this section 6.310.735 shall require or preclude a driver coordinator from making an agreement with an EDR to require membership of for-hire drivers in the EDR's entity/organization within 14 days of being hired, contracted with, or partnered with by the driver coordinator to provide for-hire transportation services to the public.

I. If a driver coordinator and the EDR fail to reach an agreement within 90 days of the certification of the EDR by the Director, either party must submit to interest arbitration upon the request of the other.

1. The interest arbitrator may be selected by mutual agreement of the parties. If the parties cannot agree, then the arbitrator shall be determined as follows: from a list of seven arbitrators with experience in labor disputes and/or interest arbitration designated by the American Arbitration Association, the party requesting arbitration shall strike a name. Thereafter

the other party shall strike a name. The process will continue until one name remains, who shall be the arbitrator. The cost of the interest arbitration shall be divided equally between the parties.

2. The interest arbitrator shall propose the most fair and reasonable agreement concerning subjects specified in rules or regulations promulgated by the Director as set forth in subsection 6.310.735.H.1 that furthers the provision of safe, reliable, and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. The term of any agreement proposed by the interest arbitrator shall not exceed two years. In proposing that agreement, the interest arbitrator shall consider the following criteria:

a. Any stipulations of the parties;

b. The cost of expenses incurred by drivers (e.g., fuel, wear and tear on vehicles, and insurance);

c. Comparison of the amount and/or proportion of revenue received from customers by the driver coordinators and the income provided to or retained by the drivers;

d. The wages, hours, and conditions of employment of other persons, whether employees or independent contractors, employed as for-hire or taxicab drivers in Seattle and its environs, as well as other comparably sized urban areas;

e. If raised by the driver coordinator, the driver coordinator's financial condition and need to ensure a reasonable return on investment and/or profit;

f. Any other factors that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment; and

g. The City's interest in promoting the provision of safe, reliable, and economical for-hire transportation services and otherwise advancing the public policy goals set forth in Chapter 6.310 and in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

3. The arbitrator shall transmit the proposed agreement to the Director for review in accordance with the procedures and standards set forth in subsection 6.310.735.H.2. With the proposed agreement, the arbitrator shall transmit a report that sets forth the basis for the arbitrator's resolution of any disputed issues. The Director shall review the agreement as provided in subsection 6.310.735.H.2.

4. In addition to the review provided for in subsection 6.310.735.I.3, a driver coordinator or EDR may challenge the proposed agreement on the following grounds: that the interest arbitrator was biased, that the interest arbitrator exceeded the authority granted by subsection 6.310.735.H and this subsection 6.310.735.I, and/or that a provision of the proposed agreement is arbitrary and capricious. In the event of such a challenge, the Director will provide notice to the driver coordinator and the EDR, allow the driver coordinator and the EDR the opportunity to be heard, and make a determination as to whether any of the challenges asserted should be sustained.

a. If the Director finds the agreement fulfills the requirements of subsection 6.310.735.H.2, and that no challenges raised under this subsection 6.310.735.I.4 should be sustained, the Director will provide written notice of that finding to the parties and the agreement will be deemed final and binding on all parties.

b. If the Director finds that the agreement fails to fulfill the requirements of subsection 6.310.735.H.2, or that any challenge asserted under this subsection 6.310.735.I.4 should be sustained, the Director shall remand the agreement to the interest arbitrator with a written explanation of the failure(s) and, at the Director's discretion, recommendations to remedy the failure(s).

c. The agreement shall not go into effect until the Director affirmatively deems the agreement final and binding pursuant to subsections 6.310.735.I.3 and 6.310.735.I.4.a.

d. A driver coordinator or EDR may obtain judicial review of the Director's final determination rendered pursuant to this subsection 6.310.735.I.4 by applying for a Writ of Review in the King County Superior Court within 14 days from the date of the Director's determination, in accordance with the procedure set forth in Chapter 7.16 RCW, other applicable law, and court rules. The Director's final determination shall not be stayed pending judicial review unless a stay is ordered by the court. If review is not sought in compliance with this subsection 6.310.735.I.4.d, the determination of the Director shall be final and conclusive.

5. If either party refuses to enter interest arbitration, upon the request of the other, either party may pursue all available judicial remedies.

J. During the term of an agreement approved by the Director under subsection 6.310.735.H or 6.310.735.I, the parties may discuss additional terms and, if agreement on any amendments to the agreement are reached, shall submit proposed amendments to the Director, who shall consider the proposed amendment in accordance with the procedures and standards in subsection 6.310.735.H.2. Any proposed amendment shall not go into effect until the Director affirmatively determines its adherence to the provisions of this Chapter 6.310 and that it furthers the provision of safe, reliable and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

1. During the term of an agreement approved by the Director under subsection 6.310.735.H or 6.310.735.I, the Director shall have the authority to withdraw approval of the agreement if the Director determines that the agreement no longer adheres to the provisions of this Chapter 6.310 or that it no longer promotes the provision of safe, reliable, and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. The Director shall withdraw such approval only after providing the parties with written notice of the proposed withdrawal of approval and the grounds therefor and an opportunity to be heard regarding the proposed withdrawal. The Director's withdrawal of approval shall be effective only upon the issuance of a written explanation of the reasons why the agreement on longer adheres to the provisions of this Chapter 6.310 or no longer furthers the provision of safe, reliable, and economical for-hire transportation services or the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

2. The Director shall have the authority to gather and consider any necessary evidence in exercising the authority provided by this subsection 6.310.735.J.

3. A driver coordinator shall not make changes to subjects set forth in subsection 6.310.735.H or specified in rules or regulations promulgated by the Director without meeting and discussing those changes in good faith with the EDR, even if the driver coordinator and EDR have not included terms concerning such subjects in their agreement.

K. A driver coordinator shall not retaliate against any for-hire driver for exercising the right to participate in the representative process provided by this section 6.310.735, or provide or offer to provide money or anything of value to any for-hire driver with the intent of encouraging the for-hire driver to exercise, or to refrain from exercising, that right. It shall be a violation for a driver coordinator or its agent, designee, employee, or any person or group of persons acting directly or indirectly in the interest of the driver coordinator in relation to the for-hire driver to:

1. Interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this section 6.310.735; or

2. Take adverse action, including but not limited to threatening, harassing, penalizing, or in any other manner discriminating or retaliating against a driver, because the driver has exercised the rights protected under this section 6.310.735.

L. Decertification. An Exclusive Driver Representative may be decertified according to the following:

1. The Director receives a petition to decertify an EDR no more than 30 days before the expiration of an agreement reached pursuant to this section 6.310.735 or no less than three years after the agreement's effective date, whichever is earlier.

a. A decertification petition must be signed by ten or more qualifying drivers. The Director shall determine by rule the standards and procedures for submitting the decertification petition.

2. Once a petition has been accepted by the Director, the Director shall issue notice to the driver coordinator and the EDR of the decertification petition and promulgate a decertification date.

3. The driver coordinator shall have 14 days from the decertification date to transmit the list of qualifying drivers to the petitioners and the EDR.

4. Within 120 days of receiving the driver contact information, petitioners for a decertification will submit to the Director statements of interest from a majority of qualifying drivers from the list described in subsection 6.310.735.K.3. The statements of interest shall be

signed and dated and shall clearly indicate that the driver no longer wants to be represented by the EDR for the purpose of collective bargaining with the driver coordinator. The Director shall determine by rule the standards and procedures for submitting and verifying the statements of interest of qualifying drivers.

5. Within 30 days of receiving such statements of interest, the Director shall determine if they are sufficient to decertify the EDR for that particular driver coordinator. The Director shall either decertify the EDR, or declare that the decertification petition did not meet the majority threshold and reaffirm that the EDR shall continue representing all drivers for that particular driver coordinator.

a. If an EDR is decertified for a particular driver coordinator, the process of selecting a new EDR may start according to the process outlined in subsection 6.310.735.G.

M. Enforcement

1. Powers and duties of Director

a. The Director is authorized to enforce and administer this section 6.310.735. The Director shall exercise all responsibilities under this section 6.310.735 pursuant to rules and regulations developed under Chapter 3.02. The Director is authorized to promulgate, revise, or rescind rules and regulations deemed necessary, appropriate, or convenient to administer the provisions of this section 6.310.735, providing affected entities with due process of law and in conformity with the intent and purpose of this section 6.310.735.

b. The Director shall investigate alleged violations of subsections 6.310.735.D and 6.310.735.H.1, and if the Director determines that a violation has occurred, the Director shall issue a written notice of the violation. The Director may investigate alleged violations of other subsections of this section 6.310.735, and if the Director determines that a violation has occurred, the Director shall issue a written notice of the violation. The notice shall:

1) Require the person or entity in violation to comply with the requirement;

2) Include notice that the person or entity in violation is entitled to a hearing before the Hearing Examiner to respond to the notice and introduce any evidence to refute or mitigate the violation, in accordance with Chapter 3.02; and

3) Inform the person or entity in violation that a daily penalty of up to $10,000 for every day the violator fails to cure the violation will accrue if the violation is uncontested or found committed.

c. The person or entity named on the notice of violation must file with the Hearing Examiner's Office the request for a hearing within ten calendar days after the date of the notice of violation. The Hearing Examiner may affirm, modify, or reverse the Director's notice of violation.

d. If the person or entity named on the notice of violation fails to timely request a hearing, the notice of violation shall be final and the daily penalty of up to $10,000 will accrue until the violation is cured.

e. Nothing in this section 6.310.735 shall be construed as creating liability or imposing liability on the City for any non-compliance with this section 6.310.735.

2. Judicial review. After receipt of the decision of the Hearing Examiner, an aggrieved party may pursue all available judicial remedies.

3. Private right of action. Subsections 6.310.735.D, 6.310.735.E, 6.310.735.H, and 6.310.735.K may be enforced through a private right of action. Any aggrieved party,

including but not limited to an EDR, may bring an action in court, and shall be entitled to all remedies available at law or in equity appropriate to remedy any violation of this section 6.310.735. A plaintiff who prevails in any action against a private party to enforce this section 6.310.735 may be awarded reasonable attorney's fees and costs.

4. Contractual remedies. Nothing in this section shall be construed as preventing the parties to an agreement approved by the Director from pursuing otherwise available remedies for violation of such agreement.

Section 4. The provisions of this ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of this ordinance, or the invalidity of its application to any person or circumstance, does not affect the validity of the remainder of this ordinance, or the validity of its application to other persons or circumstances.

Section 5. Sections 2 and 3 of this ordinance shall take effect and be in force 150 days after the effective date of the ordinance introduced as Council Bill 118499.

Section 6. No provision of this ordinance shall be construed as a providing any determination regarding the legal status of taxicab, transportation network company, and for-hire vehicle drivers as employees or independent contractors. The provisions of this ordinance do not apply to drivers who are employees under 29 U.S.C. § 152(3).

Section 7. Should a court of competent jurisdiction, all appeals having been exhausted or all appeal periods having run, determine that any provision of this ordinance is preempted by federal law, any and all such provisions shall be deemed null and void.

Section 8. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.

Passed by the City Council the 14th day of December, 2015, and signed by me in open session in authentication of its passage this 14th day of December, 2015.

President __________ of the City Council

Approved by me this ____ day of ____________________, 2015.

Edward B. Murray, Mayor

Filed by me this 23rd day of December, 2015.

Monica Martinez Simmons, City Clerk

(Seal)

STATE OF WASHINGTON -- KING COUNTY

--ss.

332162

No.

CITY OF SEATTLE,CLERKS OFFICE

Affidavit of Publication

The undersigned, on oath states that he is an authorized representative of The Daily Journal of Commerce, a daily newspaper, which newspaper is a legal newspaper of general circulation and it is now and has been for more than six months prior to the date of publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of this newspaper. The Daily Journal of Commerce was on the 12th day of June, 1941, approved as a legal newspaper by the Superior Court of King County.

The notice in the exact form annexed, was published in regular issues of The Daily Journal of Commerce, which was regularly distributed to its subscribers during the below stated period. The annexed notice, a

CT:124956-124968 TITLE

was published on

01/08/16

The amount of the fee charged for the foregoing publication is the sum of $219.47 which amount has been paid in full.

MELISSA M. DOWD
STATE OF WASHINGTON
NOTARY PUBLIC
MY COMMISSION EXPIRES
11-21-19

Subscribed and sworn to before me on

01/08/2016

Notary public for the State of Washington,
residing in Seattle

Affidavit of Publication

State of Washington, King County

City of Seattle

The full text of the following legislation, passed by the City Council on December 14, 2015, and published below by title only, will be mailed upon request, or can be accessed at http://clerk.seattle.gov. For information on upcoming meetings of the Seattle City Council, please visit http://www.seattle.gov/council/calendar. Contact: Office of the City Clerk at (206) 684-8344.

Ord 124956

AN ORDINANCE appropriating money to pay certain audited claims and ordering the payment thereof.

Ord 124957

AN ORDINANCE related to cable television; authorizing the Mayor or the Mayor's designee to enter into a renewed Cable Television Franchise Agreement with Comcast Cable Communications Management, LLC; and authorizing the Chief Technology Officer to enter into other agreements for the purpose of implementing or administering the renewed franchise.

Ord 124958

AN ORDINANCE approving and confirming the plat of "Greenbelt Station" in the portions of Southwest 1/4 of Northeast 1/4 of Section 34, Township 24 North, Range 4 East, W.M. in King County, Washington.

Ord 124959

AN ORDINANCE relating to City employment commonly referred to as the Fourth Quarter 2015 Employment Ordinance; establishing new salaries that implement 2016 increases required by Ordinance 124490; amending Ordinance 124927; increasing funds; designating positions as exempt from Civil Service status; and ratifying and confirming certain prior acts; all by a 3/4 vote of the City Council.

Ord 124960

AN ORDINANCE relating to employment in Seattle; amending Chapters 14.16, 14.17, 14.19, and 14.20 of the Seattle Municipal Code to prescribe additional remedies and enforcement procedures, harmonize ordinance language, and add provisions to facilitate compliance; amending Section 3.14.931 of the Seattle Municipal Code to update duties of the Seattle Human Rights Commission; and amending Section 5.55.230 of the Seattle Municipal Code to require labor standards compliance for business license tax certificates.

Ord 124961

AN ORDINANCE authorizing, in 2015, acceptance of funding from non-City sources; authorizing the heads of the Executive Department, City Budget Office, Department of Neighborhoods, Department of Parks and Recreation, Human Services Department, Seattle Fire Department, Seattle Police Department, Department of Information Technology, and Seattle Public Utilities to accept specified grants, private funding donations and subsidized loans and to execute, deliver, and perform corresponding agreements; and ratifying and confirming certain prior acts.

Ord 124962

AN ORDINANCE relating to the 2015 Budget; amending Ordinance 124648, which adopted the 2015 Budget, including the 2015-2020 Capital Improvement Program (CIP); changing appropriations to various departments and budget control levels, and from various funds in the Budget; revising project allocations for certain projects in the 2015-2020 CIP; creating both exempt and nonexempt positions; and ratifying and confirming certain prior acts; all by a 3/4 vote of the City Council.

Ord 124963

AN ORDINANCE relating to the creation of a Title 6 business license; adding a new Chapter 6.208 to the Seattle Municipal Code; and amending Sections 5.30.030, 5.32.150, 5.55.230, 6.10.005, 6.20.050, 6.214.310, 6.250.030, 6.500.140, 7.04.645, 21.16.060, 21.16.080, and 22.214.060 of the Seattle Municipal Code.

Ord 124964

AN ORDINANCE relating to historic preservation; imposing controls upon the Seattle Post-Intelligencer Globe, a landmark designated by the Landmarks Preservation Board under Chapter 25.12 of the Seattle Municipal Code, and adding it to the Table of Historical Landmarks contained in Chapter 25.32 of the Seattle Municipal Code.

Ord 124965

AN ORDINANCE relating to Seattle Public Utilities; authorizing the Director of Seattle Public Utilities to execute amendments to wheeling agreements between The City of Seattle and North City Water District and between The City of Seattle and Olympic View Water and Sewer District.

Ord 124966

AN ORDINANCE relating to Seattle Public Utilities; authorizing the Director of Seattle Public Utilities to enter into a Joint Project Agreement with King County to design, construct, operate, and maintain the Ship Canal Water Quality Project, in partial fulfillment of the objectives of the Consent Decree authorized under Ordinances 123908 and 124129, and the "Plan to Protect Seattle's Waterways" authorized under Ordinance 124766, to reduce Combined Sewer Overflows; and ratifying and confirming certain prior acts.

Ord 124967

AN ORDINANCE vacating the south 168 feet of the alley adjacent to Lots 17 through 24, lying between Block 55 and Block 56, Boston Company's Plat of West Seattle, near the Alaska Junction of the West Seattle neighborhood of Seattle, on the petition of Fauntleroy Place LLC (Clerk File 308171), and ratifying and confirming certain prior acts.

Ord. 124968

AN ORDINANCE relating to taxicab, transportation network company, and for-hire vehicle drivers; amending Section 6.310.110 of the Seattle Municipal Code; adding a new Section 6.310.735 to the Seattle Municipal Code; and authorizing the election of driver representatives.

Date of publication in the Seattle Daily Journal of Commerce, January 8, 2016.

1/8(332162)

Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and RASIER, LLC *Plaintiffs*, v. CITY OF SEATTLE *et al.*, *Defendants*.	Case No. 17-cv-00370-RSL **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** **NOTING DATE: March 29, 2019**

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TABLE OF AUTHORITIES

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INTRODUCTION AND MOTION

Seattle's ordinance, which authorizes independent-contractor drivers to collectively bargain over the terms of their contracts with ride-referral companies like Uber and Lyft, is a blatant, *per se* violation of federal antitrust law. Last year, the Ninth Circuit rejected Seattle's attempt to hide the ordinance behind the shield of state-action antitrust immunity. *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 779–80 (9th Cir. 2018). With its only plausible defense off the table, Seattle has now attempted to salvage the ordinance by removing the provisions authorizing horizontal price fixing, the paradigmatic *per se* violation. But Seattle's amendment does not change the required result, and summary judgment should be entered for plaintiffs, for two reasons.

First, the amended ordinance continues to authorize horizontal group boycotts, which are another classic example of *per se* illegal conduct under the Sherman Act. Specifically, the ordinance enables a group of independent drivers (through a union) to exclude rival drivers (such as part-time drivers) from the market by preventing them from contracting with ride-referral companies outside the terms of a collective-bargaining agreement. *Second*, Seattle's voluntary cessation of its price-fixing scheme does not moot Plaintiffs' challenge to the ordinance's price-fixing provisions. Seattle has refused to concede the illegality of those provisions and has given no assurances that they will not be reenacted. And, as the Federal Trade Commission and Department of Justice informed the Ninth Circuit in this case, the price-fixing provisions authorize *per se* illegal conduct for which injunctive relief is warranted.

Summary judgment is appropriate because there are no genuinely disputed issues of fact material to Plaintiffs' claims. Seattle has contended that discovery may be needed on topics like the nature of the relevant markets and whether drivers or ride-referral companies exercise market power. But such inquiries are irrelevant where *per se* rules are involved: group boycotts and price fixing "are so plainly anticompetitive, and so often lack any redeeming virtue, that they are conclusively presumed illegal without further examination" of the market or industry. *Catalano,* *Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646 & n.9 (1980) (per curiam) (internal citations, quotation marks, and ellipses omitted). As a result, the Court should grant summary judgment in favor of Plaintiffs, declare the ordinance invalid, both as originally enacted and as amended, and permanently enjoin Seattle from enforcing its provisions.

BACKGROUND

Seattle's ordinance authorizes for-hire drivers to unionize and to negotiate collectively, through those unions, over the terms in the drivers' contracts with ride-referral and similar companies. *See* Seattle Ordinance No. 124968, Doc. 39-1.[1] The ordinance covers only drivers who are independent contractors. Its provisions "do not apply to drivers who are employees under 29 U.S.C. § 152(3)," the National Labor Relations Act. *Id.* § 6; *see also id.* § 1(H) (ordinance directed at "[b]usiness models wherein … drivers [are] classified as independent contractors"). Crucially, the unionized drivers are permitted to demand that the ride-referral company deny contracts to other drivers who do not wish to be covered by the collective-bargaining agreement. *Id.* § 2 (exclusive collective-bargaining agreement "sets forth terms and conditions of work applicable to all of the for-hire drivers" who contract with a ride-referral service). In other words, the ordinance authorizes and facilitates group boycotts of non-conforming drivers.

The union-election process begins when the Seattle Director of Finance and Administrative Services designates a "qualified driver representative," which is an entity seeking to become the exclusive union representative of for-hire drivers who contract with a specific ride-referral service, or "driver coordinator." *Id.* §§ 2, 3(C).[2] The ordinance mandates that driver coordinators provide the qualified representative with the personal contact information of all "qualifying drivers," who

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[1] Unless otherwise noted, all docket citations refer to the district court docket in this case, No. 17-cv-00370.

[2] As relevant here, the ordinance defines "driver coordinator" as an entity that "contracts with … for-hire drivers" to "assist[] them with, or facilitate[e] them in, providing for-hire services to the public." Ordinance § 2. As Seattle has stated, "'driver coordinators' include … transportation network companies (like Uber and Lyft)." (Seattle MTD at 2 n.1, Doc. 42.)

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are the only drivers eligible to vote in a union election. *Id.* § 3(D), 3(F)(1).[3] The representative uses that information to contact these voting-eligible drivers and ask for their vote. *Id.* § 3(E–F). If a majority of qualified drivers vote in favor, the Director certifies the qualified representative as the drivers' union, known as the "exclusive driver representative." *Id.* §§ 2, 3(E). The ordinance then mandates collective bargaining between the union and the driver coordinator over various subjects, including "minimum hours of work." *Id.* § 3(H)(1). The ordinance originally mandated collective bargaining over the "payments to be made by, or withheld from, the driver coordinator to or by the drivers," *id.*, but, as discussed below, Seattle recently amended the ordinance to remove that mandate.

Seattle formally designated Teamsters Local 117 as a "qualified driver representative" on March 3, 2017. (Decl. of Matthew Eng ¶ 7, Doc. 39.) On March 7, the Teamsters demanded driver information from twelve driver coordinators that Seattle had identified on its collective-bargaining webpage, including three of the Chamber's members. (*Id.*) As Seattle has confirmed, the ordinance would have compelled these driver coordinators to provide lists of their qualifying drivers to Local 117 by April 3, 2017. (*Id.* ¶ 8.)

Plaintiff Chamber of Commerce of the United States of America sued on March 9, 2017, to enjoin enforcement of the ordinance. (Doc. 1.) The complaint asserted eight claims, raising challenges under both federal and state law. The Chamber subsequently amended the complaint to add Rasier, LLC (Uber's wholly owned subsidiary),[4] as a plaintiff, after Seattle demanded Uber's "individual participation in these proceedings" because Uber, not the Chamber, was subject to the ordinance. (Doc. 53.) As relevant here, the amended complaint asserts two antitrust claims:

[3] Seattle has defined "qualifying driver" as a for-hire driver that (1) "began contracting with … a particular Driver Coordinator at least 90 days prior to the commencement date" of the ordinance, and (2) has driven "at least 52 trips" in Seattle using "a particular Driver Coordinator during any three-month period in the 12 months preceding the commencement date." Director's Rule FHDR-1, Doc. 39-3.

[4] Although Rasier, LLC is distinct from Uber Technologies, Inc., for ease of reference, Rasier, LLC is referred to as "Uber" in this motion.

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first, that the ordinance is preempted by the Sherman Act (Count Two), and second, that the City's implementation of the ordinance constitutes a violation of the Sherman Act, entitling Plaintiffs to an injunction under section 16 of the Clayton Act (Count One).

After initially granting a preliminary injunction to preserve the status quo (Doc. 49), this Court granted Seattle's motion to dismiss all claims. (Doc. 66.) As to the antitrust claims, the Court assumed that the ordinance authorized a *per se* antitrust violation, but held that state-action immunity shielded the ordinance from federal antitrust law. (*Id.* at 6–16.) Plaintiffs appealed, and the Ninth Circuit reversed. It held that the ordinance satisfies neither of the two required elements for state-action immunity, and therefore must comply with federal antitrust law. *Chamber of Commerce*, 890 F.3d at 779–80.

In response to the Ninth Circuit's unfavorable ruling, Seattle amended the ordinance to eliminate the price-fixing provisions. (*See* Seattle City Council Bill No. 119427, enacted January 11, 2019, attached as Ex. A.) Where the ordinance originally mandated collective bargaining over "the nature and amount of payment" between drivers and referral companies, the amendment deletes that mandate and prohibits the City from promulgating regulations that require bargaining over "the nature and amount of payments" between drivers and referral companies. (*Id.*) The amendment also eliminates wages and payments from the list of factors an arbitrator must consider if collective bargaining results in arbitration. (*Id.*) Other than eliminating these price-fixing provisions, however, the amendment leaves the ordinance materially unchanged.

STANDARD OF REVIEW

Summary judgment is appropriate when, "taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013); Fed. R. Civ. P. 56(a).

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ARGUMENT

Plaintiffs are entitled to summary judgment on their antitrust claims (Counts One and Two of their amended complaint). *First*, the ordinance authorizes and facilitates *per se* illegal group boycotts. As a result, the ordinance is preempted by federal antitrust law, and the City's implementation of the ordinance violates the Sherman Act. *Second*, the City's amendment did not moot the Chamber's challenge to the price-fixing provisions of the original ordinance. Those provisions likewise authorize and facilitate *per se* illegal conduct and therefore also are preempted and violate the Sherman Act. There are no material facts in genuine dispute for any of these claims, and this Court can resolve this motion on the existing record.

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE ORDINANCE AUTHORIZES *PER SE* ILLEGAL GROUP BOYCOTTS

The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Certain collusive practices—like horizontal group boycotts and horizontal price fixing—are condemned as *per se* violations, which means they are unlawful on their face regardless of market conditions or any purported economic or policy justifications. *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 342–48, 351 (1982). Thus, as the Ninth Circuit explained in this case, a valid claim of *per se* illegal conduct does not "require[] an examination of the circumstances underlying a particular economic practice." *Chamber of Commerce*, 890 F.3d at 780. And "there is no need to define a relevant market or to show that the defendants had power within the market." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225–26 & n.59 (1940) (price-fixing cartel is *per se* illegal even if lacking "power to control the market").

Because the group boycotts authorized and facilitated by the ordinance are illegal *per se*, the ordinance is preempted by the Sherman Act. *See infra* Part I.A. Separately, Seattle's implementation of the ordinance constitutes a *per se* violation of the Sherman Act, warranting injunctive relief under section 16 of the Clayton Act. *See infra* Part I.B. And because *per se* illegal

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conduct requires no further inquiry into market structure and the like, Seattle's defenses fail as a matter of law and require no discovery. *See infra* Part I.C. As a result, the Court should invalidate the entire ordinance. *See infra* Part I.D.

A. The Ordinance Is Preempted Because It Authorizes *Per Se* Illegal Group Boycotts

Absent state-action immunity, federal antitrust law preempts municipal laws that authorize private parties to commit a "*per se* violation" of the Sherman Act. *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). A party subject to an ordinance that is preempted by the Sherman Act may sue to enjoin its enforcement. *Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986) (addressing antitrust preemption claim); *see also Verizon Maryland, Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 647–48 (2002) (approving common-law preemption claims). Thus, because Uber and other Chamber members are subject to the amended ordinance and the amended ordinance authorizes a *per se* violation of the Sherman Act, the amended ordinance is preempted.

The amended ordinance authorizes and facilitates horizontal group boycotts of drivers, such as part-time drivers, who will not conform to a collective-bargaining agreement. These boycotts involve concerted action among a group of competing drivers (the union) to force a third party (such as Uber) to target other competing drivers for injury or exclusion from the market. Such horizontal boycotts are a well-established category of *per se* illegal activity because of their tendency to reduce output and increase prices. *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998); *see* P. Areeda & H. Hovenkamp, Antitrust Law § 1901 (2019) (horizontal boycotts generally tend to "reduce[] marketwide ouput"); *id.* at § 2201a (horizontal boycotts tend to "reduce either the quantity or quality of total market output").

The Supreme Court has repeatedly applied the *per se* rule to group boycotts "involving horizontal agreements among competitors," which the Court has described as group boycotts "in the strongest sense." *Nynex*, 525 U.S. at 135. These occur when a "group of competitors threaten[] to withhold business from third parties unless those third parties … help them injure their directly

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competing rivals." *Id.*; *see also id.* at 135–36 ("paradigmatic boycott" occurs when there is "'collective action among a group of competitors that may inhibit the competitive vitality of rivals'" (quoting P. Areeda & L. Kaplow, Antitrust Analysis: Problems, Text, and Cases 333 (5th ed. 1997)). For example, a *per se* illegal boycott occurred when a group of competing clothing manufacturers and suppliers agreed with each other "not to sell their clothes to retailers who bought clothes from competing manufacturers and suppliers." *Id.* at 134 (discussing *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941)). A similar boycott occurred when a group of franchised auto dealers collectively pressured General Motors to forbid all dealers from reselling vehicles to unfranchised "discounters" who competed with the dealers. *United States v. GM Corp.*, 384 U.S. 127, 143–45 (1966). A slightly different *per se* illegal boycott occurred when a single firm, retailer Broadway-Hale, convinced a group of rival distributors to collectively agree not to sell products to Klor's, a retailer that competed with Broadway-Hale. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

The prohibition on group boycotts applies to efforts by individual independent contractors to join or form unions to collectively and exclusively bargain with companies over contract terms, and thereby exclude competitors from contracting with those companies on other terms. Thus, independent fishermen violated the Sherman Act by forming a union and collectively bargaining about the terms and conditions under which they would sell fish to processors, and forcing those buyers to agree "not to purchase fish from nonmembers of the Union." *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 145 (1942). Likewise, independent "stitching contractors" violated the Sherman Act by forming a union and collectively bargaining over the provision of stitching services to clothing sellers, and inducing those sellers to contract only with "members of the Association" and to "refrain from dealing with nonmembers." *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 462 (1949).

The City's ordinance, both before and after its recent amendment, authorizes group boycotts "in the strongest sense." *Nynex*, 525 U.S. at 135. It does this by authorizing a group of

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competing drivers (the union) to jointly demand that driver coordinators (such as plaintiff Uber) deny contracts to all non-conforming drivers—such as part-time drivers—who will not abide by the terms of an exclusive collective-bargaining agreement. Specifically, the ordinance allows voting-eligible drivers to elect an "exclusive driver representative," which becomes the "*sole* and *exclusive* representative of all for-hire drivers operating within the City for a particular driver coordinator." Ordinance § 2. The ensuing actions of the exclusive driver representative constitute horizontal concerted action among the drivers who voted for that representation. *See Arizona*, 457 U.S. at 336, 339, 348 (actions of "county medical societies" constituted horizontal concerted action among the member physicians).

The ordinance then gives the exclusive driver representative power to "enter into a contract that sets forth the terms and conditions of work applicable to *all* of the for-hire drivers" who contract with "that driver coordinator." Ordinance § 2 (emphasis added). This provision directly contemplates and authorizes the union to enter into an exclusive collective-bargaining agreement applicable to all drivers, without exception. Because the collective-bargaining agreement is exclusive, the driver coordinator must deny contracts to any drivers who are unable or unwilling to conform to it. *Id.* One of the mandatory subjects of collective bargaining, for example, is "minimum hours of work." *Id.* § 3(H). A collective-bargaining agreement will therefore deny contracts to the entire class of part-time drivers that cannot or do not wish to work the minimum required hours.[5]

The ordinance thus operates as a group boycott of the same type as the boycotts condemned by Supreme Court precedent as *per se* illegal. As in *Fashion Originator's Guild* and *General Motors*, the union drivers (like the clothing manufacturers and auto dealers) will compel driver coordinators (like the clothing retailers and General Motors) to deny business to a class of non-

[5] *See* John O. McGinnis, *The Sharing Economy as an Equalizing Economy*, 94 Notre Dame L. Rev. 329, 342 (2018) (explaining that "those who choose to drive part-time" as for-hire drivers highly value the flexibility to set their own hours without being subjected to minimum hours requirements).

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conforming drivers (like the boycotted clothing retailers and auto discounters). And, as in *Columbia River Packers* and *Women's Sportswear Manufacturers*, these drivers will effectuate their boycotts by forming unions and compelling driver coordinators not to contract on different terms with non-conforming, rival drivers. The ordinance thus authorizes and facilitates *per se* illegal conduct, and it is therefore preempted by the Sherman Act.

B. Seattle's Implementation of the Ordinance Violates the Sherman Act

Separately from preemption, Seattle's implementation of the ordinance means that Seattle is violating the Sherman Act by participating in an illegal conspiracy in restraint of trade. Absent state-action immunity, which the Ninth Circuit held does not apply here, the antitrust laws "impos[e] civil or criminal sanctions" on "municipalities," just like "other corporate entities." *Community Commc'ns v. City of Boulder*, 455 U.S. 40, 56 (1982); *see also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 780 (1975) (holding that government entities violated section 1 of the Sherman Act by enforcing fee schedules that enabled price fixing by private entities).[6] And Congress has authorized "any" "corporation" or "association" to sue for injunctive relief against "threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26.[7] A "threatened"

[6] The only statutory exception for municipalities is inapplicable. The Local Government Antitrust Act of 1984 (15 U.S.C. §§ 35–36) immunizes municipalities from damages suits under section 4 of the Clayton Act (15 U.S.C. § 15), but does not preclude suits for injunctive relief under section 16 of the Clayton Act (15 U.S.C. § 26). Plaintiffs here seek only injunctive relief.

[7] To establish statutory "standing" to bring a claim under the Clayton Act, a plaintiff must also show "antitrust injury" to itself or to its members, meaning that it "is adversely affected by an *anticompetitive* aspect" of the illegal conduct, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990). This Court has already determined that the Chamber has standing under the Clayton Act because its members "have standing to sue in their own right." (Order Granting MTD, Doc. 66 at 5.) Those members (including plaintiff Rasier) will plainly suffer antitrust injury because they contract with the colluding drivers for the sale and purchase of the product or service being restrained. Those members are also the immediate victims of the anticompetitive aspect of the illegal boycott, as they are coerced into denying contracts to non-conforming drivers. *See Glen Holly Entmt., Inc. v. Tektronix, Inc.*, 352 F.3d 367, 374 (9th Cir. 2003) ("One form of antitrust injury is coercive activity that prevents its victims from making free choices between market alternatives."); *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483–84 (1982) (customer of boycotted physician suffered antitrust injury that was "inextricably intertwined with the injury the conspirators sought to inflict" on their competitors); *Knevelbaard Dairies*, 232 F.3d

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loss means "a significant threat of injury from an impending violation of the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130 (1969).

An antitrust violation claim requires a showing of (1) "concerted action" that (2) unreasonably "restrains trade." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 190 (2010). As discussed above, these elements are met here because, under the ordinance, for-hire drivers act in concert to restrain trade through *per se* illegal horizontal group boycotts.

This unreasonable restraint of trade also involves concerted action by Seattle, as the Ninth Circuit has already held in this case, thereby making Seattle equally subject to injunctive relief. In the context of municipal regulation, the element of "concerted action" between the municipality and one or more private entities is satisfied if the "challenged regulation involves … a hybrid of state and private action," rather than merely "unilateral action" by a city. *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 926 (9th Cir. 2011); *accord Miller v. Hedlund*, 813 F.2d 1344, 1350 (9th Cir. 1987) (a "hybrid" restraint constitutes concerted action that "violate[s] the Sherman Act"). Here, the Ninth Circuit held that Seattle's collective-bargaining ordinance is such a "hybrid restraint" because the collective-bargaining agreement "turns on the discretion of private actors," with the involvement of Seattle. *Chamber of Commerce*, 890 F.3d at 789 n.16.

Indeed, concerted action involving Seattle is pervasive under the ordinance. Seattle designates a union as a qualified driver representative. *See* Decl. of Matthew Eng. ¶ 7, Doc. 39 (noting that Seattle formally designated Teamsters Local 117 as a qualified representative in 2017).

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at 988 (antitrust injury occurs "[w]hen horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint").

(The antitrust-injury requirement of the Clayton Act is inapplicable to Plaintiffs' preemption claim, which is based on the Supremacy Clause, not the private right of action contained in the Clayton Act. *Compare Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484–89 (1977) (deriving antitrust-injury requirement from the "remedial provision" in Section 4 of the Clayton Act); *with Fisher*, 475 U.S. at 264 (addressing preemption claim without discussing antitrust injury).)

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Seattle identifies driver coordinators for the qualified representative to contact. *See id.* (noting that the Teamsters demanded driver information from the twelve driver coordinators that Seattle had identified on its collective-bargaining webpage). Seattle requires driver coordinators to provide the union with driver contact information. Ordinance § 3(D). Seattle recognizes the union as the exclusive driver representative. *Id.* § 3(F). Seattle reviews and approves the unlawful collective-bargaining agreements. *Id.* § (H)(2). And Seattle imposes penalties on non-compliant driver coordinators. *Id.* § 3(M)(1). This extensive involvement is more than sufficient to establish Seattle's liability for the conduct at issue. *See Goldfarb*, 421 U.S. at 780–83 (governmental agency engaged in concerted action in violation of section 1 of the Sherman Act by enacting and enforcing measures that enabled private parties to fix prices).

C. Seattle's Defenses Cannot Save The Ordinance And Require No Discovery

Before Seattle amended the ordinance, it contended that it needed discovery to determine (1) "whether the nature of the market for for-hire transportation services in Seattle makes … applying a rule of *per se* invalidity inappropriate," and (2) whether collective bargaining under the ordinance "primarily involves negotiations over the price of [drivers'] labor" and is therefore exempt from the antitrust laws. (Joint Status Report, Doc. 90 at 5.) Neither question is relevant or material to the applicability of the *per se* rule to either the amended ordinance or the original ordinance.

First, the particular characteristics of the modern for-hire driver industry are irrelevant to whether the ordinance authorizes *per se* illegal price fixing or group boycotts. "In unequivocal terms," the Supreme Court has held that "the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Arizona*, 457 U.S. at 349. The same is true of "group boycotts," which like price fixing are *per se* illegal. *Id.* at 344 n.15. Any "argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules." *Id.* at 351. Application of the *per se* rule is intended to eliminate the need for discovery. Indeed, the very

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reason for the *per se* rule "is to avoid the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Id.* (quotation marks omitted).

Second, because the ordinance expressly applies only to drivers who are independent contractors and not employees, the ordinance does not remotely qualify for the statutory antitrust exemption for "labor organizations" established in sections 6 and 20 of the Clayton Act. 15 U.S.C. § 17; 29 U.S.C. § 52. As an initial matter, the Ninth Circuit implicitly determined that the labor exemption does not apply when it ruled that the ordinance is not immune from antitrust law, especially given that Seattle's amicus on appeal asserted the labor exemption. *See* Reply Brief for Appellants at 10 n.2, *Chamber of Commerce*, 890 F.3d 769 (No. 17-35640). Indeed, the Court instructed that "the parties may address on remand which mode of antitrust analysis applies," not whether the antitrust laws apply at all. *Chamber of Commerce*, 890 F.3d at 781.

Regardless, the exemption does not apply. A "labor organization" is an organization of employees, not independent contractors. *See* Clayton Act § 20, 29 U.S.C. § 52 (limiting prohibition on antitrust injunctions to cases involving "employers and employees"). The Supreme Court has therefore repeatedly held that "a party seeking refuge in the statutory [labor] exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur." *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981). Further, an "employer-employee relationship" must form "the matrix" of the specific controversy at issue. *Columbia River Packers*, 315 U.S. at 144–47; *see also id.* at 147 (statutory exemption "does not … include controversies upon which the employer-employee relationship has no bearing"); *accord L.A. Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 96–98 (1962) (dispute between independent grease peddlers and grease processers was not a "labor dispute"); *Women's Sportswear*, 336 U.S. at 463 (union of independent stitching contractors not "immune from attack under the antitrust laws"); *American Med. Ass'n v. United States*, 317 U.S. 519, 536 (1943)

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(association of "independent physicians" was not a "labor organization" because the physicians were not employees); *Conley Motor Express, Inc. v. Russell,* 500 F.2d 124, 125–27 (3d Cir. 1974) ("appellants have failed to show that the employer-employee relationship forms the matrix of their controversy" because truck drivers "were independent contractors and not employees"); *Spence v. Southeastern Alaska Pilots' Ass'n*, 789 F. Supp. 1007, 1013 (D. Alaska 1990) (union of independent-contractor pilots was not a "bona fide labor organization").[8]

The statutory antitrust exemption is inapplicable here because Seattle's ordinance expressly applies only to independent contractors. "The provisions of this ordinance," it says, "do not apply to drivers who are employees under [the National Labor Relations Act]." Ordinance § 6. Likewise, the ordinance applies only to driver coordinators that contract with drivers "other than in the context of an employer-employee relationship." *Id.* § 3(D); *see also id.* § 1(G) (ordinance directed at "[b]usiness models wherein … drivers [are] classified as independent contractors"). In other words, there are no employees at issue under the ordinance. Because there are no employees at issue, there are no "bona fide labor organizations" involved. *H.A. Artists,* 451 U.S. at 717 n.20. All of the unionization and collective bargaining activities under the ordinance are conducted between parties who operate as independent businesses. The collective-bargaining scheme thus fails to meet the "primary prerequisite for exemption from the anti-trust laws"—"an employer-

[8] The National Labor Relations Act (NLRA) reinforces the difference between labor organizations and employees, on one hand, and independent contractors, on the other. Congress reaffirmed in the NLRA that "labor organization" means an organization "in which *employees* participate." 29 U.S.C. § 152(5) (emphasis added). And it expressly excluded independent contractors from the definition of "employee" for purposes of federal labor law. 29 U.S.C. § 152(3) ("[t]he term 'employee' … shall not include any … independent contractor"). These provisions inform the meaning of the statutory labor exemption because that exemption, like the related provisions of the Norris-LaGuardia Act, *see* 29 U.S.C. § 101, is "a precursor of the NLRA" that advances "the same policy [as] the NLRA." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018); *see also Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) ("a later act can … be regarded as a legislative interpretation of (an) earlier act . . . in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting, and is therefore entitled to great weight") (quotation marks omitted).

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employee relationship." *Conley Motor Express*, 500 F.2d at 126. By definition, then, the "labor" exemption does not apply.

And Seattle designed it this way, because it had to. If the ordinance had applied to employees, the collective-bargaining program would have been facially preempted under federal labor law. *See Int'l Assoc. of Machinists v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976). Only by limiting the ordinance to independent contractors could Seattle avoid labor preemption. But by choosing that path, Seattle subjected the ordinance to antitrust scrutiny. Now that Seattle has failed on its antitrust defense of state-action immunity, it apparently wishes to have things both ways: avoid the labor laws by limiting the ordinance to independent contractors; avoid the antitrust laws by invoking the labor exemption. Those two assertions are irreconcilable.

D. This Court Must Enjoin the Entire Ordinance

Based on the foregoing, Plaintiffs are entitled to permanent injunctive relief. The entire ordinance must be enjoined, moreover, because the provisions authorizing a group boycott are not severable from the rest of the ordinance.

Severability is a question of state law. *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784, 798 (9th Cir. 2012). Under Washington law, a provision may not be severed "if its connection to the remaining [provisions] is so strong that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *Id.* A severability clause "is not necessarily dispositive." *McGowan v. State*, 148 Wash. 2d 278, 295 (2002). The valid and invalid provisions "may be so interrelated that, despite the presence of a severability clause, it cannot reasonably be believed that the legislative body would have passed the latter without the former." *Id.* For example, the Washington Supreme Court held that an unconstitutional funding provision was inseverable because it was the "the heart and soul of the Act," and "the Act would be virtually worthless without it." *Leonard v. City of Spokane*, 127 Wash. 2d 194, 202 (1995).

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That the boycott provision is integral to the operation of the ordinance is evident in the ordinance's text and structure. A drivers' union formed pursuant to the ordinance is denominated an "*exclusive* driver representative," and the ordinance emphasizes that it is to be "the *sole and exclusive* representative of all for-hire drivers … for a particular driver coordinator," with the terms it negotiates to be "applicable to *all* of the for-hire drivers employed by that driver coordinator." Ordinance § 2. And the entire set of provisions governing collective bargaining fall within a statutory section entitled "Exclusive driver representatives." *Id.* § 3.

Indeed, the boycott provision is a necessary component of the ordinance's design. If the voting-eligible drivers could not force the collective-bargaining agreement on every other driver, it would render the ordinance effectively null. Driver coordinators could simply contract with drivers who do not wish to be subject to the terms of the collective-bargaining agreement, and the ordinance "would be virtually worthless." *Leonard*, 127 Wash. 2d at 202. It therefore "cannot reasonably be believed that the legislative body would have passed" the ordinance without the boycott provision. *McGowan*, 148 Wash. 2d at 295. Tellingly, when the City amended the ordinance to remove the price-fixing provisions challenged in this lawsuit, it did not similarly remove the group-boycott provisions. The City Council understood that the ordinance would be virtually worthless without them.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE ORDINANCE ORIGINALLY AUTHORIZED *PER SE* ILLEGAL PRICE FIXING

Not only is the amended ordinance preempted, but so is the price-fixing provision of the original ordinance. Seattle has attempted to evade this Court's review of its price-fixing scheme by voluntarily amending the ordinance in response to the unfavorable ruling from the Ninth Circuit. Notwithstanding the amendment, however, Seattle has consistently maintained that the price-fixing scheme is not actually a *per se* violation of federal antitrust law. In these circumstances, Plaintiffs' challenge to the price-fixing provision has *not* become moot. And there

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can be no serious dispute that the price-fixing provision violates federal antitrust law. Declaratory and permanent injunctive relief against the price-fixing provision is therefore warranted.

A. The City's Voluntary Amendment Does Not Moot Plaintiffs' Challenge to the Price-Fixing Provisions

"A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 174 (2000). Otherwise, a defendant could simply "return to his old ways" after dismissal. *Id.* at 189. To eliminate this problem, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190. Seattle cannot meet that high standard.

A voluntary amendment to a challenged ordinance does not make a challenge moot. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *see also Carreras v. City of Anaheim*, 768 F.2d 1039, 1047 (9th Cir. 1985) (challenge to city ordinance not rendered moot by repeal). This is true not only when the government repeals the entire ordinance, but also when the government repeals only some challenged provisions, leaving other challenged provisions in place, as Seattle has done here. In *City of Mesquite*, for example, the plaintiff challenged two "sections of a licensing ordinance governing coin-operated amusement establishments." 455 U.S. at 284–85. While an appeal was pending, the city repealed just one of the challenged provisions. *Id.* at 288. The Court rejected the city's mootness argument as to the repealed provision because "the repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Id.* at 289. The Court then addressed the merits of both the existing and repealed provisions. *Id.* at 289–95.

Following *City of Mesquite*, the Ninth Circuit has routinely held that partial legislative repeal does not moot a challenge to the repealed provisions. *See Bd. of Trustees of Glazing Health*

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& Welfare Trust v. Chambers, 903 F.3d 829, 839–42 (9th Cir. 2018) (citing cases).[9] In *Chambers*, for example, the legislature repealed several challenged provisions in a statutory scheme, but left one provision in place. The Court held that the challenge to the repealed provisions was not moot, in part because the partial repeal had not "entirely resolved plaintiffs' grievance with the challenged law," and had failed to eliminate "all of [the plaintiffs'] bases for challenging it." *Id.* at 841–42 (quotation marks and alteration omitted). Similarly, in *Thalheimer v. City of San Diego*, the plaintiff challenged several provisions of a city ordinance governing campaign finance in city elections. 645 F.3d 1109, 1114–15 (9th Cir. 2011). After the district court issued an unfavorable ruling, the city amended the ordinance to repeal just one of the challenged provisions. *Id.* at 1126. On appeal, the Court held that the challenge to the repealed provision was not moot. *Id.* It therefore addressed the merits of every claim, first addressing the existing provisions, and then addressing the repealed provision. *Id.* at 1117–28.

A voluntary repeal motivated by "an adverse judicial ruling" is especially unlikely to moot a challenge to the repealed provisions. *Chambers*, 903 F.3d at 839. In that circumstance, the defendant's "heavy burden" to show mootness is generally "insurmountable." *Id.* at 839–40 (citing cases). That conclusion certainly holds when the government actor is a municipality, rather than Congress or a state legislature. *See Chem. Prod. & Dist. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (distinguishing between "statutory amendment" and "local government or administrative agency repeal"). After all, it is much easier for a nine-member city council to re-enact a challenged provision than for Congress to do so through bicameralism and presentment. Thus, of the two exceptional cases *Chambers* mentions that found mootness after voluntary repeal, one involved legislative repeal by Congress, and one by a state legislature; neither involved a municipality. 903 F.3d at 841–43.

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[9] The Ninth Circuit has also repeatedly explained that "whether a case is moot as a result of legislative change is a prudential rather than a jurisdictional issue." *Chambers*, 903 F.3d at 843. So the ultimate question is whether declaratory and injunctive relief is warranted, not whether this Court has subject-matter jurisdiction. *Id.* at 838–39.

One other factor courts have considered is whether the defendant has committed not to re-enact the offending legislation. The Ninth Circuit has repeatedly rejected mootness when a defendant refuses to declare that it "will never again" engage in the challenged conduct, and refuses to demonstrate that it will not resume the conduct, such as by admitting its illegality. *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998); *Ballen v. City of Redmond*, 466 F.3d 736, 741 (9th Cir. 2006) (challenge to amended ordinance not moot because city refused to admit illegality and threatened to re-enact ordinance).

Seattle's amendment to its collective-bargaining ordinance does not moot Plaintiffs' challenge to the price-fixing provision. Seattle amended its ordinance in direct response to this litigation and to the Ninth Circuit's ruling on state-action immunity.[10] That ruling effectively foreclosed any successful defense of the price-fixing scheme. By amending the ordinance, Seattle now seeks to avoid an unfavorable judgment from this Court, while leaving the door open for the City Council to re-enact its price-fixing scheme once litigation has concluded. In these circumstances, where the City "repealed a law in response to an adverse judicial ruling," the case is "not moot." *Chambers*, 903 F.3d at 839–40.

Moreover, Seattle has not committed to this Court that it will never re-enact the price-fixing provisions. Indeed, the City has insisted throughout this litigation that it would be perfectly legal to do so. At argument before the Ninth Circuit, the City's counsel refused to concede that the ordinance authorizes *per se* illegal price fixing, insisting that contracts between for-hire drivers and driver coordinators are a "brand new arrangement" justifying special treatment under antitrust law. Oral Argument at 29:40–31:00, *Chamber of Commerce*, 890 F.3d 769 (No. 17-35640).

[10] The Ninth Circuit's mandate issued on September 24, 2018. *Chamber of Commerce v. City of Seattle*, Doc. 119, No. 17-35640. On remand, the parties initially agreed to a schedule in which Plaintiffs would file for summary judgment on December 7, 2018. *See* Stipulated Motion Regarding Motions and Briefing Schedule, Doc. 97, at 2, No. 2:17-cv-370. Just days before the due date, on December 3, Seattle notified Plaintiffs that it anticipated amending the ordinance. *Id.* Seattle enacted the amendment on January 11, 2019.

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Seattle's recent submission to this Court reaffirmed that same position: "Seattle does not agree" that the "conduct authorized by the ordinance" "involves a form of 'horizontal price fixing' subject to *per se* invalidation under federal antitrust law." (Joint Status Report, Doc. 90, at 5.) Finally, when the City Council amended the ordinance, the Council did not concede that the price-fixing provision is unlawful and gave no assurance that the price-fixing provisions would never be reinstated.[11] Significantly, the Council did not even attempt to offer a non-litigation-related reason for its abrupt reversal on the price-fixing provision, which it had quite recently believed furthered the public interest. Nor has Seattle taken steps to amend the rules implementing the original ordinance's requirement of including the nature and amount of payments as a mandatory subject of collective bargaining.[12] All of this further confirms that the City's motive for this reversal was not based on public policy, but a naked desire to avoid judgment on this question. That being so, it is quite possible that the City will reinstate the repealed provision once the litigation cloud is lifted.

In sum, not only are legislative amendments to a challenged ordinance generally insufficient to render a challenge moot, especially when the amendment is a response to an unfavorable judicial ruling, *Chambers*, 903 F.3d at 839, but Seattle has consistently insisted that there is nothing problematic about the original ordinance, both before and after the unfavorable Ninth Circuit ruling. Seattle's actions do not come close to meeting its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190. Regardless of its ruling on the ordinance as amended, therefore, the Court should consider Plaintiffs' challenge to the recently repealed

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[11] Vote on CB 119427, Seattle City Council, at 8:18 (January 7, 2019), http://www.seattlechannel.org/FullCouncil?videoid=x100796; *see also* Hearing on CB 119427, Governance, Equity, and Technology Committee, at 8:45–13:00 (Dec. 18, 2018), http://www.seattlechannel.org/mayor-and-council/city-council/2018/2019-governance-equity-and-technology-committee?videoid=x100378&Mode2=Video (same failure to concede illegality).

[12] *See* FDHR-4, available at https://bit.ly/2UWedz2.

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price-fixing provisions. Absent such judicial review today, the City will be entirely free to reinstate the price-fixing provision tomorrow, and will have every political incentive to do so.

B. The Ordinance As Originally Enacted Authorized *Per Se* Illegal Price Fixing

Plaintiffs are entitled to summary judgment on their challenge to the ordinance's price-fixing provisions for the same reasons that they are entitled to summary judgment on the group-boycott provisions: as the Federal Trade Commission and Department of Justice told the Ninth Circuit in this case, the provisions authorize and facilitate a classic *per se* violation of the antitrust laws, namely horizontal price fixing. Brief for Amici United States and FTC at 8, *Chamber of Commerce*, 890 F.3d 769 (No. 17-35640).

"Foremost in the category of per se violations is horizontal price fixing among competitors"—*i.e.*, agreements among competitors to establish the price to be paid for a good or a service. *Knevelbaard Dairies*, 232 F.3d at 986. The Supreme Court has "consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *Arizona*, 457 U.S. at 345. "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.* at 351 n.23 (quotation marks omitted).

As at least three Supreme Court cases demonstrate, the prohibition on price fixing applies to efforts by individual independent contractors to join or form unions to collectively bargain with companies over prices for goods or services. *L.A. Meat*, 371 U.S. at 96–98 (independent grease peddlers violated the Sherman Act by joining a union and collectively bargaining over prices for restaurant grease); *Columbia River Packers*, 315 U.S. at 144–46 (independent fishermen violated the Sherman Act by forming a union and collectively bargaining about the terms and conditions for sale of fish). *Women's Sportswear*, 336 U.S. at 463–64 (independent "stitching contractors"

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violated the Sherman Act by forming a union and collectively bargaining over the provision of stitching services).

Thus, the FTC has consistently condemned measures similar to the ordinance because "collective bargaining over prices amounts to *per se* illegal price fixing." Letter to Wash. H. Rep. Brad Benson 5 (Feb. 8, 2002), http://bit.ly/2lsuMQP. For instance, Washington State legislation authorizing physicians to collectively bargain with health insurers would permit "precisely the sort of conduct" that is a *per se* antitrust violation: horizontal price fixing. *Id.* at 2. So would an Ohio bill allowing home health-care providers to collectively bargain over insurance reimbursements. Letter to Ohio H. Rep. Dennis Stapleton 7 (Oct. 16, 2002), http://bit.ly/2lsvRrT. And the FTC has reiterated this position in congressional testimony. *See, e.g.*, Testimony of David Wales 7 (Oct. 18, 2007), http://bit.ly/2m9Pady. Indeed, in this very case, the FTC, joined by the Antitrust Division of the Justice Department, told the Ninth Circuit that "the joint negotiation permitted by the Ordinance" is "a *per se* violation of the Sherman Act." Brief for Amici United States and FTC at 8, *Chamber of Commerce*, 890 F.3d 769 (No. 17-35640).

The FTC and DOJ are correct: the ordinance as originally enacted undeniably authorized *per se* illegal horizontal price fixing. It allowed independent contractors who are direct competitors to join together, agree with one another on the price terms of their contracts with a driver coordinator, and collectively negotiate with the driver coordinator over those price terms. Ordinance § 3(H)(1). Like the illegal grease peddlers' union in *Los Angeles Meat & Provision Drivers Union*, the illegal fishermen's union in *Columbia River Packers*, the illegal stitchers' union in *Women's Sportswear*, and the physicians' and home-health-care workers' unions condemned by the FTC, the drivers' collective bargaining over prices is *per se* illegal horizontal price fixing.

Moreover, collective bargaining under Seattle's ordinance is *per se* illegal whether the drivers are characterized as (a) sellers of driving services to a driver coordinator or (b) purchasers of ride-referral services from a driver coordinator. If the former, the Supreme Court "ha[s] specifically included the sale of services" within Section 1 of the Sherman Act. *Goldfarb*, 421

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U.S. at 787. And it has repeatedly held that horizontal price fixing by sellers of services is *per se* illegal. *Id.* (legal services); *Arizona*, 457 U.S. at 335, 342–54 (health-care services); *Women's Sportswear Mfrs. Ass'n*, 336 U.S. at 463–64 (stitching services). If the latter, price fixing "by purchasers" is likewise "the sort of combination condemned by the [Sherman] Act." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (footnotes omitted). The Ninth Circuit has thus made clear that "price fixing by buyers" and price fixing by sellers are equally *per se* illegal under the Sherman Act. *Knevelbaard Dairies*, 232 F.3d at 986; *see also Vogel v. Am. Soc. of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("buyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se"). Whether characterized as sellers or buyers, therefore, drivers engage in *per se* illegal price fixing when they jointly negotiate the price terms of their contracts with driver coordinators.

Finally, for the reasons discussed above in connection with the ordinance's authorization and facilitation of *per se* illegal group boycotts: (i) the price-fixing provisions are preempted, (ii) Seattle's implementation of the price-fixing provisions constitutes a threatened violation of the Sherman Act, entitling Plaintiffs to injunctive relief under section 16 of the Clayton Act, and (iii) Seattle's defenses of the price-fixing provision fail as a matter of law and require no discovery. This Court should therefore declare that the price-fixing provisions of Seattle's collective-bargaining ordinance are preempted, and should permanently enjoin Seattle from enforcing them.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in favor of Plaintiffs on Counts One and Two of the Amended Complaint and (1) declare that Seattle's collective-bargaining ordinance, both as originally enacted and as amended, is preempted, (2) declare that Seattle's implementation of the ordinance, both as originally enacted and as amended, violates Section 1 of the Sherman Act, and (3) permanently enjoin Defendants from enforcing the ordinance, both as originally enacted and as amended.

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Dated: February 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties who have appeared in this case.

DATED: February 15, 2019 at Seattle, Washington.

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Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; and RASIER, LLC, Plaintiffs, vs. THE CITY OF SEATTLE; SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES; and CALVIN W GOINGS, in his official capacity as Director, Finance and Administrative Services, City of Seattle, Defendants.	No. 17-cv-00370-RSL **DEFENDANTS' MOTION TO PERMIT DISCOVERY NECESSARY TO OPPOSE SUMMARY JUDGMENT** **NOTED ON CALENDAR: April 26, 2019**

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Federal Court Cases

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Federal Statutory Authorities

State Statutory Authorities

Federal Rules and Regulations

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DEFENDANTS' MOTION TO PERMIT DISCOVERY NECESSARY TO OPPOSE SUMMARY JUDGMENT

Pursuant to Federal Rule 56(d), Defendants the City of Seattle, Seattle Department of Finance and Administrative Services, and Calvin W. Goings (collectively "Seattle") move this Court to permit certain limited discovery necessary for Seattle to prepare a complete opposition to Plaintiffs' Motion for Summary Judgment ("MSJ"), Dkt. #100.

Plaintiffs' Motion asks this Court to declare facially invalid a Seattle ordinance establishing a process through which drivers for taxi and "transportation network coordinators" ("TNCs") like Uber and Lyft can designate a representative to engage in collective negotiations over the terms and conditions of their work for those companies. Plaintiffs contend that the Ordinance is preempted by federal antitrust law because it requires the regulated parties to engage in a "group boycott," and because it previously required negotiations regarding payments by or to regulated companies to or from their drivers.

Although Seattle will demonstrate at the appropriate time that neither theory provides a valid basis under federal antitrust law for invalidating the Ordinance, at this time, pursuant to Federal Rule of Civil Procedure 56(d), this Court should deny or defer adjudicating Plaintiffs' Motion until after Seattle has the opportunity to conduct discovery and to obtain declarations and other evidence relevant to two separate issues: (1) whether the work performed by for-hire transportation drivers subject to the Ordinance primarily involves selling their labor rather than acting as entrepreneurs operating independent businesses, such that any collective activity by those drivers with respect to the terms and conditions under which they work falls within the "labor exemption" to federal antitrust law; and (2) whether the for-hire transportation services provided by taxi companies and TNCs like Uber and Lyft depend upon coordinated driver conduct, such as the establishment of a fixed pricing scheme for all rides dispatched through the Uber or Lyft application, such that it is inappropriate to apply *per se* rules of antitrust invalidity to coordinated driver conduct. Because Seattle's success in establishing that either of these factual circumstances applies to one or more of the drivers covered by the Ordinance would require the denial of Plaintiff's Motion, Seattle should be permitted to conduct limited discovery with respect to both of these issues before responding to Plaintiff's Motion.

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Permitting this discovery will enable Seattle to prepare an opposition that addresses all of the faults with Plaintiffs' antitrust challenge to the Ordinance, allowing this Court to resolve all of the issues remaining in this lawsuit in connection with the pending Motion for Summary Judgment.

BACKGROUND

The Seattle ordinance at issue in this lawsuit establishes a process through which a majority of the qualifying drivers for a particular driver coordinator (such as a taxi company or a TNC like Uber or Lyft) may designate an "exclusive driver representative" ("EDR") to negotiate with the driver coordinator regarding certain terms and conditions. Seattle Municipal Code ("SMC") 6.310.735.F. If an EDR is certified, the EDR and driver coordinator must meet and negotiate in good faith regarding certain subjects. SMC 6.310.735.H.1. Under the original version of the Ordinance, the subjects of negotiation included "best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours of work, conditions of work, and applicable rules." Ordinance, Dkt. #39-1, §3 (adding SMC 6.310.735.H.1). But in January 2019, the Seattle City Council passed, and the Mayor signed, an amendment to the Ordinance eliminating the requirement that driver coordinators and EDRs negotiate over "the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers." *See* Dkt. #100-1.

Any agreement reached between the EDR and the driver coordinator must be approved by a Seattle official before it can take effect. SMC 6.310.735.H.2.

PROCEDURAL HISTORY

Plaintiff the Chamber of Commerce of the United States filed its first lawsuit challenging Seattle's Ordinance on March 3, 2016. Complaint, Dkt. #1, *in Chamber of Commerce v. City of Seattle*, No. 2:16-cv-00322-RSL (W.D. Wash. Mar. 3, 2016). On August 8, 2016, this Court granted Seattle's motion to dismiss, concluding that the Chamber lacked standing to pursue its lawsuit at that time. Order Granting Defendants' Motion to Dismiss, Dkt. #63, *in Chamber of*

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Commerce v. City of Seattle, No. 2:16-cv-00322-RSL (W.D. Wash. Aug. 9, 2016).

The Chamber filed its second lawsuit challenging the Ordinance on March 9, 2017. Dkt. #1. The Chamber alleged that the Ordinance was preempted by the National Labor Relations Act and the Sherman Act, that Seattle was violating federal antitrust law by enforcing the Ordinance, that the Ordinance exceeded Seattle's powers under state law, and that the Ordinance violated Washington's Consumer Protection Act and Public Records Act. *Id.* The Chamber sought a temporary restraining order barring Seattle's further implementation of the Ordinance. Dkt. #2. This Court issued a preliminary injunction providing the requested relief on April 4, 2017, concluding that the Chamber's antitrust claims presented "serious questions" on the merits, and that the public would be "well-served by maintaining the status quo while the issues are given careful judicial consideration." *Chamber of Commerce v. City of Seattle*, 274 F.Supp.3d 1140, 1147-48, 1155 (W.D. Wash. 2017).

Following further briefing on Seattle's motion to dismiss Plaintiffs' First Amended Complaint,[1] the Court held that Plaintiffs' claims all failed as a matter of law and so dismissed the case. *Chamber of Commerce v. City of Seattle*, 274 F.Supp.3d 1155 (W.D. Wash. 2017), *rev'd in part*, 890 F.3d 769 (9th Cir. 2018). The Court concluded that Plaintiffs' Sherman Act claims failed because the Ordinance was entitled to "state action" immunity from federal antitrust law, that Plaintiffs' NLRA preemption arguments lacked merit, and that Plaintiffs' state law claims likewise failed. *Id.*

On August 24, 2017, the Court dissolved the preliminary injunction it had previously issued. Order Granting Defendants' Motion to Dismiss, Dkt. #47, *in Clark v. City of Seattle*, No. 2:17-cv-00382-RSL (W.D. Wash. Aug. 24, 2017), *aff'd*, 899 F.3d 802 (9th Cir. 2018). Plaintiffs thereafter sought an injunction pending appeal, which the Ninth Circuit granted on September 8, 2017. Dkt. #77.

On May 11, 2018, the Ninth Circuit issued a decision reversing in part and affirming in

[1] Plaintiffs filed an amended complaint adding Rasier, LLC, a subsidiary of Uber, as an additional plaintiff on April 11, 2017. Dkt. #53.

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part the Court's decision dismissing Plaintiffs' First Amended Complaint. The Ninth Circuit concluded that Plaintiffs' NLRA preemption claims were properly dismissed, but that the Ordinance did not satisfy the requirements for "state action" immunity from federal antitrust law. *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 787, 787-89, 794-95 (9th Cir. 2018). The Ninth Circuit remanded Plaintiffs' antitrust claims to this Court for further proceedings. *Id.* at 795.

Following remand to this Court, Seattle agreed not to enforce the Ordinance until final judgment is entered in this lawsuit, and the parties agreed to defer discovery until the filing of Plaintiffs' motion for summary judgment and the resolution of any Rule 56(d) motion by Seattle. Dkt. #90, at 4. Plaintiffs filed their motion for summary judgment on February 15, 2019, contending that the Ordinance is preempted and facially invalid because it authorizes "group boycotts" that are *per se* illegal under federal antitrust law and because it previously authorized *per se* illegal price fixing. Dkt. #100.

As a result of this procedural history, Seattle has not taken any steps to enforce or implement the Ordinance since April 2017. In addition, Seattle has not had an opportunity to take any discovery from Plaintiffs. Although Seattle provided Plaintiffs with its initial disclosures, Plaintiffs took the position that they were not required to make such disclosures because no discovery is necessary in this lawsuit. Dkt. #90, at 7. Seattle has also not had any opportunity to undertake third-party discovery from the for-hire drivers permitted to engage in collective negotiations under the Ordinance, from driver coordinators like Lyft that are subject to the Ordinance but are not plaintiffs in this lawsuit (although the Chamber purports to bring this lawsuit on Lyft's behalf), or from other individuals or entities that possess information potentially relevant to the antitrust claims remaining in the case. *See* Declaration of Stacey M. Leyton in Support of Defendants' Rule 56(d) Motion ¶¶3-11.

STANDARD

Rule 56 provides that where a nonmoving party shows it "cannot present facts essential to justify its opposition" to a motion for summary judgment, the court may "defer considering the motion," "allow time to obtain affidavits or declarations or to take discovery," or "issue any other

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appropriate order." Fed. R. Civ. P. 56(d). "Generally where a party has had no previous opportunity to develop evidence and the evidence is crucial to material issues in the case, discovery should be allowed before the trial court rules on a motion for summary judgment." *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1193 (9th Cir. 1980).

ARGUMENT

Seattle has not yet had any opportunity to conduct discovery of the other parties to this lawsuit or to undertake third-party discovery. Because Seattle is not a participant in the for-hire transportation market, the City lacks direct access to testimony and other evidence about the work performed by for-hire transportation drivers, any capital investments they make, and the manner in which companies like Uber and Lyft operate that enables coordinated conduct by for-hire drivers with respect to matters such as ride prices, dispatching, or passenger evaluations. Because facts relating to these issues, as well as expert testimony based on the information revealed through discovery on those issues, may provide a basis for this Court to conclude that *per se* rules of antitrust invalidity do not apply to the conduct authorized by the Ordinance—which is a showing Plaintiffs must make to establish the Ordinance's facial invalidity, *see Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 885-86 (9th Cir. 2008)—those facts are relevant to Seattle's opposition to Plaintiff's Motion, and discovery with respect to those issues should be permitted before Seattle is required to file any opposition.

I. Discovery Should Be Permitted To Determine Whether the Labor Exemption to Federal Antitrust Law Applies to the Drivers Covered by the Ordinance.

Plaintiffs invoke the federal antitrust laws to challenge Seattle's efforts to provide a means through which drivers for for-hire transportation companies such as Uber and Lyft can negotiate collectively to improve their working terms and conditions. In this respect, Plaintiffs are part of a long tradition: The Sherman Act was used as a tool to target unions and labor organizing immediately upon its enactment in 1890. *See Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541, 544 (9th Cir. 1974). Congress responded to these misuses of the Sherman Act in 1914 by creating a statutory "labor exemption" to federal antitrust law through the Clayton Act, 15 U.S.C. §17, 29 U.S.C. §52, and then in 1932 (after the Supreme Court had construed the Clayton Act

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narrowly and continued to enjoin labor conduct on antitrust grounds), through the Norris-LaGuardia Act, 29 U.SC. §§101 *et seq. See Bodine Produce*, 494 F.2d at 545-47.

The labor exemption prevents federal antitrust law from being applied to coordinated efforts by workers to improve their circumstances. The 1914 Clayton Act provides that "[t]he labor of a human being is not a commodity or article of commerce," and states that labor organizations cannot "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. §17. The 1932 Norris-LaGuardia Act prohibits the federal courts from issuing an injunction "in a case involving or growing out of a labor dispute," and provides that this prohibition applies to "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. §101, 113. As a result of these statutory provisions, "A worker is privileged …, acting either alone or in concert with his fellow workers, to associate or decline to associate with other workers … and his labor is not to be treated as 'a commodity or article of commerce.'" *Hunt v. Crumboch*, 325 U.S. 821, 824 (1945). As long as workers "act in [their] self-interest and do[] not combine with non-labor groups, the licit and the illicit .. are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular [worker] activities are the means." *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

If the workers subject to the Ordinance were "employees" for common law purposes, there would be no question that the labor exemption would apply to the conduct authorized by the Ordinance. However, the Ordinance applies only to drivers who would be classified as "independent contractors" rather than "employees" at common law (and under the NLRA, which uses the common law test). Ordinance §6; *see NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (after 1947 enactment of the Taft-Hartley Act, NLRA's coverage determined by "commonlaw agency test"). Contrary to Plaintiffs' argument, however, MSJ at 12-14, this does not make the labor exemption categorically unavailable to all of the drivers covered by the Ordinance. That is because the labor

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exemption's application does not turn upon the common law (or NLRA) distinction between independent contractors and employees (referred to as "servants," in the language of the common law). *See generally* Brief of Amicus Curiae Professor Samuel Estreicher in Support of Defendants-Appellees, Dkt. #66, *in Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).[2]

The Norris-LaGuardia Act defines labor disputes to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee*." 29 U.S.C. §113(c) (emphasis added).[3] Likewise, the Supreme Court long ago rejected the argument that the common law distinction between employees and independent contractors captures the full range of employment disputes covered by the foundational federal labor statutes. *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944) ("Congress had in mind a wider field than the narrow technical legal relation of 'master and servant,' as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others."). Indeed, the Supreme Court has held that the labor exemption can apply to individuals who are independent contractor *employers* if there is an economic inter-relationship between their work and that of other workers. *Am. Fed. of Musicians v. Carroll*, 391 U.S. 99, 105-06 (1968).

Plaintiffs' argument that the labor exemption cannot apply to independent contractors relies primarily on the fact that in 1947, through the Taft-Hartley Act, Congress overruled *Hearst Publications*' specific holding regarding the NLRA and limited application of the NLRA to individuals who would be classified as employees at common law. *See* 29 U.S.C. §152(3)

[2] Plaintiffs contend that the Ninth Circuit's decision "implicitly determined that the labor exemption does not apply," Dkt. #100, at 12, but Seattle preserved the outstanding antitrust questions, and the Ninth Circuit specifically noted that it was addressing *only* the state action immunity issue. *Chamber of Commerce*, 890 F.3d at 781.

[3] Plaintiffs premise their argument in part on the reference to "employers and employees" in Section 20 of the Clayton Act, *see* MSJ at 12, but Plaintiffs' restrictive interpretation of that provision was the very unduly narrow misinterpretation that Congress sought to eliminate by making the Norris-LaGuardia Act apply "regardless of whether or not the disputants stand in the proximate relation of employer and employee." Further, as described below, the Supreme Court long ago recognized that such references do not necessarily incorporate the common law test for distinguishing employees from independent contractors.

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(providing that, for purposes of the NLRA, the term "employee" does not include "any individual having the status of an independent contractor"). But the Clayton Act and the Norris-LaGuardia Act predate both the NLRA and Taft-Hartley, and their provisions were not amended by Congress in 1947. The labor exemption recognized in *Hutcheson* does not depend upon the NLRA provision revised by Taft-Hartley, and *Hearst* makes it clear that prior to Taft-Hartley, the federal labor laws were *not* limited to common law employees. Instead, employment disputes covered by those laws sometimes involved individuals who would be characterized as independent contractors at common law.[4]

Just this Term, the Supreme Court reiterated that Congress's early twentieth century labor and employment statutes reached beyond the common law definition of employee. In *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019), the Court held that in 1925 when Congress adopted the Federal Arbitration Act but excluded certain "contracts of employment" from its coverage, the exclusion applied to not only "agreements between employers and employees but also agreements that require independent contractors to perform work." *Id.* at 539. As the Court explained, in the early twentieth century, the term "employment" was "consistently afforded … a broad construction" and was treated "more or less as a synonym for 'work.'" *Id.* at 539-40. "Nor did [this definition] distinguish between different kinds of work or workers: All work was treated as employment, whether or not the common law criteria for a master-servant relationship happened to be satisfied." *Id.* at 540.

Accordingly, in determining whether the labor exemption applies here, the relevant question is not whether the drivers covered by the Ordinance are independent contractors or employees at common law, but whether the drivers are primarily involved in selling their labor—which "is not a commodity or article of commerce" subject to federal antitrust law, 15 U.S.C. §17—or whether they are engaged in operating independent, entrepreneurial businesses, as in each

[4] Because Taft-Hartley indisputably *changed* the law by narrowing the scope of the NLRA, it cannot be interpreted as a reflection of the congressional intent underlying either the pre-Taft-Hartley NLRA or the earlier Clayton and Norris-LaGuardia Acts.

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of the cases Plaintiffs have cited. *See, e.g.*, *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 144-45 (1942) (that fishermen had organized as a union was insufficient to trigger the labor exemption where they were primarily engaged in selling a commodity and exercised "extensive" control over the supply of that commodity); *L.A. Meat & Provision Drivers Union Local 626 v. United States*, 371 U.S. 94, 96 (1962) (labor exception inapplicable to "grease peddlers" who were "independent entrepreneurs whose earnings as middlemen consisted of the difference between the price at which they bought the restaurant grease from various sources and the price at which they sold it to the processors"); *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 463-64 (1949) (labor exemption inapplicable to association of contractors who were "entrepreneur[s]," not "laborer[s]," based on extent to which their operations involved incurring significant "rentals, capital costs, overhead and profits"); *Am. Med. Ass'n v. United States*, 317 U.S. 519, 536 (1943) (labor exemption inapplicable to combination of independent physicians who objected to hiring of physicians as employees rather than independent businesspeople).[5]

Of course, that the labor exemption is potentially applicable here does not establish that it actually applies. Instead, its application will depend upon specific facts regarding the work performed by for-hire drivers and the terms of their relationships with companies like Uber and Lyft. The facts are likely to show that even if companies covered by the Ordinance, including taxi companies, Uber, and Lyft, exercise insufficient control and supervision over their drivers to render them common-law employees (because, for example, drivers can choose their own working hours), the drivers for one or more of those companies are nonetheless selling their own labor and personal services, without making significant specialized and business-specific capital investments (as distinguished, for example, from purchasing personal vehicles that are otherwise regularly used outside the business context), and that the labor exemption should therefore apply.[6] To establish

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[5] Plaintiffs also cite *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981), but the footnote they cite (which did not address the issues before the Court in that case), nowhere suggests that the labor exemption depends upon the common law distinction between employees and independent contractors.

[6] The nature of the drivers' investment in training and specialized capital is likely to distinguish the semi owners and pilots at issue in *Conley Motor Express, Inc. v. Russell*, 500 F.2d 124 (3d Cir. 1974), and *Spence v. Southeastern Alaska Pilots' Ass'n*, 789 F.Supp. 1007 (D. Alaska 1990), from the drivers here.

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those facts, and enable its experts to evaluate the nature of the work performed by for-hire drivers, Seattle must conduct discovery of both Uber (a party here) and third parties like Lyft and the for-hire drivers who work for those companies. *See* Leyton Decl. ¶¶6-8, 10-11. Seattle should be permitted to conduct that discovery and to complete its expert analysis of the information generated thereby before responding to Plaintiffs' Motion. *Id.*

II. Discovery Should Be Permitted To Determine Whether the For-Hire Transportation Services Provided by Companies like Uber and Lyft Depend Upon Coordinated Driver Conduct.

In order to prove that the Ordinance is facially invalid, Plaintiffs must establish that the conduct authorized by the Ordinance is *per se* unlawful under federal antitrust law. *Costco*, 522 F.3d at 885-86. But the Supreme Court has recognized that "[w]hen 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010) (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984)). In *BMI v. CBS*, 441 U.S. 1 (1979), for example, the Supreme Court concluded that the rule that price fixing is *per se* unlawful did not apply to the "blanket licenses" through which certain organizations of songwriters provided licensees with "the right to perform any and all of the compositions owned by the members or affiliates" of those organizations. *Id.* at 5. Although that license set a fixed price for all of the members' or affiliates' compositions, the Court concluded that the unique nature of the blanket license, which was "quite different from anything any individual owner could issue" because it enabled licensees to procure the right to perform many works without having to contact each songwriter for individual permission while also enabling the songwriters' representatives to ensure that performances were properly licensed, justified applying the Rule of Reason. *Id.* at 23-24. The Court has since recognized that the same principle requires that certain group boycotts be subject to the Rule of Reason. *See Am. Needle*, 560 U.S. at 187, 203-04 (Rule of Reason applied to NFL teams' decision to grant exclusive license for teams' intellectual property to one company and deny license to its competitor).

The for-hire transportation services provided through the Uber or Lyft applications may fall

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within this exception, because the usefulness of the applications to consumers appears to depend upon the immediate availability of numerous drivers who have agreed to provide rides dispatched through the application at prices established by and paid through the application on the basis of uniform pricing formulas. Indeed, if the Uber and Lyft applications are *not* products for which "restraints on competition are essential," the manner in which those applications enable large groups of drivers who are ostensibly competing with one another for business to ensure that the prices paid by consumers for their services will be determined on the basis of uniform pricing formulas instead of by competitively bidding against one another might be *per se* unlawful under the Sherman Act. *See, e.g.*, *Meyer v. Kalanick*, 174 F.Supp.3d 817 (S.D.N.Y. 2016). If the applications *do* depend upon such coordinated driver conduct, then the *per se* rules of invalidity Plaintiffs have invoked in support of their Motion for Summary Judgment do not apply.

In order to determine whether *per se* rules are inapplicable here because of the unique features of the ride services provided through the Uber and Lyft applications, Seattle should be permitted to undertake discovery regarding how the Uber and Lyft applications operate, including the extent to which those applications enable drivers to engage in parallel and coordinated conduct with respect to the prices charged for each ride or the driver who will be dispatched for a particular ride request. Seattle should also be permitted to undertake discovery regarding the necessity of such driver coordination to the usefulness and appeal of those applications. This information is not in Seattle's possession and cannot reasonably be developed without conducting discovery from Uber and Lyft. Leyton Decl. ¶¶6-7, 9-11.

CONCLUSION

For the foregoing reasons, this Court should grant Seattle leave to undertake discovery before responding to Plaintiffs' Motion for Summary Judgment, and should re-note Plaintiffs' Motion for a date no earlier than October 15, 2019.

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DATED this 22nd day of March, 2019.

Respectfully submitted,

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2019, I electronically filed this RULE 56(d) MOTION TO PERMIT DISCOVERY NECESSARY TO OPPOSE SUMMARY JUDGMENT and the accompanying DECLARATION OF STACEY M. LEYTON IN SUPPORT OF DEFENDANTS' MOTION TO PERMIT DISCOVERY NECESSARY TO OPPOSE SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the below-listed:

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DATED this 22nd day of March, 2019, at Seattle, Washington.

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Mayor Durkan Announces Her Fare Share Plan to Mandate A Minimum Wage and Provide Critical Worker Protections for Uber and Lyft Drivers, Invest Millions of Dollars in Housing Near Transit and Transportation Projects Like the Downtown Streetcar

by Kamaria Hightower on September 19, 2019

Proposal Will Generate $52 Million through 2025 for More Than 500 New Affordable Homes Near Transit for Low- and Middle-Income Workers

Proceeds Will Also Fully Fund Center City Connector Streetcar and Establish First–in–the–Nation Driver Resolution Center

SEATTLE (September 19) – Standing alongside housing, transit, and worker advocates, Mayor Jenny A. Durkan today announced her new Fare Share proposal to mandate that Uber and Lyft drivers be paid a minimum wage in addition to compensation for benefits and expenses, which will go into effect on July 1, 2020. Her Fare Share plan will invest millions of dollars in housing near transit and in transportation projects, including the Center City Connector streetcar. Finally, her proposal would also establish a first-in-the-nation independent Driver Resolution Center to provide Uber and Lyft drivers representation services and an impartial process for settling unwarranted deactivation by the companies.

"Seattle is a national leader in ensuring our workers are treated fairly and can build a better life for themselves and their loved ones. From the Fight for $15 to our Domestic Workers Bill of Rights, we've always been the city that puts our workers before any company's bottom line," said Mayor Durkan. "In this rapidly changing economy, we need to make sure our hard-fought worker protections are available for our Uber and Lyft drivers, who work long hours to help all of us get where we need to go. This proposal is about ensuring Seattle grows into the city we want to be. Being a city of the future isn't just about the incredible gains of the new economy. It's about being a city where all our workers are treated fairly, our communities can afford to live where they work, and everyone, regardless of income or ability level, has access to high-quality transit."

Right now, Uber and Lyft pay an existing City fee of $0.24 per ride to fund wheelchair accessible taxis and regulation of the industry. Mayor Durkan's Fare Share plan will impose an additional $0.51 per ride charge on Uber and Lyft that would allow the City to invest more than $52 million for housing near transit, $56 million to fully fund the Center City Connector streetcar, and $17.75 million to create an independent Driver Resolution Center for Uber and Lyft drivers. Revenue projections are estimated through 2025.

Mayor Durkan also announced legislation that will mandate drivers be paid a minimum wage plus benefits and expenses beginning July 1, 2020. Understanding the complexities of the current business model, the City will commission an independent study to evaluate average hourly work and expenses for drivers as well as costs to drivers not currently included such as paid sick and safe time, worker's compensation, and unemployment.

"We strive to be a city that embraces a robust, innovative, and competitive environment for consumer choices and services," said Council President Bruce A. Harrell. "Transportation Network Companies (TNCs) entry into the market has been embraced by riders and has been demonstrated with millions of rides per year after Seattle legislated TNCs in 2014. The City is listening to the concerns from drivers and the legacy industry to examine a number of issues to address fair compensation, rights of drivers, and to ensure a level playing field for all industry participants. We have no interest in stymieing the industry. All TNC drivers should be receiving fair compensation for their work. Council will work closely to examine the Mayor's proposal in a transparent manner and will provide an opportunity for the public to weigh in over the next few months."

Seattle has been the fastest-growing city in the country over the past decade, and our growth has led to many challenges, including the fact that many workers like Seattle's Uber and Lyft drivers, nurse assistants, construction workers, and preschool teachers can't afford to live close to their jobs. Mayor Durkan's proposal will generate more than $52 million to build over 500 units of housing near transit. Housing built from funds generated from the charge on Uber and Lyft will focus on families and individuals making between $15 and $25 an hour. The Seattle Office of Housing will distribute these funds via its yearly competitive process.

"Seattle's affordable housing crisis undermines the collective benefits that would normally stem from its booming economy," Marty Kooistra, Executive Director, Housing Development Consortium of Seattle-King County. "Mayor Durkan's proposed legislation is an opportunity to leverage our city's growth and ensure essential worker protections while also tackling the two biggest cost burdens for low-wage households: housing and transportation."

Mayor Durkan believes that all our residents should have access to reliable, efficient, and equitable transit options to help manage congestion by limiting trips in cars downtown and to help Seattle meet its climate goals. Last year, Uber and Lyft had 24 million rides in the City of Seattle, half of which either started or ended downtown. Uber and Lyft vehicles that are circling or idling downtown contribute to congestion that slows down buses and clogs streets and the curb.

To ensure people and goods can move quickly and safely through Seattle, the proposed tax on Uber and Lyft will generate another $56 million in proceeds over five years to fully fund the construction of the Center City Connector streetcar. In 2018, the streetcar program saw an 18 percent ridership increase, and a 31 percent increase specifically on the First Hill line. After 2025, new revenue will fund transit, bicycle, pedestrian, and safety projects.

"As Seattle continues to grow, we need policies that support more transportation and housing options, and strong worker protections to make Seattle a place where everyone can thrive. By investing in streetcar, bus, light rail, biking, and walking improvements in Seattle, we can give everyone more choices to get where they need to go, spending less time in traffic and more time with loved ones," said Alex Hudson, Executive Director of the Transportation Choices Coalition. "Mayor Durkan's legislation matches Seattle's growing demands – better transportation, affordable housing near transit, and well-paying jobs – to help everyone access opportunities to live a healthy life. Our actions today will impact the health of our communities and environment for generations."

Finally, the Mayor's proposal is expected to support a contract with an independent nonprofit organization to create the first-in-the-nation Driver Resolution Center, which allows companies and drivers to voluntarily resolve disputes regarding deactivation. Specifically, the Driver Resolution Center will provide Uber and Lyft drivers support through an impartial arbitration and appeals process, and will offer culturally responsive outreach and education services on driver rights since many drivers are immigrants and refugees.

"Seattle's technology-driven prosperity has brought undeniable benefits," said Nicole Grant, Executive Secretary-Treasurer of MLK Labor, which represents more than 150 unions. "But it has also placed new stresses on working people, people of color, and immigrants. We need to use every tool we have to make sure Seattle's growth is working for everyone and giving workers a fair share."

The Mayor will work with the Department of Neighborhoods and the Innovation and Performance Team to conduct deep community engagement with Uber and Lyft drivers to ensure any potential proposal best serves the needs of these workers.

The Durkan Digest – Special Edition: Our New Fare Share Plan to Invest in Workers, Housing, and Transportation

by Anthony Derrick on September 19, 2019

We're living in the most disruptive time for our workers since the Industrial Revolution. Our economy is changing, and long-term jobs are giving way to gig work. In this rapidly changing economy, we need to make sure our hard-fought worker protections are available for gig workers. That includes Uber and Lyft drivers, who work long hours to help all of us get where we need to go.

As Seattle grows, we also need to make sure our communities can afford to live near where they work, and everyone, regardless of income or ability level, has access to high-quality transit.

That's why earlier today I announced my "Fare Share" plan to invest in workers, housing near transit, and transit and transportation projects.

Our Fare Share plan will:

- Mandate Seattle's minimum wage, plus benefits and expenses, for Uber and Lyft drivers, beginning July 1, 2020;
- Invest in landmark worker protections, including a first-in-the-nation Driver Resolution Center;
- Invest in transit and fully fund the Center City Connector streetcar; and
- Support more than 500 new affordable homes near transit for people earning between $15 and $25 per hour.

The City of Seattle wants to create a model to ensure we're appropriately compensating drivers for the hours they truly work, the expenses they are shouldering, and the benefits they deserve, even if they are currently classified as independent contractors.

Seattle is a national leader in ensuring our workers are treated fairly and can build a better life for themselves and their loved ones. From the Fight for $15 to our Domestic

Workers Bill of Rights, we've always been the city that puts our workers before any company's bottom line.

We also know that more and more workers like Seattle's nurse assistants, construction workers, and preschool teachers can't afford to live close to their jobs. And that's why we need to continue to invest in more affordable housing as quickly as possible across Seattle.

There's no doubt that the explosive growth of companies like Lyft and Uber has helped many people, and has helped create opportunity for many communities throughout our region.

But the fact remains that some Uber and Lyft drivers are not making minimum wage, while billion dollar companies are profiting off of using the City's public resources, like the right of way and curb space. Last year alone, there were more than 24 million Uber and Lyft rides in our City, half of which started or ended downtown. That has had an impact on congestion, and has crowded our buses and curbs.

That's why we need to think big and make important investments in transit like this one to ensure we keep transit moving in downtown Seattle, manage traffic, and achieve our climate goals.

This overall plan is about ensuring Seattle builds off our legacy of fighting for working families. And it's about growing into the city we want to be.

Your feedback is critical to the success of this project. As always, please continue to write me at Jenny.Durkan@seattle.gov, reach out via Twitter and Facebook, and stay up-to-date on the work we're doing for the people of Seattle on my blog.

Sincerely,

Jenny A. Durkan

This blog post is an excerpt from Mayor Jenny Durkan's weekly newsletter. If would like more content like this, and a weekly recap of the exciting things happening in the City of Seattle, you can subscribe here.

Mayor Jenny A. Durkan’s 2020 Proposed

Budgetby Anthony Derrick on September 22, 2019

Mayor Jenny Durkan’s 2020 Proposed Budget invests in our shared vision for a better future. Her budget makes responsible investments in five key priorities: Youth opportunity; public safety; homelessness; housing; and transit and transportation. The 2020 Proposed Budget is balanced, totaling approximately $6.5 billion.

WATCH THE SPEECH

FACT SHEET
Download the 2020 Proposed Budget Fact Sheet

Explore Mayor Durkan’s 2020 Proposed Budget

- Mayor Durkan Announces $25 Million to Advance New Affordable Housing Across Seattle Using Existing Revenues
- Mayor Durkan Announces $31 Million in New City Investments in “Vision Zero” Transportation Safety Projects and Transit Improvements

- Mayor Durkan Announces Plan to Nearly Double City of Seattle's Child Care Assistance Program to Serve 600 Additional Children
- Explore the full budget here

2020 Proposed Budget Speech

Mayor Jenny A. Durkan's remarks as delivered:

Alright Jaeden, that was amazing!

I got to meet him last year in the Teen Summer Musical, he's phenomenal in everything he does.

Council President Harrell, members of the City Council, Superintendent Juneau, City Attorney Pete Holmes, community leaders, members of my Cabinet, the amazing students and staff of Franklin High School, and all my fellow Seattleites:

Good morning.

Good almost afternoon!

Thank you all for being here today.

And Council President Harrell, thank you for NOT wearing your Garfield Bulldogs gear.

Once a year, I get the chance to present my budget to the City Council and the people of this City.

And from the start of the Seattle Squeeze to the February Freeze, it has been a big year in Seattle.

And it is great to be here at Franklin High School.

Back in the day as a young lawyer, I loved coming to Franklin High School to help with the mock trial team.

This morning, I wanted to be here because my budget seizes on our chance to move ahead on the things we care about.

And things for which Franklin High School is at the epicenter in advocating for:

Free college.

Affordable housing.

Justice and equity.

Protecting workers.

And more transit, bike infrastructure, and safer streets.

Seattle is changing, and with our budget we can decide what kind of city we want to be.

Our budget reflects the present and future we want for the people of Seattle, and for our youth, like the students here today.

Look, I admit it:

I love Seattle.

From coffee shops to the grocery store to town halls to roundtables, I love meeting and talking to the people of this city.

I hear hope, but I hear anxiety, too.

Mostly, I hear shared values, shared priorities, and a shared vision of a better future for our City.

Together, Council, we know that Seattle needs a government that works – that delivers the basic City services that residents demand and deserve.

But basic services are only the floor.

We can and must do much more than that.

While the other Washington is all about division, here in Seattle, we believe in solutions.

We believe that Seattle must be an inclusive and just city that's truly open to everyone. That says that immigrants and refugees are welcome here.

Where a childcare provider or teacher can actually afford to live in the same community as the children they care for.

And where Uber and Lyft drivers can afford to live in the same city as the people they drive.

I sat down with some drivers in the last week.

They told me how they sometimes drive 10, 12 hours per day.

Hard, exhausting work, with every kind of issue ending up in their cars.

They are working full time and then some, and they barely make ends meet.

We can do better.

They deserve at least a minimum wage and reasonable expenses.

Council, Cabinet, all of us together we must continue to dismantle systemic racism and injustice – wherever we see it.

And students of Franklin, this is your town.

We know we must give you the opportunities and the skills so you can build the city of the future.

That's why our budget will provide free college, free transit, and pathways to amazing jobs.

And in these tough times, we also must also tap into our common humanity, and remember we are all in this together.

We must do more to help our neighbors experiencing homelessness.

We must do more to lift each other up.

We must build more housing, especially housing near transit, so that the nurse assistants, restaurant workers, and the teachers right in this building can live in the city they make great.

And speaking of teachers, and staff at Franklin: Can we give them a round of applause…

On Friday, students led the city in a Strike for Climate.

How many students here participated? Alright…

And with this budget, we will act urgently on climate.

We must ensure the future of our planet.

This budget keeps the lights on and invests in progress on some tough problems for Seattle.

Basic City services includes:

Picking up the garbage.

Delivering clean electricity.

Plowing the snow.

Filling the potholes.

Keeping people and goods moving during the Squeeze.

Tackling tougher problems is harder:

But it means delivering on the promise of opportunity, including two years free college for every student here, if you want it.

But that's only the start, then it means helping you get the greats jobs and careers deserve.

It means requiring a minimum wage and expenses for Uber and Lyft drivers.

It means building more affordable housing in every part of the city.

And with this budget we will usher in a new era in the fight against homelessness.

And we will continue our other big fights for climate, for justice, for making sure our City stays a welcoming vibrant city where folks can actually afford to live.

This is a budget about our future.

And I mean our future.

Students, the first priority of my budget is all about building opportunity for you and the young people in Seattle.

Together, we must build a city where your zip code, your race, your place of birth, all the things that make you who you are do not decide your destiny.

If we do our job right, students, you get to decide your destiny.

Too few of our high schoolers graduate ready to participate in the economy of Seattle.

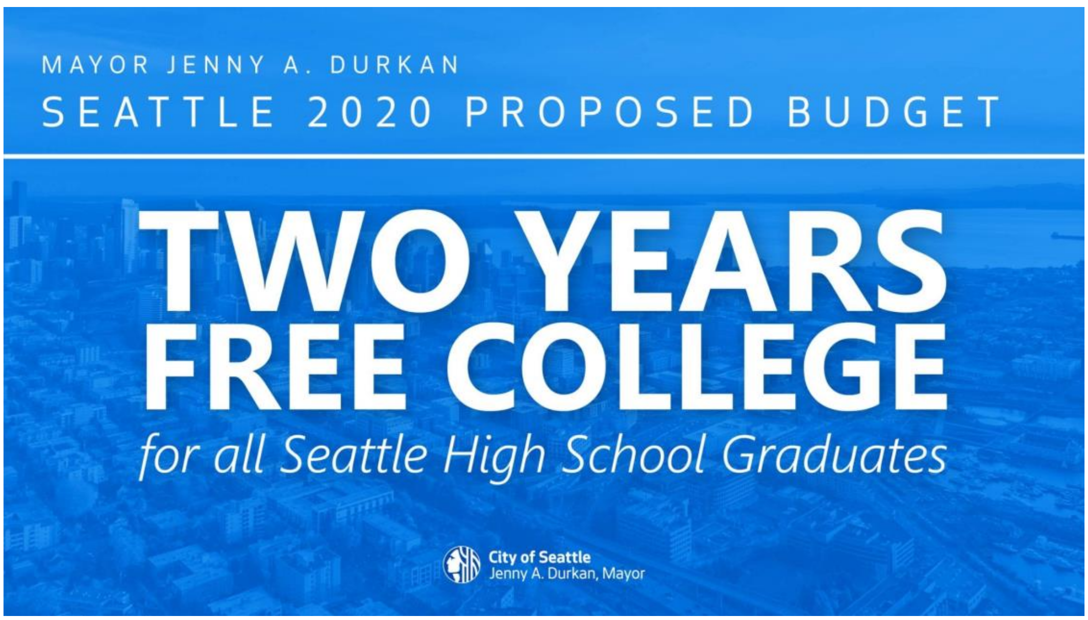
If we don't close the opportunity gap in school, we know we cannot beat the inequities that exist in Seattle today

Are there any seniors in the house? C'mon!

Seniors, thanks for being here. And if you do your job – if you graduate – we have an option for you and every student at a Seattle public high school.

Yeah, even your rivals, Garfield and Beach.

The Seattle Promise College Tuition Program will you two years of free college at any of the three Seattle Colleges.



And we'll help you with those other obstacles like books, fees, childcare and transportation.

So if you want that chance after your time here at Franklin, the City of Seattle will make sure it's available to you.

But we know that is just a start.

We're taking other steps:

We also created a new internship program for students doing the Seattle Promise program.

That gives those students the chance to have paid, and I mean paid, internships at some of Seattle's most innovative companies and labor unions, gain some experience, and make progress on their career goals.

People like Kennet Vera.

He's the first person in his family to go to college.

He's a Seattle Promise student doing the Opportunity Promise internship at Expedia.

And this fall, he ships over to an internship at SEIU 775.

Those are the opportunities that you deserve, and all our youth deserve.

We know these programs work:

They help students move from school to training to jobs.

From the best labor apprenticeships, to tech, to any field you can imagine – we want to open doors.

To every student here, like I said: This is your city.

Whether you want to be an iron worker who builds those new buildings downtown, the biotech worker who invents the cure to cancer in those buildings, or you want to be the person who owns the buildings – we are with you.

We want you to reach for your dreams – including dreams of making it in the creative economy.

Film, the arts, music, and culture.

Our creative industries are not just good for our economy – they make our City better, and the vibrant, and soulful city that we want to be.

With that goal, we'll also invest to in work to build Seattle's creative industries and make it an economic priority.

Our Office of Film + Music will work in partnership with our great entertainment community. We want Jaeden to be on the stage again, showing everyone else how to do it!

But as a city, we know we cannot wait until high school to build opportunity.

We have to support families and children.

That's why this budget makes new, unprecedented, investments in childcare.

I know what a big deal this is:

As a working mom, childcare was really important to my partner and I.

And I really want to thank Councilmember Teresa Mosqueda, Councilmember Lorena Gonzalez, and Councilmember Sally Bagshaw for their commitment to expanding access to childcare in Seattle.

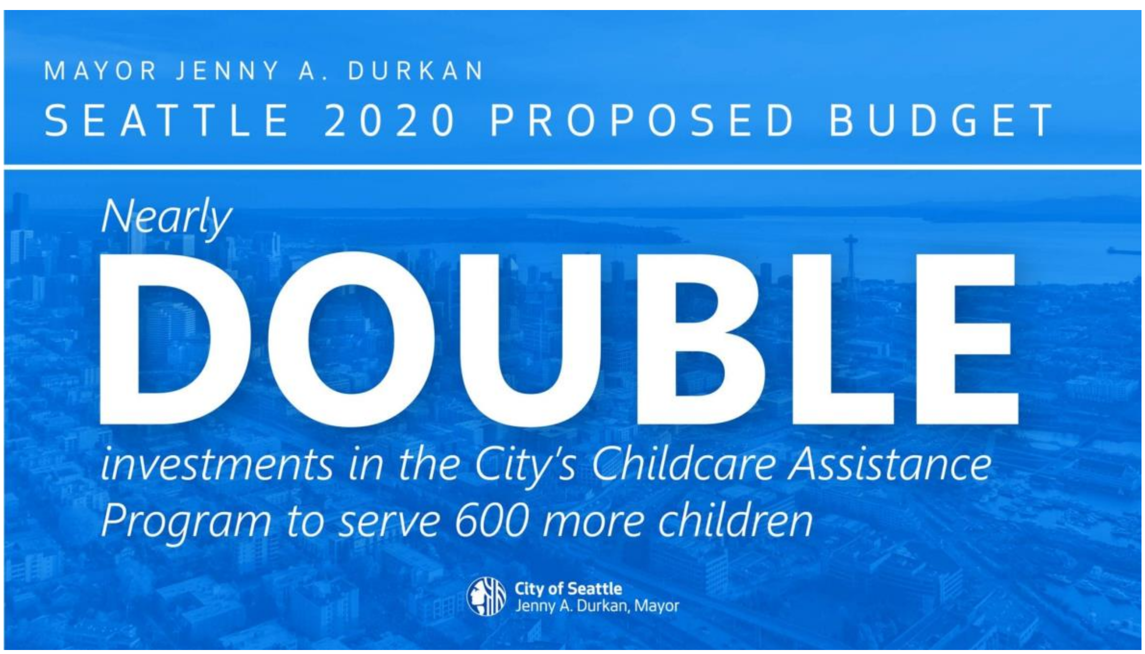
Childcare is hard to find.

And it's getting more expensive.

So our budget will nearly double our childcare program.

We'll ensure that the parents of up to 600 MORE children will get help with the cost of childcare.

We have to start early if we want our children to have the best Seattle jobs.



The second priority of my budget is to invest in safer, and more just communities.

Because of the leadership of Chief Carmen Best and our officers, we have become the national model for crisis intervention and de-escalation.

Crime in Seattle is down compared to this time last year.

But as the city has grown, so have the challenges of our urban environment.

That's why my budget works to address those challenges.

It adds new officers and expands our Community Service Officer program.
It supports community-based emphasis patrols, so there's more officers walking and biking in communities they serve.

It expands the Seattle Fire Department's Health One program, a team of specially trained firefighters and a civilian specialist that helps people with 9-1-1 calls that aren't really emergencies but where people still need help.

Like people who need help with substance abuse and accessing services.

Just like Medic One became a national model, I think Health One can too.

As we announced two weeks ago, my budget will also help fund four new pilot programs to address the complex intersection of homelessness, the criminal justice system, behavioral health, and substance abuse disorder.

Our system simply is not working:

Too many people are cycling through the criminal justice system, impacting them and their communities. They're not getting the help they need.

We have to change that.

And that requires separate City, state, and county agencies coming together to get it done.

If we are going to be the city of the future, people must be able to thrive and be safe where they live, work, and play.

But public safety is about a lot more than police and firefighters.

True public safety means that everyone, regardless of where they live, or what their background is, can have access to lasting opportunity.

That’s why in this budget, we’re renewing our commitment to not just community-based policing, but to true shared opportunity – like free transit, college and jobs.

And also by investing in restorative justice and youth safety.

We should never give up on any youth.

This budget also invests in addressing one of the most challenging moral things of our time:

Our homelessness crisis.

Over the last year, we have made investments that are having an impact.

The City is doing more than ever to help our neighbors who need their help and are living unsheltered.

We’ve created greater accountability, and we’ve helped more people.

We’ve helped more people and ensured we do the most good with our resources.

Just this year, we have made progress.

We are serving more households, moving more households to permanent housing, and preventing more people from becoming homeless in the first place.

And while we have a long way to go, we are doing better to address the fact that people of color are disproportionately impacted and lag behind on services.

We must change that.

By making our shelter system more humane and centering it on what people actually need, we are moving more people out of homelessness than basic shelters ever have.

The expansion of our Navigation Team has saved lives and has moved hundreds of people to safer places.

And this spring, for the first time since 2012 – unlike other large cities on the West Coast – the annual Point in Time count showed a reduction in the number of people living unsheltered here in Seattle and King County.

That is progress.

But still, too many of our neighbors are suffering.

So this budget will make historic investments in a new era and a new approach that will help prevent people from falling into homelessness in the first place – and help connect people with the housing and the services.

We know what works – we just have to be able to do it, and how we do it matters.

After years of talk, we are actually creating what our region needs:

Ending the era of a siloed, fragmented approach to homelessness:

Imagine, one unified system that has the authority, the responsibility and the resources under one roof, and centers its work on the lives and voices of the people being served.

Earlier this month, King County Executive Dow Constantine and I transmitted legislation to our respective Councils.

Our 2020 budget follows through on the promise and funds that new unified response to homelessness.

We must continue our progress.

Seattle cannot be a city of the future unless it lifts up those who are left behind.

We know the lack of affordable housing is helping fuel our homelessness crisis, too.

The scope of housing needs is enormous.

It’s getting harder and harder for low-income and middle-income people to live in Seattle.

We need more affordable housing in every part of the city.

Together, we have made immense progress.

In 2017 and 2018, the City and its partners invested over $700 million to build more housing for our low- and middle-income neighbors.

And Councilmembers, your dedicated work for more affordable housing has been so important and so inspiring.

Thank you for your years of hard work.

You helped bring affordable housing choices through the Mandatory Housing Affordability law.

Moved ahead on building affordable housing at Fort Lawton.

Increased backyard cottages and in-law apartments.

Thank you for everything you're doing, and for your commitment to make Seattle a more affordable place. Thank you.

This summer, I announced the "Housing Seattle Now" initiative – a new surge of investments in both low- and middle-income housing. We want it in every community across our City.

With my budget, we have a chance to keep that momentum for more housing going.

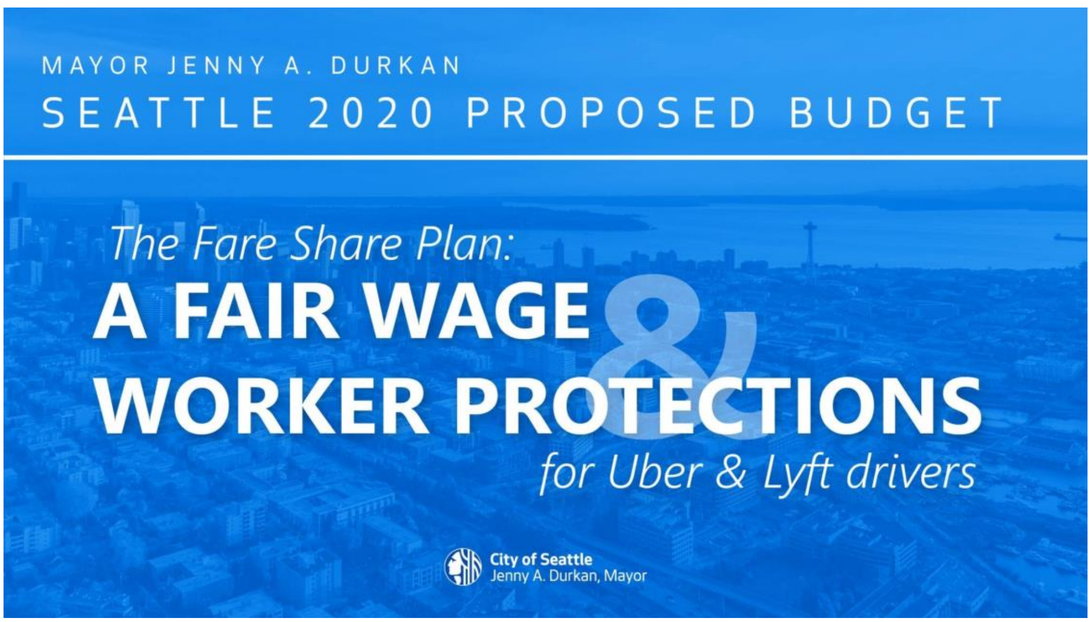
We can invest over $78 million from the sale of the Mercer properties to build and support more affordable housing and prevent displacement.

Too many people have been pushed out of our city.

Today, I am also proposing two new investments for housing.

First, we are going to take advantage of a new state law that lets us use existing revenues and add another $25 million this year to awards to build more housing.

And second, as I shared last week, I am proposing my "Fare Share" plan to make a modest tax on Uber and Lyft drives so they can make minimum wage, and to make sure we can invest another $52 million in housing near transit over the next five years.



Look we grew so fast, we fell far behind on housing, social services, policy, and transportation.

We need to catch up.

As we build more housing, we must continue to build a more connected city.

We simply don't have enough transit, and we don't have enough safe, affordable, and reliable options for people to get around – no matter where you live.

Taking transit, biking, walking, rolling, and carpooling must be a real alternative to driving alone in a car.

We can't meet our climate goals unless we do that and do it with urgency.

Here in Seattle, we have a lot to be proud of.

During the viaduct closure, we showed we could change, and that people could get out of those cars.

We need to keep that going.

Recently, Seattle was called the best city in our country for public transit.

I would have just stopped with the best city in the country.

But over the last two years, we have increased our investments in King County Metro bus service by 71 percent.

We put a free ORCA card in the hands of every Seattle public high school student.

Alright students give me a shout-out if you're using that ORCA card!

And as we increase access to transit, we are also building a safer, more connected bike network.

Over the next five years, we are ready to deliver an additional 50 miles of projects like bike lanes and greenways.

But it's not enough.

That is why this budget invests additional revenues to fund projects not previously funded through the Bike Master Plan.

We also know that if we are going to stay a world-class city, we must have a world-class transit system.

So I've identified the funding we need to fully fund our downtown streetcar.

It is going to be very cool.

We will have a connected streetcar route from Capitol Hill, to Wing Luke, to the new waterfront, to South Lake Union and MOHAI.

Imagine, being down on the waterfront, and you can get to MOHAI and Wing Luke, or anywhere in between.

Seattle deserves world-class transit.

We will also continue to increase bus service through the Seattle Transportation Benefit District.

And we will keep expanding access to free ORCA – from high school students, Seattle Promise scholars to our Seattle Housing Authority residents.

We must make transit available for as many people as possible, at a zero or low cost.

We also must recommit to our goal of Vision Zero:

Our plan to end traffic deaths and serious injuries on our City streets by 2030.

We're not doing enough, and the numbers are going in the wrong direction.

We must act with urgency so that roads – like Rainier Avenue – become safer for all users.

This budget funds that work.

Seattle leads the nation in transit use, and we still need more and better transit.

I can announce today that we will invest $31 million in new safety, bike, pedestrian, and transit improvements.

We'll invest $16.7 million of the revenue from the sale of Mercer properties in Vision Zero transportation safety projects in every corner of our City.

From new protected bike lanes to better sidewalks – or any sidewalks in some neighborhoods…

…to a new transit-, pedestrian, and bike-only street that connects with light rail…

Everyone must have safe streets, and a place to walk, in every neighborhood in this city.

And thanks to some additional resources available through the Seattle Transportation Benefit District, next year we will buy 25,000 hours of bus service in addition, and we'll invest another $4 million in first-and-last mile connections to transit so we can get as many people as possible to safe, reliable, efficient transit.

And yes, we'll invest in bus stop shelters, benches, red bus-only lanes, and head start signals for buses.

Finally, I can tell you, it's true, we have set a goal of 90 new blocks of red, bus-only lanes by the end of 2020.

And students, we need you in Olympia because we want to get a Block the Box bill finally passed!

In a city of the future, you must have safe and reliable transportation choices.

And this budget invests in that future.

None of this progress – and none of these investments we will deliver on in this budget – are possible without our incredible team at the City of Seattle.

Nearly every day, 12,000 public servants go to work ready to deliver for the people of Seattle.

So to my colleagues here at the City, I just want to say thank you.

I'm proud of what we do together, and I'm so excited about what's ahead.

And I know how hard your jobs are and the pressures you face. So thank you, for everything you do for the City of Seattle.

And I just want to give a little pitch: Students, as you think about life after high school, I hope you'll think about the chance to serve the public and work at the City of Seattle.

Members of the City Council, I look forward to working with you to cement this plan as a guide for our work in the coming year.

For some of you, voting on this budget plan will be among your final votes as a member of the City Council.

Council President Harrell, Councilmember Bagshaw, Councilmember O'Brien, who might have an excused absence, and Councilmember Pacheco – thank you for all you've done for the people of Seattle.

Can we give them a hand?

Seriously, they have done so much.

You students will learn later on, when you run for City Council and become Mayor, how much fun it will be.

For all of us here, I hope that our story can be that we worked together to invest in a safer, more just Seattle.

That we built more low- and-middle income housing.

That we ushered in that new era in the fight against homelessness in our region.

That we left a city more connected, with more safer choices for getting around.

That we built more pathways to opportunity for our young people.

That we invested in solving problems and building a future.

That these students, in a generation, really are running this city.

We have that chance.

And I think we should seize it.

Once again, let’s take our progressive Seattle values, and turn them into action.

Action that does the most good for the most people.

Let’s make that our story.

Let’s carry on that work – and now, let’s go back to work.

Thank you all for being here – thank you Franklin High School and have a great year!

THE NEW SCHOOL
CENTER FOR NEW YORK CITY AFFAIRS

CWED
CENTER ON WAGE AND EMPLOYMENT DYNAMICS
University of California, Berkeley

An Earnings Standard for New York City's App-based Drivers:

Economic Analysis and Policy Assessment

James A. Parrott and Michael Reich

Report for the New York City Taxi and Limousine Commission

July 2018

CNYCA / CWED

Center for New York City Affairs

The Center for New York City Affairs at The New School is dedicated to advancing innovative public policies that strengthen neighborhoods, support families, and reduce urban poverty. Our tools include: rigorous analysis; journalistic research; candid public dialogue with stakeholders; and strategic planning with government officials, nonprofit practitioners, and community residents.

Dr. Parrott, Economic and Fiscal Policy Director of the Center for New York City Affairs at the New School, has previously worked as chief economist for the City of New York, the State Comptroller's office, and the Fiscal Policy Institute. He has extensively studied and written about New York City economic and labor market developments for over 25 years. He received his Ph.D. in economics from the University of Massachusetts at Amherst.

Center on Wage and Employment Dynamics

CWED was established at the University of California, Berkeley in 2007 to provide a focus for research and policy analysis on wage and employment dynamics in contemporary labor markets.

Dr. Reich, Professor of Economics and Chair of the Center on Wage and Employment Dynamics at the University of California, Berkeley, has published 17 books and monographs and has authored over 130 papers. His recent work has focused on the effects of federal, state and citywide minimum wages. A product of New York City's public schools, Reich obtained his Ph.D. in Economics from Harvard University.

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An Earnings Standard for New York City's App-Based Drivers
Economic Analysis and Policy Assessment

James A. Parrott* and Michael Reich**

July 2018

Report for the New York City Taxi and Limousine Commission

We provide the first detailed analysis of the app-based transportation industry in a large metropolis. Concerned about reports of low earnings (after costs) among drivers working for the large app-based for-hire vehicle (FHV) companies, the New York City Taxi and Limousine Commission (TLC) wishes to establish a minimum driver pay standard. The policy would set an earnings floor of $17.22, the independent contractor equivalent of a $15 hourly wage, with an allowance for paid time off. We examine the need for and likely effects of the TLC's proposed policy. Our analysis draws mainly upon administrative data collected from all the companies by the TLC, and we develop a model to simulate the effects of the policy. We find that a majority of the city's FHV drivers work full-time and that 85 percent make less than the proposed pay standard. Hourly pay is low in large part because the industry depends upon a ready availability of idle drivers to minimize passenger wait times. The proposed policy would increase driver net earnings (after expenses) by 22.5 percent, or an average of $6,345 per year among the 85 percent of drivers who would get increases. At the same time, company commissions in the city generate very large mark-ups over local operating costs The policy could be fully paid for by combining an increase of 2.4 minutes in driver trips with passengers per working hour with reductions in company commissions. Fare increases would then be small (five percent or less) and average wait times for passengers would increase by about 12 to 15 seconds. The policy would reward drivers for pooled rides, which would increase as a share of all rides. The policy would substantially reduce growth in the number of new drivers and vehicles and provide some indirect benefits for medallion drivers.

*James A. Parrott, Ph.D. Director, Economic and Fiscal Policy, Center for New York City Affairs, The New School, parrottj@newschool.edu. ** Michael Reich, Ph.D. Professor, University of California, Berkeley and Chair, Center on Wage and Employment Dynamics, UC Berkeley, mreich@econ.berkeley.edu. We are particularly grateful to Commissioner Meera Joshi, and Dawn Miller, Bill Heinzen, Fausto Lopez, Rodney Stiles, and Celine Zakaryan of the TLC staff for invaluable assistance, to Xingxing Yang, Jason Rochford, Qasim Abbas, and Angela Butel for research assistance, to Bruce Cory for editorial assistance, to Milan Gary for designing the cover, to Kamille Vargas and Kristin Morse for general support, and to Eileen Appelbaum, Annette Bernhardt, Juan Camillo Castillo, David Howell, Lawrence Mishel, Carl Nadler, Elliott Sclar, David Weil, Glenn Weyl, and Stephen Zoepf for helpful advice, discussions and reviews. This report was prepared under contracts with the TLC, with additional support from The New School and the University of California, Berkeley. The authors provided technical assistance to the TLC on the likely consequences of alternative policies. TLC members and staff have reviewed this document for accuracy. The report itself is solely the product of the authors, who do not have any financial interests in the FHV industry.

Contents

Preface and Key Findings

This report addresses a critical public policy challenge facing the City of New York—the low pay of app-based drivers. In this preface, we outline our charge from the City's Taxi and Limousine Commission (TLC) concerning a minimum pay standard for these drivers, we summarize our policy design discussions, and we present the key findings that we detail in this report.

Our charge

At the outset, the TLC pointed to the growth in the number of app-based for-hire-vehicles (FHV) and drivers and suggested a possible link to downward pressure on driver earnings. In response, the TLC drafted a policy to ensure minimum earnings for drivers of for-hire vehicles. Drivers would receive a minimum payment per mile and per minute spent transporting passengers. FHV bases would be required to ensure that drivers to whom they dispatch trips do not fall below these minimums over a set period of time. The TLC asked us to evaluate and provide feedback on a proposed policy and to analyze the likely effects. We discussed four policy design questions with the TLC, including how to overcome the reduction of driver trips per hour that might occur if drivers increase their hours in response to increases in driver compensation per trip.

Four policy design questions

The first question for the policy design concerned the level of the pay standard. The prevailing app-based business model in New York City relies on drivers bearing responsibility for all vehicle capital and operating costs. The proposed minimum pay standard is designed to cover the drivers' expenses and still provide the independent contractor equivalent of $15 an hour. Currently, pay for most drivers does not meet this standard.

The second policy design question concerned the needs of the many drivers who already work long hours. A common understanding is that app drivers work on a flexible and part-time basis—to supplement their pay from another job by using their otherwise idle cars. That profile does not fit the driver workforce in New York City (and probably not in other dense world-class cities, such as London, Paris, and San Francisco). Paying for a vehicle entirely by driving for hire, as over two-thirds of New York City's app drivers try to do, is only possible by working full-time. For the 60 percent-plus of all New York City drivers who are full-time drivers—and who provide 80 percent of all rides—work hours are not flexible. Driving is demanding work; drivers' needs, and safe streets, require some paid time off. Consequently, the standard also includes a modest paid time-off supplement.

The third policy design question involved how to prevent the companies from reducing the drivers' per hour compensation. The app business model relies upon very short wait times for passengers requesting rides, which in turn depends on a large supply of available but idle drivers and vehicles. In this model, a pay increase could be counter-productive because it would encourage part-time drivers to work more hours, which would reduce average driver utilization and reduce pay per hour worked.

Our early policy design discussions with the TLC thus focused on the need for mechanisms to maintain and increase driver utilization rates. Our subsequent analysis suggested that including the utilization rate in the pay standard formula could substantially benefit the drivers and increase driver pay in a sustainable manner. This mechanism would thus better align the interests of the companies with the interests of the drivers. An incentive to drivers for shared rides would go further to improve efficiency, as it would increase the average passenger time.

The fourth policy design question concerned whether the industry would be able to absorb the costs of increasing driver pay. Our analysis indicates that a small increase in the number of driver trips per working hour could offset half or more of the costs to the companies of higher driver pay. This discovery suggested a limited need to raise fares to pay the increased costs. Moreover, it would not perceptibly increase passenger wait times. Finally, our analysis of company net revenues and operating costs in New York City indicated considerable latitude for reduced commission rates, which would further limit fare increases.

The proposed TLC pay standard would set a payment floor of $17.22 per hour in take-home pay (after expenses). The standard would ensure that drivers' overall pay provides for all vehicle expenses as well as a fair amount for the drivers' time and also some paid time off. If the compensation provided falls below the minimum pay standard, the companies will be required to make up the difference.

The TLC is developing regulatory rules to implement the proposed minimum driver pay standard, with publication of draft rules for public comment planned soon after the release of this report.

Key findings

- The proposed standard would apply to FHV companies that dispatch more than 10,000 trips daily. Initially, the policy would include the four major app dispatch companies—Juno, Lyft, Uber and Via—that combined, dispatched nearly 600,000 rides per day in the first quarter of 2018, and increased their annual trip totals by over 100 percent in 2016 and by 71 percent in 2017. About 80,000 drivers are affiliated with these four companies.

- The proposed pay standard would result in a 14 percent average increase in gross pay—to $25.76 an hour, and a 22.5 percent increase in net pay—to $17.22 an hour. The 85 percent of drivers currently paid below the standard would earn an additional $6,345 per year.

- The TLC's proposed pay policy includes a $1 bonus per pickup for each shared ride drivers provide. Currently, drivers are under-paid for shared rides; the 40 percent of drivers with the lowest estimated hourly earnings disproportionately provide shared rides.

- The proposed minimum pay standard will ensure that drivers are able to cover all vehicle and related expenses, and a higher expense allowance will apply to drivers of wheelchair-accessible vehicles (WAVs).
- Ninety percent of New York City's app-based drivers are immigrants, and only one out of every six has a four-year college degree. Driving is their only job for two-thirds of the drivers. Eighty percent acquired their vehicle to enter the industry and would risk losing their investment if they switched to working in another industry.
- Half of the drivers support children and provide the bulk of their family's income. Forty percent of drivers have incomes so low they qualify for Medicaid and another 16 percent have no health insurance; 18 percent qualify for federal supplemental nutrition assistance (nearly twice the rate for New York City workers overall).
- Driver pay is low, despite rapid industry growth and high pricing mark-ups, because companies depend upon having a large ready pool of available drivers. This business model reduces driver trips per hour and therefore driver pay per hour.
- The TLC policy would correct some of the inefficiencies and inequities in the app industry by ensuring that driver expenses are covered, incentivizing improved driver utilization, rewarding drivers when they provide shared rides, and reducing growth in the number of new app-based drivers.

The focus of this report is on the operation of the FHV car services market and the compensation of the app drivers. The equally critical situation of medallion drivers is not in our purview. Having studied the app-dispatch industry in detail, we can imagine a series of policy alternatives that would help the medallion drivers; however, a considered analysis would require a separate detailed report. Of course, policies to address the low compensation of app drivers should indirectly benefit medallion drivers and result in fewer empty app cars cruising New York City's streets, improving trip times for all drivers.

Proposals to cap the number of FHV drivers or vehicles also lie outside our purview, as caps currently do not lie within the regulatory capacity of the TLC. However, as we discuss in the report, the TLC's proposed minimum pay policy is likely to reduce substantially the number of new FHV drivers and vehicles.

Section 1 Introduction and Overview

The app-based segment of the for-hire vehicle (FHV) transportation system in New York City consists of companies and drivers who utilize matching algorithms and leverage broad-band smartphone technology to connect drivers and passengers. The companies that make up this industry—Uber, Lyft, Via, and Gett/Juno—have expanded rapidly since 2012. The app-based transportation industry in New York City includes about 80,000 vehicles, dwarfing the city's 13,587 medallion (Yellow) taxis; app-based drivers now complete over 17 million trips in the city each month, double the number of medallion trips.

The industry provides more jobs than many prominent industries, including commercial banking, hotels, and publishing. Uber alone would be the largest for-profit private employer in New York City—if Uber drivers were classified as employees rather than independent contractors.

This rapid growth has generated substantial benefits—including increased convenience for riders and the extension of transportation services to neighborhoods in the outer boroughs that are not well-served by mass transit. The industry has also generated high returns for its investors and created many new jobs for drivers.

Our concern in this report focuses on the well-publicized low pay and long hours of many of the FHV drivers. As we find in this report, 85 percent of app-based drivers currently net below $17.22 per hour (the independent contractor equivalent of $15 an hour for employees and a paid time-off supplement). Our goal is to analyze why the industry has not generated higher earnings for the drivers and how regulatory policy might improve their conditions.

Driving for the app-based companies has evolved considerably since the creation of the industry in 2010. In its early years, the app-based industry recruited and appealed to part-time drivers who valued flexibility in their work hours and who could take advantage of their mostly idle cars to generate additional income. Many of these part-timers had other jobs or were students or worked at home. Over time, this driver profile has changed substantially.

In New York City today, as we show in this report, a majority of the app-based drivers are full-time workers who undertook risky capital investments in the vehicles they acquired for driving passengers. These drivers, many of whom cannot obtain better-paying job options elsewhere in the New York economy, face difficult economic circumstances. Their low pay has persisted despite the rapid growth of the industry, the major benefits it has provided to consumers, and the high returns it has generated for the companies and their external investors.

The low pay of the drivers has been highly publicized (*The New York Times* editorial May 7, 2018). FHV drivers and their supporters articulated their concerns loudly and clearly at a New York City Taxi and Limousine Commission (TLC) hearing in April of 2017.[1] In response, the TLC proposes to establish a pay standard for drivers at the largest FHV companies—those dispatching more than 10,000 trips per day. The goal of the policy is to raise driver earnings to a level ($17.22 per hour) that is equivalent to $15 an hour, with allowance for the payroll taxes paid by the self-employed and a paid time-off supplement.

The TLC engaged us to analyze the app-based FHV industry, and to provide detailed technical assistance and feedback on the proposed policy compatible with the continued ability of the industry to provide important services to New Yorkers. They also engaged us to analyze the policy's likely effects and to write this report.

1.1 The growth of the app-based industry in New York City

App-based urban transportation services began in the U.S. in San Francisco, with the introduction of luxury UberCab service in July 2010 and Sidecar in 2011. Both companies basically tweaked existing network-based software that connected buyers and sellers, as pioneered by eBay, and leveraged the widespread diffusion of smartphones with GPS capabilities. Uber's initial business model relied on a workforce of part-time drivers, many of whom were attracted by the opportunity for extra earnings while retaining flexibility over their driving hours, and who already owned mostly idle cars. This business model avoids regulatory limits on the number of medallions in the city. As we argue in this report, the business model places much of the economic risk associated with the app sector on the drivers, as they are classified as independent contractors. And the model relies on having many idle cars and drivers, which results in low driver pay per hour.

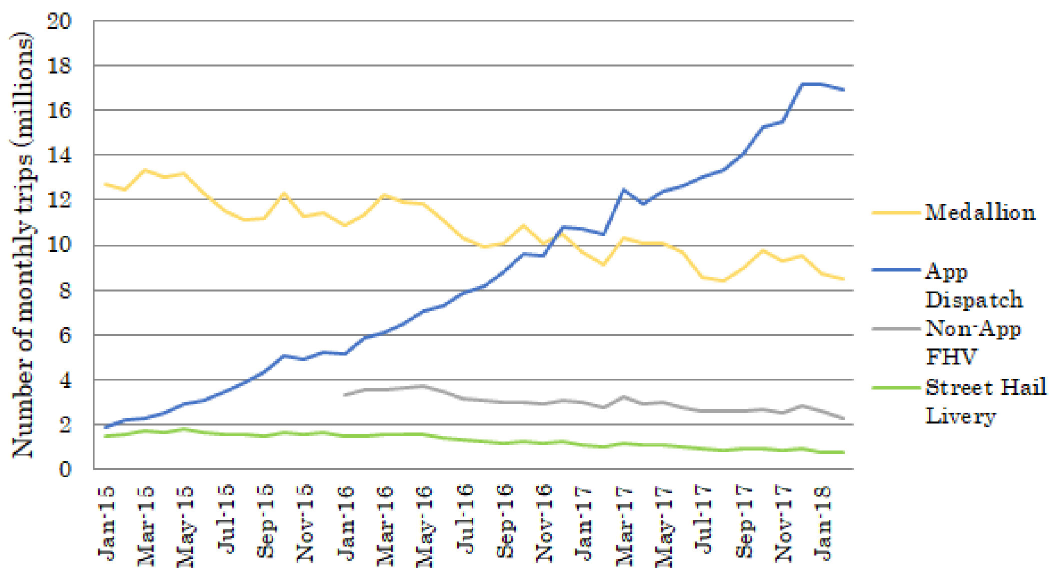
Uber introduced its flagship UberX standard point-to-point service in New York City in 2012; it was subsequently joined by Via in 2013, Lyft in 2014, and Juno in 2016.[2] Each of the newer entrants has sought to distinguish its services from those of its predecessors. Uber and Lyft also have introduced a variety of new services, including luxury and shared ride options. While the shared rides component has grown recently, the main lines of business (such as UberX) still account for the majority of all app-based trips.

[1] The hearing focused on the incomes and expenses of all TLC-licensed drivers. Testimony for the hearing can be accessed at: http://www.nyc.gov/html/tlc/downloads/pdf/transcript_04_06_2017.pdf. The New York City Council Committee on For-Hire Vehicles held a hearing on April 30, 2018 on several pieces of legislation addressing problems in the industry, particularly the adverse effects on drivers. A video transcript is available at: https://council.nyc.gov/.

[2] Chariot, now owned by Ford Motor Company, began operating as a black car service with vans in 2017. Because Chariot does not meet the daily trip threshold, it would not currently fall under this policy.

In just a few years, the app-based industry has transformed urban transportation in New York City. In 2015, Uber alone had about 25,000 cars in its New York City fleet, twice the number of taxicabs. The app-based industry's growth accelerated in 2015 and has continued since. As Exhibit 1 shows, the total number of app-dispatched trips grew by double digits in 2016 and 2017, with the number of app trips surpassing the medallion sector in December 2016. The four major app-based companies provided nearly 160 million trips in 2017, almost four times the 2015 number. By February of 2018, the number of app-dispatched trips was double the number of medallion trips. However, the growth in app-dispatched trips far exceeded the decline in medallion trips. Apparently, the rapid growth of the app-based sector has diverted some passengers from mass transit, contributing to the first non-recession declines in New York City subway and bus ridership.[3]

Exhibit 1: Monthly Trips by Medallion Taxis and FHV segments, Jan. 2015-Feb. 2018



Source: TLC trip data

Exhibit 1 also shows a steady decline in the number of medallion trips since the onset of the app industry. TLC data, not shown here, indicate that most of this decline represents a decline in the number of medallion drivers, rather than in the length of their driving shifts or in the number of their trips per driving hour. The situation of the taxi drivers and

[3] In its August 2017 Citywide Mobility Survey of 3,600 New York City residents, the New York City Department of Transportation found that ride-hailing app trips are more often replacing mass transit than any other mode of travel, including taxi or car service, car, walking or bicycling.

medallion owners deserves its own report, but that is not our purpose here. For critical accounts of the effects of the app industry on medallion owners and taxi drivers, see Hill (2015), Horan (2017) and Schaller (2017a, 2017b, 2018).

1.2 Why pay is low in the app-based industry

The company-driver relationship in the app-based industry differs both from traditional and better-known employment relations and from the taxi driver- medallion owner relationship. We discuss here how the nature of this relationship and the app-based industry model constrain pay from increasing even as the industry grows.

The company-driver relationship In traditional employment relationships, owners determine the schedules and total work hours of their employees and pay their employees a fixed rate per hour of work (or per period of time worked for salaried employees). In the "Econ 101" elementary textbook model of labor markets, pay is determined by labor supply conditions and employers have no power to set pay. The number of workers they hire varies with worker productivity for the firm. Pay will be higher for workers who work harder or have more skills. A minimum wage in this elementary model reduces employment.

Advanced labor economics textbooks present more sophisticated models, which take into account features that distinguish the labor market from other markets. These features recognize the important role of employee turnover, especially in low-wage labor markets (Reich, Gordon and Edwards 1973; Manning 2003). Turnover comes with costs—to workers of switching employers, and to employers of recruiting and retaining workers. In these more sophisticated models, employers possess considerable wage-setting power, employee pay may be lower than the value of worker productivity, and employee pay might not increase with productivity. In this context, a minimum wage standard can reduce employee turnover and increase both pay and employment levels.

In the app-based FHV industry, the drivers are independent contractors.[4] The companies set the fares and the number of new drivers credentialed to drive using their apps. The drivers set their own schedules and total number of work hours and are paid a share of the revenue generated by their passenger trips. However, driver payment is not always a fixed proportion of the passenger fare, depending upon a number of company policies, such as promotions for drivers and riders, treatment of shared rides, and route-based pricing.

[4] The legal basis for the independent contractor status of the app drivers remains unsettled and is beyond the scope of this report. The employment classification of taxi workers in the U.S. has varied historically between employees and independent contractors, for reasons that lie beyond the scope of this report. In the United Kingdom app drivers are covered by minimum wage, paid holiday and paid break regulations and fall in a category between traditional employees and independent contractors. Some commentators (for example, Harris and Krueger 2015) have proposed a similar intermediate category for "gig" workers in the U.S.

The drivers supply the vehicles and pay for all their driving-related costs. For almost all drivers, variation in the distance and time components of their individual trips tends to average out and so is not a major factor in their hourly pay.

Hourly pay will vary considerably with how much of each hour the drivers transport passengers. Trip demand varies by time of day—with peaks during morning and evening rush hours, in the evenings, and on weekends. The passenger trips are offered electronically to individual drivers with fares that are set upfront by the companies. The fares are usually determined by three components: a fixed passenger pick-up fee, a per-mile cost, and a per-minute cost (and as well as a minimum cost per trip). Companies also offer promotions and surcharges that affect these fares.

Thus far, this account of the piece-rate nature of app-driver compensation resembles a model of the determinants of pay for medallion drivers, who are also independent contractors. In both cases, weekly or hourly driver pay is determined primarily by the availability of passengers. But there are two important differences. First, the medallion drivers pay the medallion owners a fixed amount per week or per day to lease their vehicles. As a result, the medallion drivers maximize their driving hours each lease period to increase earnings.[5] Second, the number of medallions is fixed. As a result, the supply of taxi hours per week is also fixed; it changes very little with demand for taxi rides. App-based drivers, in contrast, must supply their own capital equipment—a vehicle, and the number of drivers varies with passenger demand, with the companies admitting more app drivers into their systems, and because the number of hours that the drivers choose to work will vary considerably with their earnings per hour.

The industry has been successful at recruiting new drivers to date, even as unemployment rates have fallen. Their success reflects the still high number of workers who work part-time and, in New York City, the limited employment options facing immigrant men without a four-year college degree. The companies have also provided one-time incentives to new drivers.[6]

This variability in hours of existing drivers and the recruitment of new drivers allow the companies to play the dominant role in determining driver pay. The companies compete with each other primarily by minimizing passengers' wait times and, to a lesser extent, by decreasing fares.[7]

[5] To maximize returns to a particular taxi during its lease period, many taxi drivers share their leased vehicles with other drivers. This feature does not change the overall supply of taxi hours.
[6] The companies have also emphasized the total pay that drivers receive and underplayed the costs associated with driving. Some drivers also have not been fully aware of those costs or the risks associated with upfront investments in their vehicles.
[7] They compete also by expanding their coverage with more vehicles to service a larger customer base, especially in areas of New York City that are under-served by mass transit and medallion drivers.

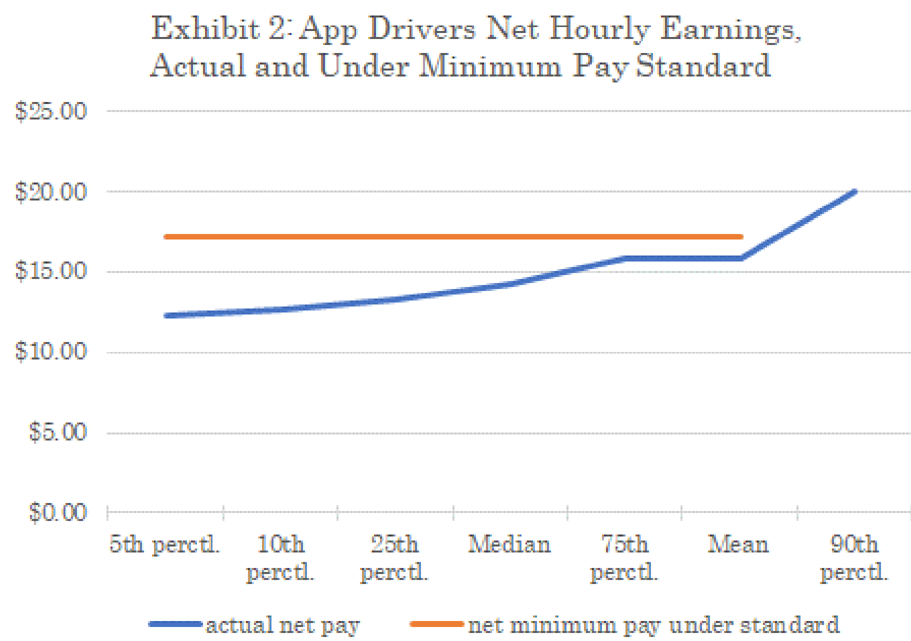
To achieve quick response times, the companies require many idle drivers to be available at any given moment and at many locations. This model creates a gap between the drivers' desires to maximize their earnings —by maximizing trips per working hour—and the companies' desire to minimize response times. In other words, the app business model works only if it keeps driver utilization low, which then keeps drivers' hourly pay low as well.

The only floor on driver pay consists of what economists call the reservation wage—the wage the drivers could obtain in other options, after taking into account the costs of switching jobs (losing their investments in their cars and their job-specific skills) and their probability of finding another job. These switching costs mean that their reservation wage might be below the minimum wage that obtains elsewhere in the local labor market.

1.3 The TLC's proposed driver pay standard

In a simple supply and demand framework, the simplest policy to increase driver pay would limit the inflow of new app-based drivers and/or vehicles to a level consistent with growth in driver trips per hour and the growth of consumer demand. However, the TLC does not have the authority to set any such limits; this authority rests with the New York City Council. To address driver pay, the TLC has instead developed a three-part driver pay standard. The first two parts consist of an amount per mile to cover driving costs, and an amount per minute to cover net driver pay after expenses. These components are divided by each company's specific utilization rate in the previous quarter. (The utilization rate measures the amount of time drivers have passengers in their vehicle.) By incentivizing companies to dispatch more trips to the existing driver pool, this standard would increase driver hourly pay, increase the efficiency of the industry, and provide a major channel through which the companies would absorb the costs of the pay standard. The third component of the policy standard consists of a fixed pick-up bonus for shared rides. This component is intended to reward drivers who have multiple fares in their vehicles during any trip. The policy also sets separate compensation levels for drivers of wheelchair-accessible vehicles.

Any policy that seeks to increase driver pay per trip will encourage some drivers to work more hours. Some of the drivers who already work long hours may choose to work fewer hours as pay per trip increases. But if, on net, drivers work more hours, or the number of drivers increases faster than the growth in the number of trips, each driver will log fewer passenger trips per hour. The result may not increase hourly pay at all. We argue in this report that the TLC's proposed policy includes sufficient incentives for companies to increase the portion of each working hour that drivers transport passengers in their vehicles. The companies could do so by limiting the number of new drivers they recruit.



Source: Authors' analysis of TLC administrative data.

How the policy can increase driver pay Changes in driver earnings under the TLC's proposed policy will affect the industry's dynamics through a more complex process than we outline above. Some drivers may choose to work more hours, others may want to work fewer hours; attrition among the app-driver workforce will fall, reducing recruitment and retention costs for the companies; and the utilization of each driver's working time will increase. In our report, we also consider whether competition will increase among the app-based companies, leading to reduced commissions, and whether companies are likely to increase their fares. These effects could trigger additional consequences. For example, any fare increases imposed by the companies might reduce demand for rides. Some behavioral responses by the drivers, the companies, and consumers might somewhat counteract the policy goals of increasing earnings per-hour worked. To take into account interactions among the adjustment channels described above, we also draw from estimates of how responsive driver hours are to increased hourly pay and how responsive riders are to higher fares. We assemble all of these components in a simulation model.

1.4 Overview of our findings, our study data, and the outline of this report

Findings We estimate that 85 percent of the app-based drivers do not currently earn the standard desired by the TLC, determined to be $17.22 an hour as the independent contractor equivalent of $15 per hour plus an allowance for paid time off. Further, we estimate that the proposed policy will likely increase driver earnings by about 14 percent, equivalent to about $6,345 per year for those currently under the proposed threshold. The percentage pay increase is relatively small compared to the high proportion of drivers currently below the minimum because the earnings of many drivers fall within $2 or $3 an hour below the proposed minimum standard.

Our simulations indicate that the companies could accommodate the policy through a combination of adjustments: a doable increase in the industry-wide driver utilization rate from its current 58 percent to about 62 percent; a continuing increase in the proportion of shared rides, which now account for about 23 percent of all trips; and by a fall in industry commission rates from their current 16 percent to a level under 10 percent. Passenger fares may not increase at all, although we cannot rule out an increase of about three to five percent. Rider wait times might increase by an average of about 12 to 15 seconds.

The New York City economy will also experience an increase in consumer spending: The estimated $500 million in industry commissions that flows out of the city's economy each year will be reduced by about one-third, while local spending out of increased driver incomes will increase by about $300 million.

The proposed pay standard establishes a floor, but not a ceiling. It does not limit driver compensation rates for each ride, nor does it restrict the use of other incentive payments to induce drivers to drive at certain times or areas. No limits are placed on drivers' movement from one app to another. The app system for trip dispatch provides the capacity to track driver earnings, allowing the companies to vary their specific approaches to increase overall utilization. The pay standard will alter the company-driver relationship and better align the interests of companies and drivers. The success of company strategies will become better linked to higher drivers' net earnings and to meeting the drivers' vehicle expenses.

Study data Previous scholarly studies of the industry have mainly drawn on administrative data provided by Uber to selected scholars and its own economists.[8] We build upon these studies by using administrative data provided by *all* the app-based companies operating in New York City to the TLC, as well as other information sources. The TLC data is the most extensive data yet made available to scholars. Most importantly, we examine the composition of the app drivers in New York City, their gross compensation levels, and the costs of operating an FHV in the city. We thereby determine the level and distribution of driver earnings net of those costs.

Overview of this report Section 2 examines New York City's drivers—who they are, how much they earn, their expenses, their net earnings after expenses, and how many drivers

[8] Most of these papers are co-authored by Jonathan Hall, Uber's Chief Economist, and draw only on data for Uber drivers. We cite these studies in our list of references and discuss them at various points in this report. We also draw upon many other contributions to the literature on the app industry.

would receive earnings increases if the pay standard is implement. Section 3 describes the components of the proposed policy and explains how it would work. Section 4 analyzes the business model of the New York City app-dispatch companies and discusses how drivers, companies, and consumers might adjust to the policy. Section 5 then applies the model to examine the policy proposal's likely quantitative effects. It does so by estimating three plausible scenarios. Section 6 extends our analysis to the effects of the proposed policy on the non-app FHV companies. Section 7 examines the broader effects of the proposed policy in the New York City economy, and Section 8 summarizes the report.

Section 2 The Drivers: Demographics, Hours, Expenses, and Pay

According to the TLC administrative database, at the end of 2017 about 130,000 drivers worked in the for-hire vehicle (FHV) sector. Approximately 85-90 percent of them are active in any given month.[9] About 80,000 of these drivers worked for at least one of the major app-dispatch companies, 15,000 drivers worked with non-app black car services, 14,000 with non-app community livery services, and about 4,000 with non-app luxury limousine services.[10]

This section first discusses the demographics of New York City's driver workforce and the labor market conditions that facilitated the ability of the app-dispatch companies to recruit tens of thousands of drivers in each of the past five years. We then analyze the distribution of working hours of the app driver workforce, first for Uber alone, and then using data from all four app companies operating in New York City in representative weeks between September 2016 and October 2017.[11] Here we use more comprehensive data than has been available to other researchers.

We reach two main findings: (1) The app companies have been able to expand their workforce by drawing principally immigrants without a four-year college degree and who face restricted labor market opportunities; and (2) 60-65 percent of app drivers are full-time, without another job, and about 80 percent acquired a car to earn a living by driving.

Using the TLC data and other information to examine the detailed expenses of the drivers, we then present evidence on the level and distribution of gross and net hourly pay among all app drivers, including by company. An appendix compares our expense model to those in three other widely cited recent papers.

2.1 Demographics of the app driver workforce

The TLC administrative data indicate that FHV drivers in New York City have different characteristics from the drivers in previous national studies (such as Hall and Krueger 2018). Ninety-seven percent are male. More than nine out of ten are immigrants, with about half coming from five countries: the Dominican Republic, Haiti, Pakistan, India, and Bangladesh.

[9] The TLC maintains extensive data on the taxi and FHV industry that is integral to the analysis in this report. TLC administrative data includes data on all drivers, vehicles, and bases (operating locations) that it licenses, as well as data on all trips provided. Many app (and non-app) drivers have also become affiliated with non-passenger app-based transportation services, such as UberEats, DoorDash, and others. These services lie outside the province of the TLC.

[10] Since a significant proportion of drivers driving for a non-app FHV base also drive part-time for the app services, these numbers overlap to some extent. Some medallion taxi drivers supplement their earnings by driving for the app services or one of the non-app services.

[11] The TLC requested data from the four major app companies. The data cover typical one-week periods in September 2016 and in March, June, and October 2017. The data include driver pay and trip miles and minutes by driver, passenger fare revenue (including Black Car Fund fees, sales tax, and tolls), and company commissions. The Appendix provides details on the company data and how we analyzed it.

The U.S. Census Bureau's American Community Survey (ACS) provides additional data on the characteristics of taxi and FHV drivers (but does not distinguish between these two groups). According to the ACS, half of the growth from 2012 to 2016 in the taxi and FHV driver workforce occurred among those under the age of 35.

Exhibit 3 compares the driver workforce to the overall New York City workforce, using data from the ACS place-of-work files. Drivers are somewhat older than the overall workforce. The share of the driver workforce that is immigrant is about twice that of the city workforce overall. More than half (56 percent) have only a high school diploma or less, nearly twice the 30 percent figure (for ages 25 and older) among the entire city workforce. Only one in six drivers (17 percent) has a bachelor's degree or better, compared to 50 percent with a bachelor's degree among the city's overall workforce, 25 and older.

Exhibit 3: Taxi and FHV Drivers and All Workers, Age, Nativity and Education, Working in New York City, 2016

	Employed and Self-Employed Taxi & FHV Drivers	All Employed and Self-Employed
Age		
Median	44	41
Under 35	25%	35%
35-44	25%	24%
45-54	29%	21%
55 and older	21%	20%
Foreign-born share of NYC workers	86%	46%
Education (age >24)		
Less than high school	20%	10%
High school	36%	20%
Some college	27%	20%
Bachelor's or higher	17%	50%

Note: All those working more than 26 weeks; includes all NYS and NJ residents working in NYC.

Source: 2016 American Community Survey.

Exhibit 4 reports additional characteristics of the drivers, again using the ACS. Half of all drivers have children and 30 percent have two or more. Fifty-four percent of the drivers provide over half of their family income; one-fourth provide over 90 percent. Nearly one-fifth of New York City's taxi and FHV drivers receive Supplemental Nutritional Assistance Program aid (food stamps), compared to about 10 percent of the overall local workforce. About 16 percent of all drivers had no health insurance coverage, 40 percent were covered by Medicaid and 4 percent by Medicare. About 26 percent were covered by employer-provided health insurance plans (either their own or their spouse's), and 14 percent purchased their own health insurance.

Exhibit 4: Taxi and FHV Drivers Working in New York City, Selected Characteristics, 2016

Number of Children--Taxi and FHV Drivers	
0	50%
1	20%
2+	30%

Taxi and FHV Driver Share of Family Income	
90-100% share	26% of drivers
50% + share	54% of drivers

Receiving Supplemental Nutritional Assistance	
Taxi and FHV Drivers	18.4%
All Working in NYC	10.6%

Health Insurance Coverage--Taxi and FHV Drivers	
Medicaid	40%
Medicare	4%
Employer provided *	26%
Purchase own insurance	14%
Uninsured	16%
Total	100%

* Includes spousal coverage by employer-provided health insurance.

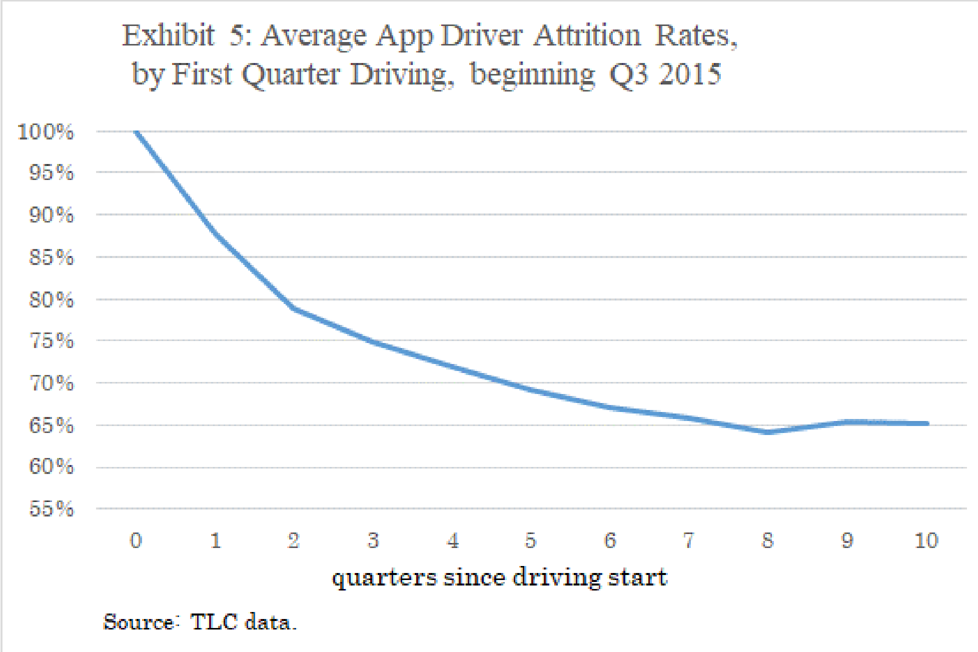
Note: All those working more than 26 weeks; includes all NYS and NJ residents working in NYC.

Source: 2016 American Community Survey.

To summarize, New York City's taxi and FHV drivers, most of whom are now app drivers, include a large share of relatively young immigrants with comparatively low education levels who provide primary support for their families. Drivers concentrate more heavily in these groups than does the city's workforce as a whole. These patterns contrast sharply with those reported in Hall and Krueger (2018), who found that Uber drivers in 2015 in a sample of U.S. cities closely resemble the overall workforce in their cities.

Rapid growth of the app driver workforce TLC data indicate that the number of active FHV drivers increased by 160 percent between 2012 and 2017, a net addition of 66,000 drivers. The TLC data further indicate that the app sector added an average of 36,000 new drivers in each of the last five years.

Attrition has also been substantial. As Exhibit 5 shows, over one-quarter of new drivers leave within their first year, rising to 35 percent leaving by the end of two years.



While New York City's economic and job growth over the past five years has been greater than in any comparable period in the previous 50 years, the app sector's growth is particularly notable. This sector has added a net of 13,000 drivers annually over this time, job growth surpassed only by home health care and restaurants.[12] Indeed, from 2012 to 2017, the number of app drivers grew 10 times faster than did blue collar or overall employment.

The job market for non-four-year degree workers has not grown anywhere as quickly. Only 11 percent of non-four-year degree immigrant males ages 25-44 working in New York City hold professional or managerial jobs. The great majority hold blue collar, lower-paying white collar, or service jobs where 2016 median annual earnings were $25,190 for 25-34 year-olds and $28,212 for 35-44 year-olds. Workers who entered driving typically faced relatively unattractive labor market options in food preparation, construction, retail sales, and building services—occupations where low pay is the norm or where subcontracting and misclassification of workers as independent contractors is widespread.[13] Thus, many younger immigrant men likely were drawn into FHV driving by the promise of better pay in the app-dispatch industry.

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[12] Authors' analysis of TLC data and New York State Department of Labor, *Quarterly Census of Employment and Wages*, 2012 to 2017.

[13] Authors' analysis of 2016 American Community Survey data.

2.2 Driver hours and gross earnings: Uber only

Hours trends, 2014 to 2017 The rapid growth of the app-based industry could not have occurred without a simultaneous rapid increase in the number of app-based drivers. According to Hall and Krueger (2018), much of the initial growth in Uber's national driver work force came from workers who had the flexibility and the desire to increase their working hours as part-time drivers, especially in evenings and on weekends when taxis and mass transit are less available. Many of the early drivers already owned their cars. In their early days, the app companies heavily recruited drivers and provided strong incentives (including cash incentives and surge pricing-inflated fares with a share going to drivers) for driving during peak demand hours.

But as the app industry has grown, the proportion of drivers who work full-time on the app system has increased as well. The upper panel of Exhibit 6 shows the distribution of work hours among UberX drivers in New York City for the years 2014 to 2017.[14] In 2014, only 23 percent of UberX drivers drove 35 hours a week or more.[15] By 2017, 42 percent drove 35 hours a week or more.

Earning trends for 2014 to 2017 The lower panel of Exhibit 6 compares inflation-adjusted earnings data for New York City Uber drivers from October 2014 to October 2017. Some year-to- year variation is evident (down in 2015, up in 2016, back down in 2017), which could reflect changes in Uber's pricing as well as driver payment and commission determination practices. The data nonetheless suggest that driver earnings before expenses have declined since 2014, particularly for those working more than 15 hours per week. For example, for those working 50 hours a week or longer, real before-expense hourly earnings fell about 30 percent between 2014 and 2017. While we do not have sufficient data to pinpoint the reasons for this earnings drop, we suspect that reduced passenger fares and a significant shift away from premium-priced fares were important contributors. However, the earlier data are not fully comparable to the more recent data, suggesting the importance of caution in inferring changes in pay over time.

2.3 Industry-wide driver hours and gross earnings

The above discussion of pay and hours among Uber drivers is suggestive. Here we discuss hours and earnings patterns for all the large app companies in a more definitive manner, using the inclusive administrative data provided to the TLC.[16]

Definitions of our key measures Data reported to the TLC from the app companies' administrative records provide a comprehensive and definitive picture of the recent hours

[14] The 2014 and 2015 data were provided by Uber to Jonathan Hall and Alan Krueger. The 2016 and 2017 data were provided by Uber to the TLC.
[15] Hall and Krueger 2018, Table 3. The October 2014 data are from an earlier version of their paper, released in 2015.
[16] Administrative data draw from a universe or near-universe of workers. They are therefore more reliable than survey data, which contain sampling error.

Exhibit 6: Hours Distribution and Gross Mean Hourly Earnings, NYC Uber Drivers, 2014-2017

	source	Distribution of Working Hours, hrs/wk 1-15	16-34	35-49	Over 50
Oct. 2014	Hall & Krueger, 2015 *actual working time on Uber app*	42%	35%	16%	7%
Oct. 2015	Hall & Krueger, 2018 *actual working time on Uber app*	24%	32%	27%	17%
Sept. 2016	Authors' analysis of TLC administrative data *imputed working time on Uber app*	37%	33%	18%	12%
Oct. 2017	Authors' analysis of TLC administrative data *imputed working time on Uber app*	36%	39%	17%	8%
Oct. 2017	Authors' analysis of TLC administrative data *actual working time-dedicated Uber drivers*	26%	32%	25%	17%

	source	Gross earnings per hr. (constant Oct. 2017 $), by hrs./week 1-15	16-34	35-49	Over 50
Oct. 2014	Hall & Krueger, 2015 *actual working time on Uber app--median hourly earnings*	$26.90	$29.42	$30.64	$30.60
Oct. 2015	Hall & Krueger, 2018 *actual working time on Uber app*	$23.91	$25.29	$25.31	$24.55
Sept. 2016	Authors' analysis of TLC administrative data *imputed working time on Uber app*	$29.41	$29.21	$28.09	$26.25
Oct. 2017	Authors' analysis of TLC administrative data *imputed working time on Uber app*	$25.60	$24.60	$22.90	$21.90
Oct. 2017	Authors' analysis of TLC administrative data *actual working time-dedicated Uber drivers*	$26.00	$23.20	$22.20	$21.30

Notes: The October 2014 data were included in an earlier version (released in 2015) of the Hall and Krueger analysis published in 2018. Our data for Sept. 2016 and Oct. 2017 are not strictly comparable to the Hall and Krueger data. In the third and fourth rows of the top panel, we imputed working time based on trip time, and in the fifth row we show the actual working time between the first and last trips for drivers working solely on the Uber app. The growth of multi-platform driving in recent years implies that weekly working hours are understated when looking at just one company's data.

and earnings of the app drivers. Each of the four major app companies responded to TLC requests for data on all the trips of individual drivers during four representative weeks over the period from September 2016 to October 2017. The data include passenger payments to the company, company payments to each driver, and combined miles and minutes for all the trips provided by each driver.

We define here our key measures and explain their derivation.

- Actual driver working time: Estimated from the TLC trip files by identifying the starting and ending time by work shift for each driver. Beginning in June 2017, the TLC trip data include not only the pick-up time and location, but also the drop-off time and location. We can therefore use each driver's first and last trips to estimate the duration of that driver's work shift. The TLC has not had access to individual driver log-on and log-off information. Exhibit 7 provides a fuller discussion of actual working time and how it is used in this report.

- Average company utilization: The average portion of each driver hour with a fare-paying passenger in the car. Estimated from the trip files by taking the ratio of passenger time to actual working time for drivers working on only one platform (averaged among all single-platform drivers for each company).[17]

- Imputed driver working time: We estimate or impute a driver's working time during the course of a week by dividing total trip time on that app from the earnings file by the average utilization for that company. We use imputed driver working time to estimate hourly earnings for each driver on a given platform. We need to use imputed working time since there are many multi-platform drivers and we do not have log-on and log-off information. A multi-platform driver may switch back and forth among apps for trips during the course of a work shift.

The imputation of working time is necessary because of complications in determining company-specific working time when a driver uses more than one platform over the course of a shift. We aggregate earnings data and imputed working time across the four app platforms by driver to estimate combined weekly hours, earnings, and hourly earnings.

Weekly hours Exhibit 8 shows the distribution of drivers' imputed working hours in 10-hour bins for the June 2017 and October 2017 weeks of our data.[18] Mean (33.3) and median (32.5) weekly hours are quite similar to each other (not shown in the exhibit). The October 2017 data indicate an increase in working hours compared to June 2017, particularly among workers driving between 40 and 60 hours per week.

The wide range of hours worked suggests three broad driver groups. One group drives as their full-time job, a second group drives on a very part-time basis to supplement earnings from other (full-time or part-time) jobs, and a third group drives an intermediate number of weekly hours. We consider those working 30 or more hours weekly to be full-time drivers who obtain the bulk of their earnings as an FHV driver.[19] About 60 percent of drivers fall into this category. We consider those working less than 20 hours a week as part-time or occasional drivers—this group is about 25 percent of all drivers. The remainder work between 20 and 30 hours a week. This intermediate group likely contains some part-time and some full-time workers whose weekly hours vary from week to week.

[17] In October 2017, 55 percent of app drivers worked on only one platform. The TLC reports that utilization is similar for one-app and two-app drivers.
[18] Working hour distributions were similar in the first three study weeks.
[19] The Internal Revenue Service defines full-time as at least 30 hours of working time per week. The Bureau of Labor Statistics defines full-time as 35 or more weekly hours. We used 30 hours as the cut-off for full-time.

Exhibit 7: How We Measure Actual Working Time for App Drivers

We measure a driver's working hours as the elapsed time between the beginning of a driver's first trip and the end of the driver's last trip. This work shift benchmark is close to but not identical with another measure: the elapsed time when their apps are turned on to signal their availability. The difference between the two measures consists mainly of a) the time drivers spend on breaks – when they might be able to do other activities, and b) the time drivers spend commuting from and to their homes.

Our use of the drivers' working shift to measure their working time accords with how economists and statistical agencies measure time at work—for both employees and for independent contractors. Not all working time is spent working. Some is used on mandatory meal and rest breaks, changing to and from work clothes, waiting for assignments, waiting for customers or materials to arrive, or in health and safety and other meetings. For employees, these times all are included in the paid work shift.

The economic concept here is opportunity cost: whether the worker can use their time as they would choose when not at work. An app driver must keep driving between paying rides when parking is unavailable (as in core Manhattan). They may also stop to rest and for bathroom breaks. All these times should count in drivers' hours worked.

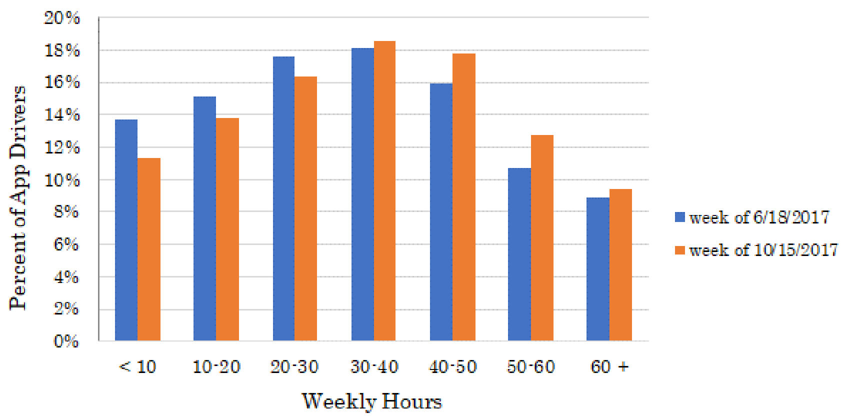
Commuting time to and from home is not counted in work time for employees, but it should be counted in working hours for drivers insofar as they turn on their apps during their commutes. Our work shift measure includes driver on-call time during commutes only when the driver obtains a passenger ride during the commute. We therefore under-estimate driver working hours and over-estimate their earnings per working hour.

We use this measure of actual working time for one-platform drivers to estimate utilization for each of the four major app companies. For single-app drivers, actual working time is very close to imputed working time based on trip time. In estimating earnings, we use imputed working time since many drivers work on more than one platform.

While app-dispatched drivers nominally have the flexibility to work the hours they choose, we find substantial consistency in weekly working hours over time. To examine this pattern, we used TLC trip data from June through December 2017 and divided all drivers into five 15-hour bins (0-15, 15-30, 30-45, 45-60 and 60+.) We assigned each driver to one of the bins based on their average weekly hours over four-week periods. The great majority of drivers (76-92 percent) remained in the same or an adjacent bin during this roughly six-month period.

We also replicated for New York City drivers the Hall and Krueger (2018) analysis of weekly hours variation among Uber drivers. Hall and Krueger estimated a within-driver, across-week coefficients of variation of hours (the ratio of the standard deviation to the mean) of 0.35 for the 25th percentile driver, 0.54 for the median driver, and 0.81 for the 75th percentile driver. We find considerably less weekly hours variation for New York City drivers: 0.28 for the 25th percentile driver, 0.39 for the median driver, and 0.56 for the 75th percentile driver.

Exhibit 8: Increase in App Driver Weekly Working Hours between mid-June and mid-October 2017



Moreover, our estimated 60 percent full-time drivers and 16 percent in an intermediate range above part-time workers accords with the response to a question about multiple job-holding in an on-line survey administered to all TLC-licensed drivers.[20] Nearly two-thirds of app drivers responding to the survey reported not having another job besides working as a TLC-licensed driver. Hall and Krueger's workers were much more likely to report that they also held another job.

About 7.5 percent of app drivers in October 2017 carried passengers whose trips were dispatched from non-app companies. Factoring in their working time for non-app FHV companies, these drivers would have a mean working week of 38.1 hours, five hours greater than average weekly working time just for the app companies. Among this subset of drivers, 56 percent of trip time occurs among non-app livery or black car services. Thus, the working hours data in the TLC earnings files understate the length of the work week for some app drivers.

Hourly earnings before expenses Since many drivers work for more than one app platform, we aggregated weekly earnings data across the various platforms for individual drivers. Our earnings data include only earnings from one or more of the four major app-dispatch companies.

We do not include tips in driver earnings. Some of the companies did not start allowing, or

[20] The TLC administered the survey, which was provided in English, Spanish, and Bengali. Completed surveys were received from approximately 8,200 drivers (a 5.5 percent response rate). Seventy-eight percent of the responses were in English, 14 percent in Spanish and eight percent in Bengali. The great majority (71 percent) of the app respondents had been driving since 2014. We re-weighted the respondent sample for app drivers (about 3,000 of the respondents) to reflect the distribution of their working hours in the administrative data.

reporting, tips until the second half of 2017. Tips have not been a significant factor for app-dispatched drivers (usually in the low single-digit range relative to regular driver pay). For Uber, tips were 2.0 percent of driver pay in the 4th week; for Lyft, 5.4 percent; and for Via, 1.2 percent. Moreover, the New York State Labor Department is currently considering whether to end employer tip credits against the minimum wage.

Using the administrative data and imputing working time, we estimated hourly earnings for each study week. As Exhibit 9 indicates, median hourly earnings before expenses ranged from $22.90 to $25.78. Mean hourly earnings were about $1.50 to $2.00 an hour higher.

Exhibit 9: App Driver Gross Hourly Earnings (before Expenses), 4 study weeks

Week beginning	Gross hourly earnings before expenses			
	Mean	25th percentile	Median	75th percentile
9/11/2016	$27.74	$23.02	$25.78	$29.53
3/19/2017	$24.79	$21.16	$23.24	$26.12
6/18/2017	$25.80	$22.08	$24.29	$27.29
10/15/2017	$24.49	$21.18	$22.90	$25.44

Source: Authors' analysis of TLC administrative data.

2.4 Driver expenses

Since the app-based car service industry depends on drivers to provide their own cars, a comprehensive accounting of all vehicle-related expenses is essential to estimating the level and distribution of driver earnings after covering all their expense costs. Surprisingly little previous research on the app industry focuses on the after-expense earnings of drivers. This report breaks new ground in combining a carefully constructed expense model with extensive administrative data on driver earnings from all the major app companies operating in New York City.

Proportion of drivers who acquired vehicles for business use Our online survey, administered directly to the drivers, indicates that 80 percent of app-based driver respondents purchased their vehicles for the purpose of providing transportation services, with 62 percent of all respondents saying they acquired a vehicle mainly to provide such services and another 18 percent acquiring their cars partly for business and partly for pleasure.[21] Most vehicle expenses are either relatively fixed costs (such as insurance or lease costs) or annual costs usually paid up front (e.g., licensing and registration).

[21] Only twenty percent of respondents indicated they acquired their vehicle mainly for personal use.

Cost categories Driver expenses fall into three categories: one-time upfront administrative costs, recurring costs such as license renewal and periodic vehicle inspection, and ongoing vehicle acquisition and operating costs. Exhibit 10A presents the expenses for each of these three categories.

One-time upfront costs and recurring costs Costs in these two categories are mainly determined by the TLC and apply to all drivers and cars licensed by the TLC. The upfront costs an app driver must pay for licensing, vehicle registration, and related requirements total over $1,500. The TLC itemizes these costs in a flyer distributed to prospective FHV drivers.[22]

Operating costs The costs of acquiring, insuring, and operating a vehicle—"operating costs"—obviously constitute the bulk of FHV expenses. Actual vehicle expenses vary from driver to driver depending on their cars' make and model and on their driving habits. We geared our estimates of operating costs to a late-model, basic five-seat sedan. Although about 25 percent of app-dispatched drivers use a higher-priced, larger or more luxurious model that can command premium fares (e.g., for Uber, an Uber Black or Uber SUV service versus the standard UberX service) that can be costlier to finance and operate, our expenses are based on a moderate-priced Toyota Camry with standard features.

Camrys are by far the most popular model in use in New York City, comprising 27,000 (38 percent) out of about 72,000 non-premium app-dispatched vehicles. The Camry is much more popular than the next four most common basic FHVs: Honda Accord (8,200); Nissan Altima (3,300); Hyundai Sonata (3,100), and Honda CRV (2,600). The purchase and operating costs for the Camry and the next four common models are roughly comparable.

The ongoing monthly costs in Exhibit 10Afor vehicle leasing, insurance, and maintenance are based on the February 2018 online driver survey results for all app drivers (re-weighted to reflect the distribution of actual working hours in the trip data file). Based on the driver survey, monthly vehicle leasing costs for app drivers averaged $635, insurance costs $400, and maintenance costs $134.[23] According to TLC data, app drivers typically put a new or relatively new vehicle into service. In 2016 and 2017, 70 percent of cars first placed into FHV service were less than two years old.

Monthly vehicle lease costs of $635 from the driver survey are very close to depreciation or car payment costs for a new car. Depreciation for a late model Camry would average $693 per month for the first two years; a 60-month car loan to purchase a 2018 Camry would cost $518 per month.[24] Lease, depreciation, and purchase costs thus turn out to be fairly similar.

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[22] http://www.nyc.gov/html/tlc/downloads/pdf/thinking_about_driving_fhv.pdf

[23] Monthly values were divided by 4.345 to put them on a weekly basis; thus, weekly costs were as indicated in Exhibit 10A.

[24] Financing costs are based on zero down payment, 60 monthly payments, and a 6.74 percent interest rate for a borrower with a credit score below 640. The average of the depreciation and financing options is $605.50, or $139.35 per week, very close to the $146.17 lease cost on a weekly basis (the difference is about one cent per mile.)

Insurance Vehicle insurance costs average $400 per month, or $92.49 per week. In New York City, the TLC sets minimum liability insurance coverage levels and vehicle insurance is paid by each driver, not by the companies. Because of concerns about the adequacy and extent of the coverage, TLC regulations specify that company or base umbrella insurance policies can only cover vehicles directly owned by the company.[25]

Fuel costs We estimated fuel costs using 25 miles per gallon (mpg), the Department of Energy's official mpg rating for city driving for the Toyota Camry.[26] Miles driven per week (673) represents the weekly average for 35,000 miles per year—the approximate mean annual distance traveled between periodic TLC vehicle inspections. We add a weekly amount for vehicle cleaning since the drivers for many companies are rated in part based on the cleanliness of their cars.

Mileage In addition to the actual trip miles, vehicle mileage includes travel en route to pick up passengers, any travel back to the driver's preferred service area, cruising mileage between trips, and mileage to and from the driver's home at the beginning and end of the work shift. We approximate total vehicle mileage to reflect cruising, pick-up, and other business-related non-passenger mileage by dividing trip mileage by average company utilization.

The average weekly total cost for a driver to be licensed and to register and operate a 2018 Toyota Camry comes to $390.

This estimate ($20,295 on an annual basis) is conservative for the costs borne by a substantial fraction of New York City app drivers. TLC records include the vehicle model driven by each licensed driver. As noted above, about 25 percent of all app drivers use a car model that would qualify for one of Uber's premium fare services above the standard Uber X level—many of these were an SUV. Weekly vehicle payment and gas expenses for these drivers are significantly higher than for a Toyota Camry driver. Five percent of Uber drivers in the administrative earnings files had weekly vehicle lease and insurance costs over $400, well above the $239 weekly lease and insurance costs in our expense model. And many young immigrant drivers without a substantial credit history likely are paying high subprime lease rates.[27]

The annual vehicle acquisition, licensing, insuring, and operating costs in our expense model are placed on a per mile basis by dividing by 35,000 annual miles. This results in an expense figure of 58.0 cents per mile. Excluding the licensing and related TLC costs, the operating costs are estimated at 53.8 cents per mile, an amount remarkably close to the 54.5

[25] http://www.nyc.gov/html/tlc/downloads/pdf/veh_insurance_req.pdf
[26] Fuel costs are from the U.S. Energy Information Administration's weekly New York City retail gas price series, averaged over the first four months of 2018. For the 13 week period through June 11, 2018, gas prices were 7 percent higher than the $2.653 per gallon figure used when the expense model was calibrated.
[27] Alison Griswold, Uber has ended its subprime car leasing program for New York drivers, *Quartz,* November 10, 2017.

cents figure for 2018 allowed by the IRS for business use of an automobile.[28] Costs are understandably higher because of the high cost of vehicle insurance and leases in New York City.

Later in this section of the report we subtract the 58.0 cents per mile expense estimate from gross driver earnings to estimate after-expense hourly driver earnings. This method amortizes vehicle expenses across a year's total mileage, whether the vehicle is used for business or personal use.

Tax treatment of FHV expenses Payments received by drivers to offset licensing and vehicle expenses should not be considered part of driver income. Independent contractor FHV drivers report their IRS form 1099 gross receipts on IRS Schedule C as miscellaneous business income. From gross receipts, they deduct their licensing and vehicle expenses in arriving at net business "profit," by either itemizing detailed expenses (which we estimate at 58.0 cents per mile) or by taking the IRS allowed mileage rate for business use of a vehicle of 54.5 cents for 2018. The resulting "net profit" amount is then included on the business income line as a component of total income on the IRS 1040 form. We refer to a driver's "net profit" as "after-expense earnings."[29]

WAV vehicles We also developed an expense model version for wheelchair-accessible vehicles (WAVs). These vehicles cost more than minivans or SUVs, as they require considerable modification for loading and unloading wheelchairs. Exhibit 10B provides the details. The costs to modify a vehicle for wheelchair accessibility are about $11,000 per vehicle. Also, our WAV expense model assumes 30,000 average annual miles, rather than the 35,000 miles for standard app-dispatch service vehicles.

To summarize, we estimate total vehicle costs as approximately $20,295 a year.

2.5 Level and distribution of hourly pay after expenses

We calculate net (after-expenses) hourly earnings by subtracting expenses on a per total mile basis from gross payments (net of tolls) received by the drivers.

Exhibit 11 summarizes the net hourly earnings data in October 2017 for each of the four app companies separately and industry-wide.[30] The exhibit shows mean and median weekly hours, and mean and quartile hourly earnings net of expenses, for the 61,000 drivers working in that week. The industry-wide figures in the bottom row indicate median hourly pay of $14.25, while hourly pay at the 75th percentile was $15.77.indicating that after-expenses earnings fall well below the TLC's $17.22 pay standard.

[28] https://www.irs.gov/newsroom/standard-mileage-rates-for-2018-up-from-rates-for-2017
[29]Some observers (including Mishel 2018) emphasize the tax deductibility of driver business expenses. However, driver business expenses are usually reported in IRS Schedule C. They cannot be deducted again elsewhere on tax returns.
[30] The combined, industry-wide figures take account of multi-platform driving by some of the drivers.

Exhibit 10A: FHV Expense Model

2018 Toyota Camry, 25 mpg, 35,000 miles per year

Expense Category	Specific Expenditure Item	Annual	Weekly	Per Mile
One-Time--all amortized over 5 years				
	TLC 24-hour course--one time $175	$35.00	$0.67	$0.001
	TLC 24-hour course exam--one time $50	$10.00	$0.19	$0.000
	DMV E class license--one time $113	$22.60	$0.43	$0.001
	TLC fingerprinting--one time $88.50	$17.70	$0.34	$0.001
	WAV sensitivity training--one time $60	$12.00	$0.23	$0.000
	SubTotal	$97.30	$1.87	$0.003
Recurring				
	TLC driver license--$252 every 3 years	$84.00	$1.62	$0.002
	TLC drug test	$26.00	$0.50	$0.001
	Vehicle Registration	$275.00	$5.29	$0.008
	TLC and DMV vehicle inspection	$130.00	$2.50	$0.004
	DMV defensive driving course--$50 every 3 years	$16.67	$0.32	$0.000
	DMV new plates	$5.00	$0.10	$0.000
	DMV vehicle license and plate renewal	$400.00	$7.69	$0.011
	DMV vehicle use tax	$40.00	$0.77	$0.001
	DMV commercial motor vehicle tax	$400.00	$7.69	$0.011
	SubTotal	$1,376.67	$26.47	$0.039
Operating				
	Gas	$3,868.96	$74.40	$0.111
	Vehicle payment	$7,600.68	$146.17	$0.217
	Commercial insurance	$4,809.23	$92.49	$0.137
	Vehicle maintenance	$1,606.11	$30.89	$0.046
	Vehicle cleaning	$936.00	$18.00	$0.027
	SubTotal	$18,820.98	$361.94	$0.538
	TOTAL	$20,294.94	$390.29	$0.580

Source: Authors' analysis based on TLC and other data sources.

Exhibit 11 also shows how weekly hours and hourly pay vary among the four app companies. Uber and Via's mean weekly hours were more than twice that for Juno. Mean hourly earnings were highest among Via's drivers ($21.73), equivalent to 43 percent higher than among Lyft's drivers ($15.16) and 35 percent higher than among Uber's drivers ($16.03). Net hourly pay was lowest for the two largest app companies.

Exhibit 10B: Wheelchair-Accessible Vehicle (WAV) Expense Model

2018 Chrysler Grand Caravan, 17 city mpg, 30,000 miles per year

Expense Category	Specific Expenditure Item	Annual	Weekly	Per Mile
One-Time--all amortized over 5 years				
	Vehicle downpayment--$3,000	$600.00	$11.54	$0.020
	TLC 24-hour course--one time $175	$35.00	$0.67	$0.001
	TLC 24-hour course exam--one time $50	$10.00	$0.19	$0.000
	DMV E class license--one time $113	$22.60	$0.43	$0.001
	TLC fingerprinting--one time $88.50	$17.70	$0.34	$0.001
	WAV sensitivity training--one time $60	$12.00	$0.23	$0.000
	SubTotal	$697.30	$13.41	$0.023
Recurring				
	TLC driver license--$252 every 3 years	$84.00	$1.62	$0.003
	TLC drug test	$26.00	$0.50	$0.001
	Vehicle registration	$275.00	$5.29	$0.009
	TLC and DMV vehicle inspection	$130.00	$2.50	$0.004
	DMV defensive driving course--$50 every 3 years	$16.67	$0.32	$0.001
	DMV new plates	$5.00	$0.10	$0.000
	DMV vehicle license and plate renewal	$400.00	$7.69	$0.013
	DMV vehicle use tax	$40.00	$0.77	$0.001
	DMV commercial motor vehicle tax	$400.00	$7.69	$0.013
	SubTotal	$1,376.67	$26.47	$0.046
Operating				
	Gas	$4,681.76	$90.03	$0.156
	Vehicle payment (includes $11,000 modification costs)	$9,334.36	$179.51	$0.311
	Commercial insurance	$4,790.08	$92.12	$0.160
	Vehicle maintenance	$2,270.04	$43.65	$0.076
	Vehicle cleaning	$936.00	$18.00	$0.031
	SubTotal	$22,012.24	$423.31	$0.734
	TOTAL	$24,086.21	$463.20	$0.803

Source: Authors' analysis based on TLC and other data sources.

Exhibit 11: App Driver Weekly Hours and Net Hourly Earnings, by Company and Combined, Week of Oct. 15, 2017

	Imputed hours				Net hourly earnings			
company	median	mean	total	share of total	25th percentile	median	mean	75th percentile
Juno	7.9	10.2	169,596	8.5%	$14.05	$15.68	$18.26	$18.77
Lyft	10.6	15.3	415,345	20.9%	$12.48	$13.85	$15.16	$15.62
Uber	21.5	23.8	1,320,961	66.4%	$13.31	$14.17	$16.03	$15.58
Via	15.6	23.8	84,737	4.3%	$17.70	$20.99	$21.73	$24.38
Combined	31.9	32.5	1,990,639	100.0%	$13.31	$14.25	$15.88	$15.77

Source: Authors' analysis of the universe of driver earnings for the week of October 15, 2017.

2.6 Proportion of workers earning below the proposed pay standard

Exhibit 11 shows that median net hourly earnings in the industry were $14.25, nearly $3 dollars an hour below the $17.22 minimum pay standard. Exhibit 12 presents the results of our analysis of how many drivers currently fall below the TLC's proposed $17.22 pay standard. After deducting estimated expenses, we find that 85 percent of app drivers (about 51,700 out of 61,100) are paid below $17.22 per hour.[31]

Exhibit 12: App Driver Net Pay, and Increases Under Proposed Minimum Pay Standard

	Number of drivers	percentile in driver net pay distribution 5	10	25	50	75	90	95	mean
1 Net pay, all drivers	61,111	$12.26	$12.65	$13.31	$14.25	$15.77	$20.00	$30.12	$15.88
2 Net pay, drivers getting increases	51,673	$12.26	$12.65	$13.31	$14.25	$15.77			$14.06
3 Percent increases in gross pay	51,673	19.4%	18.2%	15.4%	11.3%	5.3%			14.0%
4 Percent increases in net pay	51,673	40.5%	36.1%	29.4%	20.8%	9.2%			22.5%

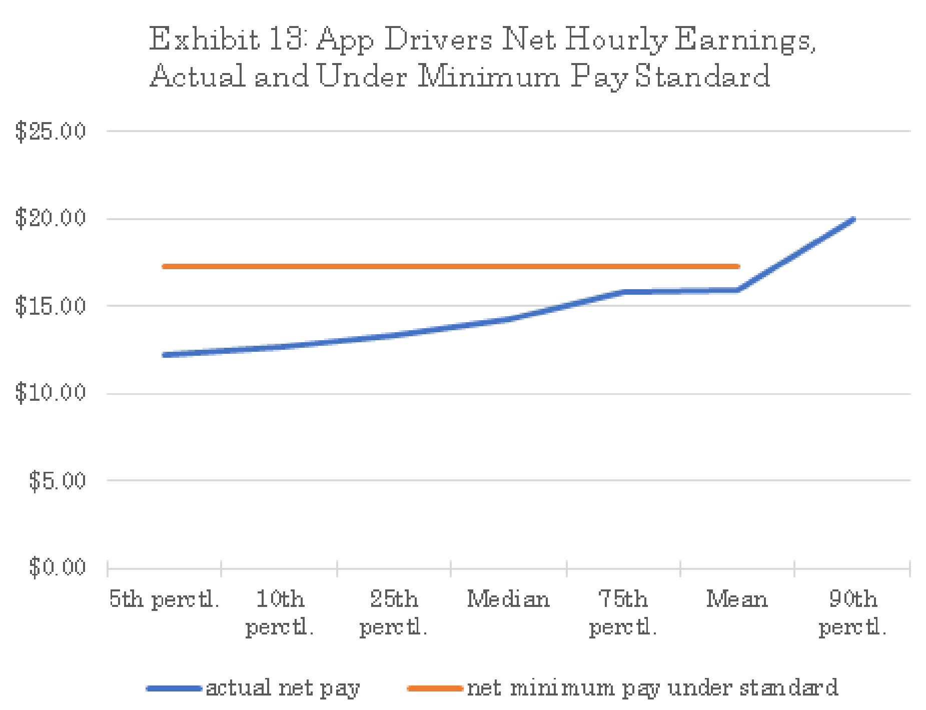
Source: Authors' analysis of the universe of driver earnings for the week of October 15, 2017.

Exhibit 12 also shows that many of the drivers below the $17.22 pay standard earn between $2 and $3 per hour below $17.22. The average net hourly earnings for the nearly 51,700 workers below the minimum is $14.06. For the average driver below the minimum, pay would increase by 22.5 percent to raise it to $17.22 an hour. Among the lowest-paid drivers, the 10th percentile driver would obtain a 36 percent pay increase, and a driver at the 25th percentile would receive a 29 percent increase.

A 14 percent increase in gross earnings translates into a 22.5 percent increase in net pay. The pay standard covers the expense component ($8.54) that was already applied in estimating the number of drivers below the $17.22 hourly pay standard. At the median of the driver pay distribution, an 11.3 percent increase in gross earnings (and a 20.8 percent increase in net pay) would bring the driver's net hourly pay to $17.22. Exhibit 13 shows how hourly earnings would change under the proposed driver pay standard.

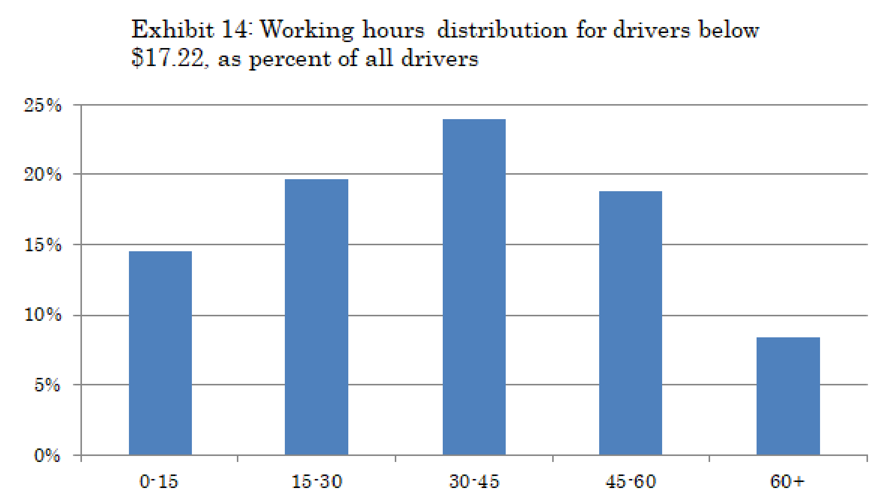
Two-thirds of the drivers currently earning above the pay standard drive vehicles that qualify for premium services and higher fares, according to the list of premium-eligible vehicles on Uber's platform. Of the remaining drivers, about two-thirds are part-time drivers and one-third are full-time drivers. The part-time drivers are likely concentrating their driving during peak service hours.

[31] Other low-wage industries, including fast-food and agriculture, also have similarly large proportions of workers affected by a proposed minimum pay increase. See Reich et.al. 2017.



Source: Authors' analysis of TLC administrative data.

As Exhibit 14 indicates, workers currently paid less than $17.22 an hour are broadly distributed across the hours distribution. About 60 percent of drivers working 30 or more hours weekly are paid below the proposed driver pay standard. Part-time drivers also comprise a substantial proportion of workers who are paid below the proposed standard.



Source: Analysis of administrative app company data from TLC.

2.7 Summary

Many young immigrant men have become app-based drivers in New York City in recent years, in proportions that are twice the share of immigrants in the New York City workforce. In contrast, Hall and Krueger concluded that in most large cities, the demographic characteristics of Uber drivers closely resembled the overall workforce in those cities. Hall and Krueger also concluded that a desire for a flexible and supplemental work arrangement using their otherwise idle cars explained why drivers sought work on an app-based platform.

The pattern in New York City is quite different. Sixty to 65 percent of app drivers are full-time, app-driving is the sole job of most of the drivers, and 80 percent acquired a vehicle for the main or significant purpose of earning a living by driving.

Our detailed expense model finds that per mile expenses (58.0 cents per mile) turn out to be very close to the IRS allowance for business use of a vehicle. We found that median after-expense hourly earnings were $14.25 in mid-October 2017, based on weekly earnings data for 61,000 drivers. Net hourly earnings were lowest for Uber and Lyft, the two largest app-dispatch companies operating in New York City.

Based upon our analysis of the TLC's administrative data on earnings, 85 percent of all drivers are paid less than $17.22. To bring the average worker below the standard up to the $17.22 wage floor, gross hourly earnings would need to rise by 14 percent, to $25.76. That gross increase would represent a 22.5 percent increase in net pay, from $14.06 to $17.22.

Appendix to Section 2 Comparison to other analyses of app-dispatched driver expenses

At least three other studies have looked at the expenses of app drivers. Since these have been widely reported, we compare here their methods and findings with ours.

Hall and Krueger (2018) estimate driver expenses using national average information from the American Automobile Association (AAA). For a medium sedan (the category that includes the Toyota Camry, the most widely-used model in New York City), Hall and Krueger estimate hourly expenses for a full-time driver at $5.33. In contrast, we estimate hourly vehicle expense in New York City equal $8.54.[32] Our hourly expense figure is considerably higher than the AAA-based Hall and Krueger estimate for several reasons: the AAA estimate uses personal insurance costs rather than the cost of FHV commercial insurance required of all New York City FHV drivers; recent fuel prices are 14 percent higher than in the 2017 AAA estimate; AAA uses a combined city and highway fuel economy average, while we base our fuel costs only on city driving; AAA maintenance costs are based on 15,000 miles per year versus the 35,000 annual mileage in our estimates; AAA uses national averages for sales tax and financing costs rather than the higher New York City-specific factors we use; and Hall and Krueger factor in lower costs for various licensing and registration-related expenses necessitated by TLC requirements.

Two other widely-cited studies also use expense estimates that are lower than ours. In an appendix to their study on gender earnings differences among Uber drivers, Cook et al. (2018) say that vehicle costs average 25 cents a mile. Based on 20 miles driven per hour, they maintain that expenses are $5.00 per hour. Their cost allowance excludes insurance since in many cities (but not New York City), Uber covers drivers' insurance costs while driving.[33] Zoepf, Chen, Adu and Ozo (2018) found that many app-dispatched drivers had median driver expenses of $0.30 per mile, about half of what we find for New York City. However, Zoepf et al. used driver earnings data from an online self-reported—and not necessarily representative—survey of 1,100 app drivers throughout the U.S.[34]

In contrast, our analysis of net driver earnings is based on detailed estimates of vehicle expenses that incorporate all the costs incurred in registering and insuring a car used for commercial purposes in New York City and in meeting the licensing requirements of the TLC and the State Division of Motor Vehicles. We also incorporate the high finance costs incurred by many immigrant New York City drivers, who do not have strong credit ratings. Our New York City expense per mile figure is $0.580, equivalent to about $390 in weekly vehicle expenses for driving 35,000 miles a year. Our expense analysis provides the most detailed account to date for New York City's app drivers.

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[32] Our $8.54 average hourly expense figure is calculated as the difference between the mean before-expense and mean after-expense hourly earnings figures for the TLC driver data for the week of October 15, 2017.

[33] In our expense model (Exhibit 10A), insurance costs are 23 percent of the total. Adjusting their $5.00 figure to include insurance would raise expenses to about $6.50 an hour.

[34] Other parts of Zoepf et al, were severely criticized, leading the authors to revise their earnings figures. However, the expense estimates were not questioned. Mishel (2018) simply draws upon the data in Cook et al. 2018. All authors who explicitly deal with New York City data agree that both gross pay and expenses are higher in New York City.

Section 3 The TLC's Proposed Driver Pay Standard

We discuss here the minimum for-hire vehicle (FHV) driver pay standard proposed by the TLC. The policy would apply to companies currently dispatching more than 10,000 trips per day. It would currently cover only the four large app companies.

The proposed pay standard specifies a payment floor to ensure that driver pay provides for all vehicle expenses as well as compensation for the driver's working time. This standard is set to allow drivers to earn $17.22 per hour after expenses. $15.90 of this amount equals the impending New York State minimum wage in New York City as of December 31, 2018 ($15) plus 90 cents for paid time off. An additional $1.32 accounts for the employer share of payroll tax on $17.22, which is required of independent contractors, but not employees. The proposal also includes a $1 bonus per trip above the minimum pay standard to encourage drivers to accept requests for shared rides.

The 90 cents per hour for paid time off equals six percent of $15. Six percent equals the average cost of paid leave for the occupational group that includes drivers (production, transportation, and material moving occupations), according to the Bureau of Labor Statistics (BLS) report on supplemental pay benefit costs in private industry. (BLS, *Employer Costs for Employee Compensation, December 2017*, released March 20, 2018).

This section details the components of the pay standard.

3.1 The minimum pay standard

The driver pay standard formula combines an expense component and a time component.[35] The expense component is based on the $0.580 per mile expense figure that we calculated from the expense model, as shown in Exhibit 10A of Section 2. The expense component is intended to allow the typical driver to cover all the costs of acquiring and operating a vehicle (as well as the cost of licensing and training). The $0.287 per minute factor is intended to compensate drivers for their time at $17.22 an hour ($0.287 is $17.22 divided by 60 minutes). Exhibit 15 describes the pay standard in more detail and shows that the expense and the per-minute components are divided by a driver utilization rate. Exhibit 16 explains utilization rate and its policy significance.

The utilization rate is important because drivers are working even when they do not have passengers in their car. Driver working time is measured basically by the time they are logged on to a company app and therefore available to carry passengers. Their work time includes the time they are using their vehicle, and incurring expenses for doing so, even when they are cruising while waiting for a dispatch or heading toward a pickup location after having accepted a ride request or returning from a drop-off location.

[35] Precisely, the pay standard formula is: Driver minimum pay per trip = ($0.580 per mile/utilization factor) + ($0.287 per minute/utilization factor).

The pay formula is thus constructed to compensate drivers for work-related time and expense when a passenger is not in the vehicle. It does so by dividing the expense and time components by company-specific utilization rates—as measured for each company by the TLC for the previous quarter. In the case of the time factor, the utilization rate adjusts for the portion of each hour that a passenger is not in the vehicle. In the case of the expense factor, the utilization factor adjusts for the expenses associated with pickup, cruising, and other non-passenger vehicle uses during the work shift.

This part of the policy in effect incentivizes each company to raise its company-wide utilization rate from one quarter to the next, that is, by increasing the average number of trips per driver hour. Since the utilization rate appears in the denominator, a higher company utilization rate lowers the company's costs for the expense and time components. At the same time, company policies that increase utilization rates will also benefit the drivers. They will be able to provide more rides in any given hour, thereby earning more on an hourly basis, even though their pay for each trip might be lower. (See Exhibit 16 for more on utilization rates.)

Increases in driver utilization rates represent an improvement in industry efficiency. With greater efficiency, the policy aligns the interests of the drivers with that of the companies and both sides benefit. To implement the policy, the TLC could evaluate the company-specific utilization rates on a quarterly basis. The utilization factor in the above formula would then vary with each company's utilization rate in the prior quarter. (See Exhibit 17 for an example of the pay standard applied to a typical trip.)

The pay standard policy also includes a $1 bonus per pickup for shared rides. This bonus would encourage drivers to provide shared rides. At present, drivers generally are not compensated adequately for providing shared rides. This bonus would further increase utilization because it extends time that drivers have passengers. The $1 bonus per pickup for shared rides represents a first approximation. It is derived from feedback that drivers do not share in the economic benefits that accrue to app-based companies from shared rides. The value is set in line with other driver incentives included in TLC-set fares, i.e., the $1.00 rush hour surcharge on taxi trips and the $1.00 bonus for trips performed in accessible taxis. The optimal value of the shared ride bonus may be higher or lower. Public discussion could help better inform the optimal bonus amount.

3.2 Wheelchair accessible vehicles

The proposed pay standard comes in two versions, one for non- accessible vehicles, as discussed to this point, and another for wheelchair accessible vehicles (WAV). Drivers of WAVs would receive $0.803 per mile to reflect the higher expenses involved in converting and operating a minivan.[36] The time component would be the same for WAV drivers, and they would also be eligible to receive the per pickup shared ride bonus.

TLC regulations will specify the precise means by which the pay standard will be

[36] We discussed the additional expenses of WAVs in Section 2.

implemented. Generally, for a set time period (such as a week or a month), companies will evaluate each driver's earnings using the total trip mileage and trip minutes for that company. If the compensation provided to a driver falls below the minimum pay standard, the companies will be required to make up the difference.

Exhibit 15: Proposed Driver Pay Standard

The minimum pay standard for FHV drivers takes into account that they are independent contractors and that they are responsible for all costs related to acquiring, licensing, insuring, and operating the vehicle used to provide FHV services. It is designed to allow drivers to fully cover their expenses as well as earn at least $15.00 an hour and a paid time-off supplement equal to 90 cents per hour (including the employer share of payroll taxes that independent contractors must pay). The paid time-off supplement compensates drivers for the fact that as independent contractors they do not receive any paid time off.

A third element of the pay policy specifies a $1 bonus to drivers for each pickup for shared rides—this is applied in addition to the $17.22 minimum pay level.

The pay standard comes in two versions, one for non-accessible vehicles and one for wheelchair accessible vehicles (WAV), with differing formulas for vehicle expenses, as illustrated below. ($17.22 per hour = $0.287 per minute)

1. Per-mile expense factor
   - $0.580 non-accessible vehicles, $0.803 WAV
2. Per-minute compensation factor
   - $0.287 non-accessible and WAV
3. Per shared ride-pick-up incentive for drivers
   - $1.00

The per-mile and per-minute factors are each divided by company-specific utilization (percent of drivers' time with a passenger) to promote more efficient use of drivers, increase driver earnings and moderate the number of vehicles.

This driver pay standard is not the passenger fare, and it is not a mandated pay method. Rather, it specifies the basis for a driver earnings floor. Companies will continue to determine their own passenger fare structure. The driver and the company can agree to higher driver pay for any trip and the company may provide incentives in addition to the minimum.

Drivers currently receive no paid time off when they are sick, as the City of New York requires for workers who are employees, nor do they receive any paid time off for holidays or vacation days. A paid time off supplement recognizes that many drivers work very long hours and should be encouraged to reduce their hours without sacrificing total weekly pay. Fewer exhausted drivers on the road will improve safety for passengers, pedestrians and drivers alike.

Exhibit 16: Company-Specific Utilization: What is it? Why does it matter?

What is company-specific utilization?
Utilization is a logical component of a driver minimum pay standard because driver pay depends on the percent of a driver's time with a passenger in the car. For example, if a driver has passengers in the car for 30 minutes out of one hour, that is a 50% utilization rate; 45 minutes would be a 75% utilization rate.

Here are 2017 utilization rates for each of the four major app-dispatch companies serving New York City:

Juno	50%
Lyft	58%
Uber	58%
Via	70%

Utilization rates for each company were calculated by the TLC based on all trip records from June 4 through the end of 2017. Total weekly working hours and weekly trip hours for drivers working for only one company during a given week were aggregated for each week to determine company-specific utilization for that week. Single app drivers accounted for 55 percent of all drivers in the fall of 2017. Weekly company-specific utilization rates for the last seven months of 2017 were averaged to derive the base period utilization rates shown here.

Via's utilization is higher because it primarily provides shared rides. The above rates were estimated from data on drivers who drive for only one company. The TLC is developing a more definitive method that would be used in connection with the minimum pay standard.

Why does utilization matter?
Increasing utilization means drivers are deployed more efficiently, driver earnings per hour increase, and fewer vehicles are needed on the streets.

Annual adjustment To ensure that the purchasing power of the minimum pay standard is maintained over time, its components will be adjusted once per year. The annual adjustment factors would be based on the 12-month percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for the NY-NJ-PA metro area.

Exhibit 17: The Proposed Driver Pay Standard Applied to a Typical Trip

A typical FHV trip might be 7.5 miles in distance and 30 minutes in time.

Here is how the driver minimum pay standard (not the passenger fare) would be calculated under the proposal pay standard (assuming an industry-wide average utilization of 58%):

$$\frac{(.580 \;*\; 7.5\ miles)}{.58\ utilization} + \frac{(\$0.287 \;*\; 30\ minutes)}{.58\ utilization} = \$22.34$$

Note: this is the *__minimum pay standard__* (for a non-shared ride), *not the passenger fare, and the company and the driver can always agree that driver pay for any trip should be higher.*

The driver pay standard ensures that the driver can cover vehicle expenses as well as get paid at least the independent contractor equivalent of $15.00 an hour.

3.3 Monitoring, compliance, and evaluation

Given the dynamic nature of the New York City app-passenger industry, as well as some uncertainty in the behavioral adjustments by drivers, companies, and consumers, it is important for the TLC to regularly monitor and evaluate the effects of the minimum pay standard on drivers and FHV companies, and to make necessary adjustments.

To ensure effective compliance, the TLC will need to monitor trip and driver earnings data for all covered drivers. The trip data includes distance and duration of each trip and identify the driver and the dispatching company. The TLC should combine this information with trip and driver earnings data from all the covered companies to ensure that drivers are paid at least the minimum amount for each trip, as set out by the standard.

The driver payment standard is based on distance and time per trip as well as the company-specific utilization rate for the prior quarter. The utilization factor would serve as a basis for computing total driver working time (see the discussion in Section 2). The TLC should also access and analyze the app-on and app-off data for each driver to more effectively determine how trip pay translates into average hourly earnings for each driver. The TLC will have to determine the best way to account for multi-platform drivers—those who drive for more than one app company and who may be logged into more than one app at a time.

Since our methods to estimate driver pay on an hourly basis are not perfect and there is variability in earnings from week to week, the TLC may need to adjust the formula after a reasonable implementation and evaluation period.

To date, the TLC does not have sufficient information on driver earnings for drivers providing trips dispatched by non-app FHV companies to develop a pay standard for those trips. The TLC might consider requiring the non-app FHV companies to begin providing such data (including trip times, trip miles, and working hours) to inform policy development.

3.4 Summary

The $17.22 hourly driver pay standard will enable drivers to better meet the considerable costs involved in providing transportation services and to receive the independent contractor equivalent of $15 per hour as well as receive a time-off supplement of $0.90 an hour. The supplement would allow drivers to be compensated at a rate that accounts for the fact that they do not receive paid time off as do most employees. The pay standard creates incentives for companies to more efficiently utilize the availability and working time of drivers. This incentive better aligns the interests of the companies and the drivers.

Section 4 The App-Based Industry's Business Model

We discuss here the business model of New York City's app-based transportation companies. This discussion will illuminate further why driver pay is so low, whether the policy levers in the TLC's proposal would in fact increase driver pay, and the likely adjustment responses of the industry to a pay increase. We then build upon this analysis to model the adjustment process more fully in Section 5, where we conduct a series of quantitative simulation exercises.

We first consider how the industry is a network-based industry. We then demonstrate that the industry has an oligopolistic market structure, with high mark-ups over local costs, especially in comparison to other companies that also mainly provide intermediary services. We then discuss the importance of low driver utilization rates to the industry's business model and how New York City's app-based drivers would respond to pay changes. Finally, we discuss how consumers are likely to respond to any fare changes. We will use these results in Section 5 to illustrate how the TLC's proposed policies can change the industry's business model and overcome its market failures.

4.1 The network-based business model

The app-based companies describe themselves as primarily software platforms that act as intermediaries connecting their networks of riders and drivers. The companies' technological innovation was limited to adapting software that already had been developed in other network-based industries. Their economic innovation consisted mainly of recognizing and exploiting an opportunity to develop a convenient network-based urban transportation system that could out-compete the traditional taxi industry. Convenience was made possible by the creation of dense local networks that connect riders and drivers directly, while also offering upfront fixed pricing (introduced in 2017), and easy payment system and quick response times. The app-based services soon became more convenient and sometimes cheaper than those of taxis.

By classifying themselves as technology companies, the industry sought to skirt the regulatory transportation structures that constrain its closest competitor—medallion cabs. In response, regulators have characterized these companies as transportation companies as well as technology companies—either by describing them as app bases that supply for-hire-vehicle rides, as in New York City, or as transportation network companies, as in California and the rest of New York State.

Economists refer to such an industry as a two-sided market—to emphasize the two networks involved.[37] Two-sided markets work well when both of the networks are

[37] Rysman (2009) provides an influential and widely-cited nontechnical introduction to the economics of two-sided markets. In two-sided markets an intermediary, such as a credit card payment platform, sells its services simultaneously in two markets. In the credit card case, the two markets are buyers paying with their car and merchants who accept the card for payment.

sufficiently large. These markets are also often characterized as platform-based industries—to emphasize that the companies' software platforms act as the intermediary between the two networks.

Well-known companies in two-sided markets include Amazon, American Express, eBay, Facebook, Google, MasterCard, Twitter, and Visa. As this high-profile list suggests, these companies are the winners of winner-take-all competitions. The leading companies in these competitions dominate their industry by attaining a sufficient network scale to deter users from switching to another network or to deter other companies from entering the industry. In other words, one or two companies dominate these industries because of large economies of scale in the creation and operation of networks.

In the app-dispatched driver industry context, a large initial investment in the intermediary technology and in building the networks constitutes the start-up phase. The initial investment is usually provided by venture capital. But once the company matures, technological innovations become less important and the cost of core company operations generally does not vary when the company marginally increases its size. Economists refer to these costs as fixed costs. The fixed costs include software engineers who maintain and upgrade the software used to operate the system, their managers and support staff, and associated office lease expenses. Other costs, such as for legal counsel, advertising and lobbyists, also do not vary much when the company grows marginally. Some costs, such as for recruiting and training new drivers, do increase when the company grows, but these variable costs are small relative to the fixed costs.

In this circumstance, companies increase their profit margins by spreading their fixed costs over more revenue-generating trips. So long as average costs per trip continue to fall, the company will achieve even greater returns by expanding and driving its smaller and therefore higher-average-cost competitors out of business.

This description corresponds closely to the elementary economic textbook model of natural monopolies. When the first successful entrant to an industry can realize economies of scale and therefore out-compete its subsequent rivals, one company survives and monopolistic behavior that harms consumers will then ensue. The standard policy recommendation for such natural monopolies is to overcome their noncompetitive behavior by regulating them as public utilities. Prominent examples of regulated monopolies include local electricity distribution systems, natural gas, water and waste collection systems, highways, bridges, tunnels, railroads, and municipal buses and subways.[38]

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[38] Public regulation also is called for when competition would generate wasteful duplication rather than needed capacity.

4.2 The oligopolistic structure of the app-based industry

Many observers believe that the app-based transportation industry is a winner-take-all market. We argue, however, that two characteristics of app-based transportation make it less monopolistic than many other two-sided markets. Regulatory policies that nudge the industry in a more competitive direction are therefore justified on efficiency and equity grounds but regulating the industry as a natural monopoly is not.

First, the leading firm will become a natural monopoly only if its rider and driver network advantages are substantial enough to deter entry by competitors. Although Uber began as a natural monopoly in this sense, the increase in the market share of Lyft, Juno, and Via in recent years suggests that they too have achieved critical masses in both rider and driver networks. Indeed, Lyft's entry into many other urban markets in the U.S. suggests that it is confident it can achieve such critical mass in any dense market—even though they compete directly with Uber.[39]

Second, the app-based transportation industry, as we have already discussed in Section 1, works well only if the supply of driver working hours exceeds the demand for rider trip hours. Companies need a supply of idle but available drivers in order to maintain low response times for their network of riders.[40] Importantly, an increasing proportion of drivers work with more than one app company. These multi-app drivers allow each company to draw upon available drivers who work primarily for one of the other companies. This feature works against the likelihood that any one company will become a natural monopoly.

Market shares Four companies—Uber, Lyft, Via, and Juno (now owned by Gett)—operate in New York City, with Uber and Lyft together accounting for about 87 percent of all app-dispatched trips in 2017. Exhibit 18 shows how the market share of these app companies changed between 2015 and 2017. Uber's market share fell from 88.5 percent of all app-industry trips in New York City in 2015 to 66.5 percent in 2017.

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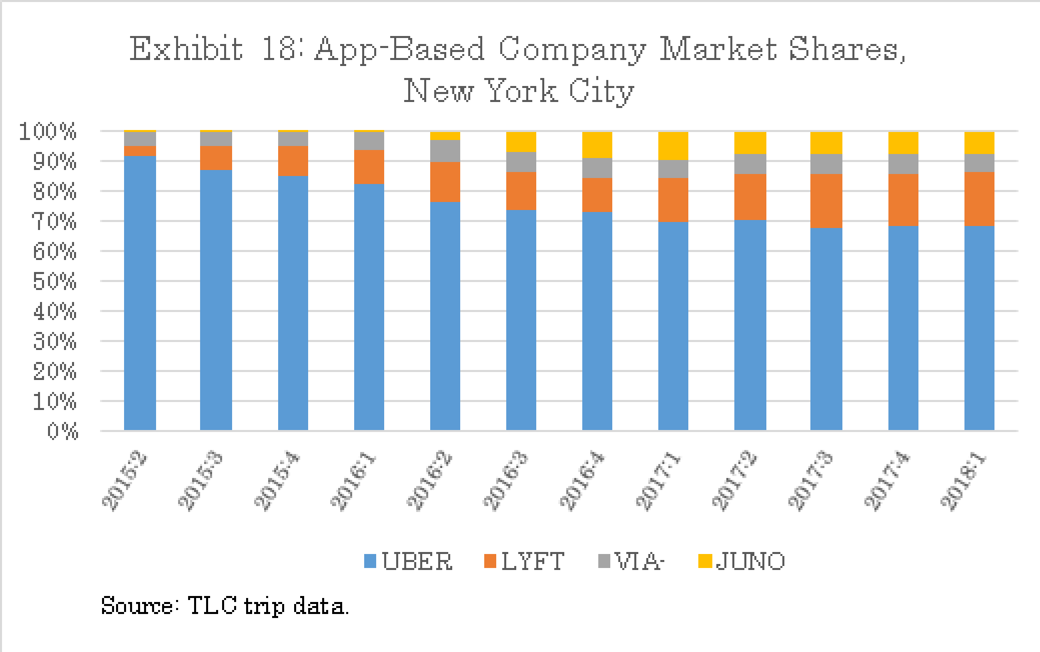
39 The entry and growth of Via, which specializes in shared rides, suggest that companies may also do well by capturing particular market niches. The analogy in the credit card payment industry is American Express.

40 Castillo et al. 2017 add that the driver-rider networks can collapse if the number of drivers who are en route to picking up passengers rises too high, relative to the level of idle drivers. In their data, en route trips at Uber average a non-trivial one-tenth the distance of passenger trips.



National data indicate similar patterns in most U.S. cities. As Lyft has entered many urban markets in recent years, its share of the app market has been increasing.[41]

It seems likely that the industry will continue to be characterized by oligopolistic competition, rather than having a single monopoly provider. While oligopolies compete with each other, they retain considerable market power. This power is most evident in their high price mark-ups over costs (Hall 2018).

4.3 High mark-ups in the app-based industry

Commissions The app companies set fare prices and routes and allocate rides to individual drivers. They also set a fee that they retain—their commission. These published commissions vary among the companies, ranging between about 10 percent and 25 percent of actual passenger fares. These nominal commission rates can vary from actual rates, including by how long a driver has been affiliated with a company, with incentives offered to recruit drivers, and with promotions offered to recruit riders and associated with particular routes.[42]

TLC administrative data allow us to calculate actual commission rates, defined as revenues less driver payments all divided by revenues. Actual effective commission rates,

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[41] https://blog.secondmeasure.com/2017/11/02/ubers-not-as-bad-off-as-you-think/.

[42] Media and online reports suggest that Uber commission rates exceed 20 percent on particular NYC routes. Uber's website acknowledges that it engages in route-based pricing and that price differentials do not accrue to the drivers.

which were 25 percent in Uber's early days, now vary from about 10 percent at Via and Juno to 20 percent at Uber and Lyft, and average 16.6 percent.[43] The smaller companies tend to have lower commissions, suggesting that the larger companies—with more economies of scale—set fares that are above, and pay drivers at rates below, the level that would obtain under conditions of greater competition.

While Lyft, the second largest app-based company in New York City, has a market share about one-third the size of Uber's, its commission level relative to passenger revenue and driver pay is similar to that of Uber. Indeed, as we discuss further below, Lyft has a higher commission rate and lower driver pay than any of the other app companies. This market concentration provides the companies with considerable, but not unlimited, price and commission-setting market power. The companies' price-setting power is also evident in how they vary their prices by neighborhoods and routes (Newcomer 2017).

The industry's average 16.6 percent commission rate in New York City may not seem excessive, relative to mark-ups of 15 percent at Amazon or at some other internet-based companies (Ovide 2016). However, the comparison is inexact, as Amazon has 600,000 employees, maintains large inventories of goods in numerous modern warehouses, and pays its employees mandatory and voluntary benefit packages, which the app-transportation industry's independent contractor drivers do not receive. The next largest e-commerce platforms (after Amazon) provide more apt comparisons. These include eBay (with a fee of 7.7 percent, Etsy (five percent) and Shopify (two percent). As these comparisons suggest, e-commerce retailers' fees reflect the number items in their online stores. Other comparisons of transaction fees in two-sided markets include Visa and MasterCard credit payment clearinghouses, which charge merchants in the neighborhood of two percent, Paypal (also two percent) and financial intermediaries, where the spread between interest rates on savings and on loans is in the neighborhood of two to three percent. The app industry falls somewhere between e-commerce retailers and credit card companies intermediaries. These comparisons suggest that the app industry's commission rates could be as low as six to seven percent and still remain profitable.[44]

Mark-ups We examine mark-ups in the industry by drawing on data for Uber, as data for Lyft and the smaller companies are less available. As Stanford economist Robert Hall (2018) has emphasized, large mark-ups of price over marginal costs indicate market power. Uber's annual revenue from passenger fares in New York City amounts to about $2 billion, of which it retains about $375 million in commissions and some smaller fees.[45] Its

[43] We present these data in Section 5.
[44] Credit card transaction fees are only 0.3 percent in Europe, mainly because anti-competitive restrictions are greater than in the U.S. https://www.fool.com/investing/2017/12/18/how-ebay-makes-most-of-its-money.aspxp; https://www.merchantmaverick.com/the-complete-guide-to-credit-card-processing-rates-and-fees/Uber has reported ongoing multi-billion-dollar losses for the company overall. These losses stem from its investments in autonomous cars and in expansion efforts, especially in Asia and Latin America, not from their domestic operations. Ian King and Eric Newcomer, "Uber Spent $10.7 Billion in Nine Years. Does It Have Enough to Show for It?" Bloomberg.com, March 6, 2018.
[45] Extrapolating from the October 2017 TLC earnings data yields $2.0 billion in annual revenues and $375

local operating costs consist mainly of payroll costs for approximately 200 employees (primarily software engineers, marketing specialists, fraud checkers and support staff), rent on the office space (including locations in Chelsea and Midtown Manhattan) that houses these employees, expenses for attorneys and lobbyists, and rent on its recruitment and training centers that are scattered among the city's boroughs.[46]

We conservatively estimate that these operating costs for Uber's New York City business add up to roughly $50 million per year, which equals about 13 percent of its estimated $375 million in New York City profits. These figures suggest that Uber's mark-up is six times larger than its variable operating costs, or 600 percent.[47] Such a large mark-up suggests a considerable capacity to increase driver pay.[48]

4.4 How the app-based industry differs from other networked industries

The business model of the app-based transportation industry differs from those in other networked industries— in three important respects.[49]

First, as we have discussed, the industry's cost structure has generated an oligopolistic market structure—permitting two or more firms to compete, but not leading to a single winner. Indeed, at least two app firms (Uber and Lyft) now compete with each other in most U.S. cities, and four app firms operate in New York City. The structure of the industry is therefore an oligopoly. Oligopolies make profits that are well above the norm in much more competitive industries, yet they also compete with each other and cannot be regulated as if they were public utilities.

Second, the app-based transportation industry's business model differs from other networked industries by requiring persistent excess capacity. Its vaunted convenience for riders is most embodied in low wait times for rides—generally five minutes or less.

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million in commissions.

[46] The number of Uber's employees in New York City is based on a personal communication with Jonathan Hall of Uber. Most of the costs of screening and licensing new drivers are borne by the drivers or the TLC. Some additional local operating costs can be attributed to a share of overall corporate expenses at Uber's San Francisco headquarters, in proportion to the size of the New York City market relative to Uber's global market. But this share is very small: In 2017 Uber had about 50,000 drivers in New York City and over 1.5 million drivers world-wide (UBER Statistics Report 2017 Business of Apps. www.businessofapps.com/data/uber-statistics/).

[47] De Loecker and Eckhout (2017) estimate that mark-ups in the U.S. economy are approximately 67 percent, up from 18 percent in 1980. See also Autor et al. (2017) and Hall (2018).

[48] Some readers may question why we do not include drivers' pay and expenses in the mark-up calculation. After all, the industry is not just a software system; it transports passengers from one point to another. Such costs would be relevant if we were calculating the mark-up rate of the app-based transportation sector as a whole. But they are not relevant when we are considering just the profitability of the app-based companies.

[49] As we saw in Section 2, the app-based industry's business model in New York City differs somewhat from that in other U.S. cities. Our discussion in this report focuses on the New York City case.

Companies compete for passengers by keeping wait times low, even beyond the value of the saved time for the riders. Such low wait times are made possible by the availability, at any point in time and place, of numerous idle cars and drivers. This condition is facilitated by new driver entry into the industry. Although the drivers and their vehicles must meet the TLC's safety and consumer protection licensing requirements, neither the TLC nor the companies themselves restrict the flow of new drivers into the industry.

Third, the industry's business model relies on drivers to be independent contractors. The drivers pay the considerable investment and operating costs of their vehicles and do not receive the benefits mandated or provided voluntarily to employees. In the New York City context, a large proportion of the independent contractors are drivers who invested in their cars for business use. They must therefore work long hours to recoup their up-front investments or lease costs. The amount of fare revenue that the companies retain is therefore not linked directly to the pay the drivers receive.

These three components of the app-based industry's business model generate three corresponding market failures. First, company mark-ups over local operating costs are higher than is required for the industry to operate effectively, reducing the proportion of revenue that the industry shares with its drivers. Second, the drivers' investments in their vehicles make it difficult to switch their employment to other industries. This barrier keeps driver pay lower than it would be otherwise. Third, inefficient utilization of driver working hours results in lower driver pay per hour and more cars on the streets. We argue that each of these failures would be remedied by the regulatory intervention proposed by the TLC.

4.5 Driver utilization and driver response to pay increases

As we have noted, the companies compete on fares and on customer response time. According to company publications, the standard response time in New York City is five minutes. The companies rely on the availability of drivers; their ability to attract drivers depends on their ability to provide trip opportunities, as the drivers have no independent access to passengers and are not permitted to pick up street hails.

The app-based companies set their own prices and do not interact directly with taxis or their drivers. In contrast, similar companies operating in Europe and elsewhere, such as mytaxi.com, developed apps that enhanced the existing taxi system rather than competing with it.[50] Uber and its followers instead developed their apps to draw upon the large pool of

[50] Mytaxi.com, a Germany company, did attempt to enter the U.S. market, in Washington, DC, but quickly withdrew, because of competition with Uber and regulatory obstacles to including Yellow Cabs in their business model. In New York City, riders have been able to hail medallion taxis using an electronic app

unemployed or underemployed workers and their (mostly) idle cars. Moreover, these companies lobbied cities heavily not to restrict the number of app-based vehicles, even at the cost of harming the medallion segment of urban transportation.[51] Thus, in 2015, Uber's aggressive public campaign and lobbying efforts soundly defeated a proposal to cap the number of app-based cars in New York City, clearing a path for unprecedented growth.

As we have emphasized, the app-based companies are able to pass on to the drivers the cost of capital that is embodied in driver-owned or leased vehicles, including the risks on these investments. In other words, the app companies are not responsible for covering most of the industry's capital and labor costs. It is thus not surprising that the enormous growth in the number of trips has not translated into higher net earnings per hour for individual app drivers.

Driver recruitment The rapid growth of app-based urban transportation could not have occurred without a simultaneous rapid increase in the number of app-based drivers. While these drivers decide when and how long to work, they have limited latitude in choosing whether or not to accept individual ride offers.[52]

The drivers must be licensed by the TLC. A driver can choose whether to purchase or lease a car for business use only, use an existing vehicle for business only (provided it meets vehicle model and year requirements determined by the companies), or use an existing vehicle for a mix of business and personal use. The drivers are responsible for all the costs associated with their rides (licensing, insurance, fuel, leasing or car loan payments, depreciation, maintenance costs, etc.) and they bear the risks of their investments in their cars.

A capital investment and labor supply model Across cities in the U.S., the opportunity provided by the app-based companies for workers to earn additional income by driving several hours a week—and on one's own schedule—has appealed to large numbers of unemployed and under-employed workers. Recall the context—the rapid increase in part-time work and in unemployment during the Great Recession and the slow labor market recovery from the Great Recession.

In New York City, as we documented in Section 2, only a small minority of Uber drivers already had their own cars; many are recent immigrants with limited labor market and

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since 2013. Taxi drivers now have access to two app devices (Curb and Arro), but they are less well known even among veteran taxi riders.

[51] The employment status of New York City's taxi drivers shifted from employees to independent contractors in the late 1970s. The app-based drivers also operate as independent contractors. Disputes about their status continue to work their way through the judicial system and are not yet fully resolved. A related literature refers to them as dependent contractors (Bernhardt 2015).

[52] Uber requires drivers to accept 80-90 percent of ride offers and "deactivates" drivers who fall below that level. Alex Rosenblat, "The Truth About How Uber's App Manages Drivers, *Harvard Business Review*, April 5, 2016.

credit opportunities who can obtain cars only at subprime rates and terms. Unlike in other cities, a substantial fraction of New York City drivers had to acquire cars to enter the industry. As well, they must obtain relatively expensive commercial auto insurance. The resulting high level of fixed costs explains the unusually large proporti6on of app drivers in New York City who work full-time: 0 percent work more than 30 hours per week and 40 percent work 40 or more hours per week.

Responsiveness of driver hours to pay increases A key issue for regulatory attempts to increase driver pay concerns the responses of the drivers themselves. If enough drivers respond to a pay increase by driving more hours and if more drivers want to enter the industry, the effect of a pay increase could be diluted substantially. More cars and drivers on the streets at any time competing for the same number of rides implies a smaller number of trips per hour for drivers, diluting their pay per hour.

Economists refer to changes in hours worked in response to pay increases as the "elasticity of labor supply." For example, an elasticity of 0.1 implies that every 10 percent increase in pay results in a one percent increase in labor hours supplied or worked. Increases in hours because new drivers enter the industry are adjustments along an extensive margin; increases in hours by incumbent hours are increases along the intensive margin. Labor supply elasticity consists of adjustment along both margins. Labor supply elasticities for males ages 25 to 54, the demographic group that makes up well over 90 percent of taxi and app drivers, are generally thought to be very low—implying that pay increases have very little effects on this group's working hours.

A large research literature has debated whether the elasticity of labor supply of taxi drivers is negative (for example, Camerer et al. 1997) or positive (for example, Farber 2015). However, labor supply elasticity studies of taxi drivers are not informative for app drivers. Recall that most taxi drivers must pay the fixed costs of leasing their vehicles; medallion leases generally are for a 12-hour shift or an entire week. App drivers—in principle—have much more flexibility.

We are aware of only two studies that attempt to estimate labor supply elasticities for app-based drivers: Angrist, Caldwell and Hall, 2018; and Hall, Horton and Knoepfle, 2018. Both papers use data on Uber drivers only and both use driver populations that differ markedly from the current app-based driver population in New York City. Angrist et al. draw from a sample of Uber drivers in Boston in July and August of 2016. Hall et al. study Uber drivers' responses to short-term surge pricing changes in 20 metropolitan areas across the U.S. during the period June 2014 to January 2017.[53]

Both studies suggest that the labor supply elasticity of Uber drivers is quite high, which

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[53] Chen et al. 2017 also estimate labor supply elasticities of Uber drivers, but only on a disaggregated basis, with nine weekly time blocks and five types of drivers--morning, evening, weekend, late night and occasional. The occasional drivers make up 56 percent of the driver sample. Chen et al. note that their elasticity estimates are unstable—because few drivers work in two consecutive weeks. This study is therefore not informative for ours.

raises the dilution fears we discussed above. We discuss these papers in detail in the appendix to this section. Our summary is that the 0.5 labor supply elasticity estimated by Horton et al. likely constitutes an upper bound and that supply elasticities in New York City are more likely to be somewhat lower. Previous labor supply studies of low-wage workers, summarized by Katz (2018), estimate a labor supply elasticity of 0.2 for the low-wage part of the labor market. To be conservative, in Section 5 we use a 0.4-0.5 range.

Our takeaway from the research literature is that an effective pay policy must include a tool that prevents a reduction in driver trips per hour because drivers will want to drive more hours. Ideally, such as tool would provide incumbent drivers with more trips per hour. As we saw in Section 3, the proposed TLC policy includes such a tool.

Utilization rates Our simulation exercises in Section 5 will illustrate the power of increasing driver trips per hour as a means of increasing pay while minimizing fare increases. We discuss here the levels and variation of driver utilization in the industry, in order to inform how much the TLC policy tool could increase utilization rates.

In its early years, UberX expanded its revenue by reducing its fares and response time. According to the company's blog, fares fell by 20 percent between September 2013 and September 2014. The resultant acceleration in rider demand lifted UberX drivers' earnings by nearly 40 percent according to the company. These earnings gains occurred primarily by reducing driver idle times—from 36 minutes per hour in September 2013 to 21 minutes per hour in September 2014. The increase in driver earnings subsequently slowed to six percent from September 2014 to September 2015, while idle time fell to 20 minutes in the same time period, according to Uber. Based on TLC-supplied data, it now appears that idle time for both dedicated Uber and Lyft drivers is about 25 minutes.

Horton et al. 2018 also suggest that utilization rates could be under-estimated for multi-platform drivers, who may have more than one app on at a time, until they obtain and accept a requested ride. We overcome this problem because we report utilization rates only among single-platform drivers. We can do so because our TLC data permit us to observe which drivers work on more than one platform.

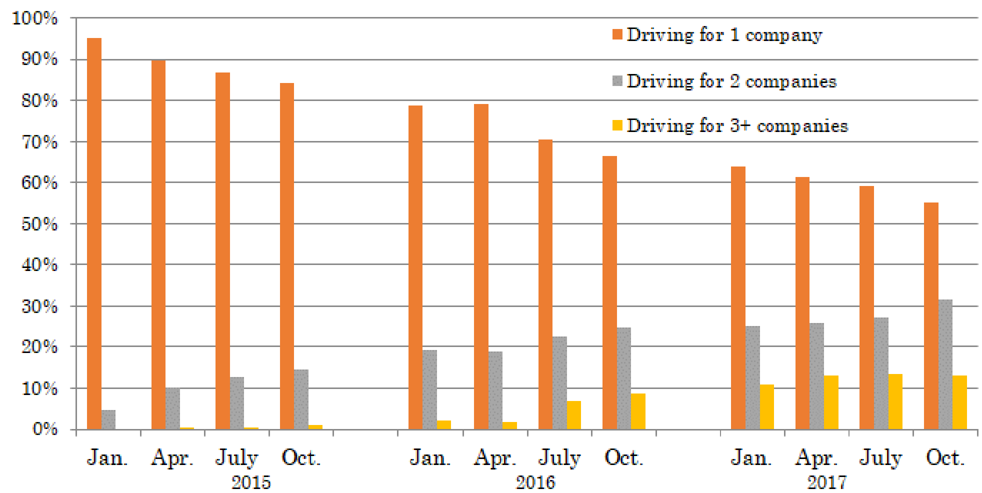
Company control over new driver entry Each company can choose the number of drivers who are credentialed on its system. It does so by admitting new drivers. The companies cannot control each driver's working time on the system—the time the driver has the app opened and is available for rides.[54] In our model, companies add new drivers to make up for attrition of their existing driver labor force, and as well to meet any shortfall in needed driver hours, after incumbent drivers choose their working hours. By needed driver hours we refer to the number required by passenger demand growth each year.

[54] The TLC does not limit the supply of licensed drivers, as it lacks the authority to cap the number of drivers. In principle, the City Council could give them such authority, but that possibility lies outside the scope of this report.

Although app passenger demand increased by 60 percent in 2017 alone, such growth is not sustainable. Indeed, much of it occurred by opening new markets for app-dispatched trips in the outer and underserved parts of the city.

Multi-platform driving Because of the drivers' need to increase their utilization and hence earnings capacity, drivers have increasingly chosen to work on multiple platforms, as indicated in Exhibit 19. The companies encourage multi-platform driving as it provides them with an additional supply of potentially idle drivers. The smaller companies have facilitated this process by allowing easy access to their own app to already-licensed drivers for the larger companies. The larger companies benefit from having drivers available to them even if they work primarily for another app.

Exhibit 19: Multiple platform driving by NYC app drivers



Note: Data for each month are taken from the first week of the month.
Source: TLC

4.6 How would consumers respond to fare increases?

The final element in the app industry business model concerns its popularity among consumers. Although consumer demand for app trips has grown enormously, it is not clear how consumers would respond to fare increases, in large part because demand growth allows few opportunities to identify how consumers might react to fare increases. The research literature on consumer demand in the app-dispatch industry is therefore extremely thin.

Cohen et al. 2016 use surge pricing by Uber to estimate that a one percent increase in fares reduces passenger demand by between -0.4 and -0.6 percent. However, as Castillo, Knoepfle and Weyl mention, these estimates are based upon extremely short time periods. The demand elasticity for Uber trips is twice as large (Weyl personal communication May 11, 2018). To be conservative, we use the upper end of this range: an elasticity of -1.2.

4.7 Summary

The app-based transportation industry business model requires low driver utilization and relies on drivers to make the capital investments and labor supply commitments—as independent contractors. The industry relies on a surplus of drivers to keep wait times low. Although the cost curve for the industry generates oligopoly, not monopoly, the industry's pricing model yields mark-ups that are well above levels in comparable industries that also provide intermediary services. We review the literature on labor supply and consumer demand elasticities and determine magnitudes of each that we will use in our simulations in Section 5.

Appendix to Section 4 Other labor supply estimates

Angrist, Caldwell and Hall 2017, hereafter ACH. ACH report a labor supply elasticity of 1.2, which they estimate from a randomized control trial among 1,600 Boston Uber drivers in August and September of 2016.The treated group, which alternated with the control group in successive weeks, was offered the option of not having to pay a 25 percent commission to Uber the following week. Of the 1600 drivers, 1031 accepted the offer in either the first or second week of the trial. Drivers who accepted the offer increased their hours by an average of 35 percent. The ACH sample excluded the 23 percent of drivers with zero hours. They state, but do not show details, that there was little variation in responses according to number of hours driven the previous month. They also report that their estimated supply results were the same for drivers with older cars. Such cars were not eligible to be Lyft vehicles, suggesting similar responses among drivers who drove only for Uber.

ACH report that 14 percent of active drivers in Boston are female, their mean age is 42, and they drove an average of 13 hours per week in the month preceding the trial. This profile differs considerably from the New York City app driver labor force and the proportion who drive full-time. The trial was short-run, suggesting that the extra income per hour was seen as a windfall and does not represent the adjustments drivers might make if the trial was made permanent. We conclude that the ACH experiment is not informative for New York City.

Hall, Horton and Knoepfle 2018, hereafter HHK. HHK estimate a labor supply elasticity of 0.5 for Uber only. The response was almost entirely among incumbent drivers (intensive margin) and not by attracting additional drivers (extensive margin). They acknowledge that labor supply elasticity for the industry as a whole would be much lower, since switching costs among app firms are close to zero. HHK suggest that hours could be over-estimated in their data, leading to lower estimated earnings (before expenses), insofar as drivers have their apps on while commuting from their homes to areas of high demand, such as downtown Manhattan. Since most drivers live in the Bronx, Brooklyn, or Queens and half of all trips begin or end in these boroughs, this problem should not be present in our data.

Section 5 How Drivers, Companies, and Consumers Will Adjust

The proposed pay standard for app-based drivers will generate benefits and costs, with incidences that will vary among groups. In Section 2, we noted that 85 percent of drivers are currently paid below the proposed standard and that an average increase of 14 percent would raise these drivers to the proposed payment standard. In Section 4 we discussed the important role of idle drivers and vehicles in the industry's business model and the high levels of commissions relative to those in related industries. That discussion showed that idle time for the drivers constituted a benefit for the companies without any corresponding cost, while at the same time imposing substantial costs on drivers. The policy proposed by the TLC would better align the companies' interests with those of the drivers. The resulting improved efficiency could provide a major means of absorbing the costs of higher driver pay.

In this section, we examine through a simulation model how drivers, riders, and the app-based companies will react to the policy. The policy will increase the payments collected by drivers during their working time. In principle, the companies could absorb this increase simply by increasing consumer prices by a similar amount. However, as we discussed in Section 4, passenger demand for app rides is relatively price-elastic. Companies might not want to incur revenue losses if they raise fares, nor might they want to reduce their market shares if other companies do not raise their prices. They might prefer to absorb the costs of the pay standard through other actions, including increasing driver utilization rates, increasing the proportion of shared rides, and reducing commission rates. We argued in Section 3 that the proposed policy incentivizes all three of these responses. By presenting a series of alternative adjustment scenarios, our simulation model quantifies the importance of each of these responses. It turns out that the incentive to increase driver utilization provides the largest effect on the adjustment process.

5.1 Direct effects on the drivers

Drivers are paid basically on a piecework basis, that is, for each trip. Driver weekly pay therefore depends on three elements: their pay for an average trip, the number of trips they provide per hour, and the number of hours in a week that they are available for trips.

Although the pay standard will raise pay per trip for most drivers, increased utilization will reduce average trip pay, but this will be offset by the increased number of trips per hour. The company-specific utilization rate in the pay standard formula encourages companies to offer drivers more trips per hour.[55] With utilization in the denominator of the pay standard formula, increasing utilization means that the companies can reduce the per trip payment to drivers. Some drivers, especially those who now drive part-time, will increase their weekly working hours.

As we estimated in Section 2, before-expense driver earnings for the 85 percent of drivers below the standard will increase by 14 percent, averaged across the companies. Relative to overall driver pay, including the 15 percent of drivers above the standard, the cost of

[55] The utilization factor in the pay standard formula is the company-wide utilization for the prior quarter.

the pay increase for the companies is 11.3 percent. The $1 per-pickup shared ride bonus is applied on top of the minimum pay standard, to compensate drivers for the additional labor in providing shared rides. When the cost of the shared ride bonus is factored in, the total cost of the proposed pay policy to the app-based companies is 13.2 percent of current total driver pay. Increases for individual companies will vary from the average. Our estimate assumes that companies will manage the overall assignment of rides to drivers in a manner that increases their utilization.

The driver pay increases will benefit all app drivers, but particularly the 85 percent who currently are paid below the pay standard. The average increase for drivers currently below the pay standard would be approximately $6,345 per year, including the shared ride bonus. The 15 percent of drivers currently above the pay standard would get an average of a little over $700 for the shared ride bonus. The increase in aggregate driver earnings would equal $335 million per year.

As we noted in Section 4, these direct effects are subject to indirect effects on the drivers that arise from adjustments to the policies by the drivers themselves, by the companies, and by riders. We turn next to describing and quantifying the policy adjustment process more broadly.

5.2 The policy adjustment process: a qualitative perspective

We consider here adjustments in labor supply, driver utilization, shared rides, fare increases, and commission rates.

Labor supply If hourly earnings effectively rise due to the pay standard, drivers on average will increase their labor supply, that is, their time working. But this will vary depending on the hours they usually drive and on individual considerations. Drivers currently working very long hours, including the 22 percent of drivers working 50 or more hours each week, are likely to reduce their hours if their effective hourly pay rises. Other full-time drivers and many part-time drivers may respond to the earnings increases per hour by increasing their working hours.

Driver utilization Since the utilization rate appears in the denominator of the per-mile and per-minute components in the pay standard formula, companies are effectively rewarded for increased utilization by reducing the per trip driver payment. Increasing driver utilization rates has the potential to absorb a substantial portion of the increased costs to the companies. For the last half of 2017, utilization rates were about 58 percent for Uber and Lyft, with Juno's utilization about 50 percent. In contrast, Via's utilization rates were close to 70 percent. Low utilization means a higher number of drivers and vehicles are cruising while waiting for rides, which reduces hourly compensation for drivers as well as contributes to congestion. The prevailing business model of the app companies provides insufficient incentives to raise utilization.

Compared to two or three years ago, the app companies can now more easily satisfy trip demand growth with existing drivers. Consequently, they could increase driver utilization by better managing the entry of new drivers into their systems. A pay standard policy that incentivizes driver utilization will be more successful than one that relies only on increases in driver earnings. Drivers would then realize more pay per trip from the standard, greater trip volume, and more passenger time (and earnings) per hour. According to Hall et. al. 2018 and Cook et.al. 2018, increasing utilization in the range discussed here (four to six percentage point increases) is not likely to result in a significant increase in wait times.

Shared rides The proportion of all rides that are shared rides has been increasing steadily, from 17 percent in the third quarter of 2017 to 23 percent in the first two months of 2018.[56] A further increase in the proportion of shared rides increases utilization. It also rewards companies by generating additional passenger revenues, and rewards drivers since the pay standard policy gives drivers a $1 bonus for each shared ride pickup. As noted in Section 3, shared rides are disproportionately provided by drivers in the two lowest-earning quintiles of the earnings distribution. That suggests they are currently under-paid for providing shared trips and underscores the purpose of the shared ride driver bonus in the proposed pay policy.[57] We consider the increase in shared rides as part of the way the policy increases driver pay and also utilization.

Fares and commissions The portion of the pay increase not absorbed by increased utilization can be accommodated through a combination of adjustments to passenger fares and company commissions. Our estimate for consumer demand price elasticity (-1.2) leads us to expect the companies to consider reducing their commissions to maintain market share in a competitive environment.[58]

Commissions for the app companies have considerable room to adjust. As we have noted, commissions in the industry exceed company costs by much greater amounts than in other high-technology sectors. Moreover, app-based commissions vary substantially over time for individual companies and as well across companies. Uber and Lyft, the two largest companies, charge the highest commissions, despite or perhaps because of their larger economies of scale. They also have the lowest average net hourly driver earnings.

5.3 Simulating alternative pay adjustment scenarios: a quantitative perspective

We estimate here a model that simulates alternative adjustments to the pay standard by the drivers, the companies, and the consumers. We use information from the TLC administrative data to inform our estimates for the key parameters, including driver

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[56] TLC trip data.

[57] See, e.g., Lyft: https://help.lyft.com/hc/en-us/articles/115012926987-Lyft-Line-driver-pay

[58] Consumer price elasticity for app services throughout the five boroughs is much higher than the Schaller estimate of demand elasticity for Manhattan-oriented taxi services and is higher than the experience following the 2012 medallion fare increase. In any case, the price elasticity of demand throughout the five boroughs is likely to be higher than in core Manhattan since rider incomes are lower in the other boroughs where service has expanded rapidly in the last two years. Moreover, the elasticity facing an individual company in an oligopolistic market will be greater than in a market environment with a single, regulated fare.

hours, driver pay, passenger fares, and commission rates. We draw from the research literature for the labor supply and consumer demand elasticities. As noted above, we focus on the policy-induced impacts by leaving aside the impact on fare revenue from changes in the number of trips, except in the case of the effect of fare changes on the demand for trips and the associated revenue impact.

The adjustment process would occur simultaneously using all of its channels. However, to keep our presentation simple (and nontechnical), we will discuss the model as if it proceeded in an iterative fashion through three stages.

Stage 1: The effect of initial driver labor supply responses, an increase in the portion of shared rides, and the effect on company costs of utilization adjustments by the companies.

Stage 2: The choice companies would make in responding to the remaining additional company costs not covered by increased utilization. We model this choice as a tradeoff between fare increases and commission rate adjustments.

Stage 3: Adjustments to driver supply and fare revenue if a passenger fare increase leads to reduced consumer demand for trips.

Stage 1: Effects on company costs

Driver supply responses Our discussion in Section 4 of the labor supply estimates in Katz (2017) and Hall et al. (2018) suggested driver labor supply elasticity estimates of at least 0.2 and lower than 0.5. To be conservative, we use 0.4 on average. We consider three groups of drivers: full-time, part-time drivers leaning full-time, and part- time drivers not likely to seek additional hours. Full-time drivers include those working 30 hours a week or more. Those at the lower end of the full-time spectrum may seek to work additional hours in response to the prospect of higher net pay; those working very long hours may seek to reduce their hours (if their behavior conforms to the income-targeting hypothesis). For full-time drivers as a group we use an average labor supply elasticity of 0.35. For drivers usually working 20-30 hours a week—the group we consider the part-time, leaning full-time group—we use a supply elasticity of 0.7. We use a supply elasticity of 0.5 for regular part-time drivers (those working less than 20 hours a week), who likely have another job or another reason for working such limited hours. These elasticities imply an overall driver supply elasticity of 0.4, which for a 10.7 percent pay increase would mean a 4.3 percent increase in driver hours.

Company utilization response Without the pay standard and the role that utilization plays in the pay standard formula, the companies have no incentive to manage driver time efficiently, so long as driver net pay does not fall below their reservation wage, i.e., the wage they would receive if they could find an alternative job, less the costs of switching jobs. A utilization increase is effectively a productivity increase since drivers will be logging more passenger time each hour. With the new policy, companies will seek ways to increase utilization, such as: limiting the entry of new drivers into their systems; queuing the next ride when a driver is close to completing the current ride; allocating trips to drivers whose driving records suggest they drive very long hours and are therefore likely to reduce their hours; and by promoting more shared rides that increase measured utilization. The app technology provides the companies real-time information on driver time and history. In sum, the app companies could readily improve their management of driver utilization.[59]

Our simulations will show that increasing utilization will provide the companies' primary means of absorbing the effect of the pay standard. Our simulation is independent of the actual likely rates of continuing market growth. The increased driver productivity will not lead to a net reduction in driver hours if there is substantial further market growth, which seems likely. The companies will still allow new entrants, beyond those required to replace drivers leaving because of attrition, at rates that fill the gap between market growth and the increased trips that would be provided by incumbent drivers.

Stage 2: Passenger fare increase and commission rate change

The companies' decision on a passenger fare increase is effectively part of a joint decision about changes in the company commission rate as well. The choice of holding fares steady or increasing them essentially determines the commission rate and reflects each company's perceptions of the impact on their market position.[60]

Since the drivers bear almost all the capital costs associated with providing app-passenger services, the operating costs of the companies are limited, giving them considerable latitude to lower commission rates from current levels. As we showed in Section 4, in a more competitive industry, app companies would be receiving commission rates well below the approximately 20 percent that are now charged by the major companies. The policy proposal should nudge the industry to be more competitive by reducing commissions rather than raising fares in response to the driver pay increase. To monitor how the companies comply with the policy, TLC should collect per-trip fare data, including driver payments, and passenger fares.

Stage 3: Effects of any fare increases on driver pay and trips

Stage 3 of the simulation model incorporates the feedback effect of any fare increase-related decline in passenger demand on drivers and company revenue. If passenger fares rise, the consumer demand response is likely to reduce the number of trips demanded. Driver trips and pay will decline accordingly. Still, any fare increase-related reduction in trip demand is likely to be much smaller than the other factors discussed here that

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[59] Rosenblat, for example, argues that once a driver is logged onto Uber's app the driver's activities are heavily monitored and algorithmic management is used to influence driver performance. Alex Rosenblat, *The Truth About How Uber's App Manages Drivers*, *Harvard Business Review*, April 6, 2016.

[60] The recently enacted MTA surcharge for app services adds $2.75 per trip for vehicles entering or leaving the core Manhattan business areas. This mandate will increase passenger fares for an average trip by about 20 percent. The fare increase will generate some reduction in demand for trips in Manhattan and it will likely increase passenger sensitivity to further price increases. These effects are not part of our analysis, as they are independent of the proposed driver pay standard.

contribute to increased labor supply or demand (and pay) from likely market growth.

Wait times The pay standard's effect on utilization is not likely to significantly lengthen passenger wait times. The current industry standard for average app response time to a passenger request is five minutes (300 seconds). According to Cook et al. (2018) a 10 percent increase in driver utilization rates would likely increase response times by six percent, which amounts to 18 seconds.

We envision a smaller utilization increase—of six percent, which implies a wait time increase of 12 seconds. We do not have data on whether wait times differ by neighborhood. They may be somewhat higher in areas with low trip densities, such as in the outer boroughs. However, population density in these areas is much higher than in other U.S. cities, where wait times also average five minutes. If wait times were six minutes instead of five, the increase in wait time would be 15 seconds.

5.4 Simulation results under three plausible scenarios

Exhibit 20A summarizes the results of our simulations for three scenarios for a 14 percent average increase in driver pay. Each scenario applies a plausible set of assumptions for the utilization increase, consumer price elasticity, and fare increase. The three scenarios show how the results vary with different parameter assumptions. We consider these three to be the most likely scenarios. In section 5.5, we vary the key parameters differently and summarize the results of additional scenarios, which are shown in Exhibit 20B.

The three scenarios in Exhibit 19A all utilize a 0.4 labor supply elasticity, a four percentage point utilization increase (58 to 62 percent), and a -1.2 consumer demand elasticity. Scenario A assumes no fare increase, Scenario B a three percent fare increase, and Scenario C a five percent fare increase. Our three most important results are shown in rows 8-10 of Exhibit 19A: the company commission rate; the change in passenger wait times; and the share of the cost of the pay increase absorbed by increased utilization. Key intermediate results include the increase in trips provided by incumbent drivers (rows 3 and 5), the reduction in trip demand resulting from a fare increase (row 4), and the overall change in incumbent driver pay (row 6).

In Scenario A with no fare increase, the average commission rate drops by about two-thirds, from 16.6 percent (as estimated from the mid-October 2017 TLC data) to 5.6 percent (row 8). Increased utilization absorbs a little over half of the policy-related driver pay increase (row 10), with the balance met through a reduction in the commission rate when passenger fares are unchanged.

Under Scenario B, a three percent fare increase, the commission rate is reduced less, declining from 16.6 to 8.3 percent. Even an 8.3 percent commission is well above the rate that would prevail under conditions of more effective competition in the industry. With a five percent fare increase as in Scenario C, the commission rate is reduced to 10.1 percent.

The four percentage point utilization increases in all three scenarios are associated with the same 52 percent absorption of the driver pay increase and the same very slight 12-second increase in wait times (the wait time effect was scaled to Cook et.al.'s [2018] estimate that a 10 percent utilization increase added six percent to wait times).

Note that the simulations in Exhibit 19A focus on the immediate impacts of the pay policy change. They do not incorporate the effects of increased market demand on revenues and driver pay. Since commissions are the residual after drivers are paid from passenger revenues, factoring in market-related revenue gains would raise the amount of commissions and the commission rate (commissions as a percent of passenger revenues). Thus, the results in Exhibit 19A overstate the likely impact of the pay standard implemented in the context of continued market growth.

Exhibit 20A: Simulation Results Using Three Pay Adjustment Models

Effects of a 13.2 percent increase in the cost of total driver pay, under three scenarios. (The 13.2 percent increase includes the shared ride bonus and is the increase for total driver pay; the 14.0 percent increase cited in the text is the average increase for those below the standard to bring them up to the standard.)

Scenarios vary with changes in passenger fares.

Trips provided by incumbent drivers increase because drivers increase their hours and as a result of utilization increases.

Labor supply elasticities: full-time drivers 0.35; part-time drivers leaning full-time 0.7, part-time drivers 0.5; average = 0.4

		A	B	C
	Key parameters in pay adjustment model ==>	**4 percentage point utilization increase, no fare increase**	**4 percentage point utilization increase, 3% fare increase, -1.2 demand elasticity**	**4 percentage point utilization increase, 5% fare increase, -1.2 demand elasticity**
1	Percent increase in hours worked by incumbent drivers in response to pay increase (13.2 x 0.4)	5.3	5.3	5.3
2	Percent increase in trips provided by incumbent drivers as utilization increases (%)	6.9	6.9	6.9
3	Percent increase in trips provided by incumbent drivers (row 1+row 2)	12.2	12.2	12.2
4	Percent change in demand for trips resulting from fare changes	0.0	-3.6	-6.0
5	Net change in # trips by incumbent drivers (row 3 + row 4)	12.2	8.6	6.2
6	Percent change in overall pay of incumbent drivers after adjusting for effects of fare changes	13.2	9.1	6.4
7	Net percentage change in fare revenue, relative to no policy change	0.0	-0.7	-1.3
8	Company commission rate (percent). Current = 16.6 percent.	5.6	8.3	10.1
9	Change in passenger median wait times (seconds)	12	12	12
10	Share of cost of pay increase absorbed by increased utilization rates (6.9% efficiency gain divided by 13.2%), (in percent)	52.3	52.3	52.3

Source: Authors' analysis.

5.5 Alternative pay adjustment scenarios

We present four additional scenarios in Exhibit 20B. Under Scenario D, utilization increases by six percentage points instead of four, and passenger fares rise by three percent. This greater utilization increase absorbs almost all of the cost of the driver pay increase and results in an 8.3 percent commission rate. Customer wait times rise by about 19 seconds. Scenario E shows the effect of a three percent fare increase without any change in utilization. The net change in incumbent driver pay remains the same—9.1 percent—as in Scenario D, and the commission rate also stays the same, at 8.3 percent. No change in utilization leaves wait times unchanged but with the absence of productivity gains, there is no offset for any of the driver pay increase.

Exhibit 20B: Alternative Pay Adjustment Scenarios

Effects of a 13.2 percent increase in the cost of total driver pay, under three scenarios. (The 13.2 percent increase includes the shared ride bonus and is the increase for total driver pay; the 14.0 percent increase cited in the text is the average increase for those below the standard to bring them up to the standard.)

Scenarios vary with changes in (1) utilization; (2) fares; and (3) labor supply elasticity

Trips provided by incumbent drivers increase because drivers increase their hours and as a result of utilization increases.

Labor supply elasticity: 0.4 (see Exhibit 19A) except Scenario F.

		D	E	F	G
	Key parameters in pay adjustment model ==	**6 percentage point utilization increase, 3% fare increase, -1.2 demand elasticity**	**No utilization change, 3% fare increase, -1.2 demand elasticity**	**0.5 labor supply elasticity, 4 percentage point utilization increase, 3% fare increase, -1.2 demand elasticity**	**4 percentage point utilization increase, 10% fare increase, -1.2 demand elasticity**
1	Percent increase in hours worked by incumbent drivers in response to pay increase	5.3	5.3	6.6	5.3
2	Percent increase in trips provided by incumbent drivers as utilization increases (%)	10.3	0.0	6.9	6.9
3	Percent increase in trips provided by incumbent drivers (row 1+row 2)	15.6	5.3	13.5	12.2
4	Percent change in demand for trips resulting from fare changes	-3.6	-3.6	-3.6	-12.0
5	Net change in # trips by incumbent drivers (row 3 + row 4)	12.0	1.7	9.9	0.2
6	Percent change in overall pay of incumbent drivers after adjusting for effects of fare	9.1	9.1	9.1	-0.4
7	Net percentage change in fare revenue, relative to no policy change	-0.7	-0.7	-0.7	-3.2
8	Company commission rate (percent). Current = 16.6 percent.	8.3	8.3	8.3	14.2
9	Change in passenger median wait times (seconds)	19	12	12	12
10	Share of cost of pay increase absorbed by increased utilization rates (efficiency gain divided by 13.2 percent), (in percent)	78.0	0.0	52.3	52.3

Source: Authors' analysis.

Scenario F is the same as Scenario B (in Exhibit 20A), except that Scenario F assumes a labor supply elasticity of 0.5 instead of 0.4. Compared to Scenario B, the only simulation change in F involves a net change in trips by incumbent drivers (row 5). This result follows directly from the assumed greater responsiveness of drivers' desire to supply more trips in response to the pay increase.

Scenario G seems particularly unlikely since it has several adverse consequences. It shows that a 10 percent fare increase allows a fairly high commission rate of 14.2 percent. However, such a large fare increase would reduce passenger trips by 12 percent. It would therefore eliminate the policy-related driver pay increase for all incumbent drivers.

5.6 Summary

This section has analyzed the likely behavioral responses of the drivers, companies, and passengers to the 14 percent pay increase needed to lift FHV app drivers above the proposed pay standard. On average, drivers are likely to increase their working hours. At the same time, the structure of the pay standard should encourage companies to improve utilization—the efficiency with which they manage the drivers' time. This increase in driver productivity would absorb a large part of the cost of the driver pay increase.

The simulation model analyzes the overall effects of alternative scenarios, with different passenger fare increases, utilization increases, and driver responses to higher pay. These exercises show that the pay increase likely can be readily absorbed through a combination of utilization increases, commission reductions, and modest fare increases.

Our three most likely scenarios use core assumptions that we believe are highly plausible: a 0.4 labor supply elasticity, a four-percentage point utilization increase, and a -1.2 consumer demand elasticity. These scenarios then consider alternative passenger fare increases of zero, three, and five percent, and examine the implications for commission rates. Holding fares steady reduces the commission rate from 16.6 percent to 5.6 percent. With a three percent fare increase, a commission rate of 8.3 percent would result, and the commission rate would be 10.1 percent with a five percent fare increase.

Four additional scenarios, which we consider less likely, help illustrate the interaction among the key elements in the pay adjustment model. These additional scenarios provide three key insights: commission rate rises further with greater fare increases; a six, instead of a four, percentage point utilization increase would absorb three-fourths of the cost of the driver pay increase; and a greater fare increase would entail a greater consumer elasticity-related decline in trips, offsetting much of the initial increase in driver pay associated with the implementation of the pay standard.

All forecasts are inevitably uncertain. We do not claim that the behavioral responses by drivers, companies, and passengers will conform precisely to the expectations outlined here. But based on our own study of the industry and on the research literature on app-dispatch services, we believe we have provided a reasonable assessment of the most salient factors. In any event, given the importance of the TLC policy proposal to drivers, the industry, and the riding public, we recommend that the TLC conduct ongoing and careful monitoring of the effects of the policy.

Section 6 Effects on the Non-App FHV Car Services

The proposed for-hire vehicle (FHV) driver pay standard currently will apply only to companies that dispatch more than 10,000 trips per day. This restriction limits the applicability of the proposal to the four app-dispatch companies—Uber, Lyft, Juno, and Via. The app-dispatch companies are part of the FHV sector, which is licensed by the TLC. The other FHV segments are traditional black car companies, livery services, and luxury limousine services. This section considers the current situation of these non-app FHV companies and how they will be affected by the FHV driver pay standard.

Black cars typically serve business clients who generally pay fares via vouchers or credit cards. Livery cars are typically neighborhood-based and serve individuals paying mostly in cash. Luxury limousine operators serve a mix of business and individual customers, with payment through business accounts or credit card.

The FHV drivers who work for these services are mainly independent contractors who mostly own or lease their own vehicles and bear responsibility for auto insurance, fuel, and all related operating costs. FHV drivers typically pay an affiliation fee to the operators, or "bases" as they are known in the trade. In some cases, the operators may also charge a commission fee, usually calculated as a percent of the passenger fare. In limited instances, some drivers for livery and luxury limousine services are hired as hourly employees and drive a company-owned car.

Most non-app FHV companies connect with passengers by phone, although a growing number use a website or an app of their own, or a combination of these methods.[61] Both large and small FHV companies employ bookkeepers, dispatchers, and owner-managers. Larger ones may also have a small staff in human resources, customer service, and other general administrative and management occupations.

6.1 Non-app FHV base numbers, affiliated drivers, and trip trends

To analyze trends and impacts, we separate the app-dispatch operators into their own category, and consider the remaining black, livery, and luxury limousine operators as the "non-app" FHV segments.[62] Exhibit 21 shows a significant decline in the number of livery and luxury limousine operators over the past four years, but a very substantial increase in black car operators, even when excluding the app-dispatch ones.

[61] This information comes from an online survey of TLC-licensed FHV bases conducted in February 2018.
[62] The app-dispatch companies, which are far larger than other FHV companies in terms of drivers, trip volume, and passengers, have bases across the three segments. Bases are the business entities licensed by the TLC to dispatch pre-arranged car services. Uber operates 26 black car licensed-bases, two livery bases, and one luxury limo base in New York City. Lyft, Juno, and Gett each operate two black car bases. Gett acquired Juno in mid-2017 and now operates under the Juno name. Via operates one black car base.

Exhibit 21: For-Hire Vehicle (FHV) Base Operators

	end of 2013	end of 2017	change 2013-17
Non-app base operators			
Black car	104	302	198
Livery	495	448	-47
Luxury Limousine	225	159	-66
subtotal	824	909	85
App-dispatched base operators			
Black car	31	33	2
Livery	3	2	-1
Luxury Limousine	1	1	0
subtotal	35	36	1

Source: TLC annual reports, 2013, 2017, and TLC information on app companies.

As of March 2018, the TLC-licensed non-app FHV base operators encompassed about 33,700 drivers of affiliated vehicles—15,300 in black cars, 14,400 in livery cars, and 4,000 in luxury limousine services.[63] The TLC began to collect data from all the FHV operators in the first half of 2015. As Exhibit 22 shows, a dramatic shift is apparent from mid-2016 on. From the six-month September 2016 to February 2017 period to the same months a year later, the number of passenger trips provided by app-dispatch companies soared by 60 percent, while the non-app FHV companies experienced a 13 percent trip decline; medallion trips fell by nine percent; and trips by green taxis dropped by one-quarter. Even the 10 largest livery car companies, which averaged 240 affiliated cars each at the end of 2017, experienced a fall in combined trip volume of 19 percent—between the first quarter of 2016 and the last quarter of 2017.

The ability to request car services through an app on a smartphone and to access precise information on the arrival time and location of the car is customer-friendly, convenient, and popular throughout the city. The trip volume trends since mid-2016 show that taxi and FHV services are increasingly dominated by the app companies. As Exhibit 23 shows, app-based services had 59 percent of the citywide total market in the first two months of 2018, nearly twice the medallion share, and more than five times the size of the combined shares of the non-app FHV and green taxi segments. The non-app FHV share of the citywide market fell by one-third over the past year, from 12 percent in the first two months of 2017 to eight percent in the same months of 2018.

[63] About 40 percent of the TLC-licensed luxury limousine services (and affiliated drivers) are located in suburban areas outside of the city. Only a handful of black car companies are based outside of the city. All livery companies are city-based.

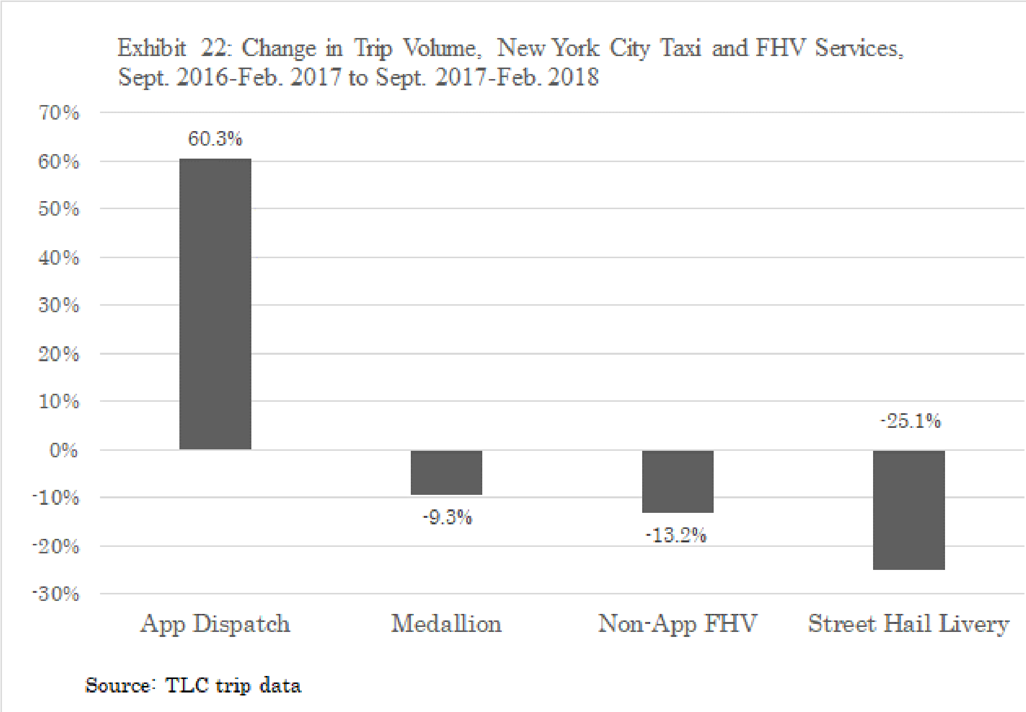


Exhibit 22: Change in Trip Volume, New York City Taxi and FHV Services, Sept. 2016-Feb. 2017 to Sept. 2017-Feb. 2018
70%
60%
50%
40%
30%
20%
10%
0%
-10%
-20%
-30%
60.3%
-9.3%
-13.2%
-25.1%
App Dispatch
Medallion
Non-App FHV
Street Hail Livery
Source: TLC trip data

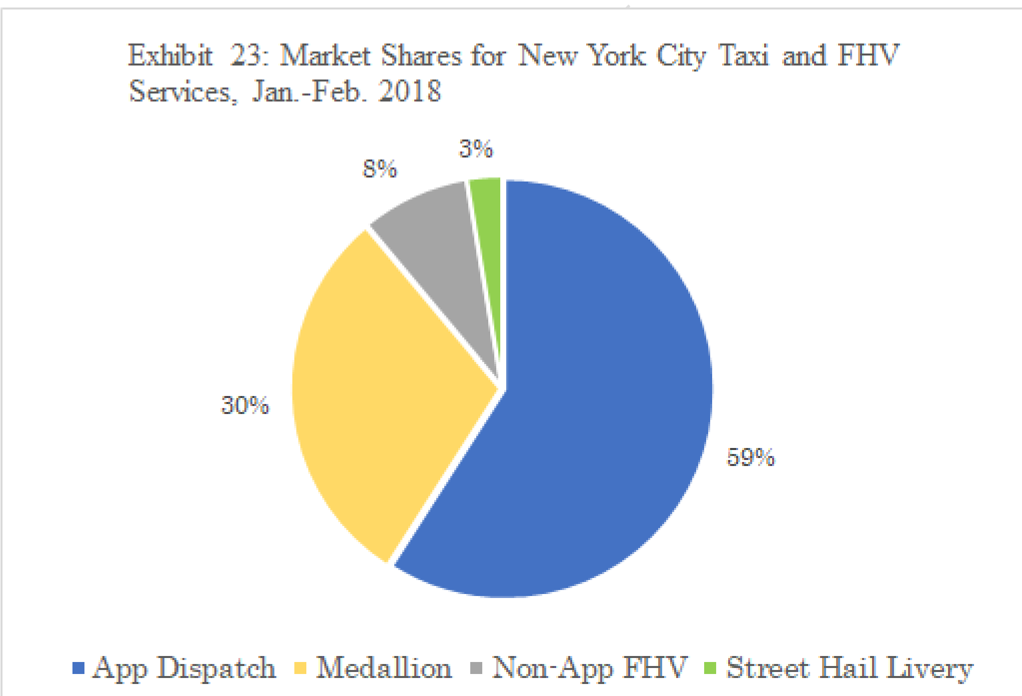


Exhibit 23: Market Shares for New York City Taxi and FHV Services, Jan.-Feb. 2018
3%
8%
30%
59%
App Dispatch
Medallion
Non-App FHV
Street Hail Livery

While some of the larger livery and black car companies have 100 to 500 affiliated vehicles, the great majority are very small businesses. Well over half of all livery and black car companies have fewer than 20 affiliated vehicles. The roughly 1,000 taxi and car service companies located in New York City employ an average of 5.1 workers; annual payroll for the 5,360 employees totaled about $200 million in 2016.[64]

Over the past two years, the app-based companies have dramatically expanded their services across most neighborhoods throughout all of the city's five boroughs, and especially beyond Manhattan. Exhibit 24 shows the increased trip volume by app-based companies at a zone level for the five boroughs.

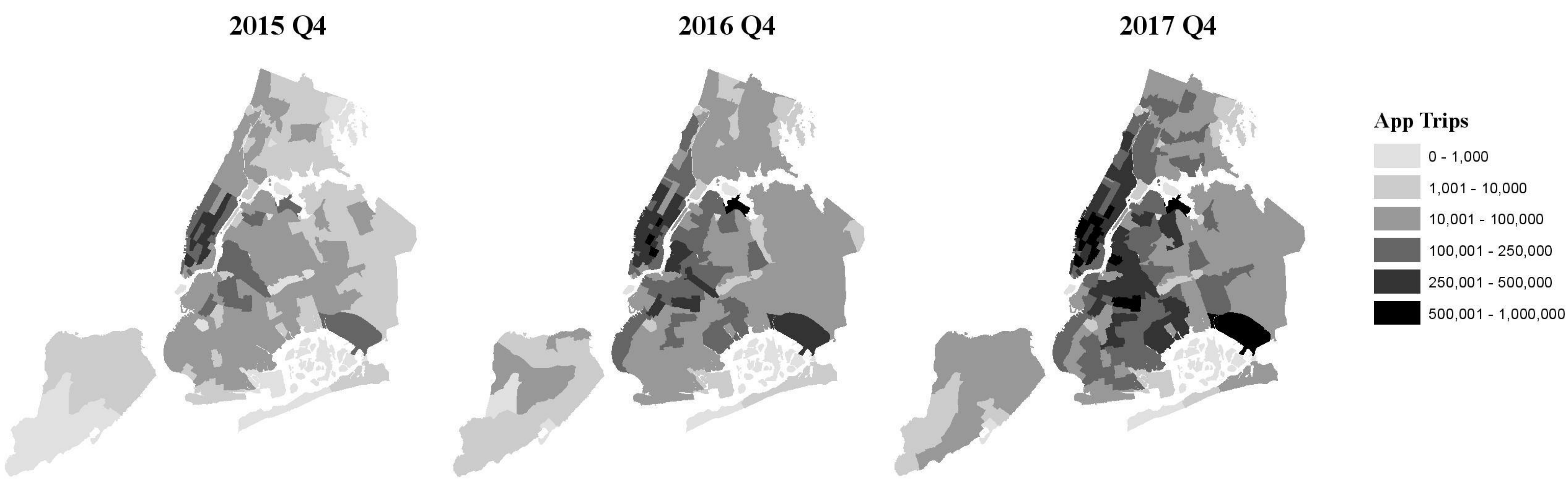
A recent Citywide Mobility Survey sheds additional light on the extent of, and reasons for the citywide increased app-dispatch patronage. The non-app companies have been losing business as the app companies have steadily grown by providing "fast," "reliable," and "convenient" service. These were the factors most prominently mentioned by respondents in the city's recent Citywide Mobility Survey, conducted during the spring of 2017.[65] In seven of 10 areas designated in the survey report (three sub-borough areas in Queens, two each in the Bronx, Brooklyn and Manhattan, and all of Staten Island), 41 percent or more of survey respondents reported using at least one ride-hailing app, and many used more than one. In Inner and Middle Queens, and in Northern Manhattan and Northern Bronx, higher percentages of respondents said they used ride-hailing apps than in the Manhattan Core area.[66]

App trips in Staten Island, Inner Queens, Inner Brooklyn, and the Manhattan Core were more likely to be for social or recreational purposes, while shopping trips were a common purpose for app trips in Southern Bronx, Northern Bronx, and Staten Island. Across almost all parts of the city, 20 to 30 percent of app users indicated they used the app services for commuting to/from work. In most neighborhoods outside of Manhattan, 42 to 46 percent of app-using passengers reported that they previously used taxis or livery cars.

Increasingly, many drivers who have traditionally driven for the non-app services are now also driving for the app-based companies. In mid-October 2017, nearly 5,000 full-time drivers (only about eight percent of the total in the app earnings files but still a sizable number) divided their time between app- and non-app companies, with about 56 percent of their trip time for non-app services. The fact that drivers for the traditional services also drive for the app companies might help some traditional companies stay in business, since their drivers can supplement their earnings.

[64] These numbers exclude most of the drivers because they are independent contractors, not employees. Data from the Quarterly Census of Employment and Wages for the "taxi and limousine services" industry. Average employment size ranges from 3.8 in Staten Island to 6.9 in the Bronx.
[65] Among six choices, "inexpensive" received by far the fewest mentions among survey respondents.
[66] The survey results cited in this and the following paragraph are from the New York City Department of Transportation's Citywide Mobility Survey, Prepared by PSB, August 2017.

Exhibit 24: Growth in App Services Trip Volume



Source: TLC.

The proposed driver pay standard applied to companies with high trip volumes may create new pressure on traditional FHV operators to raise driver pay or make other changes that appeal to drivers, such as allowing the use of vehicle models not accepted by the large app-based companies. Some traditional companies might also see an opportunity to slightly raise their fares should the app companies also raise fares. In other cases, traditional community and black car services might introduce their own apps to pool requests and dispatch drivers, as some have already been doing.

6.2 Summary

The impact of the proposed pay standard on the non-app FHV services is likely to be relatively small and is likely to neither ease the pressure on this sector from the app companies nor significantly exacerbate trends that have been occurring independently of this policy. The non-app FHV sector's share of all trips citywide, which has been declining for some time, fell by an additional one-third (from 12 percent to eight percent) between early 2017 and early 2018 alone.

The non-app FHV companies are likely to continue to lose drivers to the app-based sector regardless of the driver pay standard. Some traditional FHV companies may do better: those that serve niche markets; that have a loyal customer base; that provide working conditions that appeal to certain drivers; or that adapt their services—including introducing their own app and providing more reliable services. But the competitive challenges facing the traditional non-app companies are likely to continue.

Section 7 Effects of the Pay Standard on New York City's Economy

The magnitude of New York City's app-driving sector suggests that the driver pay standard could have sizable effects on the city's economy. About 80,000 drivers earn roughly $3 billion annually in gross pay by providing app-dispatched services in New York City. After expenses, the median driver earns $14.25 per hour, but does not receive employment-related benefits and must pay the employer payroll tax.

The combined weekly hours of the drivers for the four large app-based companies exceed the employee hours among prominent New York City industries, including commercial banking, hotels, insurance carriers, drugstores, and publishers.[67] If Uber's drivers were employees instead of independent contractors, the company would be the largest private sector employer in New York City, a city with hundreds of large employers.[68] The establishment of the pay standard could usher in a new era for an industry that has surpassed several other industries in size, and yet provides inadequate compensation to most of its drivers.

As we have seen in previous sections, the TLC driver pay standard proposal will increase driver pay an average of 14 percent. We have also found that the app-based transportation system could easily accommodate this increase without causing a reduction in trip volume. This section builds upon these results to estimate the broader economic effects of the policy proposal on the New York City economy.

7.1 The boost to New York City consumer spending

The projected average 14 percent increase in driver compensation represents a larger increase in after-expenses hourly pay. The difference occurs because driver expenses are essentially constant per week. Since expenses account for a little over one-third of driver gross compensation, the pay increase affects only the nearly two-thirds' share that comprises driver net pay. The average driver's net pay increase is therefore approximately 22.5 percent. This amount is very similar to the 23 percent estimated $15 minimum wage-related earnings increase for workers in New York City and elsewhere in the state who will receive pay increases because of the state's $15 minimum wage phase-in (Cooper 2016; Reich et al. 2016).

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67 Estimated app driver hours for the first quarter of 2018 equals 67,400 FTE positions. Average annual employment for 2017 from the Quarterly Census of Employment and Wages: commercial banking (56,100), publishing (44,500), hotels (51,900), drug stores (46,500), and insurance carriers (55,700).

68 Beside three private hospital networks that each have large facilities outside of New York City, the largest private employer in New York City is JP Morgan Chase with 29,000 employees, according to the 2018 Crain's New York Business Book of Lists, p. 18. The number of imputed working hours by Uber drivers during the week of October 15, 2017 was over 1.3 million. Those driver hours were provided by over 55,000 drivers. The 1.3 million hours divided by 40 weekly hours and 50 weeks per year equals a little over 33,000 FTEs on an annual basis, larger than the JPMorgan Chase workforce in New York City.

As we discussed in Section 5, this net driver pay increase will likely be absorbed from three sources: increased utilization of drivers' time, which will increase driver pay at a reduced cost to the companies; reduced company commissions among the largest app-based companies; and slightly higher passenger fares paid by consumers.[69]

The increase in driver pay and any decrease in company commissions will together generate more total consumer demand in the New York City economy; any fare increase will reduce consumer demand by much less. In other words, the net change in consumer demand will be positive.

In Section 2 we estimated that New York City-based commissions (company profits) approximate $500 million per year for the app-based industry. These commissions largely flow out of the local economy since they are mostly used to finance expansion of the companies in other locations. Any amount distributed to owners would flow to other locations, such as where the investors (including Silicon Valley venture capitalists) reside. Reducing commissions thus will have a very small effect on consumption or investment in New York City.

The increase in driver pay will increase spending mainly within the New York City economy. A large majority—85 percent— of drivers who work in New York City also live in New York City; three-fourths of them live in the Bronx, Brooklyn, and Queens. According to our calculations in Section 5, total driver income would increase annually by about $335 million. The 85 percent New York City resident driver share of that amount would therefore approximate $284 million annually.

In the event of a passenger fare increase the growth in net incomes would be offset by small real income declines for passengers paying higher fares.[70] The companies should want to minimize fare increases since fare increases would reduce their revenues, given the sensitivity of consumer demand to the prices of app-based services. As driver incomes rise, drivers' receipts of public benefits, particularly food stamps and Medicaid, will fall somewhat, which will also induce a slight reduction in the cost to taxpayers.[71]

Since the app companies' profits now mainly flow out of New York City, reduced commissions imply reduced outflows. Consequently, reduced commissions would have

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[69] The minimum wage research literature suggests that driver attrition will also fall, reducing recruitment and replacement costs for the companies (Dube, Lester and Reich 2016).

[70] According to a recent New York City Department of Transportation Mobility Survey (p. 69), 28 percent of ride-hailing users had household incomes of $100,000 or more, one-third had incomes between $50,000 and $100,000, and 39 percent had incomes of less than $50,000. Passengers thus include a broader distribution of household incomes than do drivers. Consequently, their spending reduction rates are smaller than the increase in spending rates by the drivers.

[71] As we noted in Section 2, ACS data on New York City taxi and FHV drivers indicate that 40 percent rely on Medicaid for health insurance coverage and 18 percent receive food stamps. Higher incomes may also lead some drivers to purchase health insurance, since 16 percent were uninsured in 2016. Previous research on minimum wage increases has shown that such reductions offset only a small fraction of the earnings gains for workers (Reich and West 2015).

little negative effect on spending in the city's economy.[72] Business taxes paid to the City and the State might be slightly lower, although such taxes paid now might be minimal. Many companies in other industries use licensing or royalty payments to corporate headquarters to shift profits generated locally to other jurisdictions.[73]

Our conservative (and very approximate estimate) suggests that the net increased income for New York City residents is likely to be nearly $300 million. Much of this additional income will translate into additional consumer spending in the local economy. In economic parlance, the mostly low-income drivers have very high propensities to consume out of their income.[74] In other words, they will spend almost all their additional earnings on goods and services in New York City, especially in their own predominantly immigrant neighborhood economies.

As we have mentioned, passengers of app-based companies who would bear a possible fare increase will experience a small loss in real income. If app passengers on average spend five percent of their income on app-based rides and if one-fourth of New York City residents are app passengers, the income loss from a five percent fare increase would be only .06 percent. The actual effect on spending is likely to be smaller, since some passengers will absorb their loss in part by reducing their savings.

App-based passengers are distributed over a larger part of the income distribution than are the drivers. Lower-income passengers spend proportionately more of their income on services, but they are also much more price-sensitive to any possible fare increases than higher-income riders. Higher-income passengers have low propensities to consume; their small real income losses will partly result in reduced savings, not just reduced consumption. The owners and managers of the app companies, only some of whom reside in New York City, spend an even lower share of their incomes in New York City.

An overall consumer stimulus on the order of $300 million is not large, relative to the size of the $800-plus billion New York City economy. But it is not negligible either. Moreover, much of the increased spending on goods and services will be locally produced, implying a local economic multiplier impact. The overall increase in consumer spending would thus mean somewhat more sales for local businesses, greater local employment, and higher local income and sales taxes.

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[72] Spending on advertising and on professional services provided by New York City-based firms might fall somewhat. Such amounts likely would be smaller in magnitude. A definitive estimate would require more detailed financial information than the app companies have released.

[73] In other words, an app company that is profitable in New York City might offset some of those profits (and local income tax liability) by making unusually large payments to corporate headquarters.

[74] A number of minimum wage studies have examined the aggregate effects of minimum wage increases on consumer spending. The most persuasive is Cooper, Luengo-Prades and Parker 2017.

7.2 Effects on the other segments of New York City's transportation system

The non-app FHV companies Since the non-app FHV companies have much lower daily trip volumes than the four large app-dispatch companies, they would not be subject to the proposed pay standard. Nonetheless, the pay standard will affect the non-app FHV companies since many of their drivers also drive for the app companies.

The TLC universal driver's license makes it easy for drivers to work in different segments of the FHV market. If the pay standard increases app pay above the level earned in the non-app companies, these drivers may be able to improve their earnings by concentrating more of their driving for the app companies and reducing the time they drive for the non- app companies. This shift may put pressure on the lower-paying non-app companies to raise their driver compensation. (Some of the non-app companies, particularly the black car services, already pay more than the proposed TLC standard.)

As we noted in Section 6, the citywide taxi and FHV market share of the non-app FHV companies has been falling for some time. This fall has continued, from 12 percent market share in the first two months of 2017 to eight percent in February 2018. It seems likely that many of the smaller non-app companies will continue to lose market share to the rapidly growing app sector, independent of the introduction of a pay standard. Some may adapt by improving the quality and convenience of their services; otherwise, they likely face continued significant challenges.

Medallion and street hail livery service The minimum driver income policy is not designed to ameliorate pressures facing the yellow or green taxi drivers or non-driving medallion or base owners. However, policies to address the low compensation of app drivers should indirectly benefit medallion drivers. Proposals to cap the number of FHV drivers or vehicles also lie outside our purview, as caps currently do not lie within the regulatory capacity of the TLC. Still, the TLC's proposed minimum pay policy is likely to reduce the number of new FHV drivers and vehicles.

Congestion and cars on city streets While the pay standard is not designed to address the congestion problem directly, to the extent it succeeds in increasing utilization the TLC standard will have a moderating effect. Any tapering in the growth of the number of drivers and vehicles providing app-based services would likely moderate a further worsening in traffic congestion in New York City. But it seems unlikely that the pay standard by itself would meaningfully ameliorate such congestion.

7.3 Effects on consumer wait times, government, and the local labor market

Consumers Consumer convenience is a major factor in the demand for app-dispatched car services. The pay standard is not likely to measurably affect that convenience. The average app response time to a passenger request is five minutes (300 seconds). According to Cook et al. (2018) a 10 percent increase in driver utilization rates (which would be substantial) would likely increase response times by six percent, which amounts to only 18 seconds. It does not seem likely that riders would notice such a small increase.

Government As we discussed in Section 7.1 above, when the earnings of low-income workers like app drivers rise, they rely less on government for public benefits such as nutrition assistance and Medicaid. In addition to savings from reduced public benefits, the public treasury also gains since better-compensated workers will pay more in income taxes on their earnings and in sales taxes on the goods and services they purchase.

Local labor market The pay standard will also have repercussions for the thousands of other New York City independent contract workers who have become engaged in the "gig economy." The pay standard will test the feasibility of regulating such labor market practices. If it is successful, the TLC standard may also inspire other jurisdictions in the U.S. to formulate pay standards for independent contractors.

The TLC standard may also indirectly improve working and pay conditions of tens of thousands of other New York City workers. The ongoing increase in the State's minimum wage (which will reach $15 an hour at the end of 2018, from $7.25 five years earlier) is raising earnings and family incomes for approximately one-third of all New York City workers (Cooper 2016; Reich et al. 2016). The rising minimum wage (together with sustained low unemployment in recent years) is pressuring many businesses to raise pay, improve working conditions, and institute operating changes to improve their overall efficiency (Woodruff and Parrott 2018). The TLC standard may reinforce these changes.

7.4 Summary

The driver minimum pay standard would have small but beneficial effects on the New York City economy. The policy would raise the earnings of 80,000 drivers (in addition to those whose pay would rise from the pay standard, all drivers providing shared rides would receive the $1 per pickup shared ride bonus); the industry-wide increase will total $335 million. This increase in driver income would be spent mainly in New York City, in contrast with the industry's roughly $500 million in New York City-based net commissions, which mainly leak out of the local economy. The estimated increase in consumer spending is small, compared to the size of the city's economy, but it is positive and not negligible. The other effects on the New York City economy would be even smaller.

Section 8 Summary and Conclusions

This report examines net pay and hours among app-based drivers in New York City, presents a proposal to create a minimum driver pay standard, and examines how the industry would absorb the cost of such a standard. We have undertaken a wide-ranging study of the app-based business model, industry driver characteristics and earnings, and regulatory levers and limits. Since New York is a world-class metropolis, the study involved a complex analysis. We were very fortunate to have access to extensive administrative data on all the drivers and companies in the industry, as provided to us by New York City's Taxi and Limousine Commission. Our work was eased considerably by assistance from the TLC's very capable data and policy analysts.

Our study, the first of its kind, examines the salient characteristics of the app-based industry as it has evolved in New York City and appraises the TLC's innovative policy design. The transportation app industry in New York City shares characteristics of the industry in other dense world-class cities, such as London, Paris, and San Francisco. However, the New York City industry differs substantially from the view presented in earlier studies that relied on national data for just one company. The policy design is innovative because the companies for the first time will pay a cost to maintain increasing pools of low-utilized drivers; the policy compels the companies to allocate rides in a manner benefitting the drivers. This policy may well serve as a model for other cities. The policy will also be a model in setting the first pay standards for independent contractors in the United States.[75]

The app-dispatch industry has grown rapidly in New York City, to the point that it now accounts for twice the number of trips as medallion cabs. The industry provides more jobs than many prominent industries, including commercial banking, hotels, and publishing. Uber alone would be the largest for-profit private employer in New York City—if Uber drivers were classified as employees rather than independent contractors.

Throughout the U.S., the business model of the app transportation industry calls on drivers to become independent contractors who drive their own vehicles. Many app drivers across the U.S. already owned their own cars when they started driving. But in New York City, a large majority of the app drivers had to acquire vehicles to drive for business purposes. The associated capital investment—and the risks associated with it—make it necessary for many of these drivers to work full-time or more. The capital investment also makes it difficult for them to switch to non-driving employment opportunities. As a result, drivers will stay in the industry even if hourly compensation falls below minimum wage standards in the rest of the local economy.

[75] The Bureau of Labor Statistics' 2017 Contingent and Alternative Employment Arrangements Survey counted the proportion of workers whose primary job was classified as an independent contractor. The overall proportion of independent contractors did not change since the previous survey in 2005. However, the proportion in transportation increased by 50 percent, indicating the growing importance of the app industry business model. https://www.bls.gov/news.release/pdf/conemp.pdf

New York City's app drivers are indeed much more likely to be full-time drivers than in other cities. The drivers are predominantly immigrants who provide the bulk of their family's earnings. Administrative earnings records indicate that hourly earnings are low for most drivers, after accounting for vehicle and licensing costs.

Unlike the winner-take-all characteristics of other network-based industries, the cost characteristics of the app-driving industry are generating competition among a small group of companies. To compete successfully, the app firms seek to minimize customer wait times. To do so they maximize the drivers available at any given time, which implies lower driver earnings per hour worked. Moreover, each company benefits by having a pool of multi-platform drivers, as their existence expands the unutilized driver work force available for all of them. It is thus not surprising that the enormous growth in the demand for app drivers has not translated into higher net earnings per hour for individual drivers.

Since drivers supply their own vehicles and are not employees, the operating costs of the app companies are very low relative to the commissions they collect. As a result, mark-ups over local variable costs approach 600 percent. Commission rates could be much lower and still generate profit rates well above the norm among comparable industries that provide intermediary services.

Our analysis of the app-based companies reveals industry inefficiencies and inequities: incentives to increase the number of drivers without regard for the consequences on driver pay; low driver utilization per driver working hour; and commissions that generate large mark-ups over local operating costs for the dominant industry firms. Only recently have the companies begun to increase their proportion of shared rides.

Our analysis of the TLC's data reveals low driver earnings. After deducting their estimated driving expenses, we find that 85 percent of app drivers are currently paid below the proposed minimum pay standard of $17.22. To remedy this situation, the TLC proposes to establish a minimum pay standard for drivers in the largest FHV companies. The pay standard includes a paid time off component, in consideration of the long hours worked by many drivers, and the beneficial effect paid time off would have on passenger, pedestrian, and driver safety.

The pay increase would amount to about $6,345 per year for drivers now below the standard, equivalent to a 22.5 percent increase in their net compensation, after paying for vehicle expenses. Since vehicle expenses would not be much changed, this increase in net pay can be accomplished with a much smaller proportionate cost increase to the companies. Overall driver pay would rise 13.2 percent, with drivers currently below the standard receiving an average 14 percent increase in gross pay—to $25.76 per hour.

How would the industry absorb a 13.2 percent cost increase? The policy includes per-mile and per-minute factors, adjustments for driver utilization rates and an extra payment to drivers for shared rides. Our simulation model suggests that a little over half of the costs could be borne by an increase of 2.5 minutes of paid trip time within each working hour and by increasing the proportion of shared rides. The companies can choose how to allocate the remainder of these costs—whether through fare increases or commission reductions or a combination of the two. Fares might not increase at all or could increase by three to five percent. Passenger wait times could increase by about 12 to 15 seconds. These outcomes are consistent with the industry meeting the continued growth in demand for app-based rides.

It thus seems feasible to improve the standard of living of app drivers while also allowing the industry to continue to meet passenger demand. We conclude that the policy may very well result in a 22.5 percent increase in take-home pay for over 50,000 drivers—with thousands of additional drivers benefiting from increased pay for shared rides.

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Appendix Methodology for Driver Earnings Analysis

We provide here details on our data, how we compile the data into trip and earnings files, how we calculate driver's expenses per hour, and a fuller explanation of how we estimate the effects of the proposed pay policy on the level and distribution of driver pay.

A. Data

This study relies extensively on detailed driver-specific administrative earnings data for the major app-dispatch companies for four study weeks in 2016 and 2017. Through its authority under the New York City Charter to regulate the for-hire vehicle (FHV) industry, the Taxi and Limousine Commission (TLC) obtained detailed driver earnings data from Uber, Lyft, Juno, Gett, and Via for the weeks of September 11-17, 2016; March 19-25, 2017; June 18-24, 2017, and October 15-21, 2017. (Gett merged with Juno in mid-2017.)

The TLC then compiled administrative earnings files on the universe of app-dispatch drivers for these four study weeks. Earnings were compiled for each driver for each company; combined earnings across companies were tallied for drivers working for more than one company in any given week. In all, earnings data were analyzed for 41,291 drivers in the September 2016 study week, 50,657 drivers in the March 2017 week, 56,429 in the June 2017 week, and 61,729 in the October 2017 week. Our study permits an unprecedented analysis of driver earnings across companies for an entire city's app sector. Previous earnings studies have either drawn from data on just one company (Uber) or from surveys of the drivers.[76]

The files on each company vary somewhat. The Uber data includes two sub-files. A *trip* file includes each driver's TLC license number ("hack" number); week range; service type (regular or shared); total trip minutes; total trip miles; total rider payment; total gross amount earned by driver; total amount deducted from gross driver payment, including Uber's fee, Black Car Fund 2.5 percent surcharge (a statewide workers' compensation fund for black car services—most of those covered drive in New York City); sales tax; total trip tolls and surcharges; and total net amount paid to driver after deductions (driver payment). The fourth study week (October 2017) file for Uber included tips—the Uber app was only modified in mid-2017 to allow passengers to include a tip amount in the rider payment. An *expense* file provides hack number, and information on incentive payments, gas card deductions, vehicle lease or rental costs, equipment fees, rider vehicle cleaning fees, and miscellaneous payments. The TLC staff merged these two files by driver hack numbers.

The Lyft data includes drivers' hack number, total number of trips, total trip minutes, total trip miles, driver payment, tips, tolls, Black Car Fund fee, sales tax, Lyft's commission, and total rider payment.

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76 Hall and Krueger (2018) and other papers co-authored by Jonathan Hall, Uber's Chief Economist. A prominent blogger on the app driving industry, Harry Campbell ("The Rideshare Guy"), conducts an annual survey of drivers. See, e.g., https://therideshareguy.com/2018-uber-and-lyft-driver-survey-results-the-rideshare-guy/

The Via data provides daily driver data for each of the four study weeks. The Via file includes starting date, week range, drivers' hack number, total number of trips (per shift), first start time and last end time of the day, total hours on the app (which we interpret as working time), total distance driven, total trip miles, total trip time, total gross driver payment, promotions and deductions, and driver payment.

The Juno data consists of drivers' hack numbers, total number of trips, total trip miles, total trip minutes, tolls, total rider payment, and driver payment.

The Gett data consists of drivers' hack number, total number of trips, waiting time, total trip minutes, total trip miles, total rider payment, tips, Gett's commission, Black Car Fund fee, sales tax, tolls, and driver payment.

The four earnings data sets described above aggregate data for each driver on a weekly basis. (The Via, Gett, and Lyft data also provide information on tips.) Using hack numbers and the TLC driver database, the TLC staff added vehicle-specific information to all the company data files, including vehicle plate, vehicle identification (VIN) number, car year, and car make and model. With this additional information, we determined whether the driver is eligible to provide premium-priced car services.

From the TLC's FHV trip records database, the TLC staff extracted a "shift table" file that includes drivers' actual weekly working hour information. In this extract, the TLC defines a driver's actual shift working time as the time difference between the first pickup time and the last drop-off time for that shift. A gap between trips greater than three hours defines a new shift. Thus, the total actual weekly working time would be the sum of working hours for all shifts in that week. However, the FHV trip data includes drop-off time only beginning in June of 2017. The shift table file provided by the TLC therefore includes data for a 30-week period from June 4 to December 24, 2017. (December 25 to 31 are excluded because they are unrepresentative.)

B. Compiling the data

We combined the individual company earnings files and organized the data in as consistent a manner as possible. We discarded all abnormal records in which trip distance or net driver payment were negative or when trip times exceeded 83 hours (which is equivalent to 120 working hours based on 0.7 utilization rate—the highest rate among the four companies). We aggregated the Via data on a weekly basis.

We computed gross driver pay (pay before expenses but excluding tolls) and "net rider pay":

(1) *Gross driver pay = driver payment – tolls*

(2) *Net rider pay = total rider payment – tolls – black car fund – sales tax*

The Black Car Fund fee and the sales tax are legally mandated charges remitted by the company. We exclude driver-paid bridge and tunnel tolls from drivers' net pay.

For Via we imputed a value for its net rider payment by using the 10 percent commission rate published by the company.

We computed driver earnings separately for each of the four study weeks. However, we rely mainly on the results from the most recent study week, the week of October 15, 2017. This study week best reflects recent changes in the industry and company compensation policies and therefore provides the closest approximation to current practices.

C. Computing before and after expenses hourly earnings

We use driver utilization rates by company and individual driver hours to estimate each driver's working hours for each company. We then use this "imputed" working time and expense records to estimate each driver's gross (before expenses) and net (after expenses) average hourly earnings.

Drawing from their trip records database for the 30-week period during the last seven months of 2017, TLC staff computed for us each company's average utilization rate and the average number of trips per hour. We calculated each driver's working time for a given company by dividing the driver's total trip hours for the company by the company-level utilization rate. We call this the driver's imputed working time.

(3) *Imputed working time= (trip minutes/60) / utilization rate*

(4) *Hourly earnings before expenses = gross driver pay / imputed hours*

To estimate each driver's expenses per hour worked, we draw on our estimates of expenses per mile (58.0 cents per miles, as presented in Section 2.4), company-wide data on driver trip minutes per hour, (utilization rate), TLC data on individual driver's trip miles, and an allowance for driver cruising and return ("dead-head") miles between trips. We use this amount to estimate a driver's total work mileage driven by dividing trip miles by the company utilization rate to allow for cruising and dead-head mileage driven between passenger trips.

(5) Hourly expenses = *58.0 cents per mile * (trip miles / utilization rate) / imputed work hours*

(6) *Hourly earnings after expenses (net earnings) = hourly earnings before expenses – hourly expenses*

D. The effects of the proposed policy on the level and distribution of driver pay

To examine the effects of the policy proposal we applied the proposed standard to each driver's trip and driving time records to estimate what earnings would be for each driver under the proposal.

The pay standard, which we presented in Section 3, comprises three elements: a per-mile expense cost (58.0 cents/mile), a per-minute compensation factor (28.7 cents/minute), and a $1 per pickup shared ride driver bonus. On an hourly basis, the compensation factor of 28.7

cents per minute equals $17.22, of which $15.00 is the minimum hourly earnings target, $1.32 covers the employer payroll tax share that independent contractors pay, and 90 cents equals the paid time-off supplement. The $1 shared ride bonus is in addition to the $17.22 hourly pay standard.

In equations 7 to 9 we apply the per-mile and per-minute elements of the proposed pay standard to the actual trip mileage and time data from the earnings file for the October 2017study week. This calculation illustrates the relation of current earnings to what they would be under the proposed pay standard policy.

(7) *Policy earnings = per mile cost * trip distance / utilization rate + per minute standard * trip minutes / utilization rate;*
[this is used only for the company-level earnings file]

(8) *Policy hourly earnings before expenses = policy earnings / imputed hour;*

(9) *Policy hourly earnings after expenses = (per minute standard * trip minutes /utilization rate) / imputed hour.*

This set of formulas provides an estimated hourly earning rate for each driver by company by week.

Since many drivers work for multiple companies, we aggregate the earnings data across the companies by driver number for each week to compile each driver's combined earnings for each study week. For example, if a driver accepted trips from both Uber and Lyft in the study week, that driver would have earning records in both the Uber and Lyft files. We combine these two earning records in our earnings file; that is, we sum all the columns of these two records— trip minutes, trip miles, net driver pay, policy earning, and imputed hours. Applying equations 4, 5, 6, 8, and 9 to this combined earning file, we obtain the pre-policy and post-policy hourly earnings rates for each driver. In Section 3, we report the driver counts, the summary statistics of imputed hours, hourly earnings after expense, hourly earnings before expense, and the percentage of drivers falling below the policy earnings standard for each week for the combined earning data.

Next, to better understand the working pattern of below-minimum drivers, we extracted their earning records in the third and fourth weeks. We merged these earning records with the shift table file of corresponding weeks and obtained the actual working hour of these drivers. We grouped them into five-hour buckets and determined the frequency of each bucket. This provided an overview of working hours distribution of the below-minimum drivers (reported at the end of Section 3).

To better understand characteristics of the drivers above the minimum pay standard, we identified those drivers who used premium service vehicles who would be eligible to command higher passenger fares. Slightly over two-thirds of all drivers with earnings already above the pay standard (for whom we could identify vehicle make and model) drove premium-service vehicles. Among the other one-third of drivers making more than the standard, about two-thirds were part-time drivers whose driving schedules concentrated at peak rush hours, when they could obtain a higher number of trips each hour.

Glossary

Actual working hours
The time from the beginning of a driver's first trip until the end of the driver's last trip, as measured by data in the TLC trip files. This work shift metric is similar to but not identical with the time that drivers' apps are turned on to signal their availability. Our work shift measure includes the time drivers spend on breaks and excludes the time drivers spend commuting from and to their homes.

After-expense (or net) driver earnings
The amount of income earned by drivers after netting out vehicle and related expenses. Expenses include one-time upfront administrative costs, recurring costs such as license renewal and annual vehicle inspections, and ongoing vehicle acquisition and operating costs.

App companies
Companies that use smartphone software technology and matching algorithms to connect drivers and passengers. The four major app companies that provide transportation services in New York City are Uber, Lyft, Via, and Juno. (Gett acquired Juno in in 2017 and now operates under the Juno name.) See also *transportation network companies*.

App dispatch
The allocation of passenger trips to drivers of affiliated vehicles through mobile apps.

Bases
Business entities that are licensed by the TLC to dispatch car services. The TLC distinguishes among three types of for-hire vehicle (FHV) bases: black car, livery car, and luxury limousine. All FHV services are arranged through a base or a dispatch service provider working with a base.

Black cars
Black cars provide prearranged car services to passengers, typically through mobile apps or agreements with corporate clients. Approximately 90 percent of black car business is conducted with non-cash payment.

Black Car Fund Fee
A 2.5 percent surcharge applied to FHV passenger fares to be paid into the Black Car Fund (technically the New York Black Car Operators' Injury Compensation Fund), a non-profit organization established by New York State in 1999 to provide workers' compensation coverage for black car drivers. The app companies collect the Black Car Fund Fee and remit it to the Fund.

Commission
A fee charged to drivers by app companies and other base operators, usually calculated as a percentage of the passenger fare but also affected by driver incentive payments and rider

promotions Actual commission rates in this report draw from TLC administrative data and consist of passenger revenues less driver payments, divided by passenger revenues.

Consumer price elasticity
The responsiveness of consumer demand for a product to price changes for that product. Consumer demand can be relatively elastic or inelastic. If consumer demand is elastic, the quantity demanded varies along with the change in price. If demand is relatively inelastic, the quantity demanded will change much less than the price change.

Driver labor supply elasticities, intensive and extensive
Driver labor supply elasticity measures the responsiveness of driver hours worked to changes in pay per trip. The intensive margin refers to changes in the hours worked by incumbent drivers, who can choose their schedules. The extensive margin reflects the addition of new drivers and is managed by the companies.

Fixed and variable costs
Fixed costs remain constant with incremental changes in production. Examples of fixed costs include advertising, rent and insurance. Variable costs change with incremental changes in the quantity of output. Examples of variable costs include fuel and vehicle maintenance costs.

FHV
An FHV or for-hire vehicle is a motor vehicle licensed by the TLC to provide rides to passengers on a pre-arranged basis. FHVs include app-based and traditional livery car, black car, and luxury limousine services.

Green taxis
Also referred to as street-hail liveries (SHLs), green taxis provide both street hail and prearranged for-hire service in northern Manhattan and the outer boroughs. The TLC sets the fare for green taxi street hails, and the affiliated base sets the fare for prearranged trips. Green taxis are a type of FHV.

Gross (or pre-expense) driver earnings
The income earned by drivers before accounting for all vehicle and licensing expenses. It excludes bridge and tunnel tolls, the Black Car Fund fee, and any State and local sales taxes collected by the companies. The companies remit to the drivers the tolls they pay since the tolls are assessed on the driver's vehicle.

Imputed working time
Total trip durations divided by average company utilization. Imputed working time is used to estimate hourly earnings for all drivers on a given platform. The imputation of working time is necessary because of complications in determining company-specific working time when a driver uses more than one platform over the course of a working shift.

Livery cars
Livery cars provide for-hire service to passengers on a pre-arranged basis. They are typically neighborhood-based and serve individuals paying mostly in cash.

Mark-ups
Mark-ups are the amount included in a cost price to cover overhead and profit. We refer to mark-ups as a percentage over the cost of production (variable cost).

Medallion taxis
Yellow taxicabs permitted to pick up passengers across the five boroughs in response to a street hail. Yellow taxis must have a medallion issued by the TLC. The total number of medallions is fixed by the TLC.

Network scale economies
Network scale economies are present when the value of a product or service to each network member increases when the total number of users increases. Facebook and Twitter are examples of network scale economies—a greater number of users increases the value of the service to each member.

Oligopoly
An oligopoly is a market condition in which a small number of firms dominate a market.

Peak and off-peak hours
Peak hours are the busiest time of day for drivers. Peak hours coincide with weekday morning and evening business rush hours, and during weekend evenings and nights. Off-peak hours are the hours in-between peak hours when demand is lower and infrequent.

Reservation wage
The lowest wage rate that a worker would be willing to accept to perform a particular job. The reservation wage is influenced by many factors, including but not limited to the nature of the job, the cost of switching jobs, and the worker's education level, general health, marital status and probability of finding another job.

Transportation network companies
A transportation network company (TNC) connects passengers through websites and mobile apps with affiliated drivers who use personal vehicles. App companies operating in New York State but outside of New York City—currently Uber and Lyft—are classified as TNCs under a 2017 state law that created a different regulatory system. The app companies have argued that they are intermediaries who provide network technology, and hence not subject to transportation regulations. Regulators in many other jurisdictions, notably California and San Francisco, consider them as a specific kind of transportation company.

TLC
TLC is the abbreviation for the New York City Taxi and Limousine Commission. The TLC is charged with licensing and regulating New York City's medallion taxicabs, for-hire vehicles, commuter vans, and paratransit vehicles.

Two-sided markets
A two-sided market is a meeting place for two sets of agents who interact through an online intermediary or platform. Well-known companies in two-sided markets include Amazon, American Express, eBay, Facebook, Google, MasterCard, Twitter, and Visa.

Universal TLC license
A single license issued by the TLC for all taxi and for-hire vehicle (FHV) drivers in New York City. It was introduced in 2016. Medallion and FHV driver's license holders were automatically converted to this new, combined license that allows drivers to operate all TLC-licensed vehicles, except for paratransit and commuter vans.

Utilization rate
The proportion of total working time during which drivers have passengers in their vehicles.

WAV
Wheelchair accessible vehicles (WAVs) are vehicles designed to permit access to and enable the transportation of persons in wheelchairs.

New York City Taxi and Limousine Commission

Notice of Promulgation

Notice is hereby given in accordance with Section 1043(b) of the Charter of the City of New York ("Charter") that the Taxi and Limousine Commission ("TLC") promulgates rules amending its provisions regarding driver income and vehicle lease transparency. These rules are promulgated pursuant to Sections 1043 and 2303 of the Charter and Section 19-503 of the Administrative Code of the City of New York. These rules were published in the City Record on August 28, 2018 for public comment. On October 3, 2018, a public hearing on these rules was held by the TLC at its offices at 33 Beaver Street, 19th Floor, New York, New York, and the rules were adopted by the Commission on December 4, 2018. Pursuant to Section 1043(c)(1)(c) of the Charter, these rules will take effect 30 days after publication.

STATEMENT OF BASIS AND PURPOSE OF RULES

On Tuesday, August 14, 2018 Mayor de Blasio signed into law legislation that mandates these rules. Local Law 150 of 2018 reiterates the authority of the Taxi and Limousine Commission (TLC) to establish a driver pay floor and Local Law 149 of 2018 provides the same support for TLC's authority to require the provision of certain data from for-hire vehicle (FHV) service providers. These rules provide protections relating to income and financial transparency to FHV drivers and taxi drivers.

FHV Drivers

As the number of FHV drivers has grown by more than 80,000 since 2014, drivers are working longer hours for fewer trips and less pay, while bearing a significant share of the expenses for providing for hire service. Over 80,000 drivers now drive for the four largest FHV companies in New York City, which operate through the apps Uber, Lyft, Gett/Juno, and Via (collectively the "Largest FHV Companies"). These four companies account for over 75% of FHV trips. Despite economic success of these companies, reflected in the massive growth in the number of trips in recent years from roughly 42 million trips in 2015 to nearly 159 million trips in 2017, the majority of drivers have not shared in this success.

Driver Earnings. Based on six hours of testimony provided during the April 2017 TLC Commission hearing on driver income and expenses, meetings with industry stakeholders, including driver groups, and a TLC survey of drivers, the TLC determined that driver earnings are falling. In response to this growing evidence of declining driver pay, TLC commissioned two labor economists from the Center for New York City Affairs at the New School and the University of California, Berkeley, respectively, to study the economics of New York City's FHV industry, including driver income and earnings ("the Report"), which is available at http://www.centernyc.org/an-earnings-standard/.

Using driver earnings data from the Largest FHV Companies, the report found that FHV driver median earnings declined by almost $3.00 per hour from $25.78 in September of 2016 to $22.90

in October of 2017, a decrease of 11.17%. Eighty-five percent of these drivers are earning less than the equivalent of the $15.00 minimum wage (which was determined in the Report to be $17.22 to account for the fact that Largest FHV Companies treat these drivers as independent contractors and therefore, unlike employees, drivers are responsible for additional payroll taxes and do not receive paid time off).

Driver Expenses. As currently structured, the Largest FHV Companies follow the same business model, which requires significant financial investment and risk on the part of drivers. The FHV Companies do not pay for the expenses of purchasing, leasing or operating a vehicle and most do not pay for labor outside of trips, i.e. while idle waiting for a dispatch, but these costs are substantial. From 2015-2017, over 30,000 vehicles with the current or prior model year were licensed as FHVs. At a purchase price of $25,000 – roughly the market price of a Toyota Camry, the most common vehicle used for-hire – that amounts to $750,000,000 drivers have invested purchasing new cars before any financing is taken into account. Also, because companies classify drivers as independent contractors and not employees, they avoid common employer requirements such as paid time off, health care, and collective bargaining.

A significant portion of each fare drivers receive must go toward covering their vehicle costs and other expenses. The average cost for a driver to license, register, and operate a 2017 Toyota Camry is at least $400 per week, adding up to over $20,000 per year. Unlike drivers in other markets, these are vehicle expenses many drivers would not have were they not driving for hire. Eighty percent of drivers took on the significant cost of car ownership and maintenance mainly to earn a living by driving. In New York City, the majority of TLC-licensed drivers drive for over 30 hours per week. Sixty-five percent of drivers work full time and 54 percent are the primary earner in their household.

The Report confirmed the need for action to protect drivers against further decreases in their earnings. To reverse the trends of declining earnings and trips per driver, the rules address pay per trip as a function of both expenses and compensation, as well as how often drivers are on a trip per working hour, a factor referred to as utilization.

The commission hearing and stakeholder input also underscored the need for more transparency in the financial relationships among FHV drivers, vehicle owners, and bases. This need is also reflected in the rules.

Driver Pay Rules. These TLC rules will protect driver earnings. The driver earnings policy is as follows:

- **Minimum Per-trip Payment Formula.** TLC's rules establish a minimum per-trip payment formula to provide drivers a minimum take-home pay after covering their expenses and taking into account drivers' total working time, both time spent driving passengers as well as time waiting for a dispatch and then traveling to pick up passengers. These two latter factors will be considered a base's Utilization Rate, which is calculated by dividing the total amount of time drivers spend transporting passengers on trips dispatched by the base by the total amount of time drivers are available to accept dispatches from the base.

- The policy establishes a means for determining the minimum amount the Largest FHV Companies must pay a driver per trip. This would result in estimated typical gross hourly earnings before expenses of at least $27.86 per hour. The minimum driver pay would be determined using one of the below formulas, developed with both the expenses of non-accessible vehicles (non-WAVs) and the higher expenses of wheelchair-accessible vehicles (WAVs) in mind. The non-WAV formula would apply to trips performed in vehicles that are not equipped to transport passengers in wheelchairs, and the WAV formula would apply to trips performed in vehicles equipped to transport passengers in wheelchairs:

$$Non-WAV\ Per\ Trip\ Driver\ Pay = \left(\frac{\$0.631\ x\ Trip\ Miles}{Company\ Utilization\ Rate}\right) + \left(\frac{\$0.287\ x\ Trip\ Minutes}{Company\ Utilization\ Rate}\right) + Shared\ Ride\ Bonus$$

$$WAV\ Per\ Trip\ Driver\ Pay = \left(\frac{\$0.818\ x\ Trip\ Miles}{Company\ Utilization\ Rate}\right) + \left(\frac{\$0.287\ x\ Trip\ Minutes}{Company\ Utilization\ Rate}\right) + Shared\ Ride\ Bonus$$

- **Sample Calculation.** For an unshared, non-WAV trip that is 7.5 miles and 30 minutes long at the current industry-wide average utilization of 58%, you would see the following result:

$$\frac{(\$.631 * 7.5\ miles)}{.58\ utilization} + \frac{(\$.287 * 30\ minutes)}{.58\ utilization} = \$23.00$$

  Alternatively, for the same trip in an unshared, non-WAV dispatched by a base with a utilization of 70%, you would see the following result:

$$\frac{(\$..631 * 7.5\ miles)}{.70\ utilization} + \frac{(\$.287 * 30\ minutes)}{.70\ utilization} = \$19.06$$

- **Covering Driver Expenses and Ensuring Minimum Compensation.** The non-WAV formula requires a minimum payment of $0.631 for each mile of a trip, divided by a company-specific utilization rate, to cover a typical driver's expenses, such as vehicle purchase or lease, fuel, maintenance and insurance. Given their higher purchase and operating costs, wheelchair-accessible vehicles have a higher per mile rate of $0.818 divided by a company-specific utilization rate. The formula also requires a minimum payment of $0.287 for each minute the driver spends transporting passengers, divided by a company-specific utilization rate, to ensure a minimum compensation after expenses taking into account working time spent without a passenger. For a typical non-WAV driver, this results in gross earnings of $27.86 per hour and net income of $17.22 per hour after expenses. This figure is the equivalent of $15 per hour for a regular employee. The additional $2.22 accounts for the 7.65 percent ($1.32 per hour) drivers must pay in payroll taxes (covered by employers for their employees) plus 6 percent ($0.90 per hour) for paid time off (representing the average time off compensation value as a share of a transportation industry worker’s overall compensation according to the U.S. Bureau of Labor Statistics).

- **Driver Utilization.** The rules also account for the percentage of a driver’s on-duty time that is spent with a passenger in their car, or utilization. The per-mile and per-minute driver expense and compensation rates would be tailored to each of the Largest FHV Companies based on how frequently each company sends trips to their drivers while they are available to work. The companies with lower utilization rates would be required to pay higher driver compensation per trip to offset the time their drivers are waiting for a dispatch. The TLC will assess the driver utilization of each of the Largest FHV Companies on a regular basis and adjust and make public the company’s per-mile and per-minute driver compensation rates accordingly.

- **Shared Rides.** Drivers often do not benefit financially from providing shared rides; the 40 percent of drivers with the lowest estimated hourly earnings disproportionately provide shared rides. To compensate drivers for the additional time and customer service required to provide efficient for-hire service, each pick-up for a shared ride would entitle the driver to a Shared Ride Bonus, in addition to minimum mile and minute rates. The TLC will set the Shared Ride Bonus value and post it on the TLC’s website after analyzing driver income and expenses for shared rides and the occupancy rates for vehicles performing shared rides.

- **Out of Town Rates:** To compensate drivers for time spent returning to the City without a passenger on trips that end outside of the City, the formula assigns a utilization rate of 50% for all companies and resulting in a per minute rate of $0.574 and per mile rate of $1.262 for WAVs and $1.636 for non-WAVs for time spent and miles driven outside of the City.

Scope of Driver Pay Rules. The rules apply to the Largest FHV Companies, defined as bases operating under the same “doing business as” name, dispatching at least 10,000 trips per day. In 2016 and 2017, the four Largest FHV Companies accounted for more than 75 percent of all FHV trips, providing more than 400,000 average daily trips as a group in 2017. In comparison, the highest total for the fifth largest FHV company was fewer than 3,000 average daily trips. The Largest FHV Companies’ fleets also work with significantly more vehicles than their smaller competitors. Large companies have achieved the economies of scale that enable them to make the financial, operational or other adjustments necessary to accommodate the driver earnings policy in these rules.

Impact of Driver Pay Rules. In addition to their analysis of TLC data, the labor economists retained by TLC conducted a prospective economic impact analysis of the per trip payment formula and determined that this policy would benefit drivers with minimal disruption to passengers. This policy is expected to lead to an effective raise for over 77,000 of the drivers working for the Largest FHV Companies. The policy would result in an average 44.7 percent increase in take-home pay or about $9,600 annually per driver, or from $11.90 net per hour to $17.22 net per hour. After an hour of work, typical gross earnings would be about $27.86. Typical earnings after expenses would be $17.22 per hour.

Enforcement. To enforce these rules, TLC will investigate and prosecute driver complaints and audit trip records on a regular basis. TLC will require the Largest FHV Companies to submit additional information on driver pay, passenger fares, driver working time, and trip distance to facilitate these audits and inform future policymaking. The Largest FHV Companies will also be required to provide driver receipts that list the applicable per-minute and per mile rates, the number of miles for each trip and the number of minutes for each trip so that drivers can determine whether they were paid at least the minimum amount required by this rule.

Expanding Pay and Expense Transparency. TLC rules have long included transparency requirements for financial transactions between drivers and yellow taxi owners. These requirements provide yellow taxi drivers the information to understand all charges a fleet may impose and allow TLC to effectively investigate allegations of fleet overcharges.

Specifically, the TLC's Driver Protection Unit regularly receives transparency and fairness-related complaints from taxi drivers that can be addressed with existing rules. These complaints frequently concern vehicle owners failing to return vehicle security deposits, vehicle owners and fleets charging fees not clearly listed in driver leases or agreements, and vehicle owners and fleets not providing a clear explanation of earnings and fees on written receipts. Relying on the taxi owner rules set forth in Chapter 58, the Driver Protection Unit has successfully enforced taxi driver rights to transparency and fairness with prosecutions resulting in over $2.5 million in restitution for drivers who did not receive money that they were due.

These protections do not currently exist in the FHV sector, and TLC's Driver Protection Unit does not always have the legal tools available to address valid concerns brought to them by FHV drivers.

TLC's rules set requirements for all FHV bases and all FHV vehicle owners that ensure transparency for FHV drivers in these financial relationships. The transparency rules apply to all FHV bases, regardless of size.

For vehicle owners who lease their FHV, the rules require:

- Leases be written in plain language
- Leases specify all costs to drivers
- Where the owner of the vehicle is a different person than the driver of the vehicle, the rules require that the owners pay drivers' earnings in a timely manner
- Owners provide drivers with receipts itemizing all payments, deductions and charges
- Owners maintain for three years records of their financial relationship with drivers.

For FHV base owners, the rules require:

- Agreements with drivers and FHV owners be written in plain language
- Agreements specify all costs to drivers and vehicle owners
- Agreements be made available to drivers on-demand

- Bases provide an itemized breakdown of how much the driver earned and how much the driver's passenger fares amounted to, as well as all driver expense information available to the base
- Bases provide requisite 1099 forms that include the total mileage for trips covered by the Form 1099-K
- Bases pay driver earnings in a timely manner
- Bases provide drivers and vehicle owners with receipts itemizing all payments, deductions and charges
- Bases maintain for three years all records of their financial relationship with drivers and vehicle owners.

Taxi Drivers

Expanding Taxi Driver Pay Protections. TLC also received feedback from yellow and green taxi drivers about their income and expenses. TLC is making several changes to rules related to yellow and green taxi operation to increase existing driver income protections in those sectors. For example, the amendments to TLC's credit card processing rules reduce from $11 to $7, the daily maximum credit card surcharge that fleets could charge, which could save a full-time driver more than $1000 per year. Other changes provide greater financial transparency, opportunities for additional trips and higher incentives, such as an increase of all Accessible Dispatch fee payments, as well as expanded financial restitution.

Specifically, the rules:

- Reduce the maximum amount taxi lessors may charge taxi lessees for credit card processing
- Allow TLC to update the per-trip Accessible Dispatch Fee payable to drivers of accessible vehicles more regularly via TLC's website, making it easier to increase the fees
- Allow TLC to update the terms of Taxi Improvement Fund payments to medallion owners and drivers of accessible vehicles more regularly via TLC's website, which allows TLC to expand the pool of wheelchair accessible vehicles eligible to receive payments and increase payments to drivers of wheelchair accessible vehicles, which TLC intends to update to make all WAVs hacked-up to a medallion eligible for the TIF hack-up payment and also extending in-service TIF payments so long as the WAV remains hacked-up to the medallion and active
- Eliminate the cap on payments for Street Hail Livery vehicle owners under the Accessible Street Hail Livery Grant program, allowing continued in-service grant payments so long as the WAV remains in service and active
- Require pro-rated leases when taxis are unavailable through no fault of the driver and allow taxi lessors to offer pro-rated leases for shifts under 12 hours
- Eliminate the prohibition against e-hailing yellow taxis at JFK and LaGuardia airports
- Protect green taxi vehicle owners from retaliation for making complaints against green taxi license owners

- Require vehicle owners to compensate drivers for the cost of damage to the taxi that the driver paid to the vehicle owner when the owner was later reimbursed through a separate source
- Remove any possible discrepancy from the fare total displayed on the taximeter with the fare total displayed on the Passenger Information Monitor display in the back of the vehicle by requiring taximeters to display the total sum of the fare at the end of trip to reduce confusion for drivers and passengers
- Afford mandatory restitution to taxi drivers for situations in which the driver has leased a taxi from a lessor and where that lessor failed to meet the terms of the lease and that failure led to additional expenses for the taxi driver. That restitution would be mandated in addition to any fines that were also assessed against the vehicle lessors for the underlying rule violation.

To provide additional financial transparency for drivers entering into a conditional purchase agreement for a taxi medallion vehicle pursuant to TLC rule 58-21(c)(4), the rules also:

- Require that such agreements specify the purchase price of the vehicle and the total itemized cost, including interest and fees, payable to the owner or agent, based on the payment terms contained therein;
- Provide restitution as a remedy, in addition to the existing penalty, when drivers are charged a security deposit in excess of the amount permitted by TLC rules; and
- Provide restitution as a remedy, in addition to the existing penalty, when security deposits are not returned to drivers as required by TLC rules.

TLC’s authority for these rules is found in section 2303 of the New York City Charter and section 19-503 of the New York City Administrative Code.

New material is underlined.
[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. The definition of “Dispatch Fee” in section 51-03 of Title 35 of the Rules of the City of New York is amended to read as follows:

Dispatch Fee is the fee payable to the Driver of an Accessible Taxicab, according to the Dispatch Fee schedule, for completing or attempting to complete a trip dispatched by the Accessible Taxi Dispatcher. The Dispatch Fee schedule, including cancellation fees and passenger no-show fees, will be determined by the Commission, and posted on the Commission’s website, every six months based on a review of available funds and the Accessible Taxi Dispatcher’s service rates.

[The Dispatch Fee is based on the distance travelled by the Driver between acceptance of the trip dispatch and arrival at the Passenger pickup location. The Dispatch Fee will compensate the

Driver for the distance travelled to the Passenger location, as well as time spent waiting for and assisting the Passenger into and out of the vehicle, assumed to be an average of ten minutes, paid at the existing Rates of Fare for time.

Any tolls incurred by the driver in traveling to the pickup location will be added to the Dispatch Fee, at EZ-Pass rates and following the routing provided by the Accessible Taxi Dispatcher. The Dispatch Fee will be calculated based on the location of Passenger pickup, following the schedules below:

For trips with a Passenger pickup location in Manhattan:

Maximum Distance (miles)	**Dispatch Fee**
Up to 0.5	$10.00
0.5 - 1	$15.00
1 - 1.5	$20.00
1.5 – 2	$25.00
More than 2	$30.00
Passenger No-Show	Fee above plus $5.00
Cancellation Fee	Fee above minus $5.00
Necessary Tolls	Added to fee above at EZ-Pass rate

For trips with a Passenger pickup location outside of Manhattan:

Maximum Distance (miles)	**Dispatch Fee**
Up to 0.5	$6.00
0.5 – 1	$10.00
1 – 2	$12.50
2 – 3	$15.00
3 – 5	$20.00
More than 5	$25.00
Passenger No-Show	Fee above plus $5.00
Cancellation Fee	Fee above minus $5.00
Necessary Tolls	Added to fee above at EZ-Pass rate

The $5 Passenger No-Show Fee applies if the Passenger does not appear at the pickup location within ten minutes of driver's arrival for on-demand trips or within ten minutes of the scheduled pickup time for reservation trips.

The Cancellation Fee applies if the Passenger cancels the trip after the Driver has traveled more than 0.5 miles to the Passenger pickup location following acceptance of the trip. The Cancellation Fee will be calculated by subtracting $5.00 from the appropriate Dispatch Fee for the distance traveled by the Driver at the time of cancellation.

Example: The Driver of a Taxi making a trip of more than 2 miles to pick up a Passenger and the Passenger cancels the trip after the Driver has traveled at least half a mile will receive a net Dispatch Fee of $25.00 ($30.00 less the $5.00 Cancellation Fee).

A Driver will not be entitled to collect more than two combined Cancellation and No-Show Fees in any Monday through Sunday weekly period.]

Section 2. Subdivision (e) of section 53-03 of Title 35 of the Rules of the City of New York is amended to read as follows:

(e) *Dispatch Fee.* The "Dispatch Fee" is the fee payable to the Driver of an Accessible Vehicle, according to the Dispatch Fee schedule, for completing or attempting to complete a trip dispatched by the Accessible Taxi Dispatcher. The Dispatch Fee schedule, including cancellation fees and passenger no-show fees, will be determined by the Commission, and posted on the Commission's website, every six months based on a review of available funds and the Accessible Taxi Dispatcher's service rates. [The Dispatch Fee is based on the distance travelled by the Driver between acceptance of the trip dispatch and arrival at the Passenger pickup location. The Dispatch Fee will compensate the Driver for the distance travelled to the Passenger location, as well as time spent waiting for and assisting the Passenger into and out of the vehicle, assumed to be an average of ten minutes, paid at the existing Rates of Fare for time.

Any tolls incurred by the driver in traveling to the pickup location will be added to the Dispatch Fee, at EZ-Pass rates and following the routing provided by the Accessible Taxi Dispatcher. The Dispatch Fee will be calculated based on the location of Passenger pickup, following the schedules below:

For trips with a Passenger pickup location in Manhattan:

Maximum Distance (miles)	**Dispatch Fee**
Up to 0.5	$10.00
0.5 - 1	$15.00
1 - 1.5	$20.00
1.5 – 2	$25.00
More than 2	$30.00
Passenger No-Show	Fee above plus $5.00
Cancellation Fee	Fee above minus $5.00
Necessary Tolls	Added to fee above at EZ-Pass rate

For trips with a Passenger pickup location outside of Manhattan:

Maximum Distance (miles)	**Dispatch Fee**
Up to 0.5	$6.00
0.5 – 1	$10.00
1 – 2	$12.50
2 – 3	$15.00
3 – 5	$20.00
More than 5	$25.00
Passenger No-Show	Fee above plus $5.00
Cancellation Fee	Fee above minus $5.00
Necessary Tolls	Added to fee above at EZ-Pass rate

The $5

Passenger No-Show Fee applies if the Passenger does not appear at the pickup location within ten minutes of driver's arrival for on-demand trips or within ten minutes of the scheduled pickup time for reservation trips.

The Cancellation Fee applies if the Passenger cancels the trip after the Driver has traveled more than 0.5 miles to the Passenger pickup location following acceptance of the trip. The Cancellation Fee will be calculated by subtracting $5.00 from the appropriate Dispatch Fee for the distance traveled by the Driver at the time of cancellation.

A Driver will not be entitled to collect more than two combined Cancellation and No-Show Fees in any Monday through Sunday weekly period.]

Section 3. Subdivision (h) of section 58-03 of Title 35 of the Rules of the City of New York is amended to read as follows:

(h) *Dispatch Fee* is the fee payable to the Driver of an Accessible Taxicab, according to the Dispatch Fee schedule, for completing or attempting to complete a trip dispatched by the Accessible Taxi Dispatcher. The Dispatch Fee schedule, including cancellation fees and passenger no-show fees, will be determined by the Commission, and posted on the Commission's website, every six months based on a review of available funds and the Accessible Taxi Dispatcher's service rates. [The Dispatch Fee is based on the distance travelled by the Driver between acceptance of the trip dispatch and arrival at the Passenger pickup location. The Dispatch Fee will compensate the Driver for the distance travelled to the Passenger location, as well as time spent waiting for and assisting the Passenger into and out of the vehicle, assumed to be an average of ten minutes, paid at the existing Rates of Fare for time.

Any tolls incurred by the driver in traveling to the pickup location will be added to the Dispatch Fee, at EZ-Pass rates and following the routing provided by the Accessible Taxi Dispatcher. The Dispatch Fee will be calculated based on the location of Passenger pickup, following the schedules below:

For trips with a Passenger pickup location in Manhattan:

Maximum Distance (miles)	**Dispatch Fee**
Up to 0.5	$10.00
0.5 - 1	$15.00
1 - 1.5	$20.00
1.5 – 2	$25.00
More than 2	$30.00
Passenger No-Show	Fee above plus $5.00
Cancellation Fee	Fee above minus $5.00
Necessary Tolls	Added to fee above at EZ-Pass rate

For trips with a Passenger pickup location outside of Manhattan:

Maximum Distance (miles)	**Dispatch Fee**
Up to 0.5	$6.00
0.5 – 1	$10.00
1 – 2	$12.50
2 – 3	$15.00
3 – 5	$20.00
More than 5	$25.00
Passenger No-Show	Fee above plus $5.00
Cancellation Fee	Fee above minus $5.00
Necessary Tolls	Added to fee above at EZ-Pass rate

The $5 Passenger No-Show Fee applies if the Passenger does not appear at the pickup location within ten minutes of driver's arrival for on-demand trips or within ten minutes of the scheduled pickup time for reservation trips.

The Cancellation Fee applies if the Passenger cancels the trip after the Driver has traveled more than 0.5 miles to the Passenger pickup location following acceptance of the trip. The Cancellation Fee will be calculated by subtracting $5.00 from the appropriate Dispatch Fee for the distance traveled by the Driver at the time of cancellation.

Example: The Driver of a Taxi making a trip of more than 2 miles to pick up a Passenger and the Passenger cancels the trip after the Driver has traveled at least half a mile will receive a net Dispatch Fee of $25.00 ($30.00 less the $5.00 Cancellation Fee).

A Driver will not be entitled to collect more than two combined Cancellation and No-Show Fees in any Monday through Sunday weekly period.]

Section 4. Subdivision (a) of section 58-21 of Title 35 of the Rules of the City of New York is amended by adding a new paragraph (3), to read as follows:

<u>(3)</u> <u>Written records required under this section must be provided to Driver and must be maintained in either a hard copy or electronic format.</u>

Section 5. The penalty box of paragraph (3) of subdivision (b) of section 58-21 of Title 35 of the Rules of the City of New York, prohibiting a charge to a Driver/lessee for the service and maintenance of a leased taxicab, is amended to read as follows:

§58-21(b)	First violation $500 Second and subsequent violations: $1000 and/or suspension of the Medallion for up to 30 days. In addition to the penalty payable to the Commission, the administrative law judge [may] <u>must</u> order the owner to pay restitution to the driver, equal to the excess that was charged to the driver.	Appearance REQUIRED

Section 6. Paragraph (1) of subdivision (c) of section 58-21 of Title 35 of the Rules of the City of New York is amended by adding a new subparagraph (vii), to read as follows:

<u>(vii)</u> <u>For a Driver with a daily lease operating under 58-21(c)(1)(i)(A)-(D), the lessor may offer pro-rated leases for shifts of under 12 hours. The lessor must pro-rate the lease if the vehicle is unavailable for use for any reason that is not the lessee’s responsibility during any part of the 12 hour shift, including the return of the vehicle from the previous shift.</u>

Section 7. Paragraph (2) of subdivision (c) of section 58-21 of Title 35 of the Rules of the City of New York is amended by adding a new subparagraph (vii), to read as follows:

<u>(vii)</u> <u>For a Driver with a daily lease operating under 58-21(c)(2)(i)(A)-(D), the lessor may offer pro-rated leases for shifts of under 12 hours. The lessor must pro-rate the lease if the vehicle is unavailable for use for any reason that is not the lessee’s responsibility during any part of the 12 hour shift, including the return of the vehicle from the previous shift.</u>

Section 8. Subparagraph (v) of paragraph (4) of subdivision (c) of section 58-21 of Title 35 of the Rules of the City of New York is amended by adding a new clause (I), to read as follows:

I. If the Driver does not opt to receive coverage for collisions and physical damage pursuant to G above, and a Medallion lessor or Agent receives compensation for damages to the vehicle incurred from an entity other than the Driver, any amount previously paid by the Driver as compensation for damages or paid by the Driver in order to repair damages to the vehicle must be refunded to the Driver.

Section 9. Subparagraph (xi) of paragraph (5) of subdivision (c) of section 58-21 of Title 35 of the Rules of the City of New York is amended to read as follows:

(xi) Credit Card Processing Surcharge for Leases entered into pursuant to 58-21(c)(1), 58-21(c)(2), 58-21(c)(3), or 58-21(c)(4) of these Rules:

A. For daily leases under 58-21(c)(1) and 58-21(c)(2), an Owner of a Taxicab can charge a [$11] $7 surcharge per shift for credit card processing.

B. For weekly leases under 58-21(c)(1) [and] 58-21(c)(2), 58-21(c)(3), and 58-21(c)(4), an Owner of a Taxicab can charge a [$66] $49 surcharge per week for credit card processing.

[C. For leases under 58-21(c)(3) and 58-21(c)(4), an Owner of a Taxicab can charge a $132 surcharge per week for credit card processing.

D. Beginning on January 1, 2013, each June and December, the TLC will review the TPEP systems' data to determine average credit card usage per shift. The TLC will review only the data for shifts at least seven hours long. Payments made by credit card shall be the entire amount paid by the passenger, as determined from the TPEP records reviewed. If, under this review, the amount of the average credit card usage per daily shift exceeds $200, the TLC will propose and support:

a rule seeking an adjustment to the Credit Card Surcharge for daily leases under 58-21(c)(1), 58-21(c)(2), 58-21(c)(3) and 58-21(c)(4) so that it is equivalent to 5% of the average credit card usage per shift for the preceding four months, rounded to the nearest whole dollar;

a rule seeking a similar adjustment to the Credit Card Surcharge for weekly leases under 58-21(c)(1) and 58-21(c)(2) by multiplying the per shift surcharge by six; and a rule seeking a similar adjustment to the Credit Card Surcharge for Medallion-only and Medallion and Vehicle leases under 58-21(c)(3) and 58-21(c)(4) by multiplying the shift rate surcharge by twelve.

For example, if the average credit card usage per shift, using the criteria set forth above, is $200, the per shift surcharge shall be $10 ($60 per week, $120 per week for a lease under 58-21(c)(3) and (4)). If the average credit card usage per shift is $240, the per shift surcharge shall be $12 ($72 per week, $144 per week for a lease under 58-21(c)(3) and (4)).

E. Upon enactment of any rule that changes the Credit Card Surcharge, the TLC will issue an industry notice setting forth the new Credit Card Surcharge.

F. Notwithstanding the results of the review(s) above, the TLC will not adjust, propose, or seek an adjustment to Credit Card Surcharges to any amount less than $10 for any daily lease entered into pursuant to 58-21(c)(1), 58-21(c)(2), or less than $60 for any weekly lease entered into pursuant to 58-21(c)(1), 58-21(c)(2), or less than $120 for any lease entered into pursuant 58-21(c)(3) and 58-21(c)(4), irrespective of the average credit card usage per shift.]

Section 10. The penalty box of paragraph (7) of subdivision (c) of section 58-21 of Title 35 of the Rules of the City of New York, establishing the collective bargaining exception to the standard lease cap, is amended to read as follows:

§58-21(c)(7)	Fine: First violation: $500 Second and subsequent violations; $1,000 and/or suspension of the Medallion for up to 30 days. In addition to the penalty payable to the Commission, the ALJ [can] <u>must</u> order the Owner to pay restitution to the Driver, equal to the excess that was charged to the Driver or the extra fuel the driver had to pay for.	Appearance REQUIRED

Section 11. The penalty box of paragraph (3) of subdivision (e) of section 58-21 of Title 35 of the Rules of the City of New York, prohibiting an Owner from requiring a Driver to pay a summons written to the Owner as respondent, is amended to read as follows:

§58-21(e)(3)	Fine: First violation: $250; Second violation: $350; Third and subsequent violations $500 and/or suspension of the Medallion for up to thirty days. In addition to the penalty payable to the Commission, the ALJ [can] <u>must</u> order the Owner to pay restitution to the Driver, equal to the excess that was withheld from the Driver, or equal to the amount that the Driver paid, at the	Appearance REQUIRED

	requirement of the Owner, to satisfy any summons against the Owner.	

Section 12. The penalty box of paragraph (4) of subdivision (e) of section 58-21 of Title 35 of the Rules of the City of New York, prohibiting taxicab security deposits in excess of the lesser of one lease term or one weekly lease payment, is amended to read as follows:

§58-21(e)(4)	Fine: $200 <u>In addition to the penalty payable to the Commission, the Hearing Officer must order the lessor to pay restitution to the Driver, equal to the amount charged to the Driver in violation of this rule.</u>	Appearance NOT REQUIRED

Section 13. The penalty box of paragraph (6) of subdivision (e) of section 58-21 of Title 35 of the Rules of the City of New York, requiring that taxicab security deposits be returned within 30 days of lease termination, is amended to read as follows:

§58-21(e)(6)	Fine: $50 <u>In addition to the penalty payable to the Commission, the Hearing Officer must order the lessor to pay restitution to the Driver, equal to the amount not returned to the Driver in violation of this rule.</u>	Appearance NOT REQUIRED

Section 14. The penalty box of paragraphs (1) and (2) of subdivision (f) of section 58-21 of Title 35 of the Rules of the City of New York, requiring the Owner to pay the Driver for all non-cash payments, is amended to read as follows:

§58-21(f)(1)& (2)	Fine: $100 In addition to the penalty payable to the Commission, the ALJ [may] <u>must</u> order the Owner to pay restitution to the Driver, equal to the cost to the Driver.	Appearance NOT REQUIRED

Section 15. The penalty box of paragraph (3) of subdivision (f) of section 58-21 of Title 35 of the Rules of the City of New York, prohibiting the Owner from withholding payments from any credit card pass-along, fees or charges, is amended to read as follows:

§58-21(f)(3)	Fine: First violation: $200 Second violation: $300 Third violation: $500 In addition to the penalty payable to the Commission, the ALJ [may] <u>must</u> order the Owner to pay restitution to the Driver, equal to the excess amount that was charged to the Driver.	Appearance REQUIRED

Section 16. Paragraph (1) of subdivision (h) of section 58-21 of Title 35 of the Rules of the City of New York is amended to read as follows:

(1) Every Taxicab operating lease (including any amendments), must be in writing, and must be signed by the Owner (or a person authorized to act on behalf of the

Owner), and by the leasing Driver or Drivers. Electronic signatures are permissible for electronic leases.

Section 17. Paragraph (2) of subdivision (i) of section 58-21 of Title 35 of the Rules of the City of New York is amended to read as follows:

(2) *Costs covered by the lease*. The lease must state the total lease amount, and must itemize that total cost, including:

(i) The amount of the lease that applies to the medallion and the amount, if any, that applies to the vehicle

(ii) The amounts, if any, of the security deposit

(iii) The gasoline surcharge if there is one

(iv) For leases under paragraph 58-21(c)(4) of these Rules, the vehicle sales price and an itemized total of all other fees and costs to be paid before title to the vehicle will be passed to the Driver

(v) Any other costs that the Driver will be charged

Section 18. The penalty box of paragraph (6) of subdivision (i) of section 58-21 of Title 35 of the Rules of the City of New York, requiring that each lease include information regarding deposits, is amended to read as follows:

§58-21(i)	Fine: First violation $500 Second and subsequent violations: $1000 and/or suspension of the Medallion for up to thirty days. In addition to the penalty payable to the Commission, the administrative law judge [may] must order the owner to pay restitution to the driver, equal to the excess or non-authorized charge that was charged to the driver.	Appearance REQUIRED

Section 19. Subdivision (j) of section 58-50 of Title 35 of the Rules of the City of New York is amended to read as follows:

(j) *Taxi Improvement Fund Allocations*. Owners of Medallions and Drivers of Medallions who have submitted all required forms and documentation as specified by the Chairperson will receive allocations from the Taxi Improvement Fund as follows:

(1) Owners of Medallions who have placed an Accessible Taxicab into service [as required under subdivisions (a) through (c) or who have assumed the accessibility requirement of another Owner under subdivision (e) of this section] will receive:

(i) *Hack-up Payment.* A one-time subsidy payment of at least $14,000, determined by the Commission and posted on the Commission's website. Such payment will be the same for all eligible Medallion Owners. [Only one payment will be allocated to each Medallion during the four years required under subdivision (f) of this section.] Such a payment will be allocated to a Medallion only if the Accessible Vehicle operating on such Medallion has not previously received such a payment. This determination will be based on the Vehicle Identification Number (VIN) of the Accessible Vehicle.

(ii) *Accessible Vehicle Operational Payments.* A series of [up to twelve (12) equal payments of $1,333, beginning with the inspection of the Accessible Taxicab at the time of initial Hack-up, and following each Tri-Annual Inspection during the four year period as required under subdivision (f) of this section] <u>equal payments adding up to no less than a total of $16,000. The frequency and amount of such payments will be determined by the Commission and posted on the commission's website, but such payments will be made at least three (3) times per year. Such payments will be the same for all eligible Medallion Owners</u>. Payments will be issued provided that the Accessible Taxicab:

A. Meets the vehicle inspection requirements of section 58-29 of these Rules, and
B. With the exception of the first payment following initial Hack-up, has completed a minimum of 250 Passenger trips since the previous inspection.
C. Was logged onto the Accessible Taxi Dispatcher system through the Dispatch Equipment while in operation during the period since the previous inspection.

[The operational payment amount is based on the estimated additional maintenance costs of an Accessible Taxicab and estimated lost revenue associated with the additional days the Accessible Taxicab will be off the road for the additional maintenance.

(2) Owners of Accessible Medallions who are not covered by the conversion provisions of this section 58-50 will receive:

(i) *Hack-up Payment.* A one-time subsidy payment of $14,000. Only one payment will be allocated to each Medallion during the four years for the next vehicle the Owner must hack up for use with that Medallion. Thereafter, an Owner will be eligible for payments for vehicles hacked up on an alternating basis for use with that Medallion (that is, every other vehicle used with such Medallion will NOT be eligible for a payment under this paragraph). Such a payment will be allocated to a Medallion only if the Accessible Vehicle operating on such Medallion has not previously received such a payment. This determination will be based on the Vehicle Identification Number (VIN) of the Accessible Vehicle.

(ii) *Accessible Vehicle Operational Payments.* For vehicle cycles in which the Owner is eligible for a hack-up payment pursuant to subparagraph (i) of this paragraph (but NOT for vehicle cycles for which an Owner is NOT eligible for a hack-up payment pursuant to subparagraph (i) of this paragraph), a series of up to twelve (12) equal payments of $1,333, beginning with the inspection of the Accessible Taxicab in use with that Medallion at the time of initial Hack-up, and following each Tri-Annual Inspection during the four year period as provided under subdivision (f) of this section. Payments will be issued only if the Accessible Taxicab:

A. Meets the vehicle inspection requirements of section 58-29 of these Rules, and
B. With the exception of the first payment following initial Hack-up, has completed a minimum of 250 Passenger trips since the previous inspection.
C. Was logged onto the Accessible Taxi Dispatcher system through the Dispatch Equipment while in operation during the period since the previous inspection.]

(2[3]) Drivers of Accessible Taxicabs will receive periodically, a per-trip payment for each Passenger trip while driving an Accessible Taxicab. The per-trip payment amount will be at least 70 percent of the number obtained by dividing the estimated balance of the driver portion of the Taxicab Improvement Fund collected in the previous calendar year by the number of Accessible Taxicab trips estimated for the current calendar year. The per-trip payment amount will be posted on the TLC Web site.

(3[4]) Allocation amounts provided for in paragraphs (1) and [,] (2) [and (3)] of this subdivision will be reviewed and adjusted as provided in subdivision (h) of this section.

Section 20. Title 35 of the Rules of the City of New York is amended by adding a new section 59A-21, to read as follows:

§59A-21 Leasing a For-Hire Vehicle

(a) A For-Hire Vehicle Owner may lease a Vehicle to a Driver, or otherwise make a Vehicle available to a Driver for use in exchange for compensation, for any period of time if the Owner complies with the provisions of this section.

(1) Written records required under this section must be provided to the Driver who is leasing or otherwise obtaining the use of the Vehicle and must be maintained in hard copy or electronically.

(b) *Lease Must Be in Writing.*

(1) All leases, including any amendments, must be in writing and signed by the lessor and leasing Driver. Electronic signatures are permissible for electronic leases.

(2) A copy of the fully executed lease must be provided to the leasing Driver upon lease execution and upon the Driver's request.

§59A-21(b)(1-2)	Fine: $500 per missing lease	Appearance NOT REQUIRED

(3) *Terms.* The lease must provide:

(i) The beginning date and time and ending date and time of the lease.

(ii) All costs and possible fees that may be charged by the lessor.

(A) For each cost and fee that will be charged, the lease must provide in clear and unambiguous language an explanation of the cost or fee.

(B) For each cost and fee that may be charged, the lease must provide in clear and unambiguous language an explanation of the conditions that will result in the imposition of such cost or fee.

(C) If a cancellation fee is included in the lease, the lease must specify the minimum prior notice that must be provided by Drivers to avoid the cancellation fee.

(D) The lease must specify if the Driver will be responsible for physical damage to the vehicle. However, if the lessor Owner receives compensation for damages to the Vehicle incurred from an entity other than the Driver, any amount previously paid by the Driver as compensation for damages must be refunded to the Driver.

(E) If the lease includes the conditional purchase of the Vehicle, the lease must provide the Vehicle sales price and an itemized total of all other fees and costs to be paid before title to the Vehicle will be passed to the Driver.

(F) If the lessor permits subleasing, all restrictions on subleases must be specified in the lease. These restrictions must include, at a minimum, that only Drivers with a Valid TLC License may sublease the Vehicle.

(G) If a security deposit is included in the lease, the terms and costs of the security deposit must be specified in the lease, including all costs that may be reimbursed from the security deposit. The lease must provide the number of days after termination of the lease, not to exceed 30 days, when the lessor will return the security deposit.

(4) *Overcharges*. Every lease must contain clearly legible notice that overcharging a Driver is prohibited by the Commission's Rules, and that complaints of overcharges may be made to the Commission or by calling 311.

(5) RESERVED (limitations on costs and fees related to the lease of a For-Hire Vehicle)

§59A-21(b)(3-5)	Fine: First violation: $500; Second and subsequent violations: $1,000 and/or suspension for up to 30 days. In addition to the penalty payable to the Commission, the Hearing Officer must order the lessor to pay restitution to the Driver, equal to the amount charged to the Driver in violation of this rule.	Appearance REQUIRED

(c) *Fees Charged to Drivers*.

(1) A lessor may require payment of only those costs and fees provided in the lease. Requiring payment of costs and fees not provided in the lease is an overcharge.

(2) A lessor cannot charge, request or accept a tip.

(3) A lessor cannot require payment of a summons not written to the Driver, except the following summonses issued to the Vehicle Owner:

(i) Any parking tickets or red light violations issued during the lease if the Driver was provided an opportunity to dispute the ticket; and

(ii) Fines for violation of Rule 59B-26(a), provided that such fine was assessed because of the conduct of the Driver, and provided further the lessor is able to show that the Driver had notice of the inspection date, and provided further that the lease clearly states that inspection of the Vehicle as required by Rule 59B-26(a) is the responsibility of the Driver.

§59A-21(c)(1-3)	Fine: First violation: $500; Second and subsequent violations: $1,000 and/or suspension for up to 30 days. In addition to the penalty payable to the Commission, the Hearing Officer must order the lessor to pay restitution to the Driver, equal to the amount charged to the Driver in violation of this rule.	Appearance REQUIRED

(4) *Vehicle Availability.* The lease payment must be pro-rated if the Vehicle is unavailable for use during any part of the term of the lease for any reason that is not the lessor's responsibility.

§59A-21(c)(4)	Fine: First violation: $500; Second and subsequent violations: $1,000 and/or suspension for up to 30 days. In addition to the penalty payable to the Commission, the Hearing Officer must order the lessor to pay restitution to the Driver, equal to the amount charged to the Driver in violation of this rule.	Appearance REQUIRED

(d) *Driver Earnings.*

(1) Driver earnings received by the lessor must be remitted to the Driver. The lessor may only deduct costs and fees from the Driver's earnings if those costs and fees are specified in the lease as required in subdivision (b) of this section and the lease further provides that such costs and fees will be withheld from the Driver's earnings.

§59A-21(d)(1)	Fine: First violation: $200 Second violation: $300 Third violation: $500 In addition to the penalty payable to the Commission, the Hearing Officer must order the lessor to pay restitution to the Driver, equal to the amount owed to the Driver.	Appearance REQUIRED

(2) Drivers must be paid earnings within one week of a trip's completion.

§59A-21(d)(2)	Fine: $100 In addition to the penalty payable to the Commission, the Hearing Officer must order the lessor to pay restitution to the Driver, equal to the cost to the Driver.	Appearance NOT REQUIRED

(e) *Written Receipt.* For every financial transaction completed under the lease or these Rules, the lessor must give a written receipt to the Driver.

(1) The receipt must include the name of the Driver and the Vehicle license number.

(2) The receipt must clearly state the following information with respect to the payment or deduction:

(i) The date;

(ii) The name of the recipient;

(iii) The amount and calculations showing how the amount was determined;

(iv) The purpose of the payment or deduction;

(v) The number of the section of this chapter or provision of the lease that authorizes the payment or deduction; and

(vi) For leases including the conditional purchase of the Vehicle, an accounting of the portion of each payment made under the lease that is devoted to the conditional purchase of the Vehicle, the cumulative amount paid towards the conditional purchase of the Vehicle, and the number of payments remaining.

§59A-21(e)	Fine: $200 per missing receipt	Appearance REQUIRED

(f) *Records Maintenance*. A lessor must maintain for a period of three years from the date a lease expires or is cancelled:

(1) A copy of the executed lease and any lease amendments;

(2) Records of all itemized earnings paid to Drivers;

(3) Records of all itemized payments received from Drivers;

(4) Records of all itemized security deposit withholdings; and

(5) Records of all Drivers subleasing the Vehicle, including the dates and times of the sublease, the subleasing Drivers' names, DMV license number and TLC Driver License number.

§59A-21(f)	Fine: $100 for each missing item	Appearance REQUIRED

(g) *Collective Bargaining Exception.* The provisions of this section do not apply to lessors and Drivers whose business relationship is governed by the terms of a collective bargaining agreement.

Section 21. Subdivisions (b) through (t) of section 59B-03 of Title 35 of the Rules of the City of New York are relettered subdivisions (c) through (u), the previous subdivision (u) is relettered subdivision (x), and new subdivisions (b), (v), and (w) are added, to read as follows:

(b) *Base Agreement* is any agreement or terms or conditions a Driver or Vehicle owner must accept or agree to in order to receive a dispatch from the For-Hire Base, any costs or fees the Driver or Vehicle owner must pay to a For-Hire Base, or any schedules or formulas used to calculate Driver or Vehicle owner earnings.

(v) *Shared Ride Bonus* refers to the dollar amount, set by the Commission, a Base subject to the minimum driver payment requirements of Section 59B-24(a) must pay a Driver for each separate pick up on a trip where a Passenger shares the Vehicle for part or all of the trip with a Passenger from a separately dispatched call. The Commission shall determine the Shared Ride Bonus dollar amount based on an analysis of Drivers' income and expenses for shared rides, average Vehicle occupancy, and any other factor the Commission determines is relevant for the analysis. The Commission will assess, and post on its website, the Shared Ride Bonus every six (6) months.

(w) *Utilization Rate* refers to the percentage of time that Drivers who have made themselves available to accept dispatches from a Base spend transporting passengers on trips dispatched by the Base. A Base's Utilization Rate is calculated by dividing the total amount of time those Drivers spend transporting passengers on trips dispatched by the Base by the total amount of time Drivers are available to accept dispatches from the Base.

Section 22. Subdivision (n) of section 59B-13 of Title 35 of the Rules of the City of New York is amended to read as follows:

(n) *Retaliation.*

(1) A For-Hire Base must not retaliate against any Driver or Vehicle owner for making a good faith complaint against any [Owner] Base.

(2) Retaliation will be broadly construed, and will include imposing any adverse condition or consequence on the Driver or Vehicle owner or withholding or withdrawing any beneficial condition or consequence from the Driver or Vehicle owner.

§59B-13(n)	Fine: $1,000 plus restitution to the driver or vehicle owner for losses for the first violation and a fine of $10,000 plus restitution to the driver or vehicle owner for the second violation within five years.	Appearance NOT REQUIRED

Section 23. Section 59B-18 of Title 35 of the Rules of the City of New York is amended by adding new subdivisions (f) and (g), to read as follows:

(f) *Base Agreements*.

(1) *Agreements Must Include All Terms.* Any terms or conditions a Driver or Vehicle owner must accept or agree to in order to receive a dispatch from a For-Hire Base, any terms or conditions a Driver or Vehicle owner must accept or agree to in order to receive payment from a For-Hire Base or the entity designated by the For-Hire Base to process and disburse payments to Drivers and Vehicle owners, any costs a Driver or a Vehicle owner must pay a For-Hire Base, and any formulas used by a Base to calculate Driver or Vehicle owner earnings must be included in a Base Agreement that complies with the provisions of this subdivision.

(a) Written records required under this subdivision may be maintained in hard copy or electronically.

§59B-18(f)(1)	Fine: First violation: $500; Second and subsequent violations: $1,000 and/or suspension for up to 30 days. In addition to the penalty payable to the Commission, the Hearing Officer must order the Base to pay restitution to the	Appearance REQUIRED

	Driver or Vehicle owner, equal to the amount charged to the Driver or Vehicle owner in violation of this rule.	

(2) *Base Agreement Must be in Writing.*

(i) All Base Agreements, including any amendments, must be in writing and signed by the Base and the Driver or Vehicle owner. Electronic signatures are permissible for electronic Base Agreements.

(ii) A copy of the fully executed Base Agreement must be provided to the Driver and/or Vehicle owner and be made available on-demand at the Driver's and/or Vehicle Owner's request.

(iii) A Base Owner must ensure that all Base Agreements are maintained in accordance with paragraph (6) of this subdivision and made available for inspection by Commission representatives during regular business hours.

§59B-18(f)(2)(i-ii)	Fine: $500	Appearance NOT REQUIRED

(iii) *Terms.* The Base Agreement must provide:

(A) All costs and fees that may be charged by the Base.

(1) For each cost or fee that will be charged, the Base Agreement must provide in clear and unambiguous language an explanation of the cost or fee.

(2) For each cost or fee that may be charged, the Base Agreement must provide in clear and unambiguous language an explanation of the conditions that will result in the imposition of such cost or fee.

(B) An explanation of how the Driver's earnings will be calculated, including but not limited to a percentage of fares paid by passengers that will be forwarded to the Driver or a formula used by the Base.

(C) All requirements the Driver or Vehicle must meet in order to receive a dispatch.

(iv) *Overcharges*. Every Base Agreement must contain a clearly legible notice that overcharging a Driver or Vehicle owner is prohibited by the Commission's Rules, and that complaints of overcharges may be made in writing to the Commission or by telephone to 311.

(v) *Plain Language.* Base Agreements must be written in clear and unambiguous language.

§59B-18(f)(2)(iii-v)	Fine: First violation: $500; Second and subsequent violations: $1,000 and/or suspension for up to 30 days. In addition to the penalty payable to the Commission, the Hearing Officer must order the Base to pay restitution to the Driver, equal to the amount charged to the Driver in violation of this rule.	Appearance REQUIRED

(3) *Driver Payments.*

(i) A Base may require payment of only those costs and fees specified in the Base Agreement. Requiring payment of costs and fees not specified in the Base Agreement is an overcharge.

(ii) A Base cannot charge, request or accept a tip.

(iii) A Base cannot require payment by a Driver of a summons not written to the Driver.

§59B-18(f)(3)	Fine: First violation: $500; Second and subsequent violations: $1,000 and/or suspension for up to 30 days. In addition to the penalty payable to the Commission, the Hearing Officer must order the Base to pay restitution to the Driver, equal to the amount charged to the Driver in violation of this rule.	Appearance REQUIRED

(4) *Driver Earnings.*

(i) A Base must remit all earnings to the Driver or Vehicle owner. A Base may only deduct costs and fees from the earnings if those costs and fees are specified in the Base Agreement as required in paragraph (2) of this subdivision and the Base Agreement further provides that such costs and fees will be withheld from the earnings.

§59B-18(f)(4)(i)	Fine: First violation: $200 Second violation: $300 Third violation: $500 In addition to the penalty payable to the Commission, the Hearing Officer must order the lessor to pay restitution to the Driver, equal to the amount owed to the Driver.	Appearance REQUIRED

(ii) Drivers must be paid earnings for every trip made by the Driver within one week of the trip's completion.

§59B-18(f)(4)(ii)	Fine: $100 In addition to the penalty payable to the Commission, the Hearing Officer must order the Base to pay restitution to the Driver, equal to the difference	Appearance NOT REQUIRED

	between what the Base paid the Driver and what the Driver actually earned.	

(5) *Written Receipts.* For every financial transaction under the Base Agreement or these Rules, the Base must give a written receipt to the Driver or Vehicle owner.

(i) The receipt must include, as applicable, the name of the Driver and the Vehicle license number subject to the Base Agreement.

(ii) The receipt must clearly state the following information with respect to the payment or deduction:

(A) The date;

(B) The name of the recipient;

(C) The amount;

(D) The purpose of the payment or deduction;

(E) The number of the section of this chapter or provision of the Base Agreement that authorizes the payment or deduction; and

(F) If the Base is subject to the minimum driver payment requirements of Section 59B-24(a), the applicable minimum per minute and per mile rates for the time period covered by the receipt.

(iii) For Driver and Vehicle owner earnings, in addition to the items specified in subparagraph (ii) of this paragraph, the receipt must also include the amount paid by passengers for trips during the time period covered by the receipt and any calculation used to determine the earnings, including the per-trip minutes and miles for which the Driver is being paid and the number of shared rides subject to the Shared Ride Bonus provided in Section 59B-24(a)(3), if applicable. Such calculation must conform to the applicable policy, formula or schedule provided in the Base Agreement.

§59B-18(f)(5)	Fine: $200 per missing receipt	Appearance REQUIRED

(6) *Records Maintenance*. A Base must maintain for a period of three years from the date a Base Agreement expires or is cancelled or from the last trip dispatched to the Driver or Vehicle, whichever is later:

(i) A copy of the executed Base Agreement and any amendments;

(ii) Records of all itemized earnings paid to Drivers and Vehicle owners; and

(iii) Records of all itemized payments received from Drivers and Vehicle owners.

§59B-18(f)(6)	Fine: $100 for each missing item	Appearance REQUIRED

(7) *Form 1099-K*. If a Base subject to Section 59B-24(a) is required to provide a Driver with a Form 1099-K, the Base must also provide the Driver:

(i) The total mileage for trips covered by the Form 1099-K, and
(ii) An itemization of the items deducted from the gross amount reported on the Form 1099-K

(8) *Collective Bargaining Exception.* The provisions of this subdivision do not apply to Bases and Drivers whose business relationship is governed by the terms of a collective bargaining agreement.

(g) *Vehicle Leases*. Any Vehicle lease agreement entered into between a Base and Driver must comply with all provisions of §59A-21. Failure to comply with any provision of §59A-21 shall subject the Base to the penalties contained therein.

§59B-18(g)	Fine: Penalties as set forth in §59A-21.	Appearance REQUIRED

Section 24. Section 59B-19 of Title 35 of the Rules of the City of New York is amended by adding a new subdivision (d), to read as follows:

(d) *Special Requirements for Bases Subject to Minimum Driver Payment Requirements*

(1) In addition to collecting and transmitting records pursuant to subdivision (a) of this section, a Base Owner subject to Section 59B-24(a) of these rules must collect and transmit to the Commission, in a format, layout, procedure, and frequency prescribed by the Commission, the following information for each time a Driver is available to accept dispatches from the Base:

(i) The Driver's TLC Driver License number
(ii) The date and time at which the Driver became available to accept dispatches from the Base
(iii) The Vehicle License number of the Vehicle the Driver is driving while the Driver is available to accept dispatches from the Base
(iv) The geographic position of the Vehicle the Driver is driving during the entire time the Driver is available to accept dispatches from the Base at an interval no less frequent than every sixty (60) seconds
(v) Total miles driven while the Driver was available to accept dispatches from the Base.
(vi) Total miles driven with a Passenger while the Driver was available to accept dispatches from the Base.
(vii) The date and time at which the Driver became unavailable to accept dispatches from the Base

(viii) An indicator as to whether the Driver or the Base made the Driver unavailable to accept dispatches from the Base
(ix) The total Driver earnings paid to the Driver for the period in which the Driver was available to accept dispatches from the Base.

(2) In addition to collecting and transmitting records pursuant to subdivision (a) of this section, a Base Owner subject to Section 59B-24(a) of these rules must collect and transmit to the Commission, in a format, layout, procedure, and frequency prescribed by the Commission, for each Driver to which the Base dispatched a trip, a weekly statement of the Driver's total earnings, itemized to include any deductions made from the Driver's earning and any payments made in addition to per-trip or hourly payments.

(3) In addition to collecting and transmitting records pursuant to subdivision (a) of this section, a Base Owner subject to Section 59B-24(a) of these rules must collect and transmit to the Commission, in a format, layout, procedure, and frequency prescribed by the Commission, the following additional information with respect to all dispatched calls:

(i) The itemized fare for the trip charged to the passenger (fare, tolls, taxes, gratuity, commission rate, deductions and surcharges)
(ii) The total number of passengers picked up and dropped off during each dispatched call referenced in 59B-19(a)(1)
(iii) The total trip mileage for each dispatched call referenced in 59B-19(a)(1)
(iv) The total trip mileage outside of the limits of the City for each dispatched call referenced in 59B-19(a)(1)
(v) The total trip time outside of the limits of the City for each dispatched call referenced in 59B-19(a)(1)
(vi) The date and time such trip request was made by a passenger
(vii) The total trip time, as calculated as the time between when the passenger entered the vehicle and when the passenger exited the vehicle
(viii) The total time between trips, as calculated as the time between when the prior trip ends and when the Driver receives dispatch for the subsequent trip
(ix) For trips dispatched to Drivers paid on a per-trip basis by the Base, the total Driver earnings paid to the Driver for each trip
(x) For trips dispatched to Drivers paid on an hourly basis, the total Driver earnings paid to the Driver for each hour the Driver was available to receive dispatches from the Base

Section 25. Title 35 of the Rules of the City of New York is amended by adding a new section 59B-24, to read as follows:

§59B-24 Minimum Driver Payment Requirements

(a) A Base that, on average, dispatches ten thousand or more trips per day, or a Base that is part of a group of Bases operating under the same public-facing trade, business or operating name that collectively dispatches more than ten thousand trips per day, must pay Drivers, at a minimum, the following amounts for each trip dispatched by the Base:

(1) *Per Mile Rate*. Beginning January 1, 2019, for each mile a Driver transports a Passenger in the City on a trip dispatched by the Base, the Base must pay the Driver no less than $0.631 per mile for a trip dispatched to a Vehicle that is not an Accessible Vehicle and $0.818 for a trip dispatched to an Accessible Vehicle, divided by the Base's Utilization Rate, and for trips that begin in the City but end outside of the City, the Base must pay the Driver no less than $1.262 per mile for a trip dispatched to a vehicle that is not an Accessible Vehicle and no less than $1.636 per mile for a trip dispatched to an Accessible Vehicle for each mile a Driver transports a Passenger outside of the City;

(i) RESERVED – [expense formulation for luxury vehicles]

(2) *Per Minute Rate*. Beginning January 1, 2019, for each minute a Driver transports a Passenger in the City on a trip dispatched by the Base, the Base must pay the Driver no less than $0.287 per minute, divided by the Base's Utilization Rate, and for each minute a Driver transports a Passenger outside of the City on a trip dispatched by the Base that began in the City and ended outside of the City, the Base must pay the Driver no less than $0.574 per minute, and

(3) *Shared Ride Bonus*. For each separate pick up on a trip where a Passenger shares the Vehicle for part or all of the trip with a Passenger from a separately dispatched call, the Base must pay the Driver the Shared Ride Bonus, in addition to the per mile and per minute rates.

(4) *Consumer Price Index Adjustments*. Beginning January 1, 2020, and continuing each calendar year thereafter, the dollar amounts in the per mile rates and per minute rates contained in this subdivision will be adjusted using the 12-month Percentage Change in the Consumer Price Index for Urban Wage Earners and Clerical Workers for the NY-NJ-PA metro area. The Consumer Price Index adjusted per mile and per minute rates will be posted on the Commission's website.

(5) *Hourly Payments*. If a Base subject to this section pays drivers on an hourly basis, the payment the Driver receives for each hour the Driver accepts dispatches from the Base must be at least the sum of the Per Mile Rate for all miles the Driver transported Passengers during the hour, the Per Minute Rate for all minutes the Driver spent transporting Passengers during the hour, and the Shared Ride Bonus for each applicable pick up performed during the hour.

§59B-24(a)	Fine: $500 per instance of under payment. In addition to the penalty payable to the Commission, the Hearing Officer must order the Base to pay restitution to the Driver, equal to the amount not paid to the Driver in violation of this rule.	Appearance REQUIRED

(b) *Utilization Rate*: The Commission will assess, and post on its website, the Utilization Rate for each Base subject to this section every six months. A group of Bases operating under the same public-facing trade, business, or operating name will be assessed one Utilization Rate, applicable to each individual Base in the group, calculated using the collective Driver availability and passenger trip times for all Bases in the group.

(1) *Initial Utilization Rate*. For the twelve (12) months following the effective date of section 59B-24 of these Rules, the Utilization Rate for all Bases subject to subdivision (a) of this section will be the aggregate Utilization Rate of all Bases subject to subdivision (a), as calculated by the Commission. A Base subject to subdivision (a) may petition the Commission to calculate a Utilization Rate specific to the Base prior to the expiration of the twelve month Initial Utilization Rate period, but in no event will a Base subject to subdivision (a) of this section have a Utilization Rate lower than the aggregate Utilization Rate of all Bases subject to subdivision (a) for the twelve (12) months following the effective date of section 59B-24 of these rules.

(c) *Daily Average Trip Volumes*: The daily average trip volume for each Base and each group of Bases operating under the same public-facing trade, business or operating name will be assessed every six months. Bases that average over ten thousand trips per day over the most recent assessment period, and Bases that are parts of a group of Bases operating under the same public-facing trade, business or operating name that collectively average over ten thousand trips per day over the most recent assessment period, will be subject to the requirements of subdivision (a) of this section until such time as the next assessment occurs.

(d) *Evaluation by the Commission*. No less than annually, the Commission will review Driver, Vehicle Owner, and Base expenses, Driver earnings, the impact on Utilization Rates of Drivers making themselves available to accept dispatches from multiple Bases, service levels, and any other information it deems relevant to determine if adjustments need to be made to the rates set forth in subdivision (a) of this section.

Section 26. Subdivision (c) of section 67-09 of Title 35 of the Rules of the City of New York is amended by adding a new paragraph (5), to read as follows:

(c) Other Technical Requirements

(5) The Taximeter must, at the end of the trip, display the total sum of the fare and any extras, taxes, or surcharges assessed on the trip.

Section 27. Subdivision (l) of section 82-16 of Title 35 of the Rules of the City of New York is amended to read as follows:

(l) *Retaliation.*

(1) [A] An Owner of a Street Hail Livery [Owner] License must not retaliate against any Driver or Vehicle owner for making a good faith complaint against any Street Hail Livery License Owner.

(2) Retaliation will be broadly construed, and will include imposing any adverse condition or consequence on the Driver or Vehicle owner or withholding or withdrawing any beneficial condition or consequence from the Driver or Vehicle owner.

§82-16(l)	Fine: $1,000 plus restitution to the driver or vehicle owner for losses for the first violation and a fine of $10,000 plus restitution to the driver or vehicle owner for the second violation within five years.	Appearance NOT REQUIRED

Section 28. Subdivision (d) of section 78-21 of Title 35 of the Rules of the City of New York is amended to read as follows:

(d) *Use Restrictions*. An E-Hail Application must conform to the following use restrictions or other specifications:

(1) [The E-Hail Application must not operate:
(i) At John F. Kennedy International Airport; and
(ii) At LaGuardia Airport;

(2)] The E-Hail Application must not transmit requests for transportation or Hails to any Driver who is not validly licensed to drive a Taxicab or Street Hail Livery or who is operating a Vehicle that does not have a Valid Taxicab License, per the listings on TLC's Current Licensees webpage.

§78-21(d)(1) [and (2)]	Penalty: $400 fine and/or suspension up to 30 days	Appearance REQUIRED

([3]2) The E-Hail Application must be available to a Driver *ONLY* when the Vehicle is standing or stopped, except that an E-Hail App can permit a Driver to accept an E-Hail request with a single touch using pre-programmed buttons or using voice activation while the vehicle is in motion. All other use of the E-Hail Application must be velocity gated by the E-Hail App Provider to prevent its use while the vehicle is in motion.

([4]3) The E-Hail Application must NOT disclose to a Driver any information about a potential Passenger except the Passenger's pickup location, except that a Passenger's trip identification number or E-Hail App user name may be transmitted to the Driver after the Driver has accepted the Passenger's E-Hail request.

([5]4) A Driver must have to affirmatively opt in to use the E-Hail Application and must be able to opt out of receiving E-Hail requests from Passengers while on duty.

Section 29. Paragraph (4) of subdivision (a) of section 80-19 of Title 35 of the Rules of the City of New York is amended to read as follows:

(4) A Driver of a Taxicab must not solicit or cruise for the purpose of soliciting Passengers [or accept Passengers for transportation with the use of an E-Hail Application]:

(i) At Kennedy, La Guardia or Newark Airports

(ii) Within 100 feet of any authorized Taxi Stand

(iii) Within the private streets of Lincoln Center

(iv) In any area of the City of New York where Taxicab cruising is prohibited

§80-19(a)(4)	Fine: $100 if plead guilty before a hearing; $150 if found guilty following a hearing.	Appearance NOT REQUIRED

Section 30. Paragraph (1) of subdivision (a) of section 82-68 of Title 35 of the Rules of the City of New York is amended to read as follows:

(1) *Accessible Vehicles*. The [maximum] Grant [amount is $30,000. This] consists of a single payment of $14,000 to be paid following the successful Hack-up of the Qualified Vehicle, and [a maximum of eight (8)] subsequent payments of $2,000 to be paid following each successful bi-annual vehicle inspection [during the four-year period after Hack-up]. [This] The initial payment amount of $14,000 will be approved only for Qualified Vehicles which, at the time the Grant application is submitted, meet all of the following:

(i) Be of the most recent model year or the next two most recent model years and,

(ii) Have fewer than 1,000 miles on the odometer.

(iii) For subsequent payments to be paid to the Grantee, the Qualified Vehicle must have, between the most recent successful bi-annual vehicle inspection and the successful bi-annual inspection previous to the most recent successful bi-annual inspection:

A. completed at least 250 Passenger trips registered through the Technology System, and

B. during this period, has been logged onto the Accessible Taxi Dispatch system through the Dispatch Equipment while in operation.

Uber State Interference:

How Transportation Network Companies Buy, Bully, and Bamboozle Their Way To Deregulation

Joy Borkholder, Mariah Montgomery, Miya Saika Chen, Rebecca Smith

January 2018

Contents

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For more than 45 years, the National Employment Law Project (NELP) has worked to restore the promise of economic opportunity for working families across America. In partnership with grassroots and national allies, NELP promotes policies to create good jobs, enforce hard-won workplace rights, and help unemployed workers regain their economic footing. For more information, visit us at **www.nelp.org**

About the Partnership for Working Families

The Partnership for Working Families is a national network of 17 powerful city and regional affiliate groups based in major urban areas across the country. The Partnership advocates for and supports policies and movements that build more just and sustainable communities where we live and work. Taking lessons learned at the local level and applying them to the national conversation, the Partnership builds a framework for addressing climate change, inequality, racial and social injustice. For more information, visit us at **www.ForWorkingFamilies.org**

Executive Summary

Over the past four years, transportation network companies (TNCs), primarily Uber and Lyft, have convinced legislators in the vast majority of states to overrule and preempt local regulations and strip drivers of rights. The speed and sweeping effectiveness of the industry's use of this strategy, known as state interference (or preemption), is unprecedented.

In this report, we set out to describe how two upstart companies have been able to convince state governments to swiftly and aggressively deregulate their industry and how their success has impacted stakeholders. The report seeks to arm legislators and the public with knowledge and tools to understand and address this phenomenon, protect communities most impacted by this industry, and uphold local democracy.

In-depth case study analyses in four states, Florida, Pennsylvania, Texas, and Washington, reveal that the TNCs' strategy has been to create political crises in localities—where for-hire transportation has traditionally been regulated—and then move state legislators to solve the manufactured crisis through state interference. The case studies detail the "barge in, buy, bully, and bamboozle" tactics the companies use to advance this strategy and the impacts on for-hire drivers, who are predominantly immigrants and people of color, and the communities in which they live.

Summary of Findings

TNCs have successfully adopted state interference, an antidemocratic legislative practice favored by the gun and tobacco industries and popularized by the ultraconservative American Legislative Exchange Council (ALEC), in order to rewrite the law.

- TNCs have secured preemptive state law in over four out of five states. Lawmakers in 41 states have passed laws that have taken away some or all of the ability of localities to set their own standards for the TNC industry.
- Preemption has tremendous impact on local transportation and largely deregulates the industry as a whole.
- State interference is a political strategy pioneered by the tobacco industry and the National Rifle Association and employed aggressively by the ultra-conservative American Legislative Exchange Council (ALEC) and other corporate interest groups, like the National Restaurant Association and, more recently, TNCs Uber and Lyft. As detailed further below, there are a number of connections linking the TNC industry and ALEC.

- State interference on behalf of TNCs harms people of color. As in other cases of state interference, state interventions into local for-hire regulation involve predominantly white legislatures blocking local programs and policies that benefit people of color, in this case for-hire drivers who are predominantly people of color and immigrants.

- State interference is a means to rewrite employment law. While state action on TNCs is often characterized as a solution to a "patchwork" of local laws, in fact TNCs may pursue state interference in part because state lawmakers can address one of their core policy goals: to rewrite state law on employee status. By rewriting the law, they exempt themselves from a myriad of employment protections - state minimum wage, unemployment insurance, workers' compensation, discrimination laws, fair chance hiring and paid sick leave where they exist, and efforts to pass a collective bargaining process at the city level.

To move states to intervene, in the case studies reviewed for this report, TNCs (and Uber in particular) created a political crisis at the local level, and pushed the state to solve that crisis through four primary tactics: barge in, buy, bully, and bamboozle.

BARGE INTO a market, sometimes illegally, and spend large amounts of money to quickly develop a customer and driver base. When first entering markets, companies offered incentives to drivers and free rides to passengers, and have even paid fines drivers receive for operating illegally. To avoid law enforcement, Uber went so far as to develop a program that identified individual public employees and officials, and then blocked their ability to use the app to hail rides.

BUY access by deploying an overwhelming number of well-connected lobbyists to make contact with elected officials and their staff. In Portland, 16 Uber and Lyft lobbyists and company representatives appear in city officials' contact logs in 2015, accounting for 30 percent of all city lobbyist activity that year. Across the country, in 2016 Uber had 370 active lobbyists in 44 states, dwarfing some of the largest businesses and technology companies.

In 2016, together Uber and Lyft lobbyists outnumbered Amazon, Microsoft, and Walmart combined.

BULLY elected leaders by individually targeting them and issuing ultimatums. In Texas, one or both of the two major TNCs suspended service in numerous cities, including Austin, Corpus Christi, Galveston, Houston, and Midland, when city legislative bodies (and voters in the case of Austin) imposed reasonable regulations on them.

BAMBOOZLE customers to take political action, frequently by misrepresenting the facts, and often via the app itself. Messages to customers have claimed that city councils, county boards, or state legislatures are threatening to "force" the TNCs to leave, when in fact elected governments are seeking to enforce existing laws or even create basic safety requirements that other businesses follow. Then the TNCs continue with the first three tactics described above.

In many cases, using these strategies and tactics, Uber has secured a high level of access in multiple state and city legislative processes, enabling it to draft its own bills, heavily influence the vetting, and even effectively staff elected officials on the issue. In Oregon and Ohio, Uber wrote or co-wrote the original drafts of legislation, and legislators in multiple other states characterize legislation as written by or in the primary interest of the industry.

TNCs have secured state laws that deregulate portions of the for-hire industry and rewrite employment law, harming drivers and communities in the process.

- When TNCs succeed in pushing legislation that exempts their drivers from state labor laws, such as unemployment insurance, workers compensation, and minimum wage, drivers no longer have access to redress or benefits afforded to other workers in the state.
- Disability rights advocates contend that TNCs, by failing to provide wheelchair accessible vehicles, are in violation of laws protecting people with disabilities. Weak state laws generally only require the TNCs to have a non-enforceable "policy" against discrimination.
- Deregulating TNCs may be hurting the climate by undermining public transit and adding more vehicle miles traveled (VMT) to city streets. A study of San Francisco TNC riders found that one third of those surveyed would have used public transit for their most recent trip, were TNCs not available.[1]
- Overriding local communities erodes democratic governance and the ability of local government to meet the unique transportation needs of residents. When locally-elected policymakers are prevented from creating policies that protect and respond to the needs of residents, or the policies they do pass are overridden by state legislatures beset by blitzkrieg-style lobbying, then local participatory democracy is at stake.

In this May 26, 2017 photo, workers set up a tent to welcome drivers back to the Uber offices in Austin, Texas. Uber and Lyft, the ride-hailing company giants who left Texas's capital city in a huff over a year ago over fingerprint requirements for drivers, are set to return after state lawmakers stepped in.

Source: Associated Press/Eric Gay

Summary of Recommendations

State and local legislators and advocates can bring fairness to the sector and oppose undue influence by corporations on our government. The following include some of our recommendations:

- ***State legislators*** should reject efforts to preempt local authority with respect to TNCs, and instead delegate regulation of TNCs to local transportation authorities, just as many states have done for taxi regulation. Alternatively, they should work closely with cities to develop policies that establish a statewide floor, allowing cities flexibility to customize TNC regulations. They should reverse laws that strip drivers of their rights as employees.

- ***Local legislators*** should require TNCs to comply with local labor standards and be alert to any attempts to define drivers' employment relationship as independent contractors in city legislation and rulemaking; require TNCs to share, with appropriate privacy safeguards, the data that communities need to ensure that TNCs are strengthening rather than undermining mobility and transportation; and learn about and support innovative ways to ensure for-hire drivers can form alternative business models, like cooperatives and nonprofit organizations.

- ***Advocates and local leaders*** should stress the uniqueness of local communities and that one size does not fit all; call out (and use litigation to attack) racial injustice when it occurs as part of preemption; and support elected officials who lead on local policymaking rights and equity in the industry.

Introduction

In just four short years, TNCs Uber and Lyft have persuaded 41 state legislatures to interfere with local government policymaking. This strategy of "state interference" or "preemption" was pioneered by the gun and tobacco industries. In this case, TNCs have not only largely deregulated their part of the for-hire driving industry, but they have also redefined the employment relationship with their drivers in state law. It is a strategy that undermines democratic local government and negatively impacts drivers, consumers, and the broader communities in which they live. These far-reaching effects illustrate the ways in which wealthy and politically-connected corporate actors, enabled by state legislators, assert control over many aspects of our daily lives.

How have two upstart companies been able to so swiftly convince legislators that these new services should be legislated in an entirely new manner? And in ways that typically benefit just a few companies, but work to the detriment of so many others?

Our investigation finds that TNCs, led by Uber, employed a two-part strategy: TNCs manufacture a crisis at the local level and appeal to state legislatures to fix that crisis by overruling local law. This "crisis" is usually the implied or actual threat of suspending a popular service. As we will describe more specifically below, in order to create a crisis and win their preferred solution, TNCs—in particular, Uber—have operated in violation of the law, leveled ultimatums to elected officials, and misled the public (see appendix for more on talking points versus reality). Both Uber and Lyft have spent, and continue to spend, massive amounts of money and time to influence the decisions of state and city legislators, in some cases over several years, through both traditional and novel lobbying efforts.

> ***"Uber…went on an internet public relations campaign, claiming to everyone who contacted them that we had banned them from the island. Coming to us and engaging us about an ordinance is the adult thing to do. Misinforming the public about factual laws and regulations regarding the services that are provided on this island…approaches criminal…And shame on them."***
>
> **— Galveston Council Member Norman Pappous**[2]

The purpose of this report is to equip legislators and consumers with knowledge and tools to confront TNCs' version of the "shock doctrine"—when these companies manufacture crises or political impasse at the local level to push through state policies that remove policymaking authority from local governments. By shedding light on these "barge in, buy, bully, and bamboozle" tactics, this report can help legislators and consumers ask essential questions and advance the interests of the public.

This report begins with important context, including a description of what state inference is, the breadth of state interference conducted by and on behalf of the TNC industry, and why state interference is the preferred tool of this industry. Then we provide a deeper dive into the strategy of manufacturing local crises to prompt an unnecessary state solution, incorporating case studies throughout. Finally, we explore the impact of this state interference and deregulation on a variety of stakeholders. This report concludes with recommendations for policymakers and advocates.

A Note on Research Methods

In order to understand how the TNC industry uses state interference, we conducted in-depth research in six states where legislatures have passed, or considered passing, preemptive state TNC laws. These states, selected based on geographic and political diversity, as well as robust activity by the industry, are Florida, Ohio, Oregon, Pennsylvania, Texas, and Washington. For all states we: analyzed public data about state and municipal lobbying expenditures; reviewed emails exchanged between key state legislators, TNCs, and their contract lobbyists; and reviewed press accounts. Additionally, for Florida, Pennsylvania, Texas, and Washington, we: reviewed emails exchanged between city officials, TNCs, and their contract lobbyists; reviewed available videos, minutes and transcripts of city/county and state meetings and hearings; and interviewed city and state legislators, their staff, and other stakeholders.[3]

PART ONE
Disrupting Democracy: State Interference on Steroids

Transportation Network Companies may be the first industry in our country's history to so quickly and completely rewrite state law in their own interest. **In fewer than five years, lawmakers in 48 states and DC have passed legislation regarding this new industry.** Some of these laws regulate only auto insurance, reflecting an agreement among the major insurance companies and TNCs in the spring of 2015.[4] But in many states, TNCs appear to have used their agreement on insurance to add many other elements to state proposals. **In 41 states, TNC laws explicitly or implicitly erase some or all of the ability of localities to set their own standards for an industry with tremendous impact on local transportation.**[5] Arguably only the gun lobby has been able to more fully restrict local regulation, with 43 states expressly preempting all, or substantially all, aspects of local firearms or ammunition regulation.[6]

State interference or preemption—the strategy of circumventing local democracy by passing state-level laws that prevent cities from governing on specific issues—has become a favorite tool of powerful conservative and corporate groups to avoid regulation, suppress progressive policy innovation at the local level, and strip workers of rights.[7] The American Legislative Exchange Council (ALEC) and other corporate interest groups and associations have aggressively employed this strategy in recent years to stop cities from adopting a diverse range of policy changes supported by their residents.[8] ALEC, the National Rifle Association (NRA), other industry associations, and wealthy special interest groups have exploited the power of the state to weaken local policymaking authority and deregulate entire industries.[9]

This effort to suppress local democracy is, unfortunately, succeeding in too many places. A large number of states now restrict cities from raising minimum wages (25), requiring construction labor agreements (23), and enforcing paid sick day measures (20), among other policies through which local policymakers are seeking to address unemployment, displacement, and affordable housing issues.[10] Numerous bills are pending in state legislatures to further limit cities' power to respond to the needs of their residents. In an extreme effort to erase city power, Texas Governor Greg Abbott has been actively advocating for the removal of local government authority to take any action without the permission of the state.[11]

Statewide TNC laws are the ultimate special interest legislation: primarily benefiting just two companies, Uber and Lyft, frequently with far less regulation than that traditionally applied to other taxi and for-hire companies.

The TNCs have employed this strategy with stunning success. In the last four years, nearly four times as many states have restricted or prohibited city regulation of ride-hailing companies as have passed minimum wage preemption bills.[12] In the states we reviewed, these efforts have been led by Uber, and have largely benefitted just Uber and Lyft, two companies that have been in existence for less than a decade. Statewide TNC laws are the ultimate special interest legislation: further enabling their monopoly or duopoly in the entire for-hire sector, frequently with far less regulation than that traditionally applied to other vehicles-for-hire.[13]

Race and State Interference

While state interference has predominantly been portrayed as a symptom of the political power struggle between the right and left, the reality can be far more alarming: state interference too often involves predominantly white legislatures blocking local programs and policies designed to help people of color to overcome structural and historical barriers. Take the battle over local minimum wages. African American workers often have the most to gain from minimum wage increases because they earn substantially less than their white counterparts in the lowest wage occupations across the United States.[14] Yet in seven cities where African Americans make up between 41 to 73 percent of the city's population, majority-white state legislatures responded to local efforts to raise the minimum wage by passing statutes that prohibit local governments from enacting these measures. In some cases, the legislature barred the wage increase on the local ballot, and in others, it reversed local wage increases.[15] In our research detailed below, predominantly white state legislatures have passed TNC bills that prevent local governments (in many cities with large populations of people of color) from enacting policies that impact drivers, who, in many places, are disproportionately people of color.

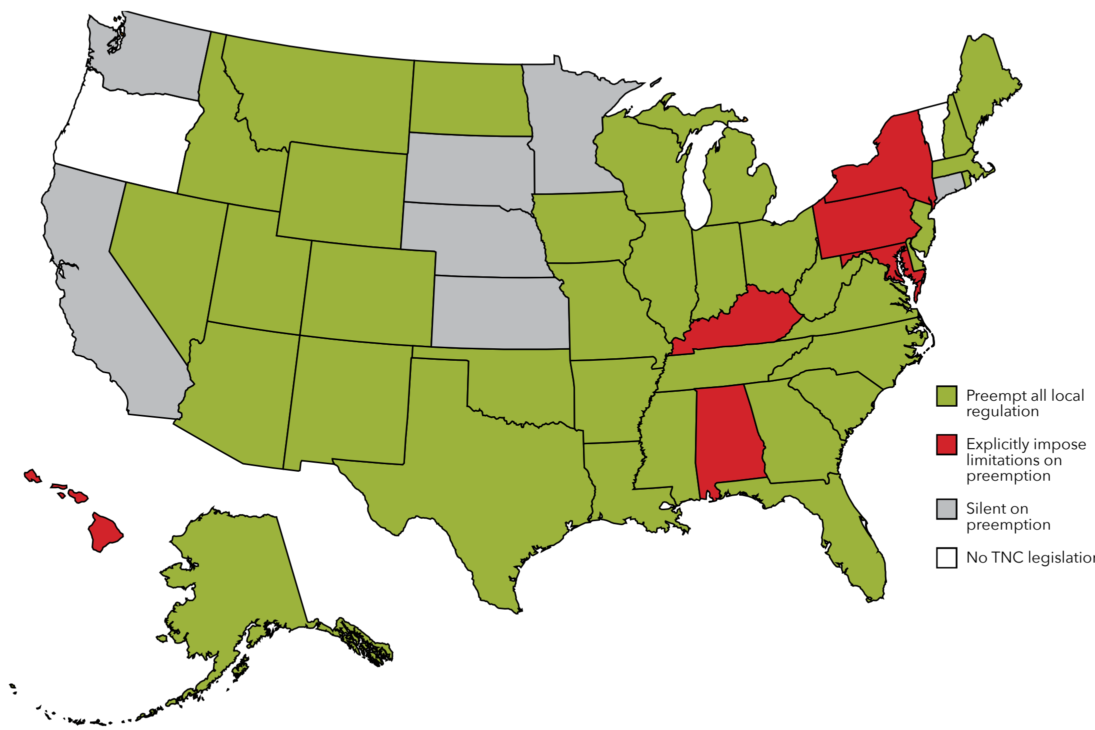
The Connections Between TNCs and ALEC

Many tech startups position themselves to lawmakers and the general public as progressive innovators, not corporate interests. For example, in 2014, Uber and Lyft joined with other tech companies to renounce membership in the ultraconservative group ALEC.[16] However, there are a number of continuing connections between the TNC industry and ALEC.

In 2014, ALEC began circulating model TNC legislation that imposes rules for insurance and background checks on TNCs—largely allowing TNCs to push costs onto drivers—as well as minimal consumer protections, and a provision declaring that the drivers "need not" be the employees of the TNCs.[17] Elements, and sometimes specific wording, of the ALEC bill have appeared in many of the state-passed laws. NetChoice, an industry lobbying group of which Lyft is a current member,[18] appears to have become a primary conduit to ALEC. NetChoice's Executive Director, Steve DelBianco, has been a member of ALEC's Corporate Private Enterprise Board since 2014.[19] The NetChoice website includes two presentations made to ALEC on TNC legislation, including one in 2015 on "solutions to enable the rideshare revolution."[20] Lobbyists for Uber reportedly presented to the ALEC annual convention in 2017 on "the virtue of the sharing economy and state legislation that would prohibit cities from regulating it."[21]

State Interference: The Tool of Choice for TNCs

TNC state legislation, backed by Uber and Lyft, prevents local governments from regulating a broad range of issues, including licensing, background checks, vehicle safety, data-reporting, and driver employment status. While most state laws impose licensing or registration requirements on TNCs, annual registration is frequently for a fee of $5,000 or less—nominal for the well-resourced Uber and Lyft. Of more than 40 laws, only a dozen have consumer privacy protections. Only about half incorporate minimum age requirements for drivers. A handful include limitations on hours that drivers may put in during the course of a day or have limitations on "surge" pricing.[22]



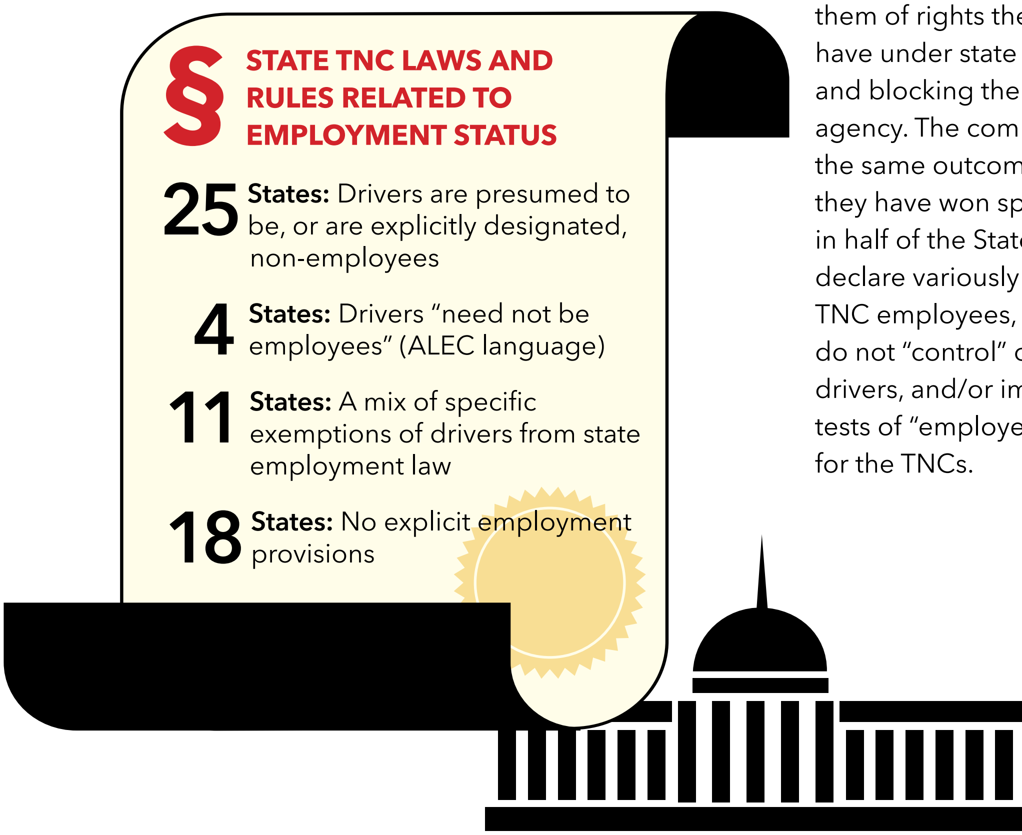
The Misleading "Patchwork" Argument

A favorite talking point of lobbyists arguing for any kind of state interference is that complex "patchworks" of city regulations put an unfair burden on business. TNCs have parroted this line. In Washington State, Uber's representative claimed that the so-called patchwork system "imposes a number of significant costs" that limit benefits to communities, and the ability of drivers and riders to take advantage of this technology.[24] However, across industries, businesses that operate in multiple jurisdictions must navigate multiple differences among the markets – regulatory, cultural, and competitive, to name a few.[25] But it is an especially odd argument coming from savvy, nimble, tech companies like Uber, whose platform reportedly can adjust the cost of rides in a given area every three minutes based on supply and demand.[26]

Why, given that for-hire vehicles like taxis have traditionally been governed at the local level in most states, have TNCs so aggressively sought state-level legislation?

Defining Drivers as Independent Contractors

First, one of TNCs' primary policy goals—to define its drivers as independent contractors—can be accomplished in large part only at the state level, given that the employment relationship is typically determined by a combination of state and federal laws.[27] Uber and Lyft have waged aggressive battles against their own drivers in multiple lawsuits in order to defend their classification as independent contractors and not the employees of the companies.[28] This is a key question for the companies, since employees have protections, benefits, and rights—and thus are more expensive—than independent contractors. Experts estimate that by acknowledging their drivers as their employees, TNCs would add 30 percent to their operating expenses.[29] Both companies say drivers are independent contractors, but multiple state labor agencies have found that drivers are in fact employees.[30] The companies appear to be using state interference to override these decisions. For example, in 2015 the Alaska Department of Labor and Workforce Development informed Uber that it could not operate in Alaska without paying workers compensation payroll taxes as an employer.[31] But in 2017, the Alaska state legislature passed a law (HB 132) that says drivers are not employees, stripping them of rights they would otherwise have under state employment law and blocking the decision of its state agency. The companies have pursued the same outcome in many states, and they have won specialized legislation in half of the States.[32] These new laws declare variously that drivers are not TNC employees, state that the TNCs do not "control" or "manage" their drivers, and/or impose entirely new tests of "employee" status, written only for the TNCs.



Lack of Familiarity with the For-Hire Driving Sector

Second, it may be precisely because cities have experience overseeing taxi and car services that TNCs seek to overrule or bypass them. TNCs are in direct competition with other for-hire vehicle services, but in order to win different and more favorable regulatory frameworks than those other services, they have sought to present themselves as fundamentally different from highly-regulated taxi and car services. This argument may be easier to make to state officials, who are less familiar with the specifics of the for-hire sector. Additionally, cities have constituencies in these sectors –including workers and advocates, organizations of and for people with disabilities, and taxi companies–which have actively opposed special treatment for TNCs.[33] Those local constituencies rarely have the same direct relationship with and capacity to lobby state legislators.

SAFETY

Texas state law eliminated safety features like extra vehicle inspections (which taxis undergo) and a limit on hours that a driver can be working in any 24-hour period. It also eliminated tax or fee revenue that a city might use for enforcement, transportation planning and infrastructure, disability access and more.

Key provisions of law/ordinance[34]	**Austin**	**Galveston**	**Houston**	**Texas HB 100**
Company operating permit required?	Yes, fees vary	$120 per vehicle	Yes, 2% of gross	Yes, fee TBD by TDLR[35]
City driver permit required?	Yes	Yes	Yes	No
Dynamic pricing limited?[36]	Yes	No	No	No
Vehicle standards (other than state inspection)?	Yes	Yes	Yes	No
Is the driver limited in hours active on the network?	12 per 24 hrs	No	12 per 24 hrs	No
Fingerprint background check?	Yes	Yes	Yes	No

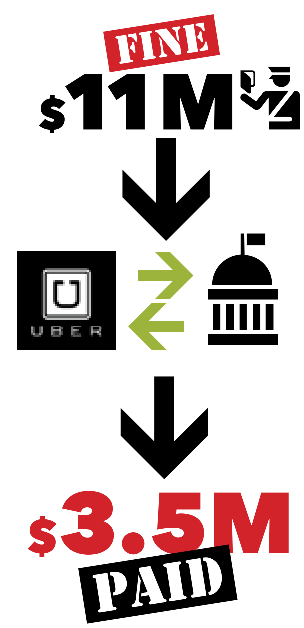
PART TWO
Manufactured Crises, Corporate "Solutions"

In the states examined for this report, TNCs, mainly Uber, have followed a strategy of creating a political crisis at the city level and pushing the state to intervene to solve that crisis.[37] The cycle goes like this: "**barge into**" a market, sometimes illegally, and spend large amounts of money to quickly develop a customer and driver base; employ a further strategy of "**buy, bully, and bamboozle**," which involves simultaneously deploying numerous well-connected lobbyists to pressure local elected officials, sending lobbyists to the state capitol to urge legislators to intervene and solve the "crisis;" and mobilizing customers as "grassroots" supporters (sometimes by misrepresenting the facts).

BARGE IN:
Violate the Law, Pay the Price, Build Base, Repeat

Pennsylvania:
Paying to Operate Illegally and Evade Law Enforcement

The Pennsylvania Public Utilities Commission (PUC), which was responsible for the regulation of the for-hire industry outside of Philadelphia, initially responded to the illegal launch of TNCs in the state by issuing citations to drivers, fining the companies, and obtaining cease and desist orders.[38] The PUC later sought an $11.3 million fine against Uber, for over 120,000 violations. This fine was settled for $3.5 million in 2017.[39]



The regulatory agency in Philadelphia, the Philadelphia Parking Authority (PPA), initiated a sting operation when the TNCs launched, using the app to summon rides, and then issuing citations and impounding drivers' cars.[40] Uber responded by pledging to pay the fines and impoundment costs for its drivers.[41] Then, in order to avoid enforcement, Uber began blocking trip requests coming from individuals and internet provider addresses associated with the PPA.[42] Ten months later, while still operating illegally, Uber had more than 12,000 drivers in Philadelphia.[43] In the summer of 2016, Uber and Lyft received temporary permission to operate. As a condition, Uber paid $350,000 into a "trust" that could be used to settle fines levied by the PPA.[44]

TNCs subsidized their early operations in order to quickly gain a market foothold, which also helped them build up a consumer advocate base to deploy politically. For example, both Uber and Lyft have offered an initial period of free rides in many (if not most) places.[45] For riders who refer enough new users, TNCs have offered credits to be used in-app.[46] Uber and Lyft also offer incentives for drivers to sign up.[47] These incentives, together with rapid growth in smartphone ownership and frustration with taxi and public transit options, led to explosive growth in TNC services.[48]

In addition to directly subsidizing riders and drivers, TNCs treated fines and tickets for operating illegally as a cost of doing business. As Uber and Lyft broke into new cities, regulators across the country tried to enforce existing law, fining the companies and their drivers millions of dollars and even impounding cars. Far from remorseful, the companies responded by fighting fines and urging drivers to continue to operate in violation of the law.[49] In the states and cities reviewed here, Pennsylvania represents the starkest example. There the Public Utilities Commission (PUC) fined Uber $11.3 million.[50] In Miami-Dade County, Uber and Lyft drivers racked up more than $4 million in fines, which the companies said they would pay, but which they fought for over a year.[51] In Houston, Uber promised to pay the fines for drivers, and in Miami-Dade, both Uber and Lyft promised to pay the fines for drivers during the periods when they were operating outside of the law.[52]

BREAKING THE LAW[53]

- **In Miami-Dade County, Uber and Lyft drivers racked up nearly 5,000 citations in two years for operating without valid for-hire licenses. Uber drivers had received 95 percent of those citations still under appeal as of November 2017.[54]**
- **In Portland, Uber paid nearly $70,000 for the several weeks that it operated without taxi permits.[55]**

Uber also spent money to develop technology, called "greyball," to avoid local law enforcement altogether.[56] Greyball used data from the Uber app to identify individual public employees and officials, and then limit their ability to use the app to hail rides —because regulators would summon rides and then issue citations or even impound vehicles.[57] Uber deployed this tool in multiple cities around the globe, including Boston, Las Vegas, Portland and possibly Austin and Philadelphia.[58] The Portland Bureau of Transportation (PBOT) conducted its own audit of Uber, finding that in the 16 days Uber operated illegally in December 2015, Uber tagged 16 government officials' rider accounts, and denied 29 ride requests by PBOT enforcement officers.[59]

Case Study: Texas-Sized Buying, Bullying, and Bamboozling

Texas was the site of a particularly pitched battle between TNCs and cities, with Uber and Lyft tangling with local officials across the state, sometimes withdrawing service, and spending millions on a proposition campaign in Austin. UberX and Lyft launched illegally in Houston and Austin in the first half of 2014.[60] Both cities acted quickly, passing legislation that permitted the companies to operate by fall 2014[61] – yet the TNCs spent the next two years in dramatic, sometimes personal, fights with the cities and elected officials.

In Houston, Lyft responded to legislation by suspending service; Uber stayed but threatened to do the same unless the city repealed requirements for fingerprint background checks.[62] After securing concessions from the city through years of pressure, Uber said that it would stay until at least through the Superbowl in February 2017. By that time, state legislation was pending and Uber never left Houston.[63]

In Austin, where the 2014 legislation was a placeholder while permanent rules were worked out, Uber and its lobbyists launched a campaign focused on Council Member Ann Kitchen, chair of the Mobility Committee. One Uber blog post urged riders to call and email her office, and tens of thousands of people signed an online petition.[64] The company also created a feature in its application ("in-app") targeting Kitchen. When Austin riders opened their app they were greeted with a "Kitchen" option which would offer them transportation via a "horse and buggy."[65] Later Kitchen said: "These guys out in Silicon Valley like to consider themselves disrupters, but they're just another version of what we've had before: big business [types] who think they can write their own laws."[66]

During 2015 and 2016, Uber had four lobbyists in Austin and Lyft had one -- to lobby a ten-member city council.[67] Despite this pressure, the final Austin ordinance regulated TNCs similarly to taxis, including requiring fingerprint background checks, a policy that Uber and Lyft consistently resist.[68] Uber and Lyft then spent a combined $8.6 million campaigning for a new ordinance in Austin.[69] The Council took the ordinance to voters via a ballot proposition. The voters decided to keep the Council's ordinance, despite the TNCs spending $200 for every vote in their favor.[70] Two days later, on May 9, 2016, Uber and Lyft ceased operations in Austin.[71]

A screenshot of the Uber app in Midland, provided by Public Information Officer Sara Bustilloz.

Back in the state legislature, from the beginning of consideration of Texas HB 100, local preemption was a widely-discussed provision.[72] The proposal would overrule the laws put in place by several cities, including Austin, Corpus Christi, Galveston, and Houston. Austin Mayor Steve Adler testified against the state preemption bill in committee hearings, as did city officials or their representatives from Dallas, El Paso, Houston, San Antonio, and the Texas Municipal League.[73]

The cities and their residents were no match for the TNCS: in the 2015 state legislative session alone, Uber reportedly spent between $420,000-$945,000 on lobbying, and Lyft spent between $160,000 and $285,000.[74] For the final push in 2017, Uber had 26 lobbyists and spent between $820,000 -$1.6 million to pass HB 100 in May 2017.[75]

BUY INFLUENCE:
Lobbyists, Legislators, and Public Relations

In addition to money spent on fines and tickets, Uber has aggressively employed traditional lobbying strategies with remarkable amounts of money. Uber's approach has been to hire strategic and high-profile Democratic and Republican operatives, depending on key officials and which parties control the legislature. The Democratic operatives in particular soften the company's brash image and perhaps distract from its connections with conservative groups like ALEC. These well-connected state and local lobbyists, and large numbers of them, are able to generate a high volume of contact with elected officials and their staff. Executing this strategy requires a significant amount of money; lobbying disclosures indicate that Uber and Lyft spent at least $4 million in 2016 and the first half of 2017, in just five of the states we reviewed.[76] In 2016 Uber and Lyft's lobbying expenditures in the five states below are on par with Walmart's expenditures in all of the 41 states it reported.[77]

In the first half of 2017, Uber topped the list of all lobbying groups in New York State, spending $1.8 million to pass statewide legislation.[78]

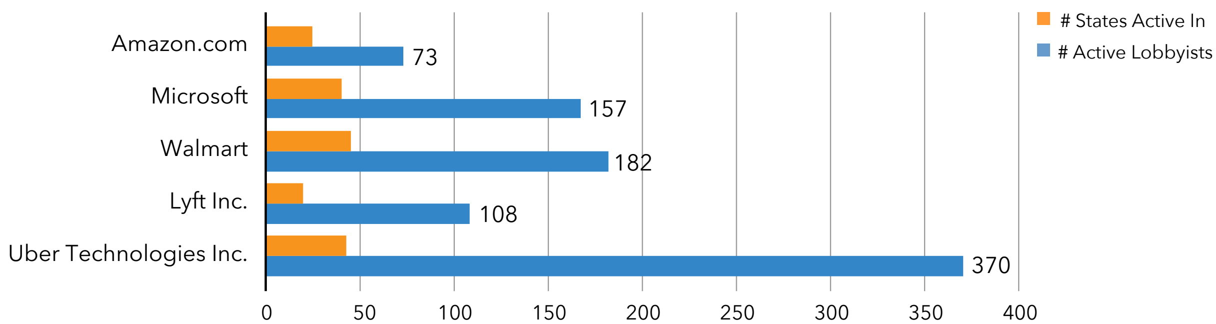
Uber and Lyft Lobbying Expenditures [76]

	Uber $ Lobbying		Lyft $ Lobbying	
	2016	**Jan. – Jun. 2017**	**2016**	**Jan. – Jun. 2017**
Florida	$480,000	$270,000	$35,000	$20,000
Oregon	$57,433	$31,574	$53,000	$30,000
Pennsylvania	$394,028	$175,193	$27,551	$2,830
Texas*	$720k–1,265k	$820k–1,560k	$185k–405k	$365k–760k
Washington	$150,876	$74,697	$35,000	$53,000
Minimum spent	**$1,802,337**	**$1,371,464**	**$335,551**	**$470,830**
Maximum spent	**$2,347,337**	**$2,111,437**	**$555,551**	**$865,830**

**Provides only ranges of amount spent, not specific amount spent.*

Well-connected lobbyists—including former elected officials and their staff at both the local and state levels—have been central to this strategy. David Plouffe is one of Uber's most high-profile hires, emblematic of what appears to be an effort to make Democrats the public face of its anti-democratic policies. Plouffe, a former strategist for President Obama, joined Uber in 2014, providing the company with a sheen of progressive values even as it fought Seattle's city council over a ground-breaking collective bargaining ordinance (see case study below).[79] In Portland, Uber hired Mark Wiener, considered to be one of the most powerful political consultants in the city, while he was also working with the Democratic mayor on his reelection plans.[80] The TNCs' PAC paid $50,000 to Austin's former Democratic Mayor Lee Leffingwell in their failed $8 million campaign in that city.[81] And in Pennsylvania, Uber's many lobbyists included Krystjan Callahan, the former Chief of Staff to Republican House Speaker Mike Turzai. In conversations, legislators, staff and stakeholders indicated that Uber stood out for the strange bedfellow mix of Democratic- and Republican-aligned lobbyists.

Legislators and their staff also said that the TNCs stood out for the sheer numbers of people they hired as lobbyists, and their resulting ability to meet with many different offices while devoting significant attention to gatekeepers and sponsors. According to The National Institute for Money in State Politics, in 2016 Uber alone had 370 active



lobbyists in 44 states across the country, dwarfing some of the largest businesses and technology companies.[82] Together, Uber and Lyft lobbyists outnumbered Amazon, Microsoft, and Walmart combined.

2016 State Lobbyists

Uber's investment in lobbying staff at the city and county level was also overwhelming. In Portland, 16 Uber and Lyft lobbyists and company representatives appear in city officials' contact logs, and in 2015 the companies together logged 453 meetings, phone calls, and emails with city council members, the mayor, and staffers, representing 30 percent of all city lobbyist activity.[83] When Uber was trying to launch UberBLACK in Miami-Dade, it had seven lobbyists to persuade a 13-member Board of Commissioners to see things its way.[84]

What does all this money buy? It allows the TNCs to literally write their own ticket.

In multiple cases, this money, time, and attention allowed Uber to draft its own bills, heavily influence the vetting, and/or even effectively staff elected representatives on the issue by helping with press releases and testimony.

> ***"This is about as loose as it comes…And I know why, because it's what Uber put on the table. The more I get into the bill, the more aggravated I get – that this is an Uber bill. This is not a Connecticut General Assembly bill. This is not a taxi bill."***
>
> **– Connecticut State Senator Michael McLachlan**[1]

[1] *Kyle Constable, "Years Behind Other States, Rules for Uber, Lyft Win Final Passage," CT Mirror, (Jun7, 2017).* https://ctmirror.org/2017/06/07/years-behind-other-states-rules-for-uber-lyft-win-final-passage/

Email records indicate that in Oregon and Ohio, Uber wrote or co-wrote the original drafts of legislation—in Ohio this version would become HB 237, the preemption bill.[86] In Washington, a state legislator said that there was no apparent stakeholder process in 2016-17—Uber just showed up with the legislation it wanted.[87] In Texas, one longtime lobbyist said, "The bill that was drafted was a pure industry bill."[88] In Pennsylvania, Uber's version of statewide legislation was the one that moved forward, reportedly because of its aggressive lobbying.[89] And in Florida, the sponsoring senator's staff emailed the first iteration of the bill to Uber, calling it "our Uber language" and Uber's lobbyist requested a meeting to review changes to "our legislation."[90]

The company's role in drafting legislation, combined with state legislators' relative unfamiliarity with for-hire vehicle regulation and the TNC technology specifically, allowed for an important key provision—exempting the companies from any obligation as employers of their drivers—to pass without discussion in some places. We were unable to locate any instance in which issues of employment classification were raised by the TNCs or the legislators at a public hearing on the 2017 legislation in Florida or Texas.[91] In Oregon, one of the chief sponsors of the TNC bill later introduced an amendment to change drivers to employees, potentially in an effort to address employment classification issues that were overlooked initially.[92]

Our review of emails suggests that many of the lobbyists function like additional staff for elected officials, providing them with ready-made talking points, drafting messages from legislators to colleagues, and drafting legislators' testimony about the bills. In Portland, Uber was involved in writing the city's press release announcing a stakeholder task force and its own suspended service, and in drafting a temporary operating agreement.[93] In Ohio, Uber's lobbyist sent over draft testimony for each primary sponsor to give to the committees considering the bill.[94]

Despite this intense TNC lobbying, and what seemed like inevitable state interference, cities still wanted to regulate TNCs. City officials and staff from places like Seattle, Broward County, Austin, El Paso, Galveston, and Houston and organizations like the Florida League of Cities,[95] League of Oregon Cities,[96] and the Ohio Municipal League[97] all testified, submitted comments, or lobbied against preemption. In Florida, Ohio, and Texas, they lost.

BULLY:
Levy Ultimatums and Call it Negotiation

In news reports and multiple conversations with city council members, the word "bully" came up not just in reference to Uber's campaigning strategies but also its behind-the-scenes legislative conversations.[98] Despite portraying itself publicly as trying to work with regulators, Uber has sometimes privately refused to negotiate on any terms but its own. In Seattle, Uber's representative told City Council President Sally Clark that it would not negotiate as long as the city was considering capping the number of for-hire vehicles: "…[caps] have no place in this conversation. We hope to start more serious discussions soon and be more actively involved of [sic] the drafting of these regulations."[99] In Washington, DC, council member Mary Cheh compared Uber to the gun lobby for its unwillingness to compromise.[100]

In Pittsburgh, Mayor Bill Peduto explained how its relationship with Uber soured: "When it came to what Uber and what Travis Kalanick wanted, Pittsburgh delivered…But when it came to our vision of how this industry could enhance people, planet and place, that message fell on deaf ears."[101]

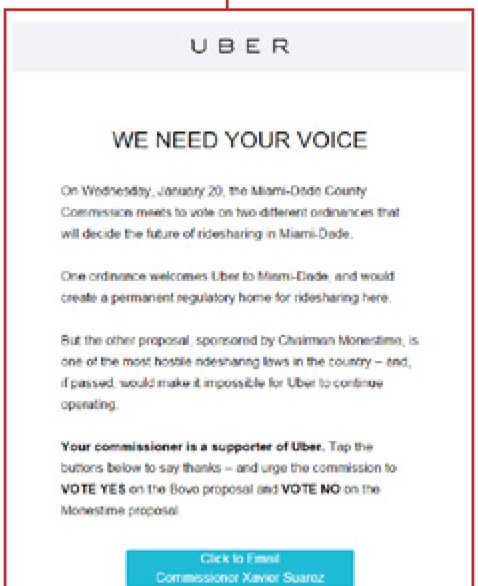
Both Uber and Lyft demonstrated a willingness to use the ultimate bullying tactic, issuing an ultimatum that they would leave a city if they did not get the rules they wanted.[102] In Miami-Dade, commissioners were debating their TNC ordinance while watching as Uber and Lyft suspended service in neighboring Broward until they won the ordinance that they wanted.[103] In Texas in particular, one or both of the companies suspended service in numerous cities, including Austin, Corpus Christi, Galveston, Houston, and Midland, when city legislative bodies (and voters in the case of Austin) imposed reasonable regulations on them.[104] Of note, Uber remained in Houston, the fourth largest city in the US, proving that it could operate with what it called "onerous" requirements in place. But legislators, not wanting to be seen as anti-innovation luddites, and fearing the potential blowback, have often relented and given in to the demands of the TNCs.[105]

BAMBOOZLE:
How to Make Customers Work for You

Within Uber, people refer to the overarching strategy of making customers into advocates as "Travis' law,"[106] named for Uber's founder and first CEO Travis Kalanick: "Our product is so superior to the status quo that if we give people the opportunity to see it or try it, in any place in the world where government has to be at least somewhat responsive to the people, they will demand it and defend its right to exist."[107]

Florida: Mobilizing (and Misleading) Riders

In Florida, Uber used its access to riders to get them to lobby county and state legislators on behalf of the company. UberX and Lyft launched service in Miami in May-June, 2014.[108] After eighteen months of deliberation, the Miami-Dade Board of Commissioners was prepared to advance one of two competing proposals in January 2016. One, backed by Chair Jean Monestime, would create a more level playing field for all for-hire drivers (taxi and TNC), while the other would give TNCs a different set of rules more to the TNCs' liking. In the week leading up to the vote, the company sent a customized email to every rider in the area, linking them with one click to their commissioner. The subject line read: "Save Uber in Miami-Dade."[109] Uber cc'd Monestime on every email to another commissioner: he withdrew his proposal, and an Uber-supported bill moved forward.[110]


UBER

WE NEED YOUR VOICE

On Wednesday, January 20, the Miami-Dade County Commission meets to vote on two different ordinances that will decide the future of ridesharing in Miami-Dade.

One ordinance welcomes Uber to Miami-Dade, and would create a permanent regulatory home for ridesharing here.

But the other proposal, sponsored by Chairman Monestime, is one of the most hostile ridesharing laws in the country – and, if passed, would make it impossible for Uber to continue operating.

Your commissioner is a supporter of Uber. Tap the buttons below to say thanks – and urge the commission to **VOTE YES** on the Bovo proposal and **VOTE NO** on the Monestime proposal.

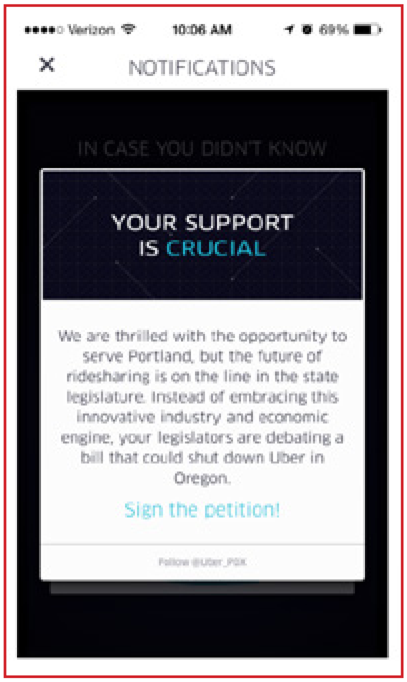
Click to Email
Commissioner Xavier Suarez

This is a screenshot of a January 2016 notice to Uber customers in Miami-Dade.[112]

At the same time, the TNCs pushed for a statewide preemption bill. In March 2016 – with its recent Miami-Dade campaign in the background – Uber targeted Florida State Senate President Andy Gardiner with an ad blitz in Tallahassee and Orlando, along with mailers to voters in his district. It ultimately delivered over 32,000 petition signatures to his office.[111]

Activating customers as advocates for the company is an essential tactic in building a local political crisis. While activating members is not a remarkable political strategy for a non-profit or political group, it is certainly a remarkable innovation for private, for-profit companies to activate customers in this way.[113] And while a non-profit or political group may be mobilizing a member to support an issue or candidate with their donation or civic engagement, TNCs are mobilizing customers to ostensibly "save" a private service, which conveniently allows the companies to grow and dominate for-hire markets.

The TNCs' technology facilitates unique access to customers, with the companies using in-app messages to mobilize customers when facing potential regulation. When a rider opens the app, they are greeted on-screen with the TNCs' message and a phone number to call, or web links to send emails or sign online petitions.[114] Uber has also used traditional political campaigning strategies, like robo-calls, direct emails, tweets, multiple forms of advertising (trucks, television, utility poles), and even door-hangers in Miami-Dade County.[115] In late 2015 while fighting a pending collective bargaining ordinance, Uber poured resources into a Seattle-specific television ad, and later developed in-app podcasts to deliver its message more directly to drivers.[116]



A screenshot of a Spring 2015 notice to Uber customers in Portland.[117]

Implied in Travis' Law is the idea that what is at stake is whether or not TNCs should exist—however, in our review this has almost never been the question under consideration by any local elected government.[118] This misleading conflation, important to building toward political crisis, is reflected in Uber's public messages. For example, messages to customers have claimed that city councils, county boards, or state legislatures are threatening to "force" the TNCs to leave, when in fact elected governments are seeking to enforce laws or even create basic safety requirements that other businesses follow. A Galveston city council member noted that constituents asked him why the council had "not allowed Uber to operate," when in fact Uber chose to leave the city (the continued operation of another local TNC, Get Me, demonstrated that law-abiding businesses were welcome in the city).[119] Austin City Council Member Delia Garza called out Uber's representative on the deception at a council meeting, saying "I'd ask in return that we be fair in the messages we're sending and the intent of what we're trying to do on this council, because, there have been messages sent, [like] 'Council member Kitchen is trying to take Uber out of Austin, Texas.' That's not fair."[120]

By using its ability to reach consumers directly in the app and by using persuasive, sometimes false, messages, Uber has overwhelmed city and state legislators with emails and phone calls from customers. In Houston the city attorney sent a "cease and desist" email to Uber because the number and persistence of emails coming into the Mayor and Council was "[h]arassing in nature and arguably unlawful."[121] In Seattle, Uber was still in its infancy of public campaigning when in September 2013 it managed to flood City Council members with phone calls from riders. Council member Mike O'Brien said he was shocked by the volume of calls on that first mobilization.[122]

The combination of building and mobilizing a consumer base, together with bullying city councils, creates a local crisis, and paves the way for the state to interfere with local policymaking.

PART THREE
What Corporate-Rewriting of State Laws Means for Communities

Pushing Costs onto Drivers

When TNCs succeed in pushing legislation that exempts TNC drivers from state labor laws, including unemployment insurance, workers compensation, and minimum wage, drivers no longer have access to baseline protections and benefits afforded to other workers in the state. In a nod to driver complaints of earning low, sometimes subminimum wages[123] and other bad publicity, Uber announced "180 days of change" in 2017, most notably allowing tips in the app.[124] However, this and other changes, such as charging riders who keep drivers waiting for more than two minutes, present corporate-driven alternatives to baseline worker protections and benefits and do not address very real driver concerns.[125]

Not only do the new state laws relieve TNCs of approximately 30 percent of their labor costs by exempting them from obligations as employers, they also allow the companies to pass many operating costs onto workers, who must purchase their own insurance and ensure their vehicles meet government requirements or purchase new ones.[126]

The loss of baseline employment protections has multiple ill effects on drivers. Access to unemployment insurance benefits when drivers are either "deactivated" or lose a second job is critical. Since taxi drivers and chauffeurs are killed on the job at a rate five times higher than the average for all other workers, workers' compensation protections are essential for this extremely hazardous occupation.[127] Existing background check laws that provide a framework for TNC driver background checks are being overridden by corporate-sponsored state laws.[128] Similarly, state legislatures are allowing TNCs to adopt their own, unenforceable, discrimination "policies," in contrast to existing laws that provide enforceable anti-discrimination protection for "employees." [129]

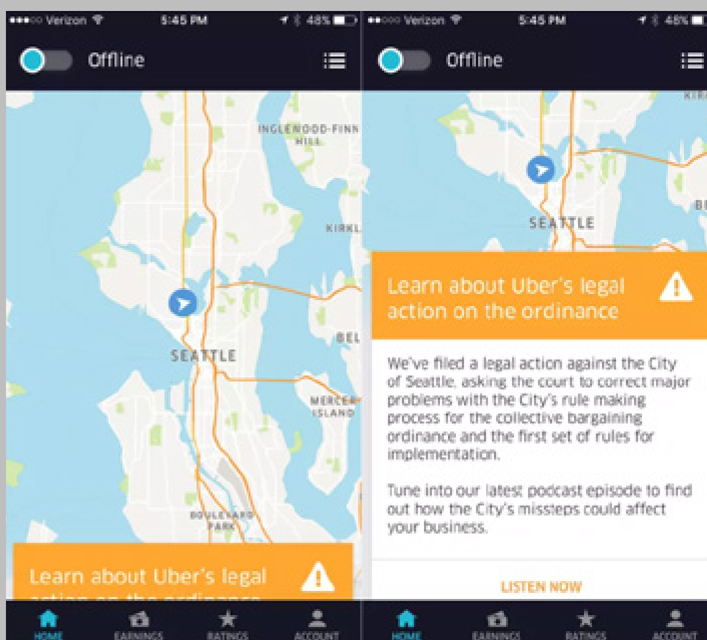
Finally, corporate rewriting of state laws governing TNC treatment of drivers undermines these drivers' ability to come together and negotiate with their employers over wages and benefits. Reclassifying workers as independent contractors, coupled with preemption of all local regulations of TNCs, shuts down innovative efforts that provide opportunities to ensure workers' voice, such as Seattle's collective bargaining ordinance, as well as emerging discussions on "portable benefits" for on-demand workers.

This corporate rewriting of state laws to exempt TNCs from obligations as employers is especially troubling because there is significant evidence that, under the traditional definitions in most state employment laws applied to virtually every other business within a state, drivers are employees. As state agency decisions, independent research, and news reports illustrate, TNCs essentially control what drivers do, surveil how they do it, set the price of their labor, and employ algorithmic management tools to get them to work when and where the company wants, all under pain of "deactivation" of their accounts.[130]

Case Study: Seattle Drivers Win Collective Bargaining as Washington Avoids Preemption

Washington State – where the battle around TNC regulation is ongoing – stands out for two reasons: first, it is one of a handful of states with very limited statewide regulation of TNCs; and second, the City of Seattle, one of the first cities where UberX launched, passed a groundbreaking ordinance enabling collective bargaining for for-hire drivers.[131]

Despite intense public campaigning by Uber and Lyft, Seattle passed an ordinance in March 2014 that set up a two-year pilot, which limited each TNC to 150 drivers on the road at any time.[132] After the Council passed the ordinance, Uber, Lyft, and a third TNC, Sidecar, spent over $1.5 million to collect more than 36,000 signatures and put a referendum on the November 2014 ballot to block the new regulations.[133] The Mayor and stakeholders began a 45-day negotiation process to repeal the original ordinance and replace it with a TNC-supported ordinance.[134] The final law lifted the cap on TNC drivers and planned for a release of 200 more taxi licenses over four years.



Seattle Uber driver screenshot.[136]

About six months later and 60 miles away, the state legislature considered and then passed a narrow, bipartisan bill, that established insurance requirements for TNCs and exempted drivers from workers compensation, but that did not, in its final form, preempt local laws.[135]

Back in Seattle, the city council unanimously passed a first-of-its-kind ordinance that would provide TNC, taxi, and other for-hire drivers the right to collectively bargain with Uber, Lyft, and other companies.[137] The law resulted from drivers organizing and advocating for themselves with support from Teamsters Local 117. During the campaign, drivers expressed concern about the TNCs unilaterally changing the payment rates and formula, which resulted in lower and lower net pay, and deactivating them with no warning, explanation, or fair appeal process.[138] The U.S. Chamber of Commerce and Uber continue to challenge the law in court.[139]

In 2017, TNCs lobbied the state legislature to pass more expansive and preemptive legislation (SB 5620) that would establish TNC drivers as independent contractors (with language similar to that adopted in Florida and Texas).[140] To advance their state agenda, TNCs hired some of the most established, respected, and expensive lobbyists on both sides of the political aisle. Uber hired conservative-leaning Gano & Associates, and Lyft hired Martin Loesch, a staffer of the previous Democratic Governor, Christine Gregoire.[141] Thus far, the TNCs have not been successful: their bill died in the state Senate.

Overriding Laws Protecting Workers of Color

As with other cases in which the state interferes with local policymaking authority, laws passed by predominantly white state legislatures can override laws that protect the rights of workers of color.[142] Anecdotal reports from media, interviewees, and even the TNCs themselves, indicate that drivers of taxis, limos, town cars, and TNC vehicles are largely people of color and immigrants. [143] According to Uber's own 2015 survey, 57 percent of Uber drivers identified as people of color across 24 large U.S. markets.[144] In places like Miami-Dade, Lyft said that 80 percent of drivers belong to a "racial minority group,"[145] while Uber said that 90 percent of their Seattle drivers were East African, Indian, or Pakistani.[146] Interviewees or the companies themselves identified driver workforces as made up primarily of people of color and immigrants in at least one city in the four states covered in this report.[147]

Drivers, who in numerous cities are also immigrants, lose anti-discrimination and harassment protections when reclassified as independent contractors.[148] Despite reports that TNC ratings systems may be hard-wired to discriminate against drivers of color, states are writing corporate-sponsored legislation that exclude drivers from anti-discrimination laws, instead allowing the TNCs to have unenforceable internal policies against discrimination.[149]

This corporate rewriting of TNC legislation compounds the competitive disadvantage faced by for-hire drivers in more traditional settings, like taxi drivers. Already outgunned by TNCs' cash and influence, taxi drivers in many cities now must comply with higher standards than TNC drivers, and city officials must decide if they should deregulate all for-hire driving. Meanwhile, taxis struggle to maintain their customer base. In Los Angeles, total taxi trips dropped by nearly 30 percent in the three years after TNCs began operating.[150] In San Francisco, TNCs are making approximately 12 times more daily trips than taxis.[151]

Reduced Access for Passengers with Disabilities

Disability rights advocates have sounded the alarm in many cities and states that TNCs are undoing progress made on access to transportation for all people. Advocates argue that TNCs, by failing to provide accessible vehicles, are in violation of laws protecting people with disabilities. Further, they contend that by driving down the business of taxi companies—which, in many cities, must meet accessibility requirements—TNCs cause fewer accessible vehicles to be on the road. In Philadelphia, wheelchair accessible vehicle medallions plummeted in value after TNCs entered the market, and some of the PPA's efforts to improve accessibility were stymied.[152]

TNCs have claimed that they are exempt from the Americans with Disabilities Act, and have faced litigation over this question.[153] State laws, most of which do not include any enforceable requirements around access, leave out passengers with disabilities; many state TNC bills note that if the TNC does not have an accessible car, their only obligation is to refer a passenger to an accessible car, if available.[154] While Houston was successfully implementing policy to address its community's mobility needs, the Texas legislature passed a law likely rendering those efforts moot.[155]

Undermining Public Transit and the Climate

There is some evidence that TNCs are drawing customers from public transit, which could not only impact the function of transit in the long term but also our air quality and environment. Recent research suggests that, despite possible reduced personal car ownership among riders, overall ride-hailing is “likely to contribute” to increased vehicles miles traveled in major cities.[156]

Transportation systems are affected as some riders migrate from public transportation to TNCs.[157] A study of San Francisco TNC riders found that one third of those surveyed would have used public transit for their most recent trip, were TNCs not available.[158] Another study in New York City found that in one year, subway and bus ridership dropped by 19 million, while TNC ridership increased by 72 million.[159] This has the potential to create a downward cycle of lower revenues and ridership on public transit, and then service cuts, which lowers access for the people who most need it – low-income residents who can’t afford to use TNCs.[160]

Movement to TNCs from public transit, biking, and walking also increases traffic congestion and the number of cars that are not held to the same emissions standards as other for-hire vehicles.[161] For example, in San Francisco, the taxi fleet met ambitious emissions standards in 2012.[162] Not only have TNCs not been held to these higher standards, but they have grown exponentially while taxi trips have declined in places like San Francisco.[163] With preemptive state laws, cities and counties may not be able to place those same emissions requirements on TNCs.

Conclusion: Eroding Democratic Governance

One of the primary duties of local government is to study and understand the unique transportation needs of residents, organize the interrelated pieces of the complete system, and regulate the whole. Through the TNC strategy of “barge in, buy, bully, and bamboozle,” cities that have made significant investment in transportation have been deprived of the ability to do their jobs, first by TNCs stonewalling them over access to crucial data needed for planning,[164] and second by TNCs pushing forward statutes that, in 41 states, explicitly or implicitly restrict or prohibit their ability to regulate ride-hailing companies at all. Even after state legislatures pass laws preempting local governments from regulating TNCs, cities continue to recognize the need for regulation of TNCs at the local level. When locally-elected policymakers are prevented from creating policies to regulate their own transportation systems and support their own workers, or the policies they do pass are overridden by state legislatures beholden to corporate interests, then local participatory democracy is at stake.

Recommendations to Counter Corporate-Sponsored State Interference and Protect Local Democracy

There is still much state and local legislators can do to bring fairness to the sector and oppose undue influence by corporations in our government.

State Legislators

Reject efforts to preempt local authority with respect to TNCs. Instead they should:

- Delegate regulation of TNCs to local transportation authorities, just as many states have done for taxi regulation, so that local concerns can be factored into policies;
- Alternatively, work closely with cities to develop policies that establish a floor, allowing cities flexibility to exceed and customize TNC regulations; and
- Reverse laws, where they exist, that strip drivers of their rights as employees; require TNCs to pay their fair share into state social insurance programs like unemployment insurance and workers' compensation, and to comply with state labor standards, like minimum wage, anti-discrimination, and fair chance hiring laws.

Local Legislators

- Set standards that ensure safe, fair conditions for for-hire drivers, equitable service for all communities, access for passengers with disabilities, and that our shared environment is protected from unnecessary emissions and congestion;
- Require TNCs to comply with local labor standards, like local minimum wage laws; and be alert to any attempts to define drivers' employment relationship in city legislation and rulemaking (for example, Salem, Oregon);[165]
- Require TNCs to share, with appropriate privacy safeguards, the data that communities need to:
    - ensure that TNCs are strengthening rather than undermining mobility and transportation, especially as they move into other forms of transportation, like autonomous vehicles and delivery trucks;
    - ensure that TNCs are serving all parts of the city and all of its residents;
    - create equity among taxis, other for-hire, and TNCs in terms of regulation and protections; and
    - protect the safety of passengers and the public;
- Learn about and support innovative ways to ensure drivers can:
    - form innovative business models, such as taxi co-ops or non-profits; and
    - come together and negotiate with the companies over wages and working conditions (See Washington and Seattle case study).

Strategies to Counter State Interference for Advocates and Local Legislators

- Stress the careful planning and unique transportation needs of your local communities (i.e., one size does not fit all); call attention to the negative impacts of preemption and put things into personal terms;
- Use data to support efforts to move hearts and minds, and where possible, frame the issue in economic terms;
- Call out (and use litigation to attack) racial injustice when it occurs as part of preemption;
- Support elected officials who lead on local policymaking rights and equity in the industry; and
- Ensure local government attorneys are willing and able to aggressively defend the city against state interference, including through legal challenges if necessary.

Appendix

TNC Talking Points v. the Whole Story

"Forced" to leave? *Council members are forcing Uber to leave;[166] customers must "save" Uber.[167]*	No proposals that we reviewed would have banned TNCs from any jurisdiction. See, e.g., Galveston spokesperson Kala McCain: "We did get quite a bit of pushback on social media… People being really upset about the fact that we did not allow Uber to operate, which is obviously not the case. They didn't want to adhere to the city ordinance that was in place."[168]
Economic opportunity? *"The legislation before you today promotes choice and opportunity… by providing ... more economic opportunity for drivers.[169]*	TNC jobs largely benefit drivers who are using them to supplement regular earnings. Uber recently settled litigation with the Federal Trade Commission after it wrongly claimed drivers could earn $90,000 yearly.[170] Both driver anecdotes and recent data show drivers earning close to, or sub-minimum wages.[171]
Independent drivers? *Drivers control when, where and how much they drive.[172] "[D]rivers operate their own small business."[173]*	Uber uses significant psychological tools and used to offer subprime loans, to keep drivers on the road and tied to Uber.[174] TNCs (Uber in particular) control almost every aspect of a driver's experience, from setting the rates they charge, constant surveillance of acceptance rates and routes, to threats of "deactivation."[175]
A technology company? *"Uber is a technology company…We've built a mobile platform that connects users with drivers giving rides… They're independent contractors who pay a small fee to us to use our platform."[176]*	Federal Judge Edward Chen's analysis of this claim: "Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs, John Deere is a 'technology company' because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a 'technology company' because it uses modern irrigation techniques to grow its sugar cane."[177]
Consumer choice? *"The legislation before you today promotes choice…"[178]* *"...more than anything, Lyft is about giving people choices."[179]*	After Uber and Lyft left Austin, a taxi driver coop and a TNC nonprofit filled the void. Altogether, 12 TNCs came in, with 7 still operating as of the spring of 2017.[180]

Endnotes

[1] Lisa Rayle, Danielle Dai, Nelson Chan, Robert Cervero and Susan Shaheen, "Just a Better Taxi? A Survey-based Comparison of Taxis, Transit, and Ridesourcing Services in San Francisco," Transport Policy, (2016, Vol. 45).

[2] Galveston Council member Norman Pappous, City council meeting (Feb. 11, 2016). Video available here, http://www.galvestontx.gov/420/G-TV.

[3] We conducted interviews and backgrounding conversations with more than 30 stakeholders.

[4] See the Property Casualty Insurers Association of America updates on Transportation Network Companies, accessed October 23, 2017: http://www.pciaa.net/industry-issues/transportation-network-companies.

[5] See: Texas A&M University, Transportation Institute's map and resources here, https://policy.tti.tamu.edu/technology/tnc-legislation/; and "City Rights in an Era of Preemption: A State-by-State Analysis," National League of Cities, (Feb. 2017), http://www.nlc.org/sites/default/files/2017-03/NLC-SML% percent20Preemption% percent20Report% percent202017-pages.pdf.

[6] See the Law Center to Prevent Gun Violence, accessed September 19, 2017: http://smartgunlaws.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/.

[7] We are not the first to call out the TNCs "disrupting democracy." See Rick Claypool and Robert Weissman, "Disrupting Democracy: How Uber Deploys Corporate Power to Overwhelm and Undermine Local Government," *Public Citizen*, (May 4, 2016), https://www.citizen.org/sites/default/files/uber-disrupting-democracy-corporate-power-report.pdf.

[8] Marni von Wilpert, "City Governments are Raising Standards for Working People – and State Legislators are Lowering Them Back Down," Economic Policy Institute, (Aug. 26 2017), http://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/.

[9] Shaila Dewan, "States Are Blocking Local Regulations, Often at Industry's Behest," New York Times, (Feb. 23, 2015), https://www.nytimes.com/2015/02/24/us/govern-yourselves-state-lawmakers-tell-cities-but-not-too-much.html.

[10] Authors' review of enacted state statutes. At least four states restrict local inclusionary housing policies; three restrict local anti-discrimination measures; and two prohibit requirements to provide jobs to local residents for publicly funded development projects ("local hire"). The four state statutes that prohibit inclusionary housing policies are Arizona Rev. Stat. § 9-461.16; Indiana Code Ann. § 36-1-24.2-1; Tenn. Code Ann. § 66-35-102; and Tex. Local Gov't Code § 214.905. The two state statutes that prohibit local hire are Ohio Rev. Code Ann. 9.49 (2016) and Tennessee Tenn. Code Ann. 12-4-117 (2016). Note: In some states, laws prohibiting rent control have been interpreted as rendering mandatory inclusionary policies on rental housing illegal. See also "City Rights in an Era of Preemption: A State-by-State Analysis," National League of Cities, (Feb. 2017), http://www.nlc.org/sites/default/files/2017-03/NLC-SML% percent20Preemption% percent20Report% percent202017-pages.pdf, citing The National Multifamily Housing Council; and von Wilpert, "City Governments are Raising Standards for Working People – and State Legislators are Lowering Them Back Down."

[11] Abbot said: "…I think a broad-based law by the state of Texas that says across the board, the state is going to pre-empt local regulations, is a superior approach." Patrick Svitek, "Abbott Wants 'Broad-based Law' that Pre-empts Local Regulations," Texas Tribune, (Mar. 21, 2017), https://www.texastribune.org/2017/03/21/abbott-supports-broad-based-law-pre-empting-local-regulations/.

[12] von Wilpert, "City Governments are Raising Standards for Working People—and State Legislators are Lowering Them Back Down."

[13] Both Uber Technologies Inc. and Lyft Inc. now operate multiple types of services, but Uber started with black town cars, "UberBLACK." UberX and Lyft services most closely resemble traditional taxi services and are the focus of this research report and the regulatory fights in cities and states. UberBLACK services typically fell under city or state regulations (Lyft eventually followed with cars similar to UberBLACK). The TNCs quickly propagated the talking point that taxi companies were the bad monopoly and entrenched special interest in the private, for-hire sector. However, the explosive growth of and consumer demand for TNCs has led to a rapid decline in taxis, as cited later in this report. See the San Francisco County Transportation Authority, "TNCs Today: A Profile of San Francisco Transportation Network Company Activity," accessed October 26, 2017: http://www.sfcta.org/tncstoday. For the first time in NYC in July 2017, TNC trips outnumbered taxi trips. Winnie Hu, "Uber, Surging Outside of Manhattan, Tops Taxis in New York City," New York Times, (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/nyregion/uber-taxis-new-york-city.html. Examples in this report will show how state legislation preempted some cities' attempts to create more parity across the for-hire industry, thus enabling TNCs to continue with competitive advantages over taxis.

[14] See, e.g., David Cooper, "Raising the Minimum Wage to $15 by 2024 Would Lift Wages for 41 million American Workers," Economic Policy Institute," (Apr. 26, 2017), http://www.epi.org/publication/15-by-2024-would-lift-wages-for-41-million/.

[15] "States Preempting Local Laws are an Extension of Jim Crow," The Partnership for Working Families, (Aug. 29, 2017), http://www.forworkingfamilies.org/blog/states-preempting-local-laws-are-extension-jim-crow.

[16] Jay Riestenberg, "Uber and Lyft Leave ALEC at Curb," Common Cause, (Sep. 25, 2014), http://www.commoncause.org/democracy-wire/uber-and-lyft-leave-alec-at-curb.html.

[17] Rosalind S. Helderman, "Uber pressures regulators by mobilizing riders and hiring vast lobbying network," *The Washington Post*, (Dec. 13, 2014), https://www.washingtonpost.com/politics/uber-pressures-regulators-by-mobilizing-riders-and-hiring-vast-lobbying-network/2014/12/13/3f4395c6-7f2a-11e4-9f38-95a187e4c1f7_story.html. See also ALEC Exposed, accessed August 5, 2017: http://www.alecexposed.org/wiki/Transportation_Network_Company_Act_Exposed

[18] NetChoice also joined the Political Action Committee that tried to overturn Austin's TNC ordinance. Staff report, "More Austin Groups Join Effort to Quash City's Uber, Lyft Rules," Austin Business Journal, (Jan. 15, 2016), https://www.bizjournals.com/austin/news/2016/01/15/more-austin-groups-join-effort-to-quash-citys-uber.html. NetChoice's website lists Lyft, but not Uber, as a member as of August 28, 2017.

[19] NetChoice biography, accessed August 5, 2017: https://netchoice.org/about/netchoice-staff/steve-delbianco/

[20] https://netchoice.org/wp-content/uploads/ALEC-slides-for-ridesharing-May-2015-FINAL.pdf, and https://netchoice.org/library/ride-sharing-presentation-alec/.

[21] Nicholas Riccardi, "US Conservatism Expands to Final Frontier: City Hall," Associated Press, (Jul. 27, 2017), https://www.apnews.com/d0ce048058d343b28fc90382926636e2?utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP_Politics.

[22] Authors' review of enacted state laws.

[23] Some of the states that are silent on preemption may limit local authority via other legal theories. These states include CA, CT, KS, MN, NE, SD, and WA. Detailed notes on 48 state laws on file with authors.

[24] Caleb Weaver, Uber, testimony to Washington Senate, Committee on Transportation, (Feb. 8, 2017). This is one example among many. Video available here, www.tvw.org/watch/?clientID=9375922947&eventID=2017021144&eventID=2017021144&autoStartStream=true.

[25] See, e.g., the Partnership for Working Families, Brief for the Partnership for Working Families and the Southern Poverty Law Center as Amicus Curiae, p. 23, *Lewis v. Alabama*, No. 2:16-CV-690-RDP, 2017 U.S. Dist. LEXIS 13565 (N.D. Ala. Jan. 31, 2017), http://www.forworkingfamilies.org/sites/pwf/files/publications/PWF% percent20SPLC% percent20Brief.pdf.

[26] Nicholas Diakopoulos, "How Uber Surge Pricing Really Works," *Washington Post*, (Apr. 17, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/04/17/how-uber-surge-pricing-really-works/?utm_term=.7e55a885654b.

[27] It is no surprise then that Lyft is lobbying at the federal level on independent contractor policies. Chris Opfer, "Uber, Lyft Each Add Half of Ex-Power Couple as Lobbying Quickens," *Bloomberg BNA*, (Jul. 26, 2017), https://www.bna.com/uber-lyft-add-n73014462300/.

[28] Cyrus Farivar, "Uber Really Doesn't Want its Drivers to be Considered Employees," Ars Technica, (Sep. 21, 2017), https://arstechnica.com/tech-policy/2017/09/uber-really-doesnt-want-its-drivers-to-be-considered-employees/. In Britain, see Prashant S. Rao, "Uber Hit With New Blow in London as Panel Says Drivers Aren't Self-Employed," *New York Times*, (Nov. 10, 2017), https://www.nytimes.com/2017/11/10/business/uk-uber-london.html. And see, e.g., Uber Cases Consolidated Appeals, No. 14-16078 (9th Cir Ct. Apps), Bekele v. Lyft, 199 F. Supp.3d 284 (D.Ma 2016).

[29] Karla Walter and Kate Bahn, "Raising Pay and Providing Benefits for Workers in a Disruptive Economy," Center for American Progress, (Oct. 13, 2017), https://www.americanprogress.org/issues/economy/reports/2017/10/13/440483/raising-pay-providing-benefits-workers-disruptive-economy/.

[30] Uber then settled the case, paying a fine of $77,000 and the parties agreed that classification might change with legislative action. See: In the Matter of the Petition for a Finding of the Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty Against, Uber Technologies, Inc and Rasier LLC, 2015 WL 4699265 (Alaska, Department of Labor and Workforce Development, Jul. 31, 2015); Advisory Opinion on the Employment Status of Uber Drivers (Oregon Bureau of Labor and Industry, Oct. 14, 2015), http://uberlawsuit.com/Oregon.pdf; Berwick v. Uber Technologies, Inc., No. 11-46739, 2015 WL 4153765 , (CA Labor Commissioner, Department of Industrial Relations, Division of Labor Standards Enforcement, Jun. 4, 2015); Uber, No, 4371509 (California Unemployment Appeals Board, Jun. 1, 2015); No. 016-23858, (NY Unemployment Insurance Appeals Board, Jun. 9, 2017) ; While state agencies, applying current law, are coming to the conclusion that drivers are Uber's employees, class action litigation on the matter has been stymied by the TNCs' use of forced arbitration and class action waivers. See, e.g., Uber Cases Consolidated Appeals, No. 14-16078 (9th Cir, Sep. 22, 2017) Order staying cases pending U.S. Supreme Court decisions in National Labor Relations Board v. Murphy Oil USA, Inc., No 16-307; Epic Systems Corp. v. Lewis, No 16-285; and Ernst & Young LLP v. Morris, No. 16-300), http://cdn.ca9.uscourts.gov/datastore/general/2017/09/22/14-16078%209.22%20order.pdf; Bekele v. Lyft, 199 F. Supp.3d 284 (D.Ma 2016).

[31] Press Release, "Uber Agrees to Stop Worker Misclassification in Alaska," State of Alaska, Department of Labor and Workforce Development, (Sep. 3, 2015), http://labor.alaska.gov/news/2015/news15-38.pdf.

[32] Authors' review of enacted state laws.

[33] Multiple people testified against the more industry-friendly Miami-Dade ordinance that passed, complaining that it did not have strong enough language and requirements for people with disabilities. Taxi drivers and a driver advocate testified against the same ordinance because of disparate standards for insurance. Miami-Dade Board of Commissioners (May 3, 2016), http://miamidade.gov/wps/portal/Main/webcasting. In Houston, members of the disability community were active on the task force to formulate a final ordinance. In Houston, see Florian Martin, "Houston City Council Makes Changes to 'Uber' Ordinance," Houston Public Media, (Oct. 15, 2015), https://www.houstonpublicmedia.org/articles/news/2015/10/15/124609/houston-city-council-makes-changes-to-uber-ordinance/, and George Powers and Richard Petty, "Advocating for Transportation Network Company (TNC) Access in Houston, Texas: A Case Study," Prepared for the Forum on Disability and Transportation, accessed October 27, 2017: www.ilru.org/sites/default/files/resources/transportation/Houston_Case_Study.docx. In Philadelphia, advocates for riders with disabilities were also active in upholding and improving accessibility. Conversation with Council member Bobby Henon's staff (Aug. 18, 2017). Notes on file with authors. See also Chris Morran, "Judge Rules Ubers is Still Illegal in Philadelphia, Despite Temporary Truce," Consumerist, (Sep. 29, 2016), https://consumerist.com/2016/07/13/judge-rules-uber-is-still-illegal-in-philadelphia-despite-temporary-truce/.

[34] Data on city ordinances from the Texas House of Representatives, House Research Organization, "Texas May Consider How Transportation Network Companies are Regulated," (Mar. 3, 2017), obtained by public records request. The requirement, or lack thereof, of fingerprint background checks is a complicated issue that NELP has taken up elsewhere. See Nayantara Mehta, "Ensuring Fairness in Background Checks for On-demand Work," National Employment Law Project, (Jun. 2016), http://www.nelp.org/publication/ensuring-fairness-in-background-checks-for-on-demand-work/.

[35] The Texas Department of Licensing and Regulation was tasked with developing a fee that would cover the costs of administering the regulations. As of September 15, 2017, it had proposed rules, including a $10,500 application fee, with a $7,500 annual renewal fee, estimating that ten TNCs would apply. See: https://www.tdlr.texas.gov/tnc/tncprop.htm.

[36] "Dynamic" or "surge" pricing is the practice of the TNCs increasing rates at times when rider demand outstrips driver supply. They argue that this serves to increase the supply of drivers, and then bring prices back down. Some state laws ban surge pricing during a state of emergency.

37 Given its larger capitalization and generally larger market share, Uber has led the legislative and public relations fights in two ways: it spent more on lobbying efforts than Lyft, and it was the most prominent public voice. As such, much of this section focuses on Uber's activities specifically. However, Lyft and other much smaller TNCs have benefitted from the policies ultimately won through these tactics—with the additional benefit of being seen as more cooperative. In the cities and states reviewed in-depth for this report, in only one instance was spending nearly similar: in 2014 when Uber and Lyft spent basically the same amount of money on gathering referendum signatures in Seattle. Regarding market share, according to Second Measure, among US credit card users, Uber's market share is 77 percent to Lyft's 23 percent (the two TNCs are considered the entire market in this research). See Leslie Hook, "Uber Loses Ground in US as Rival Lyft Accelerates," *Financial Times*, (Jun. 18, 2017), https://www.ft.com/content/b4fb76a6-52dd-11e7-bfb8-997009366969.

38 Kim Lyons, "PUC Finalizes Uber's Two-Year Experimental License," *Pittsburgh Post-Gazette*, (Jan. 29, 2015), http://www.post-gazette.com/news/transportation/2015/01/29/Pennsylvania-PUC-finalizes-ride-share-firm-Uber-s-two-year-experimental-license/stories/201501290285.

39 Fabiola Cineas, "Uber to Pay Pa. $3.5M to Settle Dispute Over Illegal Operation," *Philadelphia Magazine*, (Apr. 7, 2017), http://www.phillymag.com/business/2017/04/07/uber-pay-pa-3-5m-settle-dispute-illegal-operation/. Lyft settled with the PUC for $250,000 nearly two years earlier. See Kim Lyons, "Lyft Settlement with Pennsylvania PUC Finalized, Pittsburgh Post-Gazette, (Jul. 16, 2015), http://www.post-gazette.com/news/state/2015/07/16/Lyft-settlement-with-Pennsylvania-PUC-finalized-resolving-Pittsburgh-area-complaint/stories/201507160185. The number of Uber violations sourced from emails obtained in a Right-to-Know request made public by PennLive, and accessed August 8, 2017, here: https://www.scribd.com/document/334948493/Entirety-of-Pittsburgh-s-Right-to-Know-response-for-emails-sent-between-mayor-s-office-and-Uber.

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41 Paul Nussbaum and Claudia Vargas, "Phila. Crackdown on UberX Continues; Ride-share Firm Vows to Go on," *Philadelphia Inquirer*, (Oct. 28, 2014), http://www.philly.com/philly/business/20141028_Phila__crackdown_on_UberX_continues__ride-share_firm_vows_to_go_on.html.

42 Jason Laughlin, "UberX Marks a Year Operating Illegally in Philadelphia," *Philadelphia Inquirer*, (Oct. 24, 2015), http://www.philly.com/philly/hp/news_update/20151024_UberX_marks_a_year_operating_illegally_in_Philadelphia.html

43 Anna Orso, "New Bill Seeks to Legalize Rapidly-Growing Uber in Philadelphia," BillyPenn.com, (Aug. 27, 2015), https://billypenn.com/2015/08/27/new-bill-seeks-to-legalize-rapidly-growing-uber-in-philadelphia/.

44 Carl Bialik, "How Uber's Truce with Regulators Played out During the DNC," FiveThirtyEight, (Jul. 29, 2016), https://fivethirtyeight.com/features/how-ubers-truce-with-regulators-played-out-during-the-dnc/.

45 See, e.g.: Jason Williams, "Uber, Lyft Arrive Amid Praise, Scrutiny," *Cincinnati Enquirer*, (Apr. 9, 2014), http://www.cincinnati.com/story/news/2014/04/09/uber-lyft-raising-questions-safety-fairness/7506935/; and Claire Tsosie, "AmEx, Uber Offer Free Holiday Rides from 11 Airports," NerdWallet, (Nov. 17, 2016), https://www.nerdwallet.com/blog/credit-cards/amex-and-uber-offer-free-holiday-rides-from-the-airport/.

46 Accessed October 10, 2017: https://www.uber.com/en-SG/drive/resources/rider-referral/.

47 "How Not to get Tricked by Uber and Lyft Driver Incentives," Rideshare Dashboard, (Jan. 5, 2017), http://ridesharedashboard.com/2017/01/05/not-get-tricked-uber-lyft-driver-incentives/. In Philadelphia, Uber promised to spend "at least" $2.5 million to incentivize drivers during high demand, and in discounts for riders during the summer of 2016. See also "Announcing: Philly Moves Together," Uber Blog, (Jul. 7, 2016), https://www.uber.com/blog/philadelphia/philly-moves-together/.

48 The share of US adults owning a smart phone grew from 35 percent in 2011, to 77 percent in 2016. "Mobile Fact Sheet," Pew Research Center, (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/mobile/.

49 Fabiola Cineas, "Uber to Pay Pa. $3.5M to Settle Dispute Over Illegal Operation." Uber has encouraged drivers to operate outside of the law in, for example: Philadelphia, see Nussbaum and Vargas, "Phila. Crackdown on UberX Continues; Ride-share Firm Vows to Go On;" South Florida airports, see Brittany Wallman, "Uber: 'We Cannot Operate' Under New Broward Law," *Sun Sentinel*, (Apr. 29, 2015), http://www.sun-sentinel.com/local/broward/fl-uber-law-vote-20150428-story.html; the Hamptons (outside of New York City), see Daniel Prendergast, "Uber Urges City Drivers to Pick Up Illegal Fares in Hamptons," *New York Post*, (Mar. 10, 2015), http://nypost.com/2015/03/10/uber-urges-city-drivers-to-pick-up-illegal-fares-in-hamptons/; and Quebec, see Jonathan Montpetit and Cecilia MacArthur, "Uber Paying its Drivers to Flout Quebec Law," CBC News, (Oct. 4, 2016), http://www.cbc.ca/news/canada/montreal/uber-paying-its-drivers-to-flout-quebec-law-1.3789784.

50 Fabiola Cineas, "Uber to Pay Pa. $3.5M to Settle Dispute Over Illegal Operation." Uber also said that it would cover costs for drivers whose cars were impounded. Victor Fiorillo, "Uber Calls PPA UberX Sting a "Deplorable Charade," *Philadelphia Magazine*, (Oct. 26, 2014), http://www.phillymag.com/news/2014/10/26/uber-calls-ppa-uberx-sting-deplorable-charade/.

51 As of July 2015, both companies were appealing most of their drivers' citations: WSVN News, "Taken for a Ride," (Jul. 16, 2015), http://wsvn.com/news/taken-for-a-ride/. The Board of Commissioners voted on a final settlement November 21, 2017, with Uber paying just $2.4 million of the $4.3 million in fines owed by its drivers. Douglas Hanks, "Uber Fought the Law in Miami – and Only Has to Pay Half of its $4 million in Fines," *Miami Herald*, (Nov. 22, 2017), http://www.miamiherald.com/news/local/community/miami-dade/article185897063.html. This long appeal process has negative impacts on drivers, as some of them had delinquent citations sent to collections, and a few drivers reportedly had liens places on their personal property.

52 "'Everybody that got ticketed, Uber paid the fines and took care of all the legal issues,' …Uber did that for…hundreds of other drivers." David Pitman, "Meet Houston's First Licensed Uber Driver," Houston Public Media, (Nov. 10, 2014), https://www.houstonpublicmedia.org/articles/news/2014/11/10/54119/meet-houstons-first-licensed-uber-driver/. Patricia Mazzei, "Lawsuit Reignites Miami-Dade Policy Fight over Uber, Lyft," *Miami Herald*, (Feb. 10, 2015), http://www.miamiherald.com/news/local/community/miami-dade/article9704705.html.

53 Uber and/or Lyft entered some markets legally at the very beginning of operations by either offering free rides, or by only suggesting donations to drivers. By not requiring payment, they would not fall under taxi or other for-hire vehicle laws. See, e.g., Jason Williams, "Uber, Lyft Arrive Amid Praise, Scrutiny," *Cincinnati Enquirer*, (Apr. 9, 2014), http://www.cincinnati.

com/story/news/2014/04/09/uber-lyft-raising-questions-safety-fairness/7506935/, and Jayme Fraser, "Uber Decides to Defy City on Ride Charges," *Houston Chronicle*, (Apr. 15, 2014), http://www.houstonchronicle.com/news/politics/houston/article/Uber-decides-to-defy-city-on-ride-charges-5405208.php. In other places, like Philadelphia, TNCs and their advocates argued that the service simply fell outside of the existing regulatory framework.

54 Mayor Carlos Gimenez memo to the Miami-Dade Board of Commissioners, "Settlement Options for Transportation Network Entities Outstanding Citations," (Nov. 14, 2017), accessed November 21, 2017: http://www.miamidade.gov/govaction/legistarfiles/Matters/Y2017/172627.pdf.

55 Joseph Rose, "Uber vs. Portland: City Has Hit Company With $67,750 in Fines; Federal Court Hearing Date Set," *The Oregonian*, (Dec. 15, 2014), http://www.oregonlive.com/commuting/index.ssf/2014/12/uber_vs_portland_federal_judge.html, and Joseph Rose, "Uber Pays $67,750 in Portland as Taxi Recommendations Go to City Council," *The Oregonian*, (Apr. 6, 2015), http://www.oregonlive.com/commuting/index.ssf/2015/04/user_pays_67750_in_portland_fi.html.

56 Mike Isaac, "How Uber Deceives the Authorities Worldwide," *New York Times*, (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html?_r=0.

57 Fiorillo, "PPA Impounds UberX Vehicles in Undercover Sting Operation."

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60 Batheja, "Uber, Lyft Are Rolling in 5 Texas Cities, but the Road Ahead has Some Bumps."

61 Lilly Rockwell, "Austin City Council Gives Green Light to Ridesharing Services," *Austin American-Statesman*, (Oct. 16, 2014), http://www.mystatesman.com/news/local/austin-city-council-gives-green-light-ridesharing-services/8FV6I2GwEpV3oec0dyyjFP/.

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63 Al Ortiz, "Mayor Turner Announces Potential Agreement to Keep Uber Operating in Houston," *Houston Public Media*, (Nov. 17, 2016), https://www.houstonpublicmedia.org/articles/news/2016/11/17/177725/mayor-turner-announces-potential-agreement-to-keep-uber-operating-in-houston/.

64 Uber claimed that "nearly 30,000 Austinites" had signed the petition. "Kitchen's Uber: Horse & Carriage," Uber blog, (Nov. 4, 2015), https://www.uber.com/blog/austin/kitchens-uber-horse-carriage/. Uber then immediately ran a local ad campaign urging all of city council to not take Uber away. Melissa Yeager, "Uber Combats Regulations in Austin with New Ad Campaign," Sunlight Foundation blog post (Nov. 10, 2015), http://sunlightfoundation.com/blog/2015/11/10/uber-combats-regulations-in-austin-with-new-ad-campaign/

65 Uber's spokesperson said that the proposal being considered in November 2015 would "eliminate" ride-hailing. "Kitchen's Uber: Horse & Carriage."

66 Nellie Bowles, "'We're Just Getting Started': Inside Austin's Contentious Clash with Uber and Lyft," *The Guardian*, (Mar. 10, 2016), https://www.theguardian.com/technology/2016/mar/10/uber-lyft-austin-ann-kitchen-sxsw-texas.

67 List of registered lobbyists for 2015-16 obtained by public records request to the City of Austin.

68 Camila Domonoske, "Uber, Lyft Vow to Stop Driving in Austin After Voters Keep Regulations," NPR, (May 9, 2016), http://www.npr.org/sections/thetwo-way/2016/05/09/477310339/uber-lyft-vow-to-stop-driving-in-austin-after-voters-affirm-regulations.

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70 Domonoske, "Uber, Lyft Vow to Stop Driving in Austin After Voters Keep Regulations."

71 Madlin Mekelburg, "Texas Enacts Statewide Regulations for Uber, Lyft," *Dallas News*, (May 29, 2017), https://www.dallasnews.com/news/texas-legislature/2017/05/29/texas-enacts-statewide-regulations-uber-lyft.

72 Ben Wear, "Deja Uber: Legislators Look to Override Local Ride-Hailing Rules," *Austin American-Statesman*, (Nov. 20, 2016), http://www.mystatesman.com/news/state--regional-govt--politics/wear-deja-uber-legislators-look-override-local-ride-hailing-rules/KozpsqKEAp0ruhjfotOWWL/.

73 See witness lists from the Texas Senate, State Affairs Committee, (May 11, 2017), and the Texas House of Representatives, Transportation Committee, (Mar. 16, 2017). Available through Committee websites, and on file with authors.

74 Ben Wear, "Uber-Lyft Legislation runs out of Gas in Texas House," *Austin American-Statesmen*, (May 15, 2015), http://www.mystatesman.com/news/state--regional-govt--politics/uber-lyft-legislation-runs-out-gas-texas-house/PNTNP7RWFfHGEBMfyg7RnJ/.

75 Author's review of Texas lobbying data downloaded August 1, 2017 – see footnote 77. See also Michael King, "Lege for Sale? Uber and Lyft Splurge on Lobby to Deregulate Themselves," *Austin Chronicle*, (Mar. 14, 2017), https://www.austinchronicle.com/daily/news/2017-03-14/lege-for-sale/. There are discrepancies in data based on date of download, but no significant changes.

76 Depending on the data set, we frequently had to add lobbyist and spending data for different iterations of the name "Uber Technologies, Inc." Lyft typically had only one entry. Florida: see 2016 annual and the first half of 2017 Florida Legislature

Total Compensation by Principal reports, available here, https://floridalobbyist.gov/CompensationReportSearch/CompAggregateTotals. Florida allows ranges – these state-generated aggregate reports use midpoints, except where the amount exceeds $50k it uses the actual dollar figure. Oregon: search Lobbyist Client/Employer Expenditures by quarter here, https://apps.oregon.gov/OGEC/EFS/Records. Pennsylvania: search quarterly expenses by Principal here, https://www.palobbyingservices.pa.gov/Public/wfSearch.aspx. Texas: lobbying clients can report expenditures in ranges rather than precise dollar amounts. Nearly every client does this. We downloaded each year of data, and cleaned it to allow for creating minimum and maximum amounts. Search raw data usually titled "Registered Lobbyists with Clients," sorted by Client Name, here, https://www.ethics.state.tx.us/dfs/loblistsREG.htm. Washington: Search the L3 Reports which sum annual lobbying expenses by Employer here for 2016 and later, https://accesshub.pdc.wa.gov/home/employers, and for 2015 and earlier here, http://web.pdc.wa.gov/MvcQuerySystem/Lobbying/Employers?Length=8. Ohio is not included because the preemptive law passed in 2015.

77 See Walmart's "2016 Lobbying Disclosure Report," accessed October 28, 2017: http://s2.q4cdn.com/056532643/files/doc_downloads/ESG/2016-Shareholder-Report-Q2-2017-Update.pdf. It reported up to $2.9 million. Using directly comparable data for Uber and Lyft, their five-state total maximum would be $3.1 million.

78 James Gormley, "Uber Spent $1.8 Million during 2017 Session, Topping the List of Albany Lobbying Efforts," *Legislative Gazette*, (Oct. 19, 2017), http://legislativegazette.com/uber-spent-1-8-million-during-2017-session-topping-the-list-of-albany-lobbying-efforts/.

79 Also, during the New York City effort to regulate TNCs, "[Democratic Mayor Bill] DeBlasio was riding a wave of popularity, and it seemed like this was a battle he couldn't lose. Until Plouffe went to work. … It was a brass knuckled, no holds barred political fisticuffs, Democrat against Democrat.… In a masterful display of irony, Plouffe – the mouthpiece of a company valued at $51 billion that had been called by Salon's Andrew Leonard the closest thing we have today to robber baron capitalism – called into question the mayor's progressive bona fides." Steven Hill, "The Battle in Seattle for the Soul of the Democratic Party - Over Uber," Huffington Post, (Dec. 17, 2016), https://www.huffingtonpost.com/steven-hill/the-battle-in-seattle-for_b_8833340.html. See also Emily Badger and Zachary A. Goldfarb, "Uber Hired David Plouffe when it Realized 'Techies' Can't Do Politics," *Washington Post*, (Aug. 19, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/19/uber-hired-david-plouffe-when-it-realized-techies-cant-do-politics/?utm_term=.9e448f48d9b6. Uber has deployed Plouffe to its regulatory battles in Austin, Portland, Seattle, Boston, New York City, and other jurisdictions. In 2017, Uber contracted with another Obama alum in former Attorney General Eric Holder, who reviewed and made recommendations for the company's "workplace culture" following public accusations from a former employee of harassment and discrimination. Mike Isaac, "Uber Embraces Major Reforms as Travis Kalanick, the C.E.O., Steps Away," *New York Times*, (Jun. 13, 2017), https://www.nytimes.com/2017/06/13/technology/uber-travis-kalanick-holder-report.html.

80 Karen Weise, "This is How Uber Takes Over a City," *Bloomberg*, (Jun. 23, 2015), https://www.bloomberg.com/news/features/2015-06-23/this-is-how-uber-takes-over-a-city.

81 Matt Largey, "Uber/Lyft PAC Spent More than $5 million to Campaign for Prop 1 Last Month," KUT (Austin NPR), (Apr. 29, 2016), http://kut.org/post/uberlyft-pac-spent-more-5-million-campaign-prop-1-last-month

82 Data for all companies as lobbying clients accessed September 30, 2017: https://www.followthemoney.org/. Data is periodically updated.

83 See quarterly "Master Spreadsheet of All Lobbyist Contacts," available here, https://www.portlandoregon.gov/auditor/71329. Uber had 318 contacts to Lyft's 135.

84 See the 2013 annual report "Lobbying in Miami-Dade County," County Clerk, accessed here, http://www.miamidade.gov/cob/lobbyist-reports.asp

85 Kyle Constable, "Years Behind Other States, Rules for Uber, Lyft Win Final Passage," *CT Mirror*, (Jun. 7, 2017), https://ctmirror.org/2017/06/07/years-behind-other-states-rules-for-uber-lyft-win-final-passage/.

86 We received correspondence between legislators and their staff, and Uber, Lyft, and their lobbyists from Florida, Ohio and Oregon state legislatures, and from city/county representatives in Austin, Galveston (city attorney), Miami-Dade, Midland and Seattle. We found evidence that only Uber, not Lyft, sent draft legislation. With the exception of Seattle, email suggests that only Uber engaged deeply in the legislative process. In Seattle, there is evidence of Lyft's lobbyist's engagement with the Mayor's office. Email from Uber's Jon Isaac, Oregon Public Affairs Manager, to Senator Chris Edwards and Representative Brian Clem, "Draft Bill Language," (Sep. 22, 2016). In this email Isaacs notes that it is "the final language for submission to legislative council" [sic]. Email from Robert Klaffky, VanMeter Ashbrook to Ohio HB 237 primary sponsor Rep. Mike Duffey, "TNC draft," (Mar. 6, 2015).

87 Conversation with Washington State Representative Mike Sells (Aug, 14, 2017). Notes on file with authors.

88 Miriam Rozen, "Austin's Lobbyists Ride High with Uber and Lyft," *American Lawyer*, (Jul. 1, 2017), http://www.americanlawyer.com/id=1202791073174/Austins-Lobbyists-Ride-High-With-Uber-and-Lyft?mcode=0&curindex=0&curpage=ALL.

89 Kim Lyons, "Tussle over Direction of Pa. Ride Share Legislation," *Pittsburgh Post-Gazette*, (Apr. 26, 2015), http://www.post-gazette.com/business/pittsburgh-company-news/2015/04/26/Uber-lobbyists-may-be-roadblock-to-ride-share-legislation-in-Pa/stories/201504260061. Per a Senate Democratic staffer, Uber weighed in heavily on the bill.

90 Emails obtained by public records request for Senator Jeff Brandes' and his staff. This exchange was between staff and Uber's Cesar Fernandez, November 2016. Documents on file with authors.

91 Our private conversations with legislative staff confirmed this observation. One Texas legislature staffer was actually surprised when asked about the independent contractor language in Texas HB 100.

92 Oregon HB 3246 did not pass in 2017. Representative Ann Lininger was a chief sponsor and also introduced amendment 4. See legislative history and amendments here, accessed October 27, 2017: https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/HB3246.

93 Emails obtained by public records request. Document on file with authors. See also Weise, "This is How Uber Takes Over a City."

[94] Email from Andrew Krick, VanMeter Ashbrook, to Alex Penrod and Stephanie Kaylor, "HB 237 Sponsor Testimony," (Jun. 5, 2015). Document on file with authors.

[95] See Megan Sirjane Samples, Florida League of Cities, testimony to the Florida House of Representatives, Government Affairs Committee, (Feb. 21, 2017).

[96] See League of Oregon Cities, "Testimony to the Oregon House Business and Labor Committee," (Apr. 3, 2017), accessed July 4, 2017: https://olis.leg.state.or.us/liz/2017R1/Measures/Exhibits/HB3246.

[97] See Ohio Municipal League testimony to the Ohio House of Representatives, Government Accountability and Oversight Committee, (Jun. 22, 2015), obtained by public records request.

[98] Conversations with Council member Ann Kitchen (Aug. 15, 2017), and Council member Mike O'Brien (Aug. 9, 2017). Notes on file with authors.

[99] Emails obtained by public records request. Brooke Steger, Uber, to Council President Sally Clark, "Uber Follow up," (Jan. 14, 2014).

[100] Brad Stone, The Upstarts: How Uber, Airbnb, and the Killer Companies of the New Silicon Valley are Changing the World, Little, Brown & Company (2017), p. 191.

[101] Cecilia Kang, "Pittsburgh Welcomed Uber's Driverless Car Experiment. Not Anymore," *New York Times*, (May 21, 2017), https://www.nytimes.com/2017/05/21/technology/pittsburgh-ubers-driverless-car-experiment.html.

[102] This tactic is not dead. In September 2017, both Uber and Lyft announced that they would leave Everett, WA, as a new TNC ordinance there was set to take effect. The city then quickly announced that it would suspend enforcement pending further conversations with the two TNCs. See Rikki King, "Ride-share Firms Uber, Lyft Seek Fewer Rules in Everett," *Everett Herald*, (Oct. 4, 2017), https://www.heraldnet.com/news/ride-share-firms-uber-lyft-seek-fewer-rules-in-everett/.

[103] "The Uber-loving public clobbered county commissioners in meetings and filled their email inboxes with hate mail. Business leaders denounced the county for running Uber off. Commissioners gave in Tuesday, dismantling its months-old law to peel off elements to which Uber objected. They said the public had spoken, and they were eager to settle one of the biggest fights County Hall has ever hosted." Brittany Wallman, "Uber is Back in Broward County," *South Florida Sun Sentinel*, (Oct. 15, 2015), http://www.sun-sentinel.com/local/broward/fl-uber-final-vote-20151013-story.html.

[104] Madlin Mekelburg, "Uber to Leave Third Texas City over Background Check Laws," *Texas Tribune*, (Mar. 9, 2016), https://www.texastribune.org/2016/03/09/uber-leave-third-texas-city-over-background-check-/. As noted elsewhere in this report, Uber and Lyft later left Austin, and Lyft, but not Uber, left Houston.

[105] In our review, this was the case in Midland, TX, where the council amended its ordinance after Uber suspended service. See Cassie Burton, "TNC Amended Ordinance Could Spell Uber's Return," Midland Reporter-Tribune, (May 4, 2016). http://www.mrt.com/business/article/TNC-amended-ordinance-could-spell-Uber-s-return-9286751.php. And in Miami-Dade County, where the commissioners advanced the industry-friendly ordinance. Also, while no one ever proved that any TNC was directly behind the recall attempt on Council member Ann Kitchen, The Guardian reported that people understood that her leadership on the TNC ordinance was the primary cause of it. "And Uber did not dispute that it precipitated the recall movement. Mullin, the Uber spokesperson, did not dispute the assertion that the company galvanized the effort that has now led to moves to oust Kitchen." Bowles, "'We're Just Getting Started': Inside Austin's Contentious Clash with Uber and Lyft."

[106] Travis Kalanick is one of the founders and the former CEO who resigned from the company during the summer of 2017 amidst an array of lawsuits and bad publicity.

[107] Brad Stone, "The $99 Billion Idea: How Uber and Airbnb Fought City Hall, Outlasted Rivals, Won Over the People, and Figured out the Sharing Economy," *Bloomberg Businessweek*, (Jan. 26, 2017), https://www.bloomberg.com/features/2017-uber-airbnb-99-billion-idea/.

[108] Tim Elfrink, "UberX Will Launch in Miami Today, Defying Miami-Dade's Taxi Laws," *Miami New Times*, (Jun. 4, 2014), http://www.miaminewtimes.com/news/uberx-will-launch-in-miami-today-defying-miami-dades-taxi-laws-6533024.

[109] Douglas Hanks, "In Email Blitz, Uber Threatens to Pull Out of Miami-Dade," *Miami Herald* (Jan. 14, 2016), http://www.miamiherald.com/news/local/community/miami-dade/article54698295.html.

[110] "Douglas Hanks, "Pro-Uber Bill Wins Early Vote in Miami-Dade After Foe Stands Down," *Miami Herald*, (Jan. 20, 2016), http://www.miamiherald.com/news/local/community/miami-dade/article55610460.html.

[111] Michael Auslen, "Plan to Regulate Uber, Lyft All But Dead in Florida Legislature," *Miami Herald*, (Mar. 20, 2016), http://www.miamiherald.com/news/politics-government/state-politics/article65208997.html.

[112] Hanks, "In Email Blitz, Uber Threatens to Pull Out of Miami-Dade."

[113] See Guy Holburn and Davin Raiha, "Startups are Turning Customers into Lobbyists," *Harvard Business Review*, (Oct. 24, 2017), https://hbr.org/2017/10/startups-are-turning-customers-into-lobbyists.

[114] See screenshots in this report of Portland with a petition, and Miami-Dade with emailing. For an example of phone calls, see the image in this article: Ben Wear, "Uber Puts Heat on Kitchen With Horse-and-Buggy Gibe," *Austin American-Statesman*, (Nov. 8, 2015), http://www.mystatesman.com/news/local/wear-uber-puts-heat-kitchen-with-horse-and-buggy-gibe/FhujnjBoR8N65r3ZAJmCpJ/.

[115] See, e.g., Taylor Soper, "City of Seattle to Contact Uber About 'Illegal' Marketing Tactics," GeekWire, (Feb. 28, 2014), https://www.geekwire.com/2014/city-seattle-contact-uber-illegal-marketing-tactics/. The only strategy that we did not see covered in news reports is the door hangers in Miami-Dade, which we learned about from Commissioner Daniella Levine Cava (Aug. 14, 2017).

[116] Daniel Beekman, "No Union Needed, Says Uber Adviser Plouffe," *Seattle Times*, (Dec. 4, 2015), and Jordan Golson, "Uber is Using In-app Podcasts to Dissuade Seattle Drivers from Unionizing," The Verge, (Mar. 14, 2017), https://www.theverge.com/2017/3/14/14912524/uber-driver-app-podcast-seattle-union.

[117] Jacob Palmer, "Uber Says Bill Threatens its Operations in Oregon," *Oregon Business*, (May 12, 2015), http://www.oregonbusiness.com/article/item/12275-uber-says-bill-threatens-its-operations-in-oregon.

[118] We are aware of only recent example: Under Alaska's new state TNC law, city legislators can put to voters whether or not to allow TNCs. Ketchikan did that - the proposed ban on ridesharing failed in October 2017. Suzanne Downing, "Local Election Results from Around Alaska," Must Read Alaska, (Oct. 4, 2017), http://mustreadalaska.com/local-election-results/.

[119] Conversation with Galveston Council member Craig Brown (Aug. 21, 2017). Notes on file with authors. See also John Wayne Ferguson, "With Uber Gone, Competitor Steps in to Provide Island Rides," *Galveston Daily News*, (Apr. 11, 2016), http://www.galvnews.com/news/article_fab65b11-ee52-5ddd-a9de-bf05496b1879.html.

[120] See Austin City Council meeting video, (Oct. 15, 2015), http://austintexas.gov/page/watch-atxn-live.

[121] Tom Dart, "Uber Irks City Officials in Attempt to Enter Houston Taxi Market," *The Guardian*, (Mar. 7, 2014), https://www.theguardian.com/world/2014/mar/07/uber-houston-city-officials-taxi-market-lyft.

[122] Conversation with Seattle Council member Mike O'Brien (Aug. 9, 2017).

[123] See, e.g.: Maya Kosoff, "Uber Drivers Speak Out: We're Making a Lot Less Money than Uber is Telling People," Business Insider, (Oct. 29, 2014), http://www.businessinsider.com/uber-drivers-say-theyre-making-less-than-minimum-wage-2014-10; Seth Sandronsky, "I'm Making Only $2.64 an Hour Working as an Uber Driver, Capital and Main, (Sep. 23, 2015), https://www.alternet.org/labor/im-making-only-264-hour-working-uber-driver; and Caroline O'Donovan, "How Much Uber Drivers Actually Make per Hour," Buzzfeed News, (Jun 2016), https://www.buzzfeed.com/carolineodonovan/internal-uber-driver-pay-numbers.

[124] Andrew J. Hawkins, "Uber Finally Caves and Adds a Tipping Option to its App," The Verge, (Jun. 20, 2017), https://www.theverge.com/2017/6/20/15840818/uber-tipping-option-app-seattle-minneapolis-houston.

[125] Andrew J. Hawkins, "You Can Now Tip Your Uber Driver in the App," The Verge, (Jul. 6, 2017), https://www.theverge.com/2017/7/6/15928442/uber-tip-driver-app-list-cities.

[126] For example, an employer pays workers' compensation taxes; an independent contractor must pay their own insurance or pay the costs from any workplace injuries. Also, an employer usually pays any required work expenses such as uniforms or materials; an independent contractors must pay for all operating costs like gas, tools, etc. For more, see Sarah Leberstein and Catherine Ruckelshaus, "Independent Contractor vs. Employee: Why Independent Contractor Misclassifications Matters and What We Can Do to Stop it," National Employment Law Project, (May 2016), http://www.nelp.org/publication/independent-contractor-vs-employee/.

[127] Bureau of Labor Statistics, Fatal occupational injuries, total hours worked, and rates of fatal occupational injuries by selected worker characteristics, occupations and industries, (2014), http://www.bls.gov/iif/oshwc/cfoi/cfoi_rates_2014hb.pdf.

[128] "Ensuring Fairness in Background Checks for On-Demand Work," National Employment Law Project, (Jun. 2016), http://www.nelp.org/publication/ensuring-fairness-in-background-checks-for-on-demand-work/.

[129] All states have laws against employment discrimination. These typically outline conduct that constitutes discrimination and allow for compensatory and punitive damages, and so-called equitable remedies of back pay and reinstatement. "State Employment-Related Discrimination Statutes," National Conference of State Legislatures, (Jul. 2015), http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf. By contrast, specialized TNC laws generally require TNCs to have a policy of non-discrimination, but do not give workers any remedy for violations. They often require the drivers, not the TNCs, to comply with existing nondiscrimination laws. Compare, for example, CT SHB 7126 (2017)(requiring TNCs to have a nondiscrimination policy) with Conn. Gen. Stat. §46a-60 et.seq. (requiring employers to comply with detailed nondiscrimination law enforced by a state commission, which has subpoena power; employees may pursue claims for both equitable and legal remedies against employers who violate the law).

[130] See fn. 27, supra, and: Noam Scheiber, "How Uber Uses Psychological Tricks to Push Its Drivers' Buttons," *New York Times*, (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html; Eric Newcomer and Olivia Zalesky,"Inside Uber's Auto-Lease Machine, Where Almost Anyone can get a Car," *Bloomberg Technology* (May 31, 2016), https://www.bloomberg.com/news/articles/2016-05-31/inside-uber-s-auto-lease-machine-where-almost-anyone-can-get-a-car; Marc Ramirez, "Texas Uber Drivers Sue Company Seeking Full Employee Status, Back Pay," *Dallas News*, (Jun. 30, 2017), https://www.dallasnews.com/news/transportation/2017/06/30/texas-uber-drivers-sue-company-seek-full-employee-status-back-pay; Alex Rosenblat, "The Truth About How Uber's App Manages Drivers," *Harvard Business Review*, (Apr. 6, 2016), https://hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers; and Alex Rosenblat and Luke Stark, "Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers," International Journal of Communication (2016, Vol. 10), http://ijoc.org/index.php/ijoc/article/view/4892/1739%20.

[131] Vaughn, "Ride Services Turn to the Voters."

[132] See: https://newsroom.uber.com/us-washington/save-uberx-in-seattle/; Alexa Vaughn, "City Panel Goes Different Route with Ride-service Regulations," *Seattle Times*, (Feb. 28, 2014); Vaughn, "Ride Services Turn to the Voters;" Claypool and Weissman, "Disrupting Democracy: How Uber Deploys Corporate Power to Overwhelm and Undermine Local Government."

[133] Author's calculation of figures found in WA PDC's search engine, for contributions and staff time to "Seattle Cit. to Repeal Ordinance 124441." Lyft's total was $769,072, Sidecar's total was $541 in staff time, and Uber's total was $763,233.

[134] Alexa Vaughn, "Seattle City Council Repeals Rules for Ride Services," *Seattle Times*, (Jul. 7, 2014), https://www.seattletimes.com/seattle-news/seattle-city-council-repeals-rules-for-ride-services/.

[135] Taylor Soper, "Statewide Laws Regulating Uber, Lyft Set to Pass in Washington," Geekwire, (Apr. 17, 2015), https://www.geekwire.com/2015/statewide-laws-regulating-uber-lyft-set-to-pass-in-washington/. The "split" refers to the House, that was and is controlled by Democrats, while the Senate was controlled by Republicans.

[136] Golson, "Uber is Using In-app Podcasts to Dissuade Seattle Drivers from Unionizing."

[137] Daniel Beekman, "City to Let Uber, Other Drivers to Organize," *Seattle Times*, (Dec. 15, 2015).

[138] Conversations with Dawn Gearhart, Teamsters 117 (Jul.- Oct. 2017). Notes on file with authors. Jessica Lee, "Unionize Uber? Legal Fight Over Seattle drivers Draws National Attention," *Seattle Times*, (Mar. 29, 2017), https://www.seattletimes.

com/seattle-news/transportation/unionize-uber-legal-fight-over-seattle-drivers-draws-national-attention/.

139 Steven Hsieh, "Federal Appeals Court Puts the Brakes on Seattle's Uber Unionization Law," The Stranger, (Aug. 30, 2017), http://www.thestranger.com/slog/2017/08/30/25383904/federal-appeals-court-puts-the-brakes-on-seattles-uber-unionization-law. Uber's operating subsidiary, Rasier LLC, was a plaintiff in the US District Court for Western Washington, 2:17-cv-00370. The case continues with the US Chamber and Uber in the US Court of Appeals for the 9th Circuit, 17-35640. Lyft has filed an Amicus Curiae brief.

140 See video of public testimony and debate in the Washington House of Representatives, Committee on Labor and Workplace Standards, (Mar. 14, 2017), www.tvw.org/watch/?clientID=9375922947&eventID=2017031134&eventID=2017031134&autoStartStream=true. See also video of public testimony and debate in the Washington Senate, Committee on Commerce, Labor and Sports (Feb. 2, 2017), ntID=9375922947&eventID=2017021054&eventID=2017021054&autoStartStream=true.

141 Washington State Public Disclosure Commission L3 reports for 2017 are not due until 2018.

142 "States Preempting Local Laws Are an Extension of Jim Crow," Partnership for Working Families.

143 We requested and were told racial/ethnic data was not available at the aggregate of type of license, e.g., TNC, taxi, etc., in Austin, Portland, and Miami-Dade. In King County (which includes Seattle), the licensing division does not yet have the data infrastructure for the TNC drivers - it is on paper, with other private information like names, birthdays, etc. For the 3,133 taxi and for-hire drivers (some of whom may also drive for TNCs), just 7 percent identify as White, and less than 1 percent were born in the US.

144 "New Survey: Drivers Choose Uber for its Flexibility and Convenience," Uber Newsroom, (Dec. 7, 2015), https://newsroom.uber.com/driver-partner-survey/.

145 See Tim Alborg, Lyft, testimony to the Miami-Dade Board of Commissioners, (May 3, 2016). See also this press release from the City of Seattle, "Council Unanimously Adopts First-of-its-Kind Legislation to Give Drivers a Voice on the Job," (Dec. 14, 2015), https://www.seattle.gov/council/issues/giving-drivers-a-voice.

146 Brooke Steger, Uber, email to Council Member Sally Clark (Dec. 17, 2013). See also Mike O'Brien and Rich Stolz, "Looking out for Immigrant Drivers in New Taxi, Uber, Lyft Laws," *Seattle Times*, (Feb. 12, 2014), http://www.seattletimes.com/opinion/guest-looking-out-for-immigrant-drivers-in-new-taxi-uber-lyft-laws/

147 For Miami-Dade, drivers who showed up to public comment at Board meetings very much reflected a large number of immigrants. Numerous Haitian-American taxi drivers needed a French interpreter (May 3, 2016). Also conversations with Raymond Francois, New Vision Taxi Drivers Association (Sep. 22, 2017), and Meena Jagannath, Florida Justice Project (Sep. 26, 2017). For Philadelphia, see Ron Blount, Taxi Workers Alliance, testimony to the Philadelphia City Council, Committee on Commerce & Economic Development, (minutes from Jun. 10, 2016). Council member Helen Gym thanked all of the drivers, taxi, UberBLACK, and UberX who come from immigrant and diverse communities who are not heard from enough. For Austin, conversation with Merga Gemeda, Austin taxi cooperative (Aug. 9, 2017). All notes from conversations on file with authors.

148 Authors' review of enacted state laws.

149 "The On-Demand Economy and Anti-Discrimination Protections," National Employment Law Project, (Jun. 14, 2017), http://www.nelp.org/publication/on-demand-economy-anti-discrimination-protections/. "Fired from Uber: Why Drivers Get Deactivated, and How to Get Reactivated," RideSharingDriver.com, (Apr. 21, 2016), https://www.ridesharingdriver.com/fired-uber-drivers-get-deactivated-and-reactivated/. Avery Hartmans, "10 Ways Uber Drivers Can Get Kicked off the App," Business Insider, (Jul. 23, 2017), http://www.businessinsider.com/how-uber-drivers-get-deactivated-2017-7/#1-promoting-a-competitor-1.

150 Laura J. Nelson, "Uber and Lyft have Devastated L.A.'s Taxi Industry, City Records Show," *Los Angeles Times*, (Apr. 13, 2016), http://www.latimes.com/local/lanow/la-me-ln-uber-lyft-taxis-la-20160413-story.html. While some news reports highlight the drop in taxi medallion values, a very real financial problem for owners and owners/drivers, because of the evidence of a medallion bubble in some cities, we have chosen not to highlight this as a metric. See Douglas Hanks, "Taxis Suing Miami-Dade for $1 billion Over New Uber Law," Miami Herald, (May 4, 2016), http://www.miamiherald.com/news/local/community/miami-dade/article75555187.html, and David Maialetti, "With Uber and Lyft in Philly, Taxi Loans are Underwater, Like Mortgages in 2008," *Philadelphia Inquirer*, (Sep. 22, 2017), http://www.philly.com/philly/business/labor_and_unions/taxi-uber-philly-medallions-loans-melrose-20170922.html.

151 San Francisco County Transportation Authority, "TNCs Today: A Profile of San Francisco Transportation Network Company Activity."

152 Jason Laughlin, "Ride Sharing a Hit in Philly, but City's Disabled are Still Left Behind," Philadelphia Inquirer, (Jun. 22, 2016), http://www.philly.com/philly/business/transportation/20160622_Ride_sharing_a_hit_in_Philly__but_city_s_disabled_still_feel_left_behind.html. WAV medallions that sold for around $80,000 in 2016, had dropped to around $11,000 in 2017. See the winning bids, accessed November 12, 2017: http://www.philapark.org/wp-content/uploads/MEDALLION-SALE-WINNING-BID-POSTINGS-7.19.17-1.pdf. Also conversations with Philadelphia Council member Bobby Henon's staff (Aug. 18, 2017), and Lance Haver, Director of Civic Engagement for the Philadelphia City Council (Aug. 24, 2017). Notes on file with authors.

153 Jen Wieczner, "Why the Disabled are Suing Uber and Lyft," Time, (May 22, 2015), http://time.com/3895021/why-the-disabled-are-suing-uber-and-lyft/, and Winnie Hu, "Uber Discriminates Against Riders with Disabilities, Suit Says," *New York Times*, (Jul. 18, 2017), https://www.nytimes.com/2017/07/18/nyregion/uber-disabilities-lawsuit-new-york-city.html.

154 See, e.g., Arizona SB 800 (2015), IL SB 2774 (2015), Maine HP 934/LD 1379 (2015), Ohio HB 237 (2015), and Texas HB 100 (2017) - list not exhaustive. Texas included an accessibility pilot program in its bill. In Florida, Senator Gary Farmer introduced an amendment that would have assessed 0.5 percent of TNC gross revenue to help counties fund accessible vehicles, as Broward County was doing. It did not pass.

155 See Kathryn Bruning, City of Houston, testimony to the Texas House of Representatives, Committee on Transportation, (Mar. 16, 2017).

156 Regina R. Clewlow and Gouri Shankar Mishra, "Disruptive Transportation: The Adoption, Utilization, and Impacts of Ride-Hailing in the United States," University of California at Davis, Institute of Transportation Studies, Research Report UCD-ITS-

RR-17-07, (Oct. 2017), https://itspubs.ucdavis.edu/wp-content/themes/ucdavis/pubs/download_pdf.php?id=2752.

157 Bruce Schaller, "Unsustainable? The Growth of App-based Ride Services and Traffic, Travel and the Future of New York City," Schaller Consulting, (Feb. 2017), http://www.schallerconsult.com/rideservices/unsustainable.pdf.

158 Rayle, Dai, et al, "Just a Better Taxi? A Survey-based Comparison of Taxis, Transit, and Ridesourcing Services in San Francisco."

159 "New Yorkers Likely Abandoning Public Transit for Uber," *Crain's New York Business*, (Mar. 10, 2017), http://www.crainsnewyork.com/article/20170310/TRANSPORTATION/170319992/new-yorkers-likely-abandoning-public-transit-for-uber-lyft-gett-via.

160 A recent survey of seven major metropolitan areas finds that ride-hailing users tend to be younger, more educated, and have higher incomes than non-users. Clewlow and Mishra, "Disruptive Transportation: The Adoption, Utilization, and Impacts of Ride-Hailing in the United States."

161 Michael Barnard, "Uber Not So Climate Friendly?" CleanTechnica.com, (Jan. 14, 2016), https://cleantechnica.com/2016/01/14/uber-not-climate-friendly/.

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AB-5 Worker status: employees and independent contractors. (2019-2020)

Date Published: 09/19/2019 04:00 AM

Assembly Bill No. 5

CHAPTER 296

An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor.

[Approved by Governor September 18, 2019. Filed with Secretary of State September 18, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 5, Gonzalez. Worker status: employees and independent contractors.

Existing law, as established in the case of Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal.5th 903 (Dynamex), creates a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission. Existing law requires a 3-part test, commonly known as the "ABC" test, to establish that a worker is an independent contractor for those purposes.

Existing law, for purposes of unemployment insurance provisions, requires employers to make contributions with respect to unemployment insurance and disability insurance from the wages paid to their employees. Existing law defines "employee" for those purposes to include, among other individuals, any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

This bill would state the intent of the Legislature to codify the decision in the Dynamex case and clarify its application. The bill would provide that for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity's business, and the person is customarily engaged in an independently established trade, occupation, or business. The bill, notwithstanding this provision, would provide that any statutory exception from employment status or any extension of employer status or liability remains in effect, and that if a court rules that the 3-part test cannot be applied, then the determination of employee or independent contractor status shall be governed by the test adopted in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello). The bill would exempt specified occupations from the application of Dynamex, and would instead provide that these occupations are governed by Borello. These exempt occupations would include, among others, licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry.

The bill would also require the Employment Development Department, on or before March 1, 2021, and each March 1 thereafter, to issue an annual report to the Legislature on the use of unemployment insurance in the commercial fishing industry. The bill would make the exemption for commercial fishermen applicable only until January 1, 2023, and the exemption for licensed manicurists applicable only until January 1, 2022. The bill would authorize an action for injunctive relief to prevent employee misclassification to be brought by the Attorney General and specified local prosecuting agencies.

This bill would also redefine the definition of "employee" described above, for purposes of unemployment insurance provisions, to include an individual providing labor or services for remuneration who has the status of an employee rather than an independent contractor, unless the hiring entity demonstrates that the individual meets all of specified conditions, including that the individual performs work that is outside the usual course of the hiring entity's business. Because this bill would increase the categories of individuals eligible to receive benefits from, and thus would result in additional moneys being deposited into, the Unemployment Fund, a continuously appropriated fund, the bill would make an appropriation. The bill would state that addition of the provision to the Labor Code does not constitute a change in, but is declaratory of, existing law with regard to violations of the Labor Code relating to wage orders of the Industrial Welfare Commission. The bill would also state that specified Labor Code provisions of the bill apply retroactively to existing claims and actions to the maximum extent permitted by law while other provisions apply to work performed on or after January 1, 2020. The bill would additionally provide that the bill's provisions do not permit an employer to reclassify an individual who was an employee on January 1, 2019, to an independent contractor due to the bill's enactment.

Existing provisions of the Labor Code make it a crime for an employer to violate specified provisions of law with regard to an employee. The Unemployment Insurance Code also makes it a crime to violate specified provisions of law with regard to benefits and payments.

By expanding the definition of an employee for purposes of these provisions, the bill would expand the definition of a crime, thereby imposing a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: yes Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) On April 30, 2018, the California Supreme Court issued a unanimous decision in Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal.5th 903 (Dynamex).

(b) In its decision, the Court cited the harm to misclassified workers who lose significant workplace protections, the unfairness to employers who must compete with companies that misclassify, and the loss to the state of needed revenue from companies that use misclassification to avoid obligations such as payment of payroll taxes, payment of premiums for workers' compensation, Social Security, unemployment, and disability insurance.

(c) The misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality.

(d) It is the intent of the Legislature in enacting this act to include provisions that would codify the decision of the California Supreme Court in Dynamex and would clarify the decision's application in state law.

(e) It is also the intent of the Legislature in enacting this act to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. By codifying the California Supreme Court's landmark, unanimous Dynamex decision, this act restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law.

(f) The Dynamex decision interpreted one of the three alternative definitions of "employ," the "suffer or permit" definition, from the wage orders of the Industrial Welfare Commission (IWC). Nothing in this act is intended to affect the application of alternative definitions from the IWC wage orders of the term "employ," which were not addressed by the holding of Dynamex.

(g) Nothing in this act is intended to diminish the flexibility of employees to work part-time or intermittent schedules or to work for multiple employers.

SEC. 2. Section 2750.3 is added to the Labor Code, to read:

2750.3. (a) (1) For purposes of the provisions of this code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(2) Notwithstanding paragraph (1), any exceptions to the terms "employee," "employer," "employ," or "independent contractor," and any extensions of employer status or liability, that are expressly made by a provision of this code, the Unemployment Insurance Code, or in an applicable order of the Industrial Welfare Commission, including, but not limited to, the definition of "employee" in subdivision 2(E) of Wage Order No. 2, shall remain in effect for the purposes set forth therein.

(3) If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello).

(b) Subdivision (a) and the holding in Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal.5th 903 (Dynamex), do not apply to the following occupations as defined in the paragraphs below, and instead, the determination of employee or independent contractor status for individuals in those occupations shall be governed by Borello.

(1) A person or organization who is licensed by the Department of Insurance pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of Part 2 of Division 1 of the Insurance Code.

(2) A physician and surgeon, dentist, podiatrist, psychologist, or veterinarian licensed by the State of California pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, performing professional or medical services provided to or by a health care entity, including an entity organized as a sole proprietorship, partnership, or professional corporation as defined in Section 13401 of the Corporations Code. Nothing in this subdivision shall apply to the employment settings currently or potentially governed by collective bargaining agreements for the licensees identified in this paragraph.

(3) An individual who holds an active license from the State of California and is practicing one of the following recognized professions: lawyer, architect, engineer, private investigator, or accountant.

(4) A securities broker-dealer or investment adviser or their agents and representatives that are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or licensed by the State of California under Chapter 2 (commencing with Section 25210) or Chapter 3 (commencing with Section 25230) of Division 1 of Part 3 of Title 4 of the Corporations Code.

(5) A direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met.

(6) A commercial fisherman working on an American vessel as defined in subparagraph (A) below.

(A) For the purposes of this paragraph:

(i) "American vessel" has the same meaning as defined in Section 125.5 of the Unemployment Insurance Code.

(ii) "Commercial fisherman" means a person who has a valid, unrevoked commercial fishing license issued pursuant to Article 3 (commencing with Section 7850) of Chapter 1 of Part 3 of Division 6 of the Fish and Game Code.

(iii) "Working on an American vessel" means the taking or the attempt to take fish, shellfish, or other fishery resources of the state by any means, and includes each individual aboard an American vessel operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, including maintaining the vessel or equipment used aboard the vessel. However, "working on an American vessel" does not apply to anyone aboard a licensed commercial fishing vessel as a visitor or guest who does not directly or indirectly participate in the taking.

(B) For the purposes of this paragraph, a commercial fisherman working on an American vessel is eligible for unemployment insurance benefits if they meet the definition of "employment" in Section 609 of the Unemployment Insurance Code and are otherwise eligible for those benefits pursuant to the provisions of the Unemployment Insurance Code.

(C) On or before March 1, 2021, and each March 1 thereafter, the Employment Development Department shall issue an annual report to the Legislature on the use of unemployment insurance in the commercial fishing industry. This report shall include, but not be limited to, reporting the number of commercial fishermen who apply for unemployment insurance benefits, the number of commercial fishermen who have their claims disputed, the number of commercial fishermen who have their claims denied, and the number of commercial fishermen who receive unemployment insurance benefits. The report required by this subparagraph shall be submitted in compliance with Section 9795 of the Government Code.

(D) This paragraph shall become inoperative on January 1, 2023, unless extended by the Legislature.

(c) (1) Subdivision (a) and the holding in Dynamex do not apply to a contract for "professional services" as defined below, and instead the determination of whether the individual is an employee or independent contractor shall be governed by Borello if the hiring entity demonstrates that all of the following factors are satisfied:

(A) The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity. Nothing in this subdivision prohibits an individual from choosing to perform services at the location of the hiring entity.

(B) If work is performed more than six months after the effective date of this section, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession.

(C) The individual has the ability to set or negotiate their own rates for the services performed.

(D) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.

(E) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.

(F) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

(2) For purposes of this subdivision:

(A) An "individual" includes an individual providing services through a sole proprietorship or other business entity.

(B) "Professional services" means services that meet any of the following:

(i) Marketing, provided that the contracted work is original and creative in character and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the contracted work.

(ii) Administrator of human resources, provided that the contracted work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(iii) Travel agent services provided by either of the following: (I) a person regulated by the Attorney General under Article 2.6 (commencing with Section 17550) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, or (II) an individual who is a seller of travel within the meaning of subdivision (a) of Section 17550.1 of the Business and Professions Code and who is exempt from the registration under subdivision (g) of Section 17550.20 of the Business and Professions Code.

(iv) Graphic design.

(v) Grant writer.

(vi) Fine artist.

(vii) Services provided by an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service pursuant to Part 10 of Subtitle A of Title 31 of the Code of Federal Regulations.

(viii) Payment processing agent through an independent sales organization.

(ix) Services provided by a still photographer or photojournalist who do not license content submissions to the putative employer more than 35 times per year. This clause is not applicable to an individual who works on motion pictures, which includes, but is not limited to, projects produced for theatrical, television, internet streaming for any device, commercial productions, broadcast news, music videos, and live shows, whether distributed live or recorded for later broadcast, regardless of the distribution platform. For purposes of this clause a "submission" is one or more items or forms of content produced by a still photographer or photojournalist that: (I) pertains to a specific event or specific subject; (II) is provided for in a contract that defines the scope of the work; and (III) is accepted by and licensed to the publication or stock photography company and published or posted. Nothing in this section shall prevent a photographer or artist from displaying their work product for sale.

(x) Services provided by a freelance writer, editor, or newspaper cartoonist who does not provide content submissions to the putative employer more than 35 times per year. Items of content produced on a recurring basis related to a general topic shall be considered separate submissions for purposes of calculating the 35 times per year. For purposes of this clause, a "submission" is one or more items or forms of content by a freelance journalist that: (I) pertains to a specific event or topic; (II) is provided for in a contract that defines the scope of the work; (III) is accepted by the publication or company and published or posted for sale.

(xi) Services provided by a licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist provided that the individual:

(I) Sets their own rates, processes their own payments, and is paid directly by clients.

(II) Sets their own hours of work and has sole discretion to decide the number of clients and which clients for whom they will provide services.

(III) Has their own book of business and schedules their own appointments.

(IV) Maintains their own business license for the services offered to clients.

(V) If the individual is performing services at the location of the hiring entity, then the individual issues a Form 1099 to the salon or business owner from which they rent their business space.

(VI) This subdivision shall become inoperative, with respect to licensed manicurists, on January 1, 2022.

(d) Subdivision (a) and the holding in Dynamex do not apply to the following, which are subject to the Business and Professions Code:

(1) A real estate licensee licensed by the State of California pursuant to Division 4 (commencing with Section 10000) of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by subdivision (b) of Section 10032 of the Business and Professions Code. If that section is not applicable, then this determination shall be governed as follows: (A) for purposes of unemployment insurance by Section 650 of the Unemployment Insurance Code; (B) for purposes of workers compensation by Section 3200 et seq.; and (C) for all other purposes in the Labor Code by Borello. The statutorily imposed duties of a responsible broker under Section 10015.1 of the Business and Professions Code are not factors to be considered under the Borello test.

(2) A repossession agency licensed pursuant to Section 7500.2 of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by Section 7500.2 of the Business and Professions Code, if the repossession agency is free from the control and direction of the hiring person or entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(e) Subdivision (a) and the holding in Dynamex do not apply to a bona fide business-to-business contracting relationship, as defined below, under the following conditions:

(1) If a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation ("business service provider") contracts to provide services to another such business ("contracting business"), the determination of employee or independent contractor status of the business services provider shall be governed by Borello, if the contracting business demonstrates that all of the following criteria are satisfied:

(A) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.

(C) The contract with the business service provider is in writing.

(D) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.

(E) The business service provider maintains a business location that is separate from the business or work location of the contracting business.

(F) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

(G) The business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.

(H) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

(I) The business service provider provides its own tools, vehicles, and equipment to perform the services.

(J) The business service provider can negotiate its own rates.

(K) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

(L) The business service provider is not performing the type of work for which a license from the Contractor's State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

(2) This subdivision does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business.

(3) The determination of whether an individual working for a business service provider is an employee or independent contractor of the business service provider is governed by paragraph (1) of subdivision (a).

(4) This subdivision does not alter or supersede any existing rights under Section 2810.3.

(f) Subdivision (a) and the holding in Dynamex do not apply to the relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry, and instead the determination of whether the individual is an employee of the contractor shall be governed by Section 2750.5 and by Borello, if the contractor demonstrates that all the following criteria are satisfied:

(1) The subcontract is in writing.

(2) The subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.

(3) If the subcontractor is domiciled in a jurisdiction that requires the subcontractor to have a business license or business tax registration, the subcontractor has the required business license or business tax registration.

(4) The subcontractor maintains a business location that is separate from the business or work location of the contractor.

(5) The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.

(6) The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, legally authorized indemnity obligations, performance bonds, or warranties relating to the labor or services being provided.

(7) The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.

(8) (A) Paragraph (2) shall not apply to a subcontractor providing construction trucking services for which a contractor's license is not required by Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, provided that all of the following criteria are satisfied:

(i) The subcontractor is a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation.

(ii) For work performed after January 1, 2020, the subcontractor is registered with the Department of Industrial Relations as a public works contractor pursuant to Section 1725.5, regardless of whether the subcontract involves public work.

(iii) The subcontractor utilizes its own employees to perform the construction trucking services, unless the subcontractor is a sole proprietor who operates their own truck to perform the entire subcontract and holds a valid motor carrier permit issued by the Department of Motor Vehicles.

(iv) The subcontractor negotiates and contracts with, and is compensated directly by, the licensed contractor.

(B) For work performed after January 1, 2020, any business entity that provides construction trucking services to a licensed contractor utilizing more than one truck shall be deemed the employer for all drivers of those trucks.

(C) For purposes of this paragraph, "construction trucking services" mean hauling and trucking services provided in the construction industry pursuant to a contract with a licensed contractor utilizing vehicles that require a commercial driver's license to operate or have a gross vehicle weight rating of 26,001 or more pounds.

(D) This paragraph shall only apply to work performed before January 1, 2022.

(E) Nothing in this paragraph prohibits an individual who owns their truck from working as an employee of a trucking company and utilizing that truck in the scope of that employment. An individual employee providing their own truck for use by an employer trucking company shall be reimbursed by the trucking company for the reasonable expense incurred for the use of the employee owned truck.

(g) Subdivision (a) and the holding in Dynamex do not apply to the relationship between a referral agency and a service provider, as defined below, under the following conditions:

(1) If a business entity formed as a sole proprietor, partnership, limited liability company, limited liability partnership, or corporation ("service provider") provides services to clients through a referral agency, the determination whether the service provider is an employee of the referral agency shall be governed by Borello, if the referral agency demonstrates that all of the following criteria are satisfied:

(A) The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.

(B) If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration, the service provider has the required business license or business tax registration.

(C) If the work for the client requires the service provider to hold a state contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, the service provider has the required contractor's license.

(D) The service provider delivers services to the client under service provider's name, rather than under the name of the referral agency.

(E) The service provider provides its own tools and supplies to perform the services.

(F) The service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed for the client.

(G) The service provider maintains a clientele without any restrictions from the referral agency and the service provider is free to seek work elsewhere, including through a competing agency.

(H) The service provider sets its own hours and terms of work and is free to accept or reject clients and contracts.

(I) The service provider sets its own rates for services performed, without deduction by the referral agency.

(J) The service provider is not penalized in any form for rejecting clients or contracts. This subparagraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

(2) For purposes of this subdivision, the following definitions apply:

(A) "Animal services" means services related to daytime and nighttime pet care including pet boarding under Section 122380 of the Health and Safety Code.

(B) "Client" means a person or business that engages a service contractor through a referral agency.

(C) "Referral agency" is a business that connects clients with service providers that provide graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup.

(D) "Referral agency contract" is the agency's contract with clients and service contractors governing the use of its intermediary services described in subparagraph (C).

(E) "Service provider" means a person or business who agrees to the referral agency's contract and uses the referral agency to connect with clients.

(F) "Tutor" means a person who develops and teaches their own curriculum. A "tutor" does not include a person who teaches a curriculum created by a public school or who contracts with a public school through a referral company for purposes of teaching students of a public school.

(3) This subdivision does not apply to an individual worker, as opposed to a business entity, who performs services for a client through a referral agency. The determination whether such an individual is an employee of a referral agency is governed by subdivision (a).

(h) Subdivision (a) and the holding in Dynamex do not apply to the relationship between a motor club holding a certificate of authority issued pursuant to Chapter 2 (commencing with Section 12160) of Part 5 of Division 2 of the Insurance Code and an individual performing services pursuant to a contract between the motor club and a third party to provide motor club services utilizing the employees and vehicles of the third party and, instead, the determination whether such an individual is an employee of the motor club shall be governed by Borello, if the motor club demonstrates that the third party is a separate and independent business from the motor club.

(i) (1) The addition of subdivision (a) to this section of the Labor Code by this act does not constitute a change in, but is declaratory of, existing law with regard to wage orders of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders.

(2) Insofar as the application of subdivisions (b), (c), (d), (e), (f), (g), and (h) of this section would relieve an employer from liability, those subdivisions shall apply retroactively to existing claims and actions to the maximum extent permitted by law.

(3) Except as provided in paragraphs (1) and (2) of this subdivision, the provisions of this section of the Labor Code shall apply to work performed on or after January 1, 2020.

(j) In addition to any other remedies available, an action for injunctive relief to prevent the continued misclassification of employees as independent contractors may be prosecuted against the putative employer in a court of competent jurisdiction by the Attorney General or by a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association.

SEC. 3. Section 3351 of the Labor Code, as amended by Section 33 of Chapter 38 of the Statutes of 2019, is amended to read:

3351. “Employee” means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:

(a) Aliens and minors.

(b) All elected and appointed paid public officers.

(c) All officers and members of boards of directors of quasi-public or private corporations while rendering actual service for the corporations for pay. An officer or member of a board of directors may elect to be excluded from coverage in accordance with paragraph (16), (18), or (19) of subdivision (a) of Section 3352.

(d) Except as provided in paragraph (8) of subdivision (a) of Section 3352, any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.

(e) All persons incarcerated in a state penal or correctional institution while engaged in assigned work or employment as defined in paragraph (1) of subdivision (a) of Section 10021 of Title 8 of the California Code of Regulations, or engaged in work performed under contract.

(f) All working members of a partnership or limited liability company receiving wages irrespective of profits from the partnership or limited liability company. A general partner of a partnership or a managing member of a limited liability company may elect to be excluded from coverage in accordance with paragraph (17) of subdivision (a) of Section 3352.

(g) A person who holds the power to revoke a trust, with respect to shares of a private corporation held in trust or general partnership or limited liability company interests held in trust. To the extent that this person is deemed to be an employee described in subdivision (c) or (f), as applicable, the person may also elect to be excluded from coverage as described in subdivision (c) or (f), as applicable, if that person otherwise meets the criteria for exclusion, as described in Section 3352.

(h) A person committed to a state hospital facility under the State Department of State Hospitals, as defined in Section 4100 of the Welfare and Institutions Code, while engaged in and assigned work in a vocation rehabilitation program, including a sheltered workshop.

(i) Beginning on July 1, 2020, any individual who is an employee pursuant to Section 2750.3. This subdivision shall not apply retroactively.

SEC. 4. Section 606.5 of the Unemployment Insurance Code is amended to read:

606.5. (a) Whether an individual or entity is the employer of specific employees shall be determined pursuant to subdivision (b) of Section 621, except as provided in subdivisions (b) and (c).

(b) As used in this section, a “temporary services employer” and a “leasing employer” is an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and performs all of the following functions:

(1) Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services.

(2) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.

(3) Retains the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer.

(4) Assigns or reassigns the worker to perform services for a client or customer.

(5) Sets the rate of pay of the worker, whether or not through negotiation.

(6) Pays the worker from its own account or accounts.

(7) Retains the right to hire and terminate workers.

(c) If an individual or entity contracts to supply an employee to perform services for a customer or client, and is a leasing employer or a temporary services employer, the individual or entity is the employer of the employee who performs the services. If an individual or entity contracts to supply an employee to perform services for a client or customer and is not a leasing employer or a temporary services employer, the client or customer is the employer of the employee who performs the services. An individual or entity that contracts to supply an employee to perform services for a customer or client and pays wages to the employee for the services, but is not a leasing employer or a temporary services employer, pays the wages as the agent of the employer.

(d) In circumstances which are in essence the loan of an employee from one employer to another employer wherein direction and control of the manner and means of performing the services changes to the employer to whom the employee is loaned, the loaning employer shall continue to be the employer of the employee if the loaning employer continues to pay remuneration to the employee, whether or not reimbursed by the other employer. If the employer to whom the employee is loaned pays remuneration to the employee for the services performed, that employer shall be considered the employer for the purposes of any remuneration paid to the employee by the employer, regardless of whether the loaning employer also pays remuneration to the employee.

SEC. 5. Section 621 of the Unemployment Insurance Code is amended to read:

621. “Employee” means all of the following:

(a) Any officer of a corporation.

(b) Any individual providing labor or services for remuneration has the status of an employee rather than an independent contractor unless the hiring entity demonstrates all of the following conditions:

(1) The individual is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(2) The individual performs work that is outside the usual course of the hiring entity’s business.

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

(c) (1) Any individual, other than an individual who is an employee under subdivision (a) or (b), who performs services for remuneration for any employing unit if the contract of service contemplates that substantially all of those services are to be performed personally by that individual either:

(A) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or drycleaning services, for their principal.

(B) As a traveling or city salesperson, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, their principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(C) As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by that person that are required to be returned to that person or a designee thereof.

(2) An individual shall not be included in the term "employee" under the provisions of this subdivision if that individual has a substantial investment in facilities used in connection with the performance of those services, other than in facilities for transportation, or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

(d) Any individual who is an employee pursuant to Section 601.5 or 686.

(e) Any individual whose services are in subject employment pursuant to an election for coverage under any provision of Article 4 (commencing with Section 701) of this chapter.

(f) Any member of a limited liability company that is treated as a corporation for federal income tax purposes.

SEC. 6. No provision of this measure shall permit an employer to reclassify an individual who was an employee on January 1, 2019, to an independent contractor due to this measure's enactment.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

458 CMR: DEPARTMENT OF FAMILY AND MEDICAL LEAVE

458 CMR 2.00: DEPARTMENT OF FAMILY AND MEDICAL LEAVE

Section

2.01: Purpose, Scope, and Other General Provisions

(1) Purpose. These regulations are promulgated to clarify procedures, practices, and policies in the administration and enforcement of the Family and Medical Leave Law, M.G.L. c. 175M.

(2) Scope. 458 CMR 2.00 applies to Massachusetts employers and covered business entities and to Massachusetts covered individuals, including employees and self-employed individuals who elect coverage, who are eligible for family and medical leave benefits pursuant to the provisions of M.G.L. c. 175M.

Under 458 CMR 2.00, an employer or covered business entity shall be considered a Massachusetts employer or covered business entity with respect to services performed by a covered individual for the employer or covered business entity, and a covered individual shall be considered a Massachusetts covered individual with respect to all services provided within, or both within and without the Commonwealth for an employer or covered business entity, if

(a) the service is localized in the Commonwealth. Service shall be deemed to be localized within the Commonwealth if the service is performed entirely within the Commonwealth, or the service is performed both within and without the commonwealth, but the service performed without the Commonwealth is incidental to the individual's service within the Commonwealth; for example, is temporary or transitory in nature, or consists of isolated transactions.

(b) the service is not localized in any state, but some part of the service is performed in the Commonwealth and

1. the individual's base of operations is in the Commonwealth or, if there is no base of operations, then the place from which such service is directed or controlled, is within the Commonwealth, or

2. the individual's base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in the Commonwealth.

(3) Interaction with State and Federal Leave Laws. Leave taken under M.G.L. c. 175M shall run concurrently with leave taken under other applicable state and federal leave laws, including the Commonwealth's Parental Leave Act (M.G.L. c. 149, §105D) and the federal Family and Medical Leave Act of 1993 (29 U.S.C. 2601 *et seq*.), as amended, when the leave is for a qualified reason under those acts.

(4) Use of Electronic Communications. Any written communication required or permitted under M.G.L. c. 175M or under 458 CMR 2.00 shall be made and transmitted in the manner and form prescribed by the director, which may include by means of electronic communication. The director shall establish procedures allowing the use of the United States Postal Service (regular mail) for persons lacking reasonable access to, or the ability to use, electronic communication.

2.02: Definitions

For the purposes of 458 CMR 2.00, the following words shall have the following meanings, unless the context clearly requires otherwise. Terms defined under the Federal Family Medical Leave Act of 1993, as amended, and its implementing regulations shall be treated as persuasive, supplementary authority when those definitions are not facially inconsistent with the terms adopted in M.G.L. c. 175M and 458 CMR 2.00.

Adoption, legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (*i.e.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave.

Average Weekly Wage, shall have the same meaning as provided in M.G.L. c. 151A, § 1(w); provided, however, that Average Weekly Wage shall be calculated using earnings from the base period; and provided further, that in the case of a self-employed individual, Average Weekly Wage shall mean 1/26 of the total earnings of the self-employed individual from the two highest quarters of the 12 months preceding such individual's application for benefits under M.G.L. c. 175M.

Base Period, the last four completed calendar quarters immediately preceding the starting date of a qualified period of paid family or medical leave. A completed calendar quarter is one for which an employment and wage detail report has been or should have been filed, pursuant to 458 CMR 2.04(1)-(2).

Benefit Year, the period of 52 consecutive weeks beginning on the Sunday immediately preceding the first day that job-protected leave under M.G.L. c. 175M commences for the covered individual.

Calendar Year, a 12-month period starting with January 1st and ending with December 31st.

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.

Continuing Treatment by a Health Care Provider, includes any one or more of the following:

(a) Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

1. Treatment two or more times, within 30 calendar days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

2. Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider. Treatment includes examination to determine if there is a serious health condition.

Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes a course of prescription medication or therapy requiring specialized equipment to resolve or alleviate the health condition.

3. The requirement for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven calendar days of the first day of incapacity.

4. Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

5. The term extenuating circumstances means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) Pregnancy or Prenatal Care. Any period of incapacity due to pregnancy, or for prenatal care.

(c) Chronic Conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(d) Permanent or Long-term Conditions. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee, covered individual or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) Conditions Requiring Multiple Treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

1. Restorative surgery after an accident or other injury; or
2. A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under Continuing Treatment by a Health Care Provider (b) or (c) qualify for leave even though the employee, covered individual or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days.

(g) Cosmetic treatments are not serious health conditions unless inpatient hospital care is required or unless complications develop.

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 M.G.L. c. 175M.

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% of its workforce.

Covered Contract Worker, a self-employed individual for whom an employer or covered business entity is:

(a) required to report payment for services on IRS Form 1099-MISC; and

(b) required to remit contributions to the Family and Employment Security Trust Fund pursuant to the requirements of M.G.L. c. 175M, § 6.

Covered Individual, either:

(a) an employee who meets the financial eligibility test; provided, however, that all such employment shall have been with an employer in the Commonwealth;

(b) a self-employed individual:

1. who has elected coverage under M.G.L. c. 175M, § 2(j);

2. whose reported earnings to the Massachusetts Department of Revenue from self-employment meet the financial eligibility test as if the individual were an employee; and

3. who has made contributions as required by M.G.L. c. 175M, § 6, for at least two of the previous four calendar quarters;

(c) a covered contract worker:

1. for whom at least one employer or covered business entity is required to remit contributions to the Family and Employment Security Trust Fund pursuant to M.G.L. c. 175M, § 6; and

2. whose payments from such employer or covered business entity satisfy the financial eligibility test as if the covered contract worker were an employee; or

(d) a former employee who has:

1. met the financial eligibility test 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

2. 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:

(a) a member of the Armed Forces, as defined in M.G.L. c. 4, § 7, including a member of the National Guard or Reserves, who is:

1. undergoing medical treatment, recuperation or therapy;

2. otherwise in outpatient status; or

3. 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

(b) 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 M.G.L. c. 175M, § 8.

Director, the Director of the Department of Family and Medical Leave.

Domestic Partner, a person not less than 18 years of age who:

(a) 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:

1. common ownership of real or personal property;

2. common householding;

3. children in common;

4. signs of intent to marry;

5. shared budgeting; and

6. the length of the personal relationship with the covered individual; or

(b) 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.

Earnings from Self-employment, or Income from Self-Employment, shall have the same meaning as "net earnings from self-employment", as defined in the Internal Revenue Code §

1402(a) as amended and in effect for the taxable year, and the implementing regulations thereunder.

Employee, shall have the same meaning as provided in M.G.L. c. 151A, § 1(h); provided, however, that notwithstanding M.G.L. c. 151A, § 1(h); or any other special or general law to the contrary, Employee shall include a family child care provider, as defined in M.G.L. c. 15D, § 17(a).

Employer, shall have the same meaning as provided in M.G.L. c. 151A § 1(i); provided, however, that

(a) an individual employer shall be determined by the Federal Employer Identification Number;

(b) the Department of Early Education and Care shall be deemed the employer of family child care providers, as defined in M.G.L. c. 15D, § 17(a); provided further, that the PCA Quality Home Care Workforce Council established in M.G.L. c. 118E, § 71 shall be the employer of personal care attendants, as defined in M.G.L. c. 118E, § 70;

(c) any employer not subject to M.G.L. c. 175M may become a covered employer under M.G.L. c. 175M by notifying the Department of Family and Medical Leave and completing the procedure established by the Department; and

(d) a municipality, district, political subdivision or its instrumentalities shall not be subject to M.G.L. c. 175M unless it adopts M.G.L. c. 175M by majority vote of its authorized local legislative body or governing body and otherwise as provided by M.G.L. c. 175M, § 10.

Employment, shall have the same meaning as provided by M.G.L. c. 151A, § 1(k); provided, further, that employment shall not include any service not included in “employment” pursuant to M.G.L. c. 151A, § 6.

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 to care for a family member with a serious health condition, for a parent to bond with the parent’s child during the first 12 months after the child’s birth, adoption, or foster care placement, to care for a family member who is a covered service member, or because of a 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.

Family Leave Benefits, wage replacement paid pursuant to M.G.L. c. 175M, § 3 and provided in accordance with M.G.L. c. 175M, § 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.

Financial Eligibility Test, a demonstration that, over the 12 months preceding an individual's claim for benefits, the individual has received total wages as an employee or payments for service as a covered contract worker from a Massachusetts employer or a Massachusetts covered business entity that in the aggregate equal or exceed 30 times the individual's weekly benefit amount as determined under 458 CMR 2.12, below, and that in the aggregate are not less than the dollar amount calculated annually by the Department of Unemployment Assistance pursuant to M.G.L. c. 151A, § 24(a).

Foster Care, 24-hour care for children in substitution for and away from their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent and guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will care for the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

Grandparent, a parent of the covered individual's parents.

Health Care Provider, an individual licensed by the State in which the individual practices to practice medicine, surgery, dentistry, chiropractic, podiatry, midwifery or osteopathy, and including the following:

(a) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in by a State and performing within the scope of their practice as defined under that State's law;

(b) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(c) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

(d) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of the person's practice as defined under such law.

Incapacity, an inability to perform the functions of one's position, or where the covered individual is a former employee, to perform the functions of one's most recent position or other suitable employment as that term is defined under M.G.L. c. 151A, § 25(c), due to the serious health condition, treatment therefor, or recovery therefrom.

Inpatient Care, an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity, or any subsequent treatment in connection with such inpatient care.

Intermittent Leave, leave taken in separate periods of time due to a single qualifying reason, rather than for one continuous period of time. Examples of intermittent leave include leave taken on an occasional basis for medical appointments or leave taken several days at a time spread over a period of months. An employer may require that intermittent leave be taken in increments not smaller than a designated minimum time period; provided, however, that an employer's designated minimum time period may not be greater than four consecutive hours.

Medical Leave, leave taken by a covered individual due to a serious health condition.

Medical Leave Benefits, wage replacement paid pursuant to M.G.L. c. 175M, § 3, and provided in accordance with M.G.L. c. 175M, § 2, to a covered individual while the covered individual is on medical leave.

Parent, the biological, adoptive, step- or foster mother or father of the covered individual.

Pay Period, the shortest pay period used by a business or trade for regular payments to any group of employees of the business or trade.

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.

Qualifying Earnings,

(a) wages paid to an employee;

(b) payments by covered business entities to covered contract workers; and

(c) earnings from self-employment on which a self-employed individual is making contributions pursuant to 458 CMR 2.06.

Qualifying Reason, any of the following reasons for which a covered individual is eligible for family or medical leave benefits: to bond with a child during the first 12 months after the child's birth, adoption, or foster care placement; to care for a family member's serious health condition;

to care for a family member who is a covered service member; a qualifying exigency arising out of a family member's active duty or impending call to active duty in the Armed Forces; or the covered individual's own serious health condition that incapacitates the individual from performing the essential functions of the individual's job.

Reduced leave schedule, a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of a covered individual.

Self-employed individual, a sole proprietor, sole 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 Massachusetts 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:

(a) inpatient care in a hospital, hospice or residential medical facility; or

(b) continuing treatment by a health care provider.

Sibling, the biological, adoptive, step- brother or sister of a covered individual.

State Average Weekly Wage, the average weekly wage in the Commonwealth as calculated under M.G.L. c. 151A, § 29(a) and determined by the Director of the Massachusetts Department of Unemployment Assistance.

Trust Fund, the Family and Employment Security Trust Fund established in M.G.L. c. 175M, § 7.

Wages, shall have the same meaning as provided in M.G.L. c. 151A, § 1(s).

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 M.G.L. c. 175M, § 3.

2.03: Covered Business Entities and Covered Contract Workers

A business or trade shall annually determine if it is a covered business entity by the following method:

(1) The business or trade shall count the total number of self-employed individuals with whom the business or trade contracted for services during each pay period in the previous calendar year and was required to report the payment for such services on IRS Form 1099-MISC.

(2) The business or trade shall then calculate its total workforce by adding the number of self-employed individuals counted in 458 CMR 2.03(1) to the total number of employees, including

full time, part-time, and seasonal employees, that the business or trade employed during each pay period in the previous calendar year.

(3) If the number calculated in subsection 458 CMR 2.03(1) is greater than 50% of the number calculated in 458 CMR 2.03(2), then, for the following calendar year, the business or trade is a covered business entity, and the self-employed individuals who contract with the trade or business are covered contract workers.

2.04: Registration and Filing

(1) Registration. An employer, covered business entity, and any self-employed individual who elects coverage under 458 CMR 2.06 shall remit contributions owed under 458 CMR 2.05 through the Massachusetts Department of Revenue's MassTaxConnect system. Employers and covered business entities shall likewise file employment and wage detail reports through the MassTaxConnect system. Employers, covered business entities, and self-employed individuals who elect coverage and who do not have pre-existing accounts on the MassTaxConnect system shall register and establish an account in order to make filings and remit contributions required under M.G.L. c. 175M and 458 CMR 2.00.

(2) Quarterly Filing and Contribution Payment. Following the end of each calendar quarter, every employer and covered business entity and any self-employed individual who has elected coverage shall file an employment and wage detail report and payment for their contribution through the MassTaxConnect system on or before the quarterly filing deadline established by the Massachusetts Department of Revenue.

(a) The employment and wage detail report shall contain the following information for each employee, covered contract worker, and self-employed individual electing coverage:

1. name,

2. Social Security Number or individual taxpayer identification number, and

3. wages paid or other earnings.

(b) The report shall contain:

1. for each employer or covered business entity the federal employer identification number that such employer or covered business entity is required to include on a withholding tax return filed pursuant to M.G.L. c. 62B; and

2. for each self-employed individual who has elected coverage, the Social Security Number or Individual Taxpayer Identification Number of the self-employed individual.

(3) Covered Contract Workers. If an employer or covered business entity made payments to individuals for services during the calendar quarter that are required to be reported on IRS Form

1099-MISC, the employer must also report the names and Social Security numbers or Individual Taxpayer Identification numbers of those individuals, and the amounts of such payments made.

(4) Veracity/False Statements. Without limitation, any employer, covered business entity, or self-employed person electing coverage who makes a false statement or representation or willfully withholds a material fact with regard to any of the information required by 458 CMR 2.04, 458 CMR 2.00 generally, or M.G.L. c. 175M may be subject to penalties, including those under M.G.L. c. 62C, § 73.

2.05: Contributions

(1) Generally.

(a) Contributions are the payments made to the Family and Employment Security Trust Fund established in M.G.L. c. 175M, § 7 by an employer, a covered business entity, an employee, a covered contract worker, or a self-employed individual electing coverage.

(b) Beginning on October 1, 2019, the initial contribution rate shall be 0.75 percent of all wages or other qualifying earnings or payments, as limited by subsection (c) and (d), below. Annually, not later than October 1, the director shall set the contribution rate for the upcoming calendar year, as required by M.G.L. c. 175M, § 7(e).

(c) Contributions shall not be required for employees' wages or other qualifying earnings or payments above the contribution and 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.

(d) An employer or covered business entity with an average total workforce in the commonwealth of fewer than 25 persons, including employees and covered contract workers, as determined by the method specified in 458 CMR 2.05(2), shall not be required to pay the employer portion of premiums for family and medical leave, as defined in 458 CMR 2.05(5).

(2) Average Total Workforce Count. An employer or covered business entity shall annually determine its workforce count based on the previous calendar year by counting the number of employees, including full time, part-time, and seasonal employees on the payroll during each pay period and dividing by the number of pay periods. If an employer or covered business entity contracted with individuals for services during any pay period and is required to report the payment to such individuals on IRS Form 1099-MISC, those individuals must be included in the count for the pay period.

An employer or a covered business entity with an average total workforce that consists of more than 50% self-employed individuals for whom the employer is required to report payment for services on Internal Revenue Service form 1099-MISC shall count those self-employed individuals as covered contract workers for the purposes of determining the size of the employer's or covered business entity's average total workforce pursuant to 458 CMR 2.05(2).

(3) Required Remittance of Contributions. An employer or covered business entity shall be required to remit contributions for all employees and covered contract workers. Notwithstanding the foregoing, the Department may refund contributions paid by or on behalf of an employee, covered contract worker, or self-employed individual who has elected coverage, where the contribution remitted was greater than required under M.G.L. c. 175M, or 458 CMR 2.00, or both.

(4) Allocation of Contribution Rate between Family Leave and Medical Leave. The total contribution rate shall be allocated between the family leave contribution rate and the medical leave contribution rate. The rate allocation will be based on the Department's estimate of the anticipated costs of benefits and administration of the program. When the Department deems it necessary to do so, but no more than once a year, it may adjust the allocation of rates.

(5) Allocation of Contributions between Employers and Employees and Covered Contract Workers. In accordance with applicable laws and regulations, including the required notice under M.G.L. c. 175M, § 4(a), an employer or a covered business entity may deduct up to certain defined percentages of the required medical leave and family leave contributions directly from wages or other qualifying payments made to an employee or covered contract worker.

The employer's or covered business entity's portion of the contribution is that part of the full contribution amount not deducted from wages paid or other qualifying payments made to the employee or covered contract worker. The employer or covered business entity in all instances shall be responsible for paying and remitting the remainder of any required contribution not lawfully deducted from the employee or covered contract worker.

(a) Medical Leave Contribution. An employer or covered business entity may deduct from an employee's wages or from qualifying payments made to a covered contract worker up to 40% of the medical leave contribution required for that employee or covered contract worker.

(b) Family Leave Contribution. An employer or covered business entity may deduct from an employee's wages or from qualifying payments made to covered contract worker up to 100% of the family leave contribution required for that employee or covered contract worker.

(c) An employer or covered business entity may not deduct a greater percentage of the medical leave and family leave contributions than the maximum authorized by M.G.L. c. 175M, § 6(e)(1) and (2). An employer or covered business entity that opts to deduct a lower percentage of medical or family leave contributions than the maximum allowable deductions specified in 458 CMR 2.05(5)(a) and (b) shall still be required to remit the full amount of contribution amount owed pursuant to 458 CMR 2.05(6).

(d) An employer or covered business entity may choose to deduct differing percentages from the wages or qualifying payments of different groups of covered individuals, but it may not deduct more than the maximum percentages authorized by M.G.L. c. 175M, § 6(e)(1) and (2) from any employee or covered contract worker.

(6) Remitting Contributions. Based on the quarterly Employment and Wage Detail Report filed by an employer, covered business entity, or self-employed individual electing coverage, the Department will calculate the total quarterly contribution amount owed. Contributions owed must be remitted to the Department through the Massachusetts Department of Revenue's MassTaxConnect system on or before the quarterly filing deadlines established by the Massachusetts Department of Revenue.

(7) Penalty. An employer or covered business entity who fails or refuses to make contributions as required in 458 CMR 2.05(6) shall be assessed an amount equal to its total annual payroll for employees and covered contract workers for each year or fraction thereof that it failed to comply multiplied by the then-current annual contribution rate required under M.G.L. c. 175M, § 6(a), in addition to the total amounts of benefits paid to covered individuals for whom it failed to make contributions. The Department may waive or modify any penalty or assessment imposed or due hereunder upon a showing of good cause.

An employer that is assessed a charge against payroll for failure to remit required contributions or that is required to repay the trust fund the cost of benefits paid to covered individuals for whom it failed to make contributions may not recoup any assessment or cost of repayment through charges against employees or covered contract workers.

2.06: Optional Coverage for Self-Employed Individuals

(1) A self-employed individual may elect coverage under M.G.L. c. 175M and become a covered individual for an initial period of not less than three years.

(2) To elect coverage a self-employed individual shall, during a period designated by the Department, file a Self-Employed Notice of Election with the Department and thereafter register, file, and make contributions to the Family and Employment Security Trust Fund pursuant to 458 CMR 2.03, 2.04, and 2.06.

(3) The election shall be effective on the date the Self-Employed Notice of Election is accepted by the Department, but a self-employed individual who elects coverage shall not be eligible to receive paid leave benefits until the individual has remitted the required contributions for at least two out of four completed calendar quarters.

(4) A self-employed individual who elects coverage shall be responsible for the full contribution amount, based on that individual's income from self-employment. If a self-employed individual elects coverage and thereafter fails to remit contributions owed for the required minimum period of three years, coverage shall be terminated. At the discretion of the director, the self-employed individual may be disqualified from electing coverage thereafter as a self-employed individual, but shall not be precluded from obtaining coverage as an employee or covered contract worker. A self-employed individual who elects coverage and thereafter fails to remit contributions for at least three years shall not be disqualified from future coverage if the individual was not required to remit such contributions because the self-employment ended or the individual moved away from the commonwealth.

(5) A self-employed individual who is required to be treated as a covered contract worker by a covered business entity to whom the self-employed individual provides services and whose payment for those services is subject to contributions pursuant to 458 CMR 2.05(3), may elect coverage and remit contributions on additional income from self-employment that is unrelated to services provided to a covered business entity.

2.07: Application for Exemption due to Approved Private Plan

(1) Application. An employer or covered business entity may apply to the Department for an exemption from certain obligations under M.G.L. c. 175M by demonstrating that it offers paid family and medical leave benefits to its workforce through a private plan. If approved, the employer or covered business entity shall be exempt from the requirement to make contributions to the Trust Fund pursuant to M.G.L. c. 175M, § 6 and 458 CMR 2.05. Applications for such exemptions will be accepted and reviewed by the Department on a rolling basis and will be effective no earlier than the quarter immediately following the date of approval. Exemptions from contributions will be effective for one year and may be renewed annually. An employer or covered business entity may apply for exemption from the requirement to make contributions for medical leave coverage, family leave coverage, or both. An employer or covered business entity offering paid family and medical leave benefits to its workforce through a private plan may submit an application for approval to the Department no more frequently than once per quarter.

(2) Requirements for Exemption. To be approved for an exemption from the requirement to remit contributions, an employer's or covered business entity's private plan must:

(a) confer all the same or better benefits as those provided to employees and covered contract workers under M.G.L. c. 175M, including but not limited to all of the requirements specified in M.G.L. c. 175M, § 11; and

(b) not cost employees and covered contract workers more than they would be charged to be eligible to receive paid leave benefits from the Trust Fund administered by the Department pursuant to M.G.L. c. 175M. Additionally, the employer's or covered business entity's policies concerning family or medical leave must provide equivalent or better rights and protections as those provided in M.G.L. c. 175M, including the job- and benefit-protection provisions of M.G.L. c. 175M, § 2 and the non-retaliation provisions of M.G.L. c. 175M, § 9. The employer or covered business entity must certify to the Department that its private plan meets these requirements.

(3) If an employer's or covered business entity's plan provides for insurance, the forms of the policy must be issued by a Massachusetts licensed insurance company.

(4) If an employer's or covered business entity's plan is in the form of self-insurance, the employer or covered business entity must furnish to the Department a surety bond running to the commonwealth in such form as may be approved by the Department and in such amount as may be required by the Department. The surety company issuing the bond must be authorized to transact business in the Commonwealth.

(5) Review. An employer or covered business entity that is denied an exemption from the requirement to remit contributions and that believes in good faith that its private plan meets or exceeds the requirements for exemption may request supplementary review by the Department.

(6) Retained Rights for Employee and Covered Contract Workers Under Private Plans.

(a) An employee or covered contract worker who is denied family or medical leave benefits by a private plan shall have a right to appeal the denial before the Department and in the district court as provided by 458 CMR 2.14(5) and M.G.L. c. 175M, § 8(d).

(b) An employee covered by a private plan approved under 458 CMR 2.07 shall retain all applicable rights under M.G.L. c. 175M, § 2(e) and (f) and under M.G.L. c. 175M, § 9.

(7) Audits, Withdrawal of Approval, and Penalties for Private Plans.

(a) The Department may audit any approved private plan maintained by an employer or covered business entity and may require periodic reporting to ensure that a private plan complies with the requirements of M.G.L. c. 175M, 458 CMR 2.00, or other state or federal law.

(b) Employers and covered business entities with approved private plans must retain all reports, information, and records related to the approved plan, including those related to all claims for benefits made under the plan, for three years, and must furnish same to the Department upon request.

(c) The Department may withdraw approval for a private plan when terms or conditions of the plan have been changed or violated. Causes for termination of plan approval shall include, but not be limited to the following:

1. failure to pay benefits;

2. failure to pay benefits timely and in a manner consistent with the public plan;

3. failure to maintain adequate bond coverage;

4. misuse of private plan trust funds;

5. adverse changes to the financial condition or licensure status of the employer or covered business entity, private plan insurer, or surety company responsible for a bond;

6. failure or refusal to respond to requests for information or to submit reports, records, or other information that may be required by the Department; or

7. failure to comply with M.G.L. c. 175M, these regulations, or other state or federal law applicable to the private plan.

(d) An employer must notify the Department in writing at least 30 calendar days before any proposed changes to the terms or conditions of an approved private plan.

(e) An employer or covered business entity that fails to maintain a private plan as approved by the Department or has its approval withdrawn by the Department pursuant 458 CMR 2.07(7)(c) may be subject to the following penalties:

1. Assessment of a penalty of up to an amount equal to its total annual payroll for employees and covered contract workers each year or fraction thereof that it failed to maintain said plan multiplied by the then-current annual contribution rate required under M.G.L. c. 175M, § 6(a).

2. The employer or covered business entity may be required to repay to the Trust Fund the total amount of benefits paid to covered individuals who received benefits from the Trust Fund.

(f) The penalty prescribed in 458 CMR 2.07(7)(e)1 shall also apply to an employer or covered business entity that fails to maintain or renew a private plan approved by the Department for the future payment of leave benefits scheduled to begin on January 1, 2021, pursuant to 458 CMR 2.08(8). An employer or covered business entity who fails to maintain or renew a private plan exemption approved prior to January 1, 2021 may be responsible for retroactive contributions to the Trust Fund.

(8) <u>Private Plan Termination or Non-Renewal and Intersection of State and Private Plans</u>.

(a) Benefits and benefit eligibility under an approved private plan must be maintained for all covered individuals until the effective date of termination or non-renewal of the approved private plan. An employer or covered business entity that does not intend to renew its approved private plan at the effective date of termination must notify covered individuals and the Department no later than 30 calendar days prior to the effective date of termination.

(b) An employer or covered business entity that does not renew an approved private plan must continue to provide paid leave benefits under the same terms and conditions of the private plan for the entire duration of the leave for a claim that began prior to the effective date of termination.

<u>2.08: Claim for Benefits</u>

(1) <u>Process for filing</u>. A covered individual must file a claim for family leave or medical leave benefits using forms prescribed by the Department.

(2) <u>Required Notice</u>.

(a) Except as otherwise provided, a covered individual filing a claim for benefits must provide the Department and the individual's employer (if any) with at least 30 calendar days' notice of:

1. the anticipated start date of the leave,
2. the anticipated length of the leave,
3. the type of leave, and
4. the individual's expected return date.

If, for reasons beyond the individual's reasonable control, the individual cannot provide 30 days' notice then the individual shall provide notice as soon as is practicable.

(b) An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. An employee or covered individual also may be required by an employer's policy to contact a specific individual to report this information.

(c) Where an employee does not comply with the notice requirement in 458 CMR 2.08(2)(a) or follow the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, protected leave may be delayed or denied.

(d) When planning medical treatment, the employee or covered individual must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider.

(e) The Department shall notify a covered individual's employer, if applicable, not more than five business days after a claim for benefits under M.G.L. c. 175M is filed, and shall facilitate the disclosure and exchange of relevant information or records regarding the claim. The Department's notice to an employer shall contain:

1. the covered individual's name,
2. the type of leave at issue,
3. the expected duration of the leave,
4. whether the request is for continuous or intermittent leave, and
5. any other information relevant to the claim.

(3) Consent. A covered individual filing a claim for benefits must provide the Department with consent to share information regarding the claim and other information necessary for the Department to process the individual's claim for benefits, including consent to share information with the individual's employer (if any) and health care provider. Consent shall be acknowledged by the individual in a form provided by the Department.

(4) Claim. When filed, a claim for benefits must include all information necessary for the Department's review and processing, including but not limited to:

(a) Identifying information, such as Social Security number or Individual Taxpayer Identification number;

(b) The nature of the leave, whether family leave or medical leave;

(c) The starting date and expected duration of the leave;

(d) Whether the leave will be continuous or intermittent;

(e) For employees:

1. Employer name and identification number (which is included on the notice the employer is required to provide to employees and covered individuals),

2. The date notice was provided to the employer,

3. Any denied, granted, or pending requests for leave for a qualifying reason from the employer during the last 12 months;

(f) A statement regarding the family relationship in the form specified by the Department if the leave involves family leave or leave relating to active duty military service by a family member;

(g) Completed certification as required in 458 CMR 2.08(5), below;

(h) Additional specific information requested by the Department where reasonably necessary to review and process an individual's claim;

(i) If a claim is filed with the Department or is filed but does not include all required information and more than 90 calendar days have passed since the start of the individual's period of leave, the covered individual may receive reduced benefits in the discretion of the director.

(5) Certifications. All claims for benefits shall be supported by a certification evidencing that the leave is for a qualifying reason.

(a) Medical Leave. The certification must be from a health care provider and must include:

1. a statement that the covered individual has a serious health condition;

2. the date on which the serious health condition commenced;

3. the probable duration of the serious health condition; and

4. other information required by the Department, including a certification by the health care provider that the individual is incapacitated from work due to the serious health condition; and

5. where the claim for benefits is for leave on an intermittent or reduced leave schedule, information regarding the need for intermittent leave, including a statement that such leave or schedule is medically necessary.

In the event that a serious health condition of the covered individual prevents the covered individual from providing the required certification within 90 calendar days, the Department will allow for a good cause exemption to permit delayed notification under 458 CMR 2.08(4)(i).

(b) Family Leave to care for a family member with a serious health condition. The certification must contain a statement in a form prescribed by the Department confirming the relationship between the covered individual and the family member and must include the following from the family member's health care provider:

1. a statement that the family member has a serious health condition,

2. the date on which the family member's serious health condition commenced,

3. the probable duration of the family member's serious health condition,

4. a statement that the covered individual is needed to care for the family member, and

5. an estimate regarding the frequency and the anticipated duration of time that the covered individual is needed to care for the family member.

(c) Family Leave for the birth of a child. The certification must include:

1. the child's birth certificate, or

2. a statement from the child's health care provider stating the child's birth date, or

3. a statement from the health care provider of the person who gave birth stating the child's birth date.

The leave period for which benefits are requested may only include dates within 12 months of the child's birth date.

(d) Family Leave for the placement of child for adoption or foster care. The certificate must be from the child's health care provider or from an adoption or foster care agency involved in the placement or the Department of children and families and must confirm both the placement and the date of the placement. The leave period for which benefits are requested must be for dates within 12 months of the placement date.

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 provide written notice to the Department within five business days of such change in status. 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.

(e) Family Leave for a qualifying exigency arising out of the fact that a family member is on active military duty or has been notified of an impending call or order to active duty in the Armed Forces. The certificate must include:

1. a copy of the family member's active duty orders, or

2. a letter of Impending Activation from the family member's Commanding Officer, or

3. other documentation reasonably acceptable to the Department in circumstances where, for good cause shown, the applicant is unable to produce the documentation specified in 458 CMR 2.08(5)(e)1 or 2.

4. a statement of the family relationship between the service member and the family member requesting benefits in a form prescribed by the Department.

(f) Family Leave to care for a family member who is a covered service member. The certificate from the service member's health care provider must include:

1. the date on which the covered service member's serious health condition commenced,

2. the probable duration of the condition,

3. a statement that the covered individual is needed to care for the family member,

4. an estimate of the amount of time the covered individual will be needed to care for the family member,

5. an attestation by the service member's health care provider and the covered individual that the health condition is connected to the service member's military service,

6. a statement of the family relationship between the service member and the family member requesting benefits in a form prescribed by the Department, and

7. other information or documentation that may be required by the Department.

(g) Where it determines that a certification lacks required information, or is not accurate or authentic, or is otherwise insufficient, the Department may contact the health care provider and require that it verify, supplement, or otherwise amend the information in the certification.

(6) Information from Employer or Covered Business Entity. Upon request, an employer or covered business entity shall within five business days provide to the Department information or records relevant to a claim for benefits made by a covered individual, including with respect to the covered individual the following:

(a) Wage and/or earnings information for the past 12 months;

(b) A description of the employee's or covered individual's position;

(c) Whether the employee or covered individual currently works a full- or part-time schedule;

(d) Weekly hours worked;

(e) Prior requests/approvals for a qualifying reason;

(f) Amount of paid leave already taken for a qualifying reason during the current benefit year;

(g) A description of the employer's or covered business entity's own paid leave policies and whether the employee or covered individual has received paid leave during the last 12 months under any plan or practice of the employer or covered business entity, and whether the employee or covered individual will receive any paid leave benefits from the employer or covered business entity during the requested leave period at issue;

(h) Whether the covered individual has applied for concurrent FMLA or other leave and whether the employer has approved the application;

(i) Any other relevant information or records related to the claim, including any evidence of a potentially fraudulent claim.

(7) Processing of Applications. The time standards for the Department's processing of applications for paid leave benefits are as follows:

(a) Within 14 calendar days of receiving an application under M.G.L. c. 175M the Department shall notify applicants for benefits of its approval or denial of applications for paid leave benefits, or of the need for additional information from the covered individual. A request from the Department for additional information necessary to process an application for paid leave benefits shall satisfy the Department's obligation to timely notify applicants under M.G.L. c. 175M, § 8(b), if such request is made within 14 calendar days of its receipt of the claim.

(b) The Department shall commence payment of leave benefits not less than 14 calendar days after approving an application, unless that determination occurs more than 14 calendar days before the onset of eligibility, in which case the Department shall commence payment of leave benefits as soon as eligibility begins.

(8) Leave Allotments.

(a) Beginning January 1, 2021, covered individuals shall be eligible for up to 26 total weeks, in the aggregate, of paid family and medical leave under M.G.L. c. 175M in a benefit year.

(b) Beginning January 1, 2021, covered individuals shall be eligible for up to 12 weeks of paid family leave in a benefit year:

1. for the birth, adoption, or foster care placement of a child, or

2. due to a qualifying exigency arising out of the fact that a family member is on active duty or has been notified of an impending call to active duty in the Armed Forces.

(c) Beginning January 1, 2021, covered individuals shall be eligible for up to 26 weeks of paid family leave in a benefit year in order to care for a family member who is a covered servicemember.

(d) Beginning January 1, 2021, covered individuals shall be eligible for up to 20 weeks of paid medical leave in a benefit year if they have a serious health condition that incapacitates them from work.

(e) Beginning July 1, 2021, covered individuals shall be eligible for up to 12 weeks of paid family leave to care for a family member with a serious health condition.

(f) Leave allotments are based on the number or hours or days a covered individual works. When a covered individual works a part-time schedule or variable hours, the amount of leave that a covered individual uses is determined on a *pro rata* or proportional basis. If a covered individual's schedule varies from week to week to such an extent that an employer is unable to determine with certainty how many hours the employee would otherwise have worked (but for taking leave as authorized by M.G.L. c. 175M), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period will be used for calculating the leave entitlement.

2.09: Approval of Payment for Benefits

(1) The Department shall provide contemporaneous notice to the covered individual and to the employer, if any, on an approval of a claim for paid benefits.

(2) The approval for payment of benefits notice shall include:

(a) The reason for the approved leave benefits;

(b) The duration of the approved leave benefits;

(c) For intermittent leaves, the frequency and duration of the leave benefits;

(d) The expiration of the approved leave benefits.

2.10: Amendment or Extension of Leave Period and Paid Leave Benefits

(1) Amendment of Benefits. Following an approval of a claim for benefits, if there is a change in relevant circumstances that would justify an extension, reduction, or other modification of the period of leave or the amount of benefits, both the employee or covered individual and the employer or covered business entity shall have an affirmative obligation to notify the Department using the forms prescribed by the Department.

(2) Extension of Benefits. If a covered individual seeks an extension of benefits, the covered individual must file a request for extension using forms prescribed by the Department.

(a) A request for an extension must be filed 14 calendar days prior to the expiration of the original approved leave; provided, however, that the director may allow a late filed request for extension for good cause shown.

(b) A request for an extension must include all information required by the Department, including the following:

1. the reason for the extension;

2. the requested duration of the extended leave;

3. The date on which the covered individual provided notice for the request for extension to the employer (if applicable);

4. A newly completed or updated health care certification for individual or family leave that otherwise satisfies the requirements of 458 CMR 2.08(5).

(c) The Department shall notify an employer of a request for an extension not more than five business days following its receipt of a completed request form. The Department shall provide to the employer:

1. the requested duration for the extension;

2. whether the newly requested leave is continuous or intermittent;

3. any other information or record the Department deems relevant to verifying and otherwise processing the claim.

(d) The covered business entity or employer shall, within five business days from the date of the notice, provide to the Department all relevant information or records requested by the Department, which may include the following:

1. Whether the employee or covered individual will receive any paid leave benefits from the employer or covered business entity during the requested extended leave period at issue;

2. Whether the employer has approved or intends to approve the request for extension under FMLA or any other policy allowing for paid or unpaid leave;

3. Any other relevant information or records related to the request for extension, including but not limited to, evidence of a fraudulent claim.

(e) The initial seven calendar day waiting period for benefits, referenced in 458 CMR 2.12(7), shall not apply to an approved extension of benefits.

(f) Any extension of a claim shall be limited to any period of paid family or medical leave the employee remains eligible for in the benefit year pursuant to 458 CMR 2.10.

(g) Requests for extensions shall be subject to the claim approval process in 458 CMR 2.09.

(h) The Department shall provide contemporaneous notice to the individual and to the employer, if any, of the Department's approval or denial of the extension request.

<u>2.11: Fitness for Duty at Close of Medical Leave Period</u>

(1) As a condition of restoring an employee whose leave was occasioned by their own serious health condition, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees who take leave for such conditions to obtain and present certification from their health care provider that the employee or covered individual is able to resume work.

(2) An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for leave. The certification from the health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of their job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of their job within five business days of the notice to the employer of the approval of leave by the Department and must indicate that the certification must address the employee's ability to perform those essential functions. If the

employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of their job.

(3) An employer may delay restoration to employment until an employee or covered individual submits a required fitness-for-duty certification unless the employer has failed to provide the notice required 458 CMR 2.11(2). If an employer provides the notice required, an employee or covered individual who does not provide a fitness-for-duty certification following the approved leave period by the Department is no longer entitled to reinstatement. In furtherance of the foregoing, an employee or covered individual who does not provide a fitness-for-duty certification following the approved leave period by the Department shall not be entitled to an extension of benefits unless said extension would comply with the requirements of 458 CMR 2.10(2).

(4) An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. An employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 calendar days if reasonable safety concerns exist regarding the employee or covered individual's ability to perform their duties, based on the serious health condition for which they took leave.

2.12: Weekly Benefit Amount

(1) The weekly benefit amount for covered individuals on family or medical leave is calculated on the individual's average weekly wage, which is determined by the individual's earnings in the base period as reported to the Massachusetts Department of Revenue pursuant to 458 CMR 2.04 and 2.05.

(2) Calculation. Subject to the limitations described in 458 CMR 2.12(2) through (4), a covered individual's weekly benefit amount shall be calculated as follows:

> (a) The portion of an individual's average weekly wage that is equal to or less than 50% of the state average weekly wage shall be replaced at a rate of 80%; and
>
> (b) The portion of an individual's average weekly wage that is more than 50% of the state average weekly wage shall be replaced at a rate of 50%.

(3) Eligible Wages or Income. For purposes of calculating the weekly benefit amount, a covered individual's average weekly wage shall include only those wages or qualifying earnings subject to the contribution requirements of 458 CMR 2.05, and M.G.L. c. 175M, § 6.

(4) Maximum. The maximum weekly benefit amount for any individual shall be 64% of the state average weekly wage. Annually, not later than October 1st of each year, the Department shall establish a maximum weekly benefit amount at a level that is 64% of the then-applicable state average weekly wage. The adjusted maximum weekly benefit amount shall take effect on January 1st of the year following such calculation.

(5) Pro-rated Benefit. For a covered individual who takes leave on an intermittent or reduced leave schedule, the weekly benefit amount calculated pursuant to 458 CMR 2.12, shall be reduced in direct proportion to the intermittent or reduced leave schedule.

(6) Reductions. The weekly benefit amount for a period shall be reduced by the amount of wages or wage replacement that a covered individual on family or medical leave receives for that period from

(a) any government program or law, including unemployment benefits under M.G.L. c. 151A, or workers' compensation under M.G.L. c. 152, other than for permanent partial disability incurred prior to the family or medical leave claim; or

(b) under other state or federal temporary or permanent disability benefits law; or

(c) a permanent disability policy or program of an employer.

Unless the aggregate amount a covered individual receives would exceed the covered individual's average weekly wage, the weekly benefit amount for a period shall not be reduced by the amount of wage replacement that a covered individual on family or medical leave receives for that period from

(a) a temporary disability policy or program of the employer; or

(b) a paid family or medical leave policy of the employer.

An employer who makes payments to a covered individual during a period of family or medical leave that are equal to or greater than the amount required under this subsection shall be reimbursed out of any benefits due or to become due from the trust fund by the department.

(7) Initial Seven-Day Wait period. No family or medical leave benefits are payable during the first seven calendar days of an approved initial claim for benefits. The initial seven-day waiting period for paid leave benefits will count against the total available period of leave in a benefit year. Where the approved claim involves leave on an intermittent or reduced leave schedule, the wait period shall be seven consecutive calendar days, not the aggregate accumulation of seven days of leave.

(8) Substitution of Employer-Provided Paid Leave.

(a) Employees or covered individuals who are approved for leave benefits by the Department may choose to use accrued paid leave provided by their employer rather than receive a paid benefit under M.G.L. c. 175M. Employees or covered individuals may not be compensated with paid leave benefits pursuant to M.G.L. c. 175M for a period of time for which they received compensation through the use of accrued paid leave.

(b) Employees or covered individuals who choose to use accrued leave paid by the employer are required to follow the employer's notice and certification processes related to the use of this leave.

(c) Employers are required to inform employees who choose to use accrued leave paid by the employer that the use of employer-provided leave accruals will run concurrently with the leave period provided in M.G.L. c. 175M.

(d) Upon request from the Department, employers shall report the use of accrued leave by employees or covered individuals for this purpose.

2.13: Intermittent Leave and Reduced Leave Schedules

(1) Generally. A covered individual may take family or medical leave on an intermittent or reduced leave schedule, as follows:

(a) For family leave to bond with a child during the first 12 months after the child's birth, adoption, or foster care placement, leave may be taken on an intermittent or reduced leave schedule only if the employer and employee mutually agree.

(b) For family leave to care for a family member's serious health condition, to care for a family member who is a covered service member, leave may be taken on an intermittent or reduced leave schedule if the health care provider determines it is medically necessary.

(c) For family leave due to a qualifying exigency arising out of a family member's active duty or impending call to active duty in the Armed Forces, leave may be taken on an intermittent or reduced leave schedule.

(d) For medical leave due to a covered individual's own serious health condition, intermittent leave may be taken if medically necessary. An employee or covered individual shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee or covered individual and employer shall attempt to work out a schedule for such leave that meets the individual's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(e) Self-employed individuals who have elected coverage and former employees may take leave intermittently or on a reduced leave schedule.

(2) Agreed-to Intermittent or Reduced Leave Schedules. An employee who is approved for and takes leave on an intermittent or reduced leave schedule and who fails to work during the times or on the schedule agreed to with the employer may be subject to employer discipline. An employer shall notify the Department when an employee approved for intermittent leave fails to adhere to the agreed-upon intermittent or reduced leave schedule.

(3) Impact on Leave Allotments. Taking leave intermittently or on a reduced leave schedule pursuant to 458 CMR 2.13 and M.G.L. c. 175M, § 2(c)(2)(A) and (B) shall result in a proportionate reduction in the covered individual's available allotment of leave.

For example, if an employee or covered individual who would otherwise work 40 hours a week takes eight hours of intermittent leave in a week, that leave would count as 1/5 of a week of leave. If an employee or covered individual who would otherwise work 30 hours per week only works 20 hours on a reduced leave schedule, the ten hours of leave would constitute 1/3 of a week of leave to be counted against the available allotment of leave.

(4) Weekly Benefit Adjustment**.** As described in 458 CMR 2.12(5), a covered individual who takes leave on an intermittent or reduced schedule shall receive a weekly benefit amount that is reduced in direct proportion to the intermittent or reduced leave schedule.

2.14: Claim Denials and Appeals

(1) The Department will provide contemporaneous notice to the individual and the employer (where applicable) of the approval or denial of a claim for paid leave benefits.

(2) A covered individual may appeal a denial of family or medical leave benefits to the Department. A covered individual who is denied family or medical leave benefits by a private plan maintained by an employer or covered business entity pursuant to 458 CMR 2.07(6)(a), above, shall be subject to appeal pursuant to this section and M.G.L. c. 175M, § 8(d).

(3) A covered individual's request for an appeal shall be filed within ten calendar days of receipt of notice of the determination. The Department may extend the ten-day filing period where an individual establishes to the satisfaction of the Department that circumstances beyond the individual's control prevented the filing of a request for an appeal within the prescribed ten-day filing period. When the appeal is requested by a covered individual subject to an approved private plan, the covered individual requesting the appeal shall also provide a complete copy of the request to the employer or covered business entity that maintains the approved private plan.

(4) When requesting an appeal, a covered individual may request a hearing. A covered individual may agree to a disposition of the matter on the record without a hearing, or may submit documents or evidence without appearing at a hearing. The conduct of a hearing regarding an appeal of a denial of benefits shall be in accordance with the procedures prescribed by M.G.L. c. 30A and 801 CMR 1.02. The Department will issue a final decision affirming, modifying, or revoking the initial determination within 30 calendar days of the hearing.

(5) Following the Department's issuance of a final decision on the appeal, an individual aggrieved by the Department's decision may take a further appeal by filing a complaint in the district court for the county in the commonwealth where the individual resides or was last employed. Such court action must be commenced within 30 calendar days of the date the Department's final decision is received by the individual.

(6) When a notice of a determination or a decision by the Department is transmitted by means of an electronic communication, it shall be presumed received on the date it is sent, except that any notice transmitted after 5:00 p.m. or on a state or federal holiday, Saturday, or Sunday, shall be presumed received on the next business day. When notice of a determination or a decision is sent by regular mail, it shall be presumed received three calendar days after it is mailed, except that if the third day falls on a state or federal holiday, Saturday, or Sunday, the notice shall be presumed received on the next business day. However the notice is transmitted, the presumption may be rebutted by substantial and credible evidence satisfactory to the Department that the notice was actually received on an earlier or later date. A request for an appeal shall be deemed filed on the postmark date if sent by regular mail and otherwise when actually received by the Department. A request received after 5:00 p.m. shall be deemed filed on the next business day.

2.15: Attestations and False Statements

Individuals applying for benefits or seeking to amend or extend an approved claim for benefits shall attest to the truthfulness of all statements and submissions made to the Department. An individual shall not be eligible to receive family or medical leave benefits if the Department finds by a preponderance of the evidence that the individual willfully made a false statement or representation or willfully withheld a material fact in order to obtain benefits.

In determining whether an individual willfully made false statements, the Department will consider the nature and cause of the false statement and the capacity of the particular individual to recognize the error resulting in the false statement. Factors considered shall include the individual's age and intelligence as well as any physical, mental, educational, or linguistic limitation, including lack of facility with the English language. A good faith mistake of fact by the individual in the filing of a claim for benefits does not constitute willfulness. A false statement shall be considered willful if the individual:

(1) furnishes information that the individual knew, or reasonably should have known, to be incorrect; or

(2) fails to furnish information that the individual knew or reasonably should have known to be material; or

(3) accepts a payment that the individual knew, or reasonably should have known that the individual was not entitled to receive.

If the Department finds that an individual received benefits on the basis of a false statement, it may require the individual to repay to the Trust Fund any benefits received. Employees who have been determined to have received benefits on the basis of a false statement shall not receive the protections and benefits of 458 CMR 2.16(1), (2), and (3).

2.16: Job Protection, Prohibition on Retaliation

(1) Job Protection. An employee who has taken family or medical leave under M.G.L. c. 175M shall on returning to employment at the close of a period of approved family or medical leave 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 under M.G.L. c. 175M 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. Nor shall an employer be required to restore an employee who was hired for a specific term or only to perform work on a discrete project, if the employment term or project is over and the employer would not otherwise have continued to employ the employee.

Upon reinstatement, taking family or medical leave under M.G.L. c. 175M 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. Leave periods under M.G.L. c. 175M need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

During the duration of an employee's family or medical leave, the employer shall continue to provide for and contribute to the employee's employment-related health insurance benefits, if any, at the level and under the conditions that coverage would have been provided if the employee had continued working continuously for the duration of such leave. The employee portion of the employee's employment-related health insurance benefits shall be remitted by the employee in accordance with the employer's uniformly-applied policies or practices.

(2) Retaliation. It shall be unlawful for any employer to threaten to retaliate or 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 M.G.L. c. 175M or with the purpose of interfering with the exercise of any right to which such employee is entitled under M.G.L. c. 175M.

It shall be unlawful for any employer to threaten to retaliate or 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 anti-retaliation provision, 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 provision. Nothing in M.G.L. c. 175M or these regulations, however, shall limit an employer's or covered business entity's ability to reasonably communicate with an employee or covered contract worker who is approved for leave benefits.

Additionally, an employer may require an employee who has been approved for leave benefits to comply with reasonable attendance and call in procedures established by the employer. An employee who is approved for intermittent leave benefits must work with the employer to make an effort to take leave so as not to unduly disrupt the employer's or covered business entity's operation. Furthermore, an employee who takes leave on an intermittent or reduced leave schedule and who fails to work during the times agreed to between the employer and the employee may be subject to employer discipline. An employee who fails to return to work or to the employee's regular work schedule following the expiration of the leave period may be subject to employer discipline.

(3) Presumption. Any negative change in the seniority, status, employment benefits, pay or other terms or conditions of employment of

(a) an employee which occurs any time during a leave taken by an employee under M.G.L. c. 175M, or during the six-month period following an employee's leave or restoration to a position pursuant to this section, or

(b) an employee who has participated in proceedings or inquiries pursuant to this section within six 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 section. An employer found to have threatened, coerced or taken reprisal against any employee pursuant to this section 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 pursuant to 458 CMR 2.16(4).

(4) Civil Actions. An employee or former employee aggrieved by a violation of this section or M.G.L. c. 175M, § 2(e) and (f) may, not more than three years after the violation occurs, institute a civil action in the superior court.

2.17: Severability

If any provision of 458 CMR 2.00 or the application of any provision of 458 CMR 2.00 to any person or circumstance is finally held invalid by a court of competent jurisdiction, the validity of the remainder of 458 CMR 2.00 shall not be affected.

REGULATORY AUTHORITY
458 CMR 2.00: M.G.L. c. 175M

Legislation Details (With Text)

File #:	Int 0136-2018 **Version:** A	**Name:**	Protections for workers under the city's human rights law.
Type:	Introduction	**Status:**	Enacted
		In control:	Committee on Civil and Human Rights
On agenda:	1/31/2018		
Enactment date:	10/13/2019	**Enactment #:**	2019/172

Title: A Local Law to amend the administrative code of the city of New York, in relation to protections for workers under the city's human rights law

Sponsors: Brad S. Lander, Helen K. Rosenthal, Deborah L. Rose, Margaret S. Chin, Justin L. Brannan, Ben Kallos, Antonio Reynoso, Keith Powers, James G. Van Bramer, Diana Ayala, Carlos Menchaca, Bill Perkins, Carlina Rivera, Donovan J. Richards, Stephen T. Levin, The Public Advocate (Mr. Williams), Alicka Ampry-Samuel, Mark Levine, Adrienne E. Adams, Laurie A. Cumbo, Rafael L. Espinal, Jr.

Indexes: Oversight

Attachments: 1. Summary of Int. No. 136-A, 2. Summary of Int. No. 136, 3. Int. No. 136, 4. January 31, 2018 - Stated Meeting Agenda, 5. Committee Report 6/18/18, 6. Hearing Testimony 6/18/18, 7. Hearing Transcript 6/18/18, 8. Proposed Int. No. 136-A - 9/5/19, 9. Committee Report 9/12/19, 10. Hearing Transcript 9/12/19, 11. September 12, 2019 - Stated Meeting Agenda with Links to Files, 12. Hearing Transcript - Stated Meeting 9-12-19, 13. Int. No. 136-A (FINAL), 14. Fiscal Impact Statement, 15. Legislative Documents - Letter to the Mayor

Date	Ver.	Action By	Action	Result
1/31/2018	*	City Council	Introduced by Council	
1/31/2018	*	City Council	Referred to Comm by Council	
6/18/2018	*	Committee on Civil and Human Rights	Hearing Held by Committee	
6/18/2018	*	Committee on Civil and Human Rights	Laid Over by Committee	
9/12/2019	*	Committee on Civil and Human Rights	Hearing Held by Committee	
9/12/2019	*	Committee on Civil and Human Rights	Amendment Proposed by Comm	
9/12/2019	*	Committee on Civil and Human Rights	Amended by Committee	
9/12/2019	A	Committee on Civil and Human Rights	Approved by Committee	Pass
9/12/2019	A	City Council	Approved by Council	Pass
9/12/2019	A	City Council	Sent to Mayor by Council	
10/13/2019	A	Administration	City Charter Rule Adopted	
10/15/2019	A	City Council	Returned Unsigned by Mayor	

Int. No. 136-A

By Council Members Lander, Rosenthal, Rose, Chin, Brannan, Kallos, Reynoso, Powers, Van Bramer, Ayala, Menchaca, Perkins, Rivera, Richards, Levin, the Public Advocate (Mr. Williams), Ampry-Samuel, Levine, Adams, Cumbo and Espinal

A Local Law to amend the administrative code of the city of New York, in relation to protections for workers under the city's human rights law

Be it enacted by the Council as follows:

Section 1. Section 8-102 of the administrative code of the city of New York, as amended by local law 98 for the year 2018, is amended to read as follows:

Employer. For purposes of subdivisions 1, 2, 3, 11-a, and 22, subparagraph 1 of paragraph a of subdivision 21, [and] paragraph e of subdivision 21 and subdivision 23 of section 8-107, the term "employer" does not include any employer [with] that has fewer than four persons in the employ of such employer at all times during the period beginning twelve months before the start of an unlawful discriminatory practice and continuing through the end of such unlawful discriminatory practice, provided however, that in an action for unlawful discriminatory practice based on a claim of gender-based harassment pursuant to subdivision one of section 8-107, the term "employer" shall include any employer, including those with fewer than four persons in their employ. For purposes of this definition, (i) natural persons [employed as independent contractors to carry out work] working as independent contractors in furtherance of an employer's business enterprise [who are not themselves employers] shall be counted as persons in the employ of such employer and (ii) the employer's parent, spouse, domestic partner or child if employed by the employer are included as in the employ of such employer.

§ 2. Paragraph (f) of subdivision 1 of section 8-107 of the administrative code of the city of New York, as amended local law 63 for the year 2018, is amended to read as follows:

(f) The provisions of this subdivision [shall] do not govern the employment by an employer of the employer's parents, spouse, domestic partner, or children; provided, however, that such family members shall be counted as persons employed by an employer for the purposes of the definition of employer set forth in section 8-102.

§ 3. Subdivision 23 of section 8-107 of the administrative code of the city of New York, as added by local law number 9 for the year 2014, is amended to read as follows:

23. Additional provisions relating to employment. The [provisions]protections of this chapter relating to employees [shall] apply to interns, freelancers and independent contractors.

§ 4. This local law takes effect 90 days after it becomes law.

MN/JJ/HKA/BAM
LS #4450/Int. 1016-2015
LS #355 9/4/2019 4:26 p.m.

Economic
Policy
Institute

State attorneys general can play key roles in protecting workers' rights

Report • By Terri Gerstein and Marni von Wilpert • May 7, 2018

SECTIONS

Summary

State attorneys general can be key allies in protecting workers' rights. While there are variations in the structure, resources, and jurisdiction of state attorney general offices, these offices often have a range of powers that can enable them to play a key role in advancing and defending workplace protections by ensuring that employers comply with the law. This report describes some of the ways state attorneys general have been involved in protecting workers' rights.

Introduction: Broader state enforcement is needed to enforce workers' rights laws

Working people in America are being shortchanged: They are working harder, but inequality is rising and wages for all but the highest-paid workers are failing to keep up with economywide productivity growth (Gould 2018). Even worse, many workers are not being paid what they are owed by their employers. The failure to enforce workers' rights laws has resulted in billions of dollars in wages being stolen from workers' paychecks (Levine 2018; McNicholas, Mokhiber, and Chaikof 2017). For example, in the 10 most populous states in the country, each year 2.4 million workers covered by state or federal minimum wage laws report being paid less than the applicable minimum wage in their state—approximately 17 percent of the eligible low-wage workforce.[1]

The Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL)—the federal agency responsible for enforcing minimum wage and overtime laws—has been stretched increasingly thin. The number of payroll jobs in the U.S. is more than three times as large as it was in the 1940s—146.6 million in 2017 compared with 45.0 million in 1948—but the number of wage and hour investigators at WHD has remained essentially the same (BLS various years). In 1948, WHD employed one investigator for every

22,600 covered workers; today, WHD has only one per every 135,000 workers (Cooper and Kroeger 2017). As a result, the agency's ability to effectively police violations of labor law has suffered: from 1980 to 2015, the number of wage and hour violation cases WHD investigated decreased by 63 percent (Cooper and Kroeger 2017).

Moreover, the decline in union rates has put more workers at risk of labor law violations. Workers not covered by unions—those who are neither in a union nor covered by a union contract—are almost twice as likely (4.4 percent) to experience minimum wage violations as those in a union or covered by a union contract (2.3 percent) (Cooper and Kroeger 2017). And unions continue to be under attack: Trump's budget blueprint calls for funding cuts to the National Labor Relations Board (NLRB), the federal agency charged with upholding private-sector workers' rights to organize and join unions (Opfer 2018).

These staffing shortages and funding cuts show that the Trump administration is not making enforcement of our nation's labor laws a priority. To protect workers' rights to fair pay and fair treatment on the job, funding and resources for federal labor and employment law enforcement agencies need to increase dramatically. In addition, state governments can and should take up the fight to protect workers' basic rights on the job. State labor departments are usually the primary enforcer of state labor laws, but there are other governmental entities that can and do engage in worker protection activities, including state attorney general offices.

This report explores the ability of state attorneys general to take up enforcement of our labor laws and protection of workers' rights. By examining enforcement actions among a number of states, this report highlights the various ways state attorneys general exercise jurisdiction to protect workers and enforce labor laws.

General background on state attorneys general

All 50 states and the District of Columbia, as well as Puerto Rico and other territories, have attorneys general. Although 43 of these attorneys general are elected statewide on a partisan basis, the staffs of these offices are generally career and operate in a professional, nonpolitical manner.[2]

Within the variety of office structures, most state attorney general offices have the following divisions (sometimes called "bureaus"): a division representing state agencies in trial courts; an appeals division, headed by the solicitor general; a division that brings public advocacy enforcement cases; a criminal division (where such jurisdiction exists); and a front office or executive team, including communications, intergovernmental, and outreach staff, a policy director; and other similar positions.

All state attorney general offices share a core commitment to the enforcement of state laws, but they vary widely in their jurisdiction, structure, resources, and areas of greatest focus:

- **Law enforcement.** Some offices have considerable resources to investigate and open cases on their own initiative and conduct their own law enforcement, while others have funding structures that limit such opportunities.
- **Representation of state agencies.** State attorney general offices are responsible for representing state agencies in court, and, in some states, they serve as agencies' general counsel as well. Depending on a variety of resource, institutional, structural, and political factors, attorney general relationships with the administrative agencies they represent vary considerably.
- **Public advocacy.** In their public advocacy activities, attorneys general tend to intervene in strategic or high-impact cases where there is a pattern of violations.
- **Criminal jurisdiction.** Some have extensive jurisdiction to enforce criminal laws, while others do not.

> Advocates who wish to engage with a state attorney general office should begin by learning about the structure, jurisdiction, resources, and current activities of that particular office. This will lead to a fuller and more realistic understanding of the untapped potential, as well as the limitations, that may exist. Some useful online resources providing general information about state attorney general offices include StateAG.org ("an educational resource on the office of state attorney general"); the National Association of Attorneys General website (naag.org); and the Conference of Western Attorneys General website (cwag.org).

Currently, there are several state attorney general offices that have units or staff dedicated to labor enforcement: California, Massachusetts, and New York have longstanding labor units, and, in recent years, new units have been created by District of Columbia Attorney General Karl Racine, Illinois Attorney General Lisa Madigan, and Pennsylvania Attorney General Josh Shapiro, while Washington Attorney General Bob Ferguson has also increased his office's involvement in labor enforcement (OAG DC 2017b; OAG Illinois n.d.).

Unlike their federal counterparts and state agencies, state attorneys general typically have a broad range of issues they can address that impact policy and people's lives. In addition to their statutory duties to represent state agencies in court, attorneys general often fulfill a generalized public advocacy role within their states. Attorneys general enforce state laws, educate the public about important rights, propose legislation, file amicus briefs, produce reports, author op-eds, issue opinion letters, make public statements that garner media and public attention, submit comments and provide testimony on state and federal legislation, and, in recent years, have sued the federal government over matters of national importance.

While state attorney general offices, like all government agencies, have limited resources and jurisdiction, they can often be more nimble and flexible than many other government agencies in addressing a range of emerging issues with a range of potential tools.

Roles of state attorneys general in protecting workers' rights

Enforcement of laws to protect workers

Using their authority to enforce state laws, state attorneys general have played an affirmative role in protecting workplace rights.

Some state attorneys general are granted explicit civil or criminal enforcement jurisdiction. For example, the Massachusetts Attorney General's Fair Labor Division has sole authority to enforce the Commonwealth's wage and hour laws, including laws and regulations pertaining to prevailing wage, minimum wage, overtime, retaliation, misclassification of workers, tip pooling, and child labor (Gerstein and Sheikh 2017; OAG Massachusetts 2018b). The Division has the power to investigate work sites, issue civil citations, and bring criminal charges where appropriate. The attorney general of the District of Columbia also has independent enforcement authority for wage and hour laws. States such as Ohio and Florida have enacted their minimum wage laws through constitutional amendments that grant enforcement authority to the state attorney general, although they may not have exercised that authority to date (Gerstein and Sheikh 2017; Levine 2018).[3]

State labor agencies, through varying arrangements, often refer labor and employment law cases to their attorneys general for enforcement. For example:

- In 2013, the Washington State Attorney General's Office partnered with the state's Department of Labor & Industries to launch an extensive investigation into a construction company for multiple violations of the state's prevailing wage and overtime pay laws. The attorney general's office recovered more than $64,000 in unpaid wages plus $25,000 in interest for the 14 misclassified workers (OAG Washington 2013).
- In 2017, New York Attorney General Eric T. Schneiderman, upon referral from and with the support of the state Department of Labor, prosecuted the owner of a home health care agency for wage theft. The owner was ultimately sentenced to one year in jail for defrauding 67 employees out of over $135,000 in wages (OAG New York 2017c).
- In 2015, Indiana's attorney general brought a civil lawsuit, upon referral from its state labor agency, against a trucking company for wrongful termination and retaliation against an employee after that employee reported workplace violence in violation of Indiana's Occupational Safety and Health Act (Flores 2015).
- Since at least 2007, the Wisconsin Department of Justice (which is the state attorney general's office) has successfully pursued several cases to recover back wages for employees under Wisconsin's plant closing law. The law requires employers of a certain size to provide advance notice prior to shutdowns that impact a threshold number of employees (Wisconsin DOJ 2007, 2009b).[4] If the Department of Workforce Development cannot recover payment of certain wages owed within a certain

timeframe after receiving notice of the closure, the Department is required to refer the case to the Wisconsin Department of Justice.

State attorneys general also often work with a range of other government agencies, not just labor departments, to enforce workers' rights laws:

- In Washington, the attorney general's office worked with the Washington State Department of Revenue, Office of Insurance Commissioner, Employment Security Department, and Department of Labor & Industries, among others, to recover over $500,000 in unpaid wages and taxes from an athletic club that had underpaid its employees (OAG Washington 2015a).

Most state attorneys general who are actively engaged in labor enforcement are not specifically charged with enforcing labor laws; nonetheless, they may utilize labor statutes as well as other bases for jurisdiction to address workplace issues, as discussed in the examples below.

Independent contractor misclassification

Numerous state-level studies show that between 10 and 20 percent of employers misclassify at least one worker as an independent contractor (Carré 2015). Independent contractor misclassification[5] occurs when employers treat workers as self-employed independent contractors even though they should be considered employees, and thereby deprive such workers of coverage by minimum wage, overtime pay, unemployment insurance, and workers' compensation laws (Carré 2015).

- The Illinois attorney general has used the state's Consumer Fraud and Deceptive Business Practices Act to pursue misclassification cases.[6] In 2009, the attorney general, along with the Illinois Department of Labor, investigated, sued, and eventually settled with five construction companies for misclassifying workers in violation of the state's Employee Classification Act, the Illinois Whistleblower Reward and Protection Act, and the Illinois Consumer Fraud and Deceptive Business Practices Act (OAG Illinois 2009).
- In 2018, the New York attorney general obtained the conviction of three Queens-based construction companies for misclassifying over 150 workers as independent contractors to avoid paying them overtime premiums, including a court order requiring the employers to pay $371,447.01 for unpaid wages and $359,747.86 in unpaid unemployment contributions to the New York State Department of Labor (OAG New York 2018a).

Payroll fraud

Payroll fraud occurs when employers pay workers cash wages "off the books" and thereby fail to pay unemployment insurance taxes, procure required workers' compensation insurance, or withhold payroll taxes, among other things. In some states, efforts to address this conduct are combined with efforts to address independent contractor misclassification, through multi-agency misclassification task forces or other focused enforcement efforts. State attorney general offices have brought cases to address such off-the-books employment (OAG New York 2014a, 2015b).

Wage theft

Wage theft occurs when employers fail to pay workers the full wages to which they are entitled for their labor. This includes, for example, refusing to pay workers the total amount of promised wages, not paying for time spent preparing a workstation at the start of a shift or closing up at the end of a shift, not paying overtime premiums to workers who work more than 40 hours a week, and keeping workers' tips. Given that wage theft disproportionately affects workers from low-income households—who are already struggling to make ends meet—the loss of wages can have a particularly damaging impact.

- In 2017, the California attorney general filed suit against a janitorial cleaning company for failing to pay workers the minimum wage, underreporting payroll taxes, and providing false payroll information to its workers' compensation insurance carrier (OAG California 2017).
- In 2017, the District of Columbia attorney general filed a lawsuit against a home health care service provider and its owner for failing to pay 27 employees wages they had earned (OAG DC 2017a).
- In 2014, the New York attorney general recovered $625,000 in restitution and another $300,000 in damages for airport workers who were receiving as little as $3.90 per hour. The investigation began after several workers notified the Service Employees International Union Local 32BJ, which has been organizing airport workers, that they were not earning the minimum wage (OAG New York 2014c).

Joint-employer liability

When two or more businesses determine or have control over a worker's pay, schedule, job duties, or other important terms and conditions of employment, the joint-employer doctrine allows them both to be held accountable as employers and responsible for violations of employment and labor laws (von Wilpert 2018):

- In 2016, the New York attorney general filed a lawsuit against Domino's Pizza and three of its franchisees as joint employers. The lawsuit alleged, among other things, that Domino's required its franchisees to use software containing a payroll system that systematically undercalculated overtime wages for franchisee employees. The attorney general's investigation revealed that the company "urged franchisees to use payroll reports from the company's computer system (called 'PULSE'), even though Domino's knew for years that PULSE undercalculated gross wages" (OAG New York 2016b).
- In 2017, the Massachusetts attorney general settled a case with the owners of an aerosol factory for nearly $1 million to resolve intentional overtime and minimum wage violations and for hindering the state's investigation. As a result, approximately 480

affected workers received restitution. In the lawsuit, the attorney general alleged that the company used staffing agencies to pay its workers in an attempt to protect itself from liability. In 2018, the attorney general settled a related case with the staffing company itself (OAG Massachusetts 2017b, 2018a).

Immigrant workers' rights

Immigrant workers across the United States are often particularly vulnerable to workplace abuse:

- In 2015, the Illinois attorney general sued several employment agencies and restaurants for abusive and exploitative employment practices (OAG Illinois 2015). The attorney general alleged that two restaurants consistently underpaid Latino immigrant workers who were required to work 12- to 14-hour days, six days a week, with no official meal breaks; discriminated against them based on their race and national origin; and housed them in squalid living conditions (OAG Illinois 2015).
- In 2017, the Washington attorney general filed suit against a private prison corporation—which had been contracted by U.S. Immigration and Customs Enforcement to house detained immigrants—for not paying its detainee workers the minimum wage. The attorney general alleged that the corporation paid thousands of detainee workers $1 per day or, in some instances, only snacks and extra food, for labor necessary to keep the prison operational. Washington's minimum wage is $11 per hour (OAG Washington 2017; Johnson 2017).

Noncompete agreements

Labor mobility is fundamental to the ability to earn good wages. But an estimated 30 million U.S. employees, many of them relatively low-wage workers, are prevented from leaving their jobs for better wages elsewhere because they are bound by noncompete agreements (Eisenbrey 2016; Dougherty 2017). While noncompete agreements are legal in many states, one powerful tool that state attorneys general can use to challenge the use of noncompete agreements is the doctrine of *parens patriae*. This doctrine "allows a state to bring an action on behalf of its citizen in order to protect its quasi-sovereign interests in their health, comfort and welfare" (Myers 2013). Illinois Attorney General Lisa Madigan's office exercised its *parens patriae* authority to challenge the use of noncompete agreements directed at workers in fast-food restaurants, and was able to require 300 Jimmy John's sandwich restaurants throughout the state to rescind the noncompete agreements it had forced its sandwich makers and delivery drivers to sign (OAG Illinois 2016a, 2016b); Madigan's office also sued a payday lending company for unlawful noncompete agreements (OAG Illinois 2017a). New York Attorney General Eric Schneiderman has also reached several settlements in relation to employers' use of noncompete agreements (OAG New York 2016e, 2016f).

Prevailing wage

Prevailing wage laws seek to ensure that government contractors pay wages that are comparable to the local norms for a given trade when those contractors are working on public construction and certain other contracts. Without prevailing wage requirements, contractors can win bids on government contracts by reducing their workers' wages rather than competing on the basis of efficiency and management skills, materials costs, or the productivity of their workforce. Even after taking into account cost-of-living differences, median wages in construction are almost 7 percent lower in states where there is no prevailing wage law (Eisenbrey and Kroeger 2017).

Some state attorneys general have enforced the prevailing wage law directly. For example, New York's attorney general has brought cases against contractors for prevailing wage violations in construction of affordable housing, public schools, public housing, and airport construction, among other things (OAG New York 2013a, 2014b, 2016a). In addition, many states have false claims acts, which fight fraud against the government by allowing whistleblowers who report fraud against New York State or local governments to receive a portion of the money recovered (OAG New York 2017a). Several state attorneys general have used their state's false claims act to enforce prevailing wage laws.[7]

Criminal prosecutions

New York's attorney general has obtained over 40 convictions of employers for violating labor laws since 2011. One such case involved a Papa John's franchisee who created false records and gave workers fictitious names in order to continue to illegally withhold overtime pay after becoming aware that he was under investigation by the U.S. Department of Labor for wage violations.[8]

Representing state labor agencies in court

A core function of state attorneys general is representing the state in court. Offices may defend labor agencies in their enforcement of state laws when employers challenge that enforcement in court, or they may defend agency decisions in unemployment or workers' compensation cases. For example, in New York during the past decade, there have been numerous unemployment insurance cases where the New York Department of Labor determined that a worker had employee status, and was not an independent contractor as the employer claimed, and the attorney general's office defended those determinations in appellate courts.[9] This representational function can also come into play in cases with national implications, such as in the *Janus v. AFSCME* case, in which the Illinois Attorney General's Office represented the state as a party when defending public-sector unions' ability to collect fair share fees (OAG Illinois 2018).

In their representation of state agencies, state attorneys general have the ethical obligations and other constraints that accompany representing a client, but their work in this area often has important ramifications for workers' rights.

Amicus briefs and comments on federal rulemaking

State attorneys general can also influence labor and employment policies and regulations by participating in litigation before the United States Supreme Court and by submitting comments in relation to federal rulemaking.

State attorneys general are active in filing amicus briefs in labor and employment cases, both individually and through coordinated multistate efforts.

For example, several state attorneys general filed a brief in support of the Obama administration's revised interpretation of the Labor-Management Reporting and Disclosure Act's (LMRDA) Persuader Rule, a rule that was intended to provide greater transparency and fairness in union elections in the private sector (OAG Massachusetts 2016; von Wilpert 2017). And 21 state attorneys general filed a brief in the *Janus v. AFSCME* case, urging the Supreme Court to uphold fair share fee provisions in public-sector collective bargaining agreements.[10] A coalition of 18 state attorneys general also filed a brief in the *Murphy Oil v. NLRB* case, speaking out against the use of forced arbitration in employment contracts (OAG Massachusetts 2017a). An estimated 60 million American workers have been forced to give up their access to the courts to resolve employment disputes because of mandatory arbitration agreements in employment contracts (Colvin 2017).

In 2017, several state attorneys general submitted comments to the United States Department of Labor urging the Trump administration to not roll back the 2016 overtime rule,[11] which would have updated the overtime salary threshold and given 12.5 million workers automatic overtime protections (OAG New York 2017b; Shierholz 2017).

In February 2018, a coalition of 17 state attorneys general filed public comments opposing the Trump administration's proposal to rescind 2011 regulations that ensure employees can keep the tips they have earned (OAG California 2018b). It is estimated that, under the proposed rule, employers would have pocketed $5.8 billion in tips earned by tipped workers each year (Shierholz et al. 2017). As a result of this advocacy (in coalition with other groups), the omnibus spending bill enacted by Congress on March 23, 2018, included a provision that provides America's tipped workers with explicit protection of their hard-earned tips (Conti 2018).

In April 2018, a coalition of 11 state attorneys general wrote a letter to U.S. Secretary of Labor Alexander Acosta, raising serious concerns about the U.S. Department of Labor's Payroll Audit Independent Determination (PAID) program, a pilot program that allows certain employers who violate labor laws to avoid prosecution and penalties in exchange for simply paying the back wages their employees were already owed under federal law (OAG New York 2018b).

General advocacy

In addition to their law enforcement role, state attorneys general have engaged in various types of advocacy to protect and support workers' rights.

Public education

State attorneys general have used a variety of approaches to educate the public on labor topics, including public outreach events to educate participants about their rights. Through their websites, state attorneys general often provide information about a variety of labor law–related topics and workers' rights generally. Some websites also provide public access to formal complaint portals, which can be offered in various languages and may inform complainants that staff will not ask about an individual's immigration status (Gerstein and Sheikh 2017).

The activities of the Fair Labor Section in Pennsylvania's attorney general's office provide an example of extensive outreach in this area. In its first year, the Section conducted labor roundtables with leadership from organized labor across the Commonwealth and participated in dozens of meetings with workers' rights and other stakeholder groups. During the fall semester, the Temple University Beasley School of Law Sheller Center for Social Justice participated in a clinical experience with the Fair Labor Section, in which students investigated the use of noncompete agreements for low-wage workers in Pennsylvania. Finally, after co-authoring public comments regarding the proposed rescission of the 2011 tip rule described above, Pennsylvania Attorney General Josh Shapiro held press conferences at a diner in Philadelphia and a restaurant in Pittsburgh about the potential adverse effects of the proposed rule change. There was extensive media coverage of these events, which raised public awareness of the issue.

Opinion letters

State attorney general opinion letters are typically issued in response to a formal request for legal guidance by a state agency or state officials. Although not generally binding on the courts, a final opinion typically goes through a formalized review process and carries with it the full weight and authority of the office. Opinions often detail the duties and responsibilities of a state agency or official under state and federal law, or elucidate ambiguous or unclear statutory provisions in a state law (Gerstein and Sheikh 2017). For example, the Delaware and New Mexico state attorneys general each issued opinion letters asserting that the local governments in Sussex County, Delaware, and Sandoval County, New Mexico, did not have the statutory authority to enact local "right to work" ordinances, which would have barred unions from collecting fair share fees in the private sector (*Delaware State News* 2017; OAG New Mexico 2018).

Reports

In 2014, the New York Attorney General's Office issued *Pinched by Plastic*, a report on the payment of wages by payroll cards (OAG New York 2014d). The report was based on responses to inquiry letters sent by the attorney general's office to approximately 40 national employers that were using payroll cards. It found that virtually all payroll card programs charged fees for card-related activities, and these fees added up, reducing take-home pay received by the lowest-paid workers in the state (OAG New York 2014d). In 2014, the New York Attorney General's Office also began issuing annual Labor Day reports, providing a detailed overview of the Labor Bureau's actions to protect the state's workers (StateAG.org 2017b). Massachusetts began publishing a similar annual report in 2016 to highlight notable cases, investigations, and trends in labor enforcement in Massachusetts (StateAG.org. 2017a).

Legislation

Many state attorneys general have units within their office dedicated to drafting and proposing legislation. Some have used their legislative units to introduce bills that enhance worker protections and target abusive practices. In 2014, then Illinois Governor Pat Quinn signed into law Illinois House Bill 5622, a bill protecting low-wage workers who receive wages through payroll cards from unreasonable fees (OAG Illinois 2014). The Illinois Attorney General's Office played a key role in this legislation: After receiving complaints from workers about onerous payroll card fees, the attorney general's office, with assistance from the Illinois Department of Labor, drafted the original legislation, which was eventually sponsored by several state house representatives.

Similarly, after issuing its report on the payment of wages through payroll cards, New York Attorney General Eric Schneiderman's office also drafted legislation to regulate the use of payroll cards and enhance protections surrounding workers' access to wages (OAG New York 2015c). In 2016, Schneiderman also proposed a bill to curb the widespread misuse of noncompete agreements (OAG New York 2016c).

Washington Attorney General Bob Ferguson made wage theft the centerpiece of his 2015 legislative agenda. His office introduced legislation barring companies who have repeatedly violated the state's wage theft laws from doing business in Washington (OAG Washington 2015b).

Multistate advocacy

There is a growing level of multistate action on workers' rights issues among state attorneys general. In 2016, nine attorney general offices jointly sent letters to a number of retailers about their use of on-call shifts (shifts in which workers are expected to call in an hour or two before the start of a shift to learn whether or not they are needed for the day).[12] The retailers that were using on-call shifts terminated the practice. In April 2018, 11 state attorney general offices jointly sent a letter to U.S. Secretary of Labor Acosta, expressing concerns about the Wage and Hour Division's new pilot program, titled the Payroll Audit Independent Determination, which allows employers to avoid paying damages and penalties by voluntarily paying back wages only to underpaid workers (OAG California 2018a). And in February 2018, all 50 state attorneys general and the attorney general of the District of Columbia signed a letter to Congress seeking an end to mandatory arbitration for sexual harassment cases.[13]

Conclusion

State attorney general offices can be key allies in protecting workers' rights. While there is variation in their structure, resources, and jurisdiction, state attorneys general have a range of powers that can enable them to play a leading role in ensuring legal compliance by employers and advancing and defending workplace protections.

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About the authors

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Marni von Wilpert is associate labor counsel supporting EPI's Perkins Project on Worker Rights and Wages, a policy response team tracking the wage and employment policies coming out of the White House, both houses of Congress, and the courts. Von Wilpert came to EPI in 2017 from the National Labor Relations Board, where she was an attorney in the Appellate and Supreme Court Litigation Branch from 2014–2017. Before coming to Washington, D.C., von Wilpert served as a law clerk for Judge James E. Graves, Jr., on the United States Court of Appeals for the Fifth Circuit (2013–2014). She has a J.D. from Fordham University School of Law and a bachelor's degree from the University of California at Berkeley.

Endnotes

1. Those states are: California, Florida, Georgia, Illinois, Michigan, New York, North Carolina, Ohio, Pennsylvania, and Texas. See Cooper and Kroeger 2017.

2. See the StateAG.org website.

3. FLA. CONST. art. X, § 24(e) (2004) ("The state attorney general or other official designated by the state legislature may also bring a civil action to enforce this amendment."); OHIO CONST. art. II, Section 34a (2006) ("An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction.").

4. 2 Wis. Stat. Ann. § 109.11.

5. In addition to independent contractor misclassification, the term "misclassification" is also sometimes used in discussions regarding employers who misclassify workers as being subject to the executive, administrative, or professional exemption from overtime, as well as to refer to public contractors who misclassify workers into the wrong job category for prevailing wage purposes.

6. 8 ILCS Ch. 815 et seq.

7. See, e.g., OAG New York 2017a.

8. See, e.g., OAG New York 2016d, 6–7; OAG New York 2015a.

9. See, e.g., *In the Matter of the Claim of Catherine Nance, Respondent. Nyp Holdings Inc., Doing Business as New York Post, Appellant. Commissioner of Labor, Respondent*, 2014 NY Slip Op 03720, 2014 WL 3490935; *In re Yoga Vida NYC, Inc.*, 28 N.Y.3d 1013, 64 N.E.3d 276 (2016).

10. See OAG New York 2018c; EPI 2018.

11. The attorneys general of New York, California, Delaware, Illinois, Iowa, Maryland, Massachusetts, Vermont, and Washington all joined the brief.

12. See, e.g., Office of the Attorney General of New York to Aeropostale Inc., "Request for Information Regarding 'On Call Shifts,'" April 12, 2016.

13. National Association of Attorneys General to Congress, "Mandatory Arbitration of Sexual Harassment Disputes," February 12, 2018.

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA a municipal corporation 441 4th Street, N.W. Washington, D.C. 20001, Plaintiff, v. **DOORDASH, INC.** 901 Market Street San Francisco, CA 94103 ***Serve on:*** **REGISTERED AGENT SOLUTIONS, INC.,** **Registered Agent** 1100 H Street N.W. Suite 840 Washington, D.C. 20005 Defendant.	Case No.:

COMPLAINT FOR VIOLATIONS OF THE CONSUMER PROTECTION PROCEDURES ACT

Plaintiff the District of Columbia ("District"), through the Office of the Attorney General, brings this action against Defendant DoorDash, Inc. ("DoorDash") for violations of the District's Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901, *et seq.* In support of its claims, the District states as follows:

INTRODUCTION

1. This case seeks relief from DoorDash's deceptive trade practices that were in place from approximately July 2017 until at least September 2019 (the "relevant time period"). DoorDash misled consumers to believe that they were using DoorDash's online delivery service

to tip the company's workers who delivered their food. Instead, the "tip" largely went to subsidize DoorDash's agreed payment to the worker and almost never served to increase that payment amount.

2. DoorDash is a food delivery company valued at nearly $13 billion. DoorDash is an online platform whose business involves connecting consumers (who place food delivery orders) with workers (who deliver food to the consumers). DoorDash maintains a consumer and worker base in Washington, D.C. ("D.C.") numbering well into the tens of thousands. DoorDash calls its delivery workers—all of whom it classifies as independent contractors—"Dashers."

3. Consumers place delivery orders through DoorDash's mobile application or website (www.doordash.com). After the consumer places their order, the consumer enters a "checkout screenflow," where they receive an order subtotal, as well as the option to tip the Dasher who will perform the delivery. The consumer is presented with a menu of discrete tip amounts, as well as an option to enter a customized tip. While the tip options presented vary depending on the size of the order, a default tip amount is preselected. After confirming their tip selection, the consumer places their order.

4. Upon receiving a consumer order, DoorDash presents it to a nearby Dasher through the DoorDash mobile application, along with an approximate delivery route and a limited time to accept or decline the job. During the relevant time period, DoorDash also provided the Dasher with a "Guaranteed Amount," which was shown to the Dasher before they accepted or declined the job. The Guaranteed Amount was set by DoorDash and informed the Dasher the minimum amount they would earn if they accepted the job. If the Dasher accepted and successfully completed the delivery, they were paid at least the Guaranteed Amount. If the Dasher declined the delivery, it would be offered to other Dashers until it was accepted.

5. Any reasonable consumer would have expected that the "tip" they added to the delivery charge through the DoorDash checkout screenflow would be provided to the Dasher on top of the payment promised by DoorDash for the delivery. But during the relevant time period, that was not the case. Instead, DoorDash used consumer tips to subsidize the Guaranteed Amount payment it promised to Dashers.

6. During the relevant time period, DoorDash's payment model for all orders was that it would pay $1 plus the remainder of the Guaranteed Amount not covered by the consumer's tip. Take, for example, a job where DoorDash set the Guaranteed Amount at $10. If a consumer tipped $0, DoorDash would pay $10 ($1 + $9 remainder). If a consumer tipped $9, DoorDash would pay $1 ($1 + $0 remainder). Thus, no matter where the tip was between $0 and $9, the Dasher would be paid the same ($10)—the only thing the consumer's tip changed was DoorDash's share of the worker's pay. Indeed, in the overwhelming majority of circumstances, the consumer's tip had no impact on the Dasher's actual payment.

7. Consumers using DoorDash were unlikely to know about or fully understand this payment model. While DoorDash did address the payment model in a separate FAQ webpage, its statements about the model were ambiguous, confusing, and misleading. Among other things, the FAQ webpage encouraged consumers to tip, but did not disclose that a consumer's tip would, in the vast majority of circumstances, make no difference at all to a Dasher's pay. In addition, the FAQ webpage was entirely separate and apart from the consumer's checkout screenflow. As a result, a consumer placing an order would likely never encounter the FAQ.

8. On August 22, 2019, following exposure of this practice by multiple media outlets, DoorDash announced that it would change its tipping practices. *See* DoorDash Blog Post, *Working to Strike a Better Balance*, (Aug. 22, 2019), *available* at

https://blog.doordash.com/working-to-strike-a-better-balance-e1f66c76fca1. However, DoorDash did not provide any restitution for consumers who had been misled by DoorDash's deceptive tipping practices. Nor did it provide any relief to workers who had their tips taken by DoorDash to subsidize its business.

9. The District brings this case to permanently enjoin this deceptive trade practice and secure appropriate restitution and other relief.

JURISDICTION

10. This Court has jurisdiction over the subject matter of this case pursuant to D.C. Code §§ 11-921 and 28-3909.

11. This Court has personal jurisdiction over Defendant DoorDash pursuant to D.C. Code § 13-423(a).

PARTIES

12. Plaintiff the District of Columbia, a municipal corporation empowered to sue and be sued, is the local government for the territory constituting the seat of the government for the United States. The District brings this action through its chief legal officer, the Attorney General for the District of Columbia. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest. D.C. Code § 1-301.81(a)(1). The Attorney General is specifically authorized to enforce the District's consumer protection laws, including the CPPA.

13. Defendant DoorDash, Inc. is a Delaware corporation with its headquarters and principal place of business at 901 Market Street, San Francisco, CA 94103. DoorDash provides food delivery services to consumers in Washington, D.C.

FACTS

A. DoorDash's Business in Washington, D.C.

14. DoorDash is an on-demand food delivery company. DoorDash works by matching two types of users with one another: (1) consumers (who pay DoorDash to place delivery orders) and (2) workers (who DoorDash pays to deliver those orders).

15. In order to use DoorDash's services, consumers register for a DoorDash account by providing the company with their name, email address, and phone number. Once a consumer is logged into their account, they can place a delivery order with numerous local restaurants through DoorDash's website and mobile application.

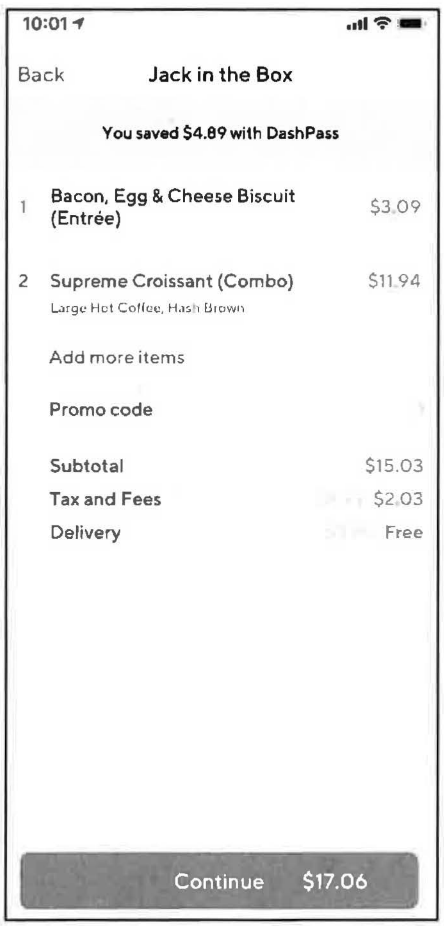
16. DoorDash calls its workers "Dashers." A prospective Dasher also registers with DoorDash by providing their email, phone number, and zip code. After clearing a background check, Dashers are able to begin delivering orders for the company. DoorDash classifies its Dashers as independent contractors and pays them on a weekly basis.

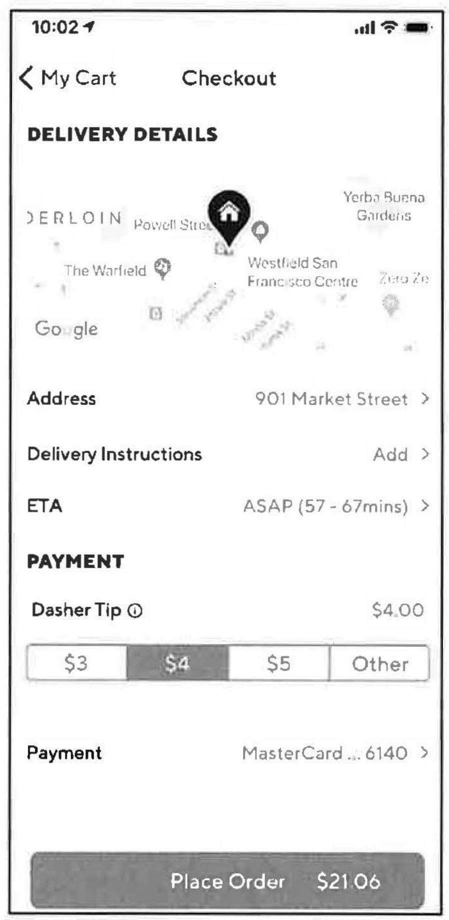
17. DoorDash has operated in D.C. since 2015. The company currently maintains a consumer and Dasher base operating in D.C. that numbers well into the tens of thousands. On a weekly basis, DoorDash receives thousands of delivery orders in D.C.

B. DoorDash's Dasher Payment Model During the Relevant Time Period

18. Throughout the relevant time period, DoorDash employed a payment model that subsidized the company's payments to Dashers with consumer tips.

19. Under this model, a consumer first placed a delivery order. This process involved a two-screen checkout screenflow. First, DoorDash presented the consumer with a subtotal for the order that included the cost of food, as well as taxes and a service fee, and an option to "Continue." After clicking "Continue," DoorDash presented the consumer with a "Delivery Details" page that allowed the consumer to confirm the delivery address and estimated time of arrival, and also included an option to add a "Dasher Tip." An example of how this two-screen checkout screenflow appeared to consumers on DoorDash's mobile application is provided below.





20. The options presented for the Dasher Tip varied depending on the size of the order. However, in general, the consumer was provided with several discrete options either in

dollars (i.e., $3, $4, $5) or as a percentage of the total amount (i.e., 10%, 15%, 20%). Consumers were also provided with an "Other" option to enter a customized tip amount. DoorDash defaulted the tip to the middle amount.

21. If a consumer selected the "information" icon next to the "Dasher Tip," a pop-up window appeared informing the consumer that, "Tip is [selected amount] on your [total amount] order (subtotal & service fee). **All of your tip goes to your dasher**." (emphasis added).

22. A consumer confirmed their order by clicking the "Place Order" button.

23. Next, DoorDash matched the placed order with a Dasher by presenting a nearby Dasher with an offer to deliver the order. This offer was presented to the Dasher through the DoorDash application and included a map showing the delivery route and distance, a time to complete the delivery, a summary of the items to be delivered, and a "Guaranteed Amount" dollar amount for completing the delivery. The Dasher had a limited time in which to accept or decline the offer.

24. The "Guaranteed Amount" provided the Dasher with the minimum amount they would earn for making the delivery. DoorDash calculated the Guaranteed Amount using a variety of factors, including the size of the order, the projected delivery distance, and the projected wait time at the restaurant.

25. Under DoorDash's payment model, DoorDash paid out (a) $1 and (b) any remainder toward the Guaranteed Amount after deducting the consumer's tip. DoorDash's share of the Dasher's Guaranteed Amount thus fluctuated depending on the consumer tip.

26. Take, for example, a Dasher who accepted a job with a Guaranteed Amount of $10:

a. If a consumer tipped $0, DoorDash would pay $10 ($1 + $9 remainder). The Dasher was paid $10.

b. If a consumer tipped $3, DoorDash would pay $7 ($1 + $6 remainder). The Dasher was paid $10.

c. If a consumer tipped $6, DoorDash would pay $4 ($1 + $3 remainder). The Dasher was paid $10.

d. If a consumer tipped $9, DoorDash would pay $1 ($1 + $0 remainder). The Dasher was paid $10.

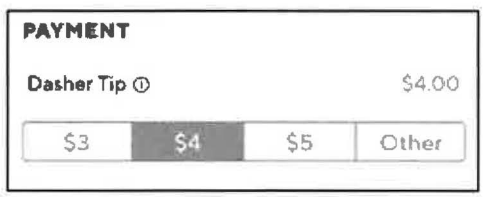
e. If a consumer tipped $10, DoorDash would pay $1 ($1 + $0 remainder). The Dasher was paid $11.

27. Thus, for the vast majority of orders, the consumer's tip made no difference at all to the Dasher's pay. As seen in the prior example involving a $10 Guaranteed Amount, any tip amount a consumer chose between $0 and $9 would not affect the Dasher's pay—for any tip amount in that range, the Dasher would be paid $10. Only when the consumer chose to tip over $9 would the Dasher's pay increase above $10.

28. Put another way, DoorDash set the Dasher's pay for each job (the Guaranteed Amount) and then used the consumer's tip, which DoorDash defaulted to a set amount, to subsidize the company's share of that pay.

29. This practice was deceptive, as any reasonable consumer would have expected that the amount they chose to tip would increase a worker's pay and be provided to workers on top of DoorDash's promised payment.

30. This deception was compounded by how DoorDash presented tip options to consumers. As shown in the below screenshot excerpted from the checkout screenflow shown in Paragraph 19, by presenting tip options to consumers in an increasing sequence ($3, $4, and $5), a reasonable consumer would have expected that selecting a higher tip amount would increase the payment to Dashers. But, in the vast majority of orders, regardless of the tip chosen by the consumer from the options presented by DoorDash, the Dasher received the <u>same</u> payment amount. In other words, regardless of whether a consumer tipped $3, $4, or $5 in the example below, the worker's payment in almost all cases did not change. The only beneficiary of higher tips in these circumstances was DoorDash—the more the consumer tipped, the less DoorDash had to pay to its Dashers.



31. While DoorDash made some disclosures during the relevant time period about its payment model to consumers in an FAQ webpage, they were ambiguous, confusing, and misleading. For example, DoorDash addressed its payment model on a webpage titled, "Should I tip my Dasher?" In responding to that question, DoorDash disclosed the following to consumers:

> In general, we recommend you tip your Dasher and Dashers always receive 100% of tips.
>
> Dashers are independent contractors who work hard to provide you with a great delivery experience. We encourage you to tip an amount that you believe is fair to thank your Dasher. Standard tipping ranges are similar to those of the broader service industry. We provide a suggested tip amount, though you're welcome to adjust the percentage or specify the exact dollar amount you'd like to leave for your Dasher.

> Here's how Dasher pay is calculated. Dashers are shown a guaranteed amount that they will earn when they are offered a delivery. In addition to 100% of the tip, Dashers will always receive at least $1 from DoorDash. Where the sum of $1 plus tip is less than the guaranteed amount, DoorDash will provide a pay boost to make sure the Dasher receives the guaranteed amount. Where that sum is more than the guaranteed amount, the Dasher keeps the extra amount.
>
> Tips can be entered on the checkout page prior to completing your order. If you'd like to adjust your tip after you place your order, please visit the Delivery Help section and we'll adjust the tip for you.

32. This FAQ was ambiguous, confusing, and misleading because it encouraged consumers to tip, but did not disclose that a consumer's tip would, in the vast majority of circumstances, make no difference at all to a Dasher's pay and would only go toward subsidizing DoorDash's share of Dasher pay. In addition, DoorDash's representations to consumers that Dashers would receive "100% of the [consumer's] tip" was also misleading because it contravened a reasonable consumer's understanding that a tip would be provided on top of DoorDash's payment to the Dasher and it implied to consumers that their choice of tip would affect Dasher pay when in reality, this was rarely the case.

33. In addition, this FAQ disclosure was located on a webpage that consumers would be unlikely to see, entirely separate from the checkout screenflow that consumers used to place their orders. It was thus insufficiently clear and conspicuous, especially when considering how DoorDash's payment model contravened a reasonable consumer's expectations that tips would be provided to the Dasher on top of the payment promised by DoorDash and that generally, an increased tip would increase a Dasher's pay.

34. In effect, DoorDash's deceptive payment model allowed it to significantly reduce its labor costs by using consumer tips (which DoorDash defaulted to a positive value) to subsidize the company's share of the Guaranteed Amount.

35. These cost savings were significant. Over the course of the two-year relevant time period DoorDash had this policy in place, consumers in D.C. paid millions of dollars in tips that were used to subsidize DoorDash's payments to Dashers.

36. Had DoorDash adequately disclosed its payment model to consumers and the fact that tip amounts would rarely have an impact on Dasher pay, this understanding would have significantly affected consumers' tipping decisions.

C. **DoorDash's Changes to its Tipping Practices**

37. The Office of the Attorney General opened an investigation of DoorDash's tipping practices in March 2019. Five months later, after multiple media outlets published reports exposing DoorDash's tipping practices, DoorDash announced changes to its tipping practices on August 22, 2019. Those changes were implemented in September 2019. However, DoorDash has not provide any restitution to consumers who were misled by DoorDash's deceptive tipping practices throughout the relevant time period. Nor has DoorDash committed to making workers whole who had their tips taken by DoorDash to subsidize its payments to Dashers.

Count I: Violations of the Consumer Protection Procedures Act

38. The District incorporates the allegations of paragraphs 1 through 37 into this Count.

39. The CPPA is a remedial statute that is to be broadly construed. It establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia.

40. The services that DoorDash provides consumers are for personal, household, or family purposes and, therefore, are consumer goods and services.

41. DoorDash, in the ordinary course of business, supplies consumer goods and services and, therefore, is a merchant under the CPPA.

42. DoorDash users receive consumer goods and services in the form of food delivery services from DoorDash and are therefore consumers under the CPPA.

43. The CPPA prohibits unfair and deceptive trade practices in connection with the offer, sale, and supply of consumer goods and services.

44. During the relevant time period, DoorDash's deceptive payment model constituted a deceptive and unfair trade practice that violated D.C. Code § 28-3904.

45. During the relevant time period, DoorDash made misrepresentations to consumers in their checkout screenflow that consumers could "tip" their Dashers, commonly understood as an amount paid directly to the worker on top of any agreed payment by the employing company, that "All of your [the consumer's] tip goes to your dasher", and that consumer tips would impact Dasher pay. These misrepresentations had the tendency to mislead and were unfair and deceptive trade practices in violation of D.C. Code § 28-3904(e).

46. During the relevant time period, DoorDash's failure to disclose to consumers that their tips, in the vast majority of cases, did not change Dasher pay and subsidized DoorDash's share of payments to Dashers, was a failure to state material facts that had the tendency to mislead and were unfair and deceptive trade practices in violation of D.C. Code § 28-3904(f).

47. During the relevant time period, DoorDash's failure to adequately explain to consumers that their tips would rarely impact Dasher pay, as well as its representations, both express and implied, that 100% of tips would go to workers and that consumer tips would impact Dasher pay, constituted ambiguities as to material facts that had the tendency to mislead and were unfair and deceptive trade practices in violation of D.C. Code § 28-3904(f-1).

Prayer for Relief

WHEREFORE, the District of Columbia respectfully requests this Court enter a judgment in its favor and grant relief against Defendant DoorDash as follows:

(a) Permanently enjoin Defendant, pursuant to D.C. Code § 28-3909(a), from violating the CPPA;

(b) Award such relief as the Court finds necessary to redress injury resulting from Defendant's violations of the CPPA, including disgorging monies from Defendant based on their unlawful conduct and/or requiring Defendant to pay damages and restitution;

(c) Award civil penalties in an amount to be proven at trial and as authorized per violation of the CPPA pursuant to D.C. Code § 28-3909(b); and

(d) Award the District the costs of this action and reasonable attorney's fees pursuant to D.C. Code § 28-3909(b); and grant such further relief as the Court deems just and proper.

Jury Demand

The District of Columbia demands a trial by jury by the maximum number of jurors permitted by law.

Dated: November 19, 2019

Respectfully submitted,

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Attorney General for the District of Columbia

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Public Advocacy Division

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Attorneys for the District of Columbia

SETTLEMENT AGREEMENT

BETWEEN

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

AND

STYNT, INC.

AND ALIREZA ADELI-NADJAFI

I. PARTIES

A. The Commonwealth of Massachusetts, through the Office of the Attorney General (the "Attorney General"), is charged with enforcement of, among other things, the Commonwealth's wage and hour laws, including, but not limited to the overtime, misclassification and record keeping laws included in M.G.L. c. 151.

B. At all relevant times, Stynt, Inc. (the "Company") has operated in Boston, Massachusetts and Alireza Adeli-Nadjafi has served as its Chief Executive Officer (Mr. Adeli-Nadjafi hereinafter referred to in his individual capacity as the "Managing Officer"). The Company is an online healthcare staffing platform that provides a marketplace for healthcare offices to find and engage healthcare workers, and healthcare workers to find healthcare offices that need their services.

II. THE ATTORNEY GENERAL'S INVESTIGATION

A. In August 2017, the Attorney General received a complaint alleging that the Company was classifying healthcare workers using the platform as independent contractors rather than employees and treating and paying them in accordance with such classification (the "Classification Allegation"). As a result of an investigation conducted by the Attorney General, with the cooperation of the Company, the Attorney General determined that the Company and the Managing Officer were in violation of the independent contractor misclassification statute (M.G.L. c. 149, § 148B) and of related Massachusetts wage and hour laws (the "Finding"). The Company and the Managing Officer maintain that neither is nor has ever been in violation of the misclassification statute or Massachusetts wage and hour laws.

B. Notwithstanding the disagreement of the Company and the Managing Officer with the Finding, the Company and the Managing Officer desire to amicably resolve this matter. To that end, the Company, the Managing Officer, and the Attorney General are entering into this Settlement Agreement.

III. TERMS OF AGREEMENT

WHEREAS,

A. This Settlement Agreement (the "Agreement") is entered into among the Commonwealth of Massachusetts, acting through its Attorney General, the Company, and the Managing Officer.

B. The Attorney General wishes to assure compliance by the Company and the Managing Officer with the Commonwealth's wage and hour laws.

C. The Company and the Managing Officer wish to resolve fully and finally any and all claims or causes of action against the Company, the Managing Officer, or any other officer, director or employee of the Company that may be brought by the Attorney General, now or in the future, under M.G.L. c. 149, § 148B or any other of the Commonwealth of Massachusetts' wage and hour laws, arising out of or pertaining to the Classification Allegation for the time period beginning on the date on which the Company began performing business in Massachusetts and continuing through December 31, 2019.

NOW,

D. The Company agrees to change its business model so that, effective no later than January 1, 2020 (the "Required Effective Date"), all Massachusetts workers utilizing its on-line job placement portal will be classified as employees. Pursuant to the new business model, as of the Required Effective Date, Massachusetts workers will be joint employees of (i) the healthcare offices for which they are providing services, and (ii) a third-party employer of record.

E. The Company will ensure the completion of the changes to its business model by implementing the following practices by December 31, 2019:
    a. Engaging an employer of record and providing the employer of record with information needed to onboard Massachusetts workers as employees;
    b. Undertaking good faith reasonable efforts to ensure that the practices of the employer of record will be in compliance with all Commonwealth of Massachusetts wage and hour laws, as well as all other Massachusetts wage and hour law-related provisions, including, but not limited to, those set forth in Chapters 149 and 151 of the Massachusetts General Laws and the Code of Massachusetts Regulations pertaining to minimum wage and overtime, as well as those regulating unemployment insurance payments, workers' compensation insurance, and income taxation;
    c. Ensuring that all Massachusetts workers are onboarded as employees prior to allowing the workers to bid on jobs;
    d. Revising the terms of service (for both workers and client healthcare offices) to reflect the new business model, including an express agreement that each client healthcare office will be considered, along with the employer of record, the joint employer of each worker placed at its Massachusetts location(s);

e. Ensuring that all workers and client healthcare offices accept the new terms of service, electronically or in writing, prior to any engagements of workers through the Company's platform;
f. Modifying the Company's website by changing back-end and front-end technology to support the change;
g. Changing pricing, billing and invoicing practices to the extent necessary to reflect the new business model;
h. Creating and implementing marketing, public relations and messaging for workers and client companies announcing the new business model; and
i. Training the Company's internal team to handle the new business model.

F. In the event that the terms in III.D and III.E are not met in a timely fashion, the Company will pay the following penalty to the Commonwealth:
   a. If the terms in III.D and III.E are not met by the Required Effective Date but are met between January 1, 2020 and January 31, 2020 - $25,000.00;
   b. If the terms in III.D and III.E are not met by the Required Effective Date but are met between February 1, 2020 and February 29, 2020 - $50,000.00; or
   c. If the terms in III.D and III.E are not met by the Required Effective Date but are met after March 1, 2020 - $100,000.00.

The method of payment for payments set forth in Paragraph F., shall be by money order or cashier's check payable to the Office of the Attorney General and mailed to: Office of the Attorney General, Fair Labor Division, P.O. Box #6303, Boston, MA 02114 unless otherwise instructed by the Attorney General's Office. In the event that the method of payment changes, the Attorney General's Office will provide updated instructions in writing to Employer at least 30 days prior to the payment due date. For the avoidance of doubt, no penalty due hereunder shall be deemed owed or payable by the Managing Officer.

G. The Company and the Managing Officer further agree to continue to comply, after the Required Effective Date, with all Commonwealth of Massachusetts wage and hour laws, as well as all other Massachusetts wage and hour law-related provisions, including, but not limited to, those set forth in Chapters 149 and 151 of the Massachusetts General Laws and the Code of Massachusetts Regulations pertaining to minimum wage and overtime, as well as those regulating unemployment insurance payments, workers' compensation insurance, and income taxation.

H. The Company's and the Managing Officer's obligations to the Commonwealth of Massachusetts under this Agreement shall be fully discharged upon completion of the obligations described in Paragraphs III.D and III. E of this Agreement. Failure by the Company to fully comply with the provisions of Paragraphs III.D and III.E by April 1, 2020 shall constitute a material breach of this Agreement (the "Material Breach"). Following a Material Breach, this Agreement shall be voidable by the Attorney General, and shall allow the Attorney General to pursue enforcement actions against the Company and the Managing Officer, including, but not limited to, issuance of a civil citation against the Company for the misclassification of employees, and/or any other criminal, civil, or administrative proceedings that were available to the Attorney General prior to the entry of this Agreement. The Attorney General agrees that until and unless a Material

Breach occurs, it shall not pursue any enforcement action against the Company or the Managing Officer for any claim relating to the Classification Allegation, including, but not limited to, any criminal, civil, or administrative proceeding alleging violation of M.G.L. c. 149, § 148B or any other Massachusetts wage and hour law, for the time period beginning on the date on which the Company began performing business in Massachusetts and ending on the date of the Material Breach.

I. This Agreement represents a final settlement between the Company, the Managing Officer, and the Attorney General for the Classification Allegation, and it shall not bind any other private or governmental entity outside the Office of the Attorney General, including, but not limited to, any individuals and the United States, nor release the Company or the Managing Officer from liability for any other conduct not identified or described in Paragraph II.A of this Agreement.

J. The Company and the Managing Officer understand that the Attorney General cannot waive any statutory rights provided to individuals to pursue additional remedies, but nothing in this Agreement is intended to or shall prohibit the Company and/or the Managing Officer from asserting in a private action any and all defenses to such action, including that neither has violated M.G.L. c. 149, § 148B or any other Massachusetts wage and hour law, and/or that the Company and/or the Managing Officer is entitled to a set-off for amounts accepted as a result of this Agreement.

K. This Agreement may not be modified, except by a writing signed by the parties to this Agreement.

L. This Agreement is entered into by the parties as their own free and voluntary act and with full knowledge and understanding of the nature of the obligations and duties imposed by this Agreement. This Agreement sets forth the entire agreement between the parties with respect to the matters discussed herein, and there are no representations, agreements, or understandings, oral or written, between the parties related to the subject matter of this Agreement that are not fully expressed herein or attached hereto.

M. The terms of this Agreement shall not be subject to appeal in any forum. For purposes of enforcement, it shall be construed in accordance with the laws of the Commonwealth of Massachusetts.

COMMONWEALTH OF MASSACHUSETTS
MAURA HEALEY
ATTORNEY GENERAL

By: Amy L. Goyer
Assistant Attorney General
Fair Labor Division
105 William St.
New Bedford, MA 02740

Dated: 9.14.19

STYNT, INC.

By: Alireza Adeli-Nadjafi
CEO

Dated: 9/10/19

Alireza Adeli-Nadjafi

Dated: 9/10/19

Testimony of
Sharon I. Block
Labor and Worklife Program, Harvard Law School

Hearing Before the
United States Congress
House Education and the Workforce Committee:

The Sharing Economy: Creating Opportunities for Innovation and Flexibility

September 6, 2017

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Testimony of
Sharon I. Block
Labor and Worklife Program, Harvard Law School

Hearing Before the
United States Congress
House Education and the Workforce Committee:
The Sharing Economy: Creating Opportunities for Innovation and Flexibility

Chair Foxx, Ranking Member Scott, and members of the Committee: thank you for this opportunity to testify today on the important subject of the "sharing economy" and its impacts on people who earn income from it, the workforce, and the broader economy.

My name is Sharon Block, and I am the Executive Director of the Labor & Worklife Program at Harvard Law School, which is Harvard University's center for research, teaching and creative problem solving related to the world of work and its implications for society, as well as home of the Harvard Trade Union Program, the oldest executive leadership program at Harvard. The views expressed in my testimony are my own and do not represent the views of Harvard Law School.

Before I start, I would like to make a note about vocabulary, which I find challenging in the context of talking about what the Committee has labeled "the sharing economy." In addition to "sharing economy," it is often referred to as the "gig economy," the "on-demand economy" or the "online platform economy". I prefer the "online platform economy" because I find it the most descriptive and value neutral. It also can be difficult to arrive at agreed terms for labeling people who derive income from the online platform economy without betraying an opinion as to the answer to one of the questions that we are here today to discuss: whether or not those individuals are employees or independent contractors. To foster a spirit of open dialogue on the question, I prefer to use a term that does not convey a bias as to the answer to that question and so have adopted the convention of labeling those individuals "workers" – even in the absence of agreement on whether they are employees or independent contractors, surely we agree that they work for a living and differ only on whether they work for another company or for themselves.

I would imagine that everyone in this hearing room has used the services of an online platform at some point and most probably use them regularly. I know that I do. We value the ease that they bring to our lives in procuring goods and services with just the click of a button or a touch of a finger. As with many technologic innovations, the digital platform creates new opportunities for its consumers. The ability to order food, call for car service or sell our unwanted stuff without interacting with a person allows us to forget sometimes that there are real people behind these platforms -— often they're our neighbors or even family members, and indeed, the terms under which they're working makes a difference in the standards of living of many American families. I appreciate the Committee's interest in exploring the standard of living for those workers and how our labor and employment laws do and should apply to work in this sector.

The key question that this hearing is designed to address is whether the innovation and flexibility that marks the online platform economy is consistent with our historical structure of labor and employment laws that we enacted to ensure a basic level of economic security for American workers. Judge Vince Chhabria[1], in a case brought by Lyft drivers asserting that they were employees misclassified as independent contractors, described the dilemma this way: "The jury . . . will be handed a square peg and asked to choose between two round holes." In an address this spring to the Consumer Technology Association's New American Jobs Summit, Chair Foxx similarly adopted the square peg/round hole analogy and concluded that, "self-employed individuals who rely on the sharing economy for work don't fit neatly into obsolete job categories defined in another era."[2]

I believe that the square peg/round hole analogy sells short the framers of our basic labor and employment laws. They handed down to us statutes that did not define their scope in reference to the particulars of the jobs that were familiar to them at the time, but rather in accordance with the timeless principle that the norm for workers in our nation should be the ability to earn a fair wage, be safe on the job, save for retirement and avoid destitution during periods of unemployment. Although there are always new challenges arising from technologic and business innovation, I see nothing inconsistent between that principle and the dynamism that has always marked the American economy. Employers have found ways to innovate their way through many phases of the American economy from the recovery from the Great Depression through to the information age within the confines of this principle.

The Digital Age of the American economy need not be any different. Online platform companies have a choice: they can be innovative and flexible while creating good jobs or while destroying good jobs. My testimony will focus on demonstrating that there is nothing inherent in their drive for innovation or flexibility that precludes them from making the right choice – the choice to create good jobs.

Current Law Can Be Applied to Online Platform Business Models

The first step in assessing whether or not current law is an impediment to innovation and flexibility is to assess how that law applies to the business models adopted by the dominant online platform companies. Although the experience of hailing a ride by watching pictures of cars on your smartphone was new with the advent of Uber, the experience of paying a company to procure transportation from point A to point B on our nation's city streets is not new. In fact, even the argument that a company using new technology to connect people who need rides with people who want rides is a technology company and not a transportation company is not new. Consider this opening paragraph from a recent article[3] on ridesharing platforms:

> In 1933, Elizabeth Rhone called Try Me Cab Company's advertised phone number to order a cab The company dispatched a vehicle bearing its logo. Unfortunately, the driver negligently operated the cab and injured Ms. Rhone. She sued the company for her injuries, but the company responded by saying it is not 'engaged in carrying passengers for hire.' Rather, the company characterized itself as "a nonprofit-sharing corporation,

[1] Cotter v. Lyft, Inc., Case No. 13-cv-04065-VC, Order Denying Cross-Motions for Summary Judgment (N.D. CA) (3/11/15); http://www.rstreet.org/wp-content/uploads/2015/03/Lyft-summary-judgment.pdf
[2] https://www.bna.com/gig-workers-need-n57982087532/
[3] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995176#

> incorporated under the laws of the District of Columbia for the purpose of furnishing its members a telephone service and the advantages offered by use of the corporate name, while the company did not own this or any other cab." Although Try Me Cab Company held the license to operate the cabs, it maintained that drivers were the passengers' independent contractors and claimed that it was not liable for Ms. Rhone's harm.

Much of the debate over the online platform economy, however, is dominated by words like "disruptive," "innovative," and "new."[4] If, in fact, online platform companies are service providers and not just intermediaries between individuals providing services and individuals needing services, however, the business model in terms of worker classification looks rather conventional. My former colleagues David Weil and Tanya Goldman have differentiated between platforms that create virtual markets and those that provide branded services. Much of the litigation over employee status has been against the online platforms that provide branded services, such as Uber and Handy.[5] In those examples, the platform company endeavors to deliver a consistent experience for customers – looking at Uber's website it is clear that they want the public to associate Uber with a ride that is always fast, reliable, safe, and ubiquitous.[6]

While the outcomes of employee status cases are dependent on the particular facts and circumstances, business models premised on the need to provide a consistent branded service tend to require a level of integration and control of the workers involved that is indicative of employee status[7]. For example, in order to appeal to a particular segment of the market that the platform company has decided is most profitable to serve, branded service platforms typically set the price at which workers offer the service to the customer. Similarly, in order to ensure consistent quality of service, branded service platforms typically dictate many aspects of the way in which workers provide the service. Moreover, thus far, most of the branded service platforms provide services that do not require a degree of worker skill or specialization, such as driving, cleaning or delivering groceries.

Moreover, under the FLSA[8] and the NLRA,[9] the opportunity for entrepreneurial gain or loss is a key indicator of employee or independent contractor status. Looking at Uber as emblematic of the branded service platform model, the entrepreneurial opportunity appears very constrained. Although Uber tends to be rather secretive about how its platform works, recent reports have revealed the following rules[10] that apply to drivers' behavior:

- Drivers must accept at least 80% of assigned rides or they may be deactivated.

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[4] http://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working; https://www.nytimes.com/2017/06/19/books/review/wild-ride-adam-lashinsky-uber-airbnb.html

[5] Weil and Goldman, "Labor Standards, the Fissured Workplace, and the On-Demand Economy," Perspectives on Work (2016); http://www.fissuredworkplace.net/assets/Weil_Goldman.pdf

[6] https://www.uber.com/ride/

[7] https://www.dol.gov/whd/regs/compliance/whdfs13.htm (FLSA economic realities test); NLRB v. United Insurance Co. of America, 390 U.S. 254 (1968) (NLRA common law agency test).

[8] Solis v. Cascom, Inc., 2011 WL 10501391, at *4 (S.D. Ohio Sept. 21, 2011).

[9] FedEx Home Delivery v. N.L.R.B., 563 F.3d 492 (D.C. Cir. 2009).

[10] Rosenblat and Stark, Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers , International Journal of Communications 10(2016); https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686227

- Drivers have only about 15 seconds to decide whether to accept an assigned ride.
- Drivers may be required to explain any deviations from GPS suggested routes.
- Drivers do not know their passengers' destination when they decide whether or not to accept a ride.
- Uber sets the price charged to the customer for the ride and may change it at any time without prior notice to drivers.

When you put all of these rules together, it is hard to see how Uber drivers have the opportunity to exercise entrepreneurial initiative. These rules preclude them from using their business acumen to decide whether a ride provides an optimal opportunity for profit, as they have to make an almost instant decision whether to accept it or not and do not know how much they will be paid for the ride, how long it will take or where it will lead them when they make the decision. Moreover, they cannot use their own business goodwill to make their "businesses" more profitable as they lack the authority to set their own prices. Setting prices is a fundamental feature of business decisionmaking. Instead, they have the ability to make more money by working more hours, not through the exercise of entrepreneurial or management skill. But that is no different than employees in many settings who have the option to add additional hours to their work week. Having the option to add hours does not transform an employee into an entrepreneur.

Debunking the Myth that Current Law Stifles Innovation and Impedes Flexibility

This hearing is premised on the uncontroversial premise that innovation and flexibility are positive attributes for participants in our economy and that the law should at best encourage them and at the least not create obstacles to companies achieving them. This premise necessarily then raises the question of whether the application of current law stifles innovation and impedes flexibility.

Innovation:

Many in the online platform sector have created a narrative that bending their business models to fit our Depression-era worker protection statutes will stifle the innovation that is crucial to the success of their companies. In a 2015 Atlantic article, David Mack, then Lyft Director of Public Affairs, suggested that a new definition of employment was needed to avoid burdening innovation in the ridesharing sector.[11] In introducing legislation to clarify the tax laws in order to facilitate online platform companies' classification of workers as independent contractors, Senator John Thune explained that he introduced the bill because he "think[s] it's important for Congress to do its part to keep up and ensure our laws don't prevent or stifle future growth" of the gig economy.[12] Senator Thune's legislation was endorsed by 10 of the biggest online platform companies, including Uber, Instacart and Handy, who in a letter to Thune asserted that

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[11] "In the Sharing Economy, No One's an Employee," Gillian B. White, The Atlantic (June 8, 2015); https://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/

[12] https://www.thune.senate.gov/public/index.cfm/2017/8/ten-innovative-technology-companies-support-thune-s-new-gig-act

his legislation would enable continued innovation in their sector.[13] Harris and Krueger also echoed this theme of the possible conflict between our current legal regime for classifying workers and promoting innovation. They asserted that the existing legal dichotomy "creates much legal uncertainty for workers and intermediaries" and that such uncertainty "may stifle innovation."[14]

While assertions of a connection between the ability to treat workers as independent contractors and the fostering of innovation are easy to find, it is harder to find explanations of the causal mechanism. Harris and Krueger rely primarily on what they perceive is an ill fit between the FLSA's requirements that employers track employees' time and the looser and more fluid nature of work hours for those engaged in online platform work. Larry Mishel and Ross Eisenbrey of the Economic Policy Institute provide a strong refutation of that assertion.[15] As they point out, the rules set by platforms – Uber in particular – provide very powerful incentive for drivers to devote concentrated time on the app, dispelling the idea that Uber drivers frequently mix personal time with their driving time or that they constantly switch back and forth between different apps, such as Uber and Lyft. As Noam Scheiber documented in the New York Times, Uber has even adopted behaviorial tools based on psychological research to push drivers to stay on the app longer.[16]

Further undermining the assertion that gig workers' hours are immeasurable and therefore any tracking requirement would necessitate an innovation-stifling reconception of how the platforms operate is the fact that the companies are among the most tech savvy in history that have found ways to track workers and customers to a degree that many find alarming. Uber now touts its minimum income guarantee for drivers who meet stringent standards for frequent usage of the app.[17] Implicit in Uber's ability to provide a minimum income guarantee is its ability to track the number of hours that drivers are working – exactly the kind of tracking that Uber would have to do if their drivers were classified as employees. It is hard to imagine that a company that until recently had a practice of tracking the whereabouts of its customers after they finished their rides and without their knowledge cannot track the amount of time its drivers spend working for the company.[18]

The best evidence that employee status is not an obstacle to innovation are the examples of online platform companies that have made the choice not to fight application of the current

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[13] https://www.thune.senate.gov/public/_cache/files/188c3824-417e-48b5-9239-6af4b5dff1c6/78A9306A1CA70CFC597175E47D8189EF.thune-new-gig.pdf

[14] Harris and Krueger, "A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The 'Independent Worker'", The Hamilton Project, Policy Brief 2015-10 (December 2015); https://www.brookings.edu/wp-content/uploads/2016/07/modernizing_labor_laws_for_twenty_first_century_work_policy_brief.pdf

[15] Mishel and Eisenbrey, "Uber business model does not justify a new 'independent worker' category," Economic Poilcy Institute Report (March 17, 2016); http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/

[16] "How Uber Uses Psychological Tricks to Push Its Drivers' Buttons," Noam Scheiber, New York Times (April 2, 2017); https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html?_r=0

[17] https://www.uber.com/drive/atlanta/resources/driver-partner-guaranteed-hourly-fares/; https://www.uber.com/drive/pittsburgh/resources/guarantee-faq/

[18] http://www.npr.org/sections/thetwo-way/2017/08/29/547113818/uber-ends-its-controversial-post-ride-tracking-of-users-location

definition of employee status and, instead, have embraced providing their workers with the security and stability that comes with employee status. I have had the privilege to spend time with several CEOs of online platform companies that have made this choice and have enjoyed watching their business flourish.[19] For example, Dan Teran, CEO of Managed by Q, an online platform company that provides office cleaning services on-demand, has classified all of his workers as employees and provides a wide array of benefits, including profit sharing, in addition to paying minimum wage and overtime, making workers compensation contributions on their behalf and meeting Social Security and Medicare contribution requirements. Dan is frequently recognized as a highly successful entrepreneur in the online platform economy.[20]

Flexibility:

As the title of this hearing suggests, there is a perception that: (1) workers in the online platform economy value flexibility in their work arrangements over all other attributes of work; (2) that online platform business model provides the desired flexibility; and (3) that employee status impedes achieving the desired level of flexibility. I think that there are flaws in all three of these assumptions.

There is a little doubt that a segment of online platform workers – perhaps a large segment – value the flexibility that platform work offers. In an article in the Harvard Business Review, Alex Rosenblat, a sociologist conducting an in depth ethnography of Uber drivers, found that for part-time ride hail drivers, who use their online platform work to supplement their primary source of income, the flexibility to work when and as much as they want is important.[21] In addition, a study done by Uber's Head of Economic Research Jonathan Hall and Princeton economist Alan Krueger found that 85 percent of survey respondents agreed that flexibility was a major motivator for driving for Uber[22]. Thus, many online platform companies justify their use of the independent contractor status as a means of facilitating workers' desired flexibility.

There also should be little doubt that flexibility – even radical flexibility -- is not inconsistent with employee status. For example, to decide which days to work is not an uncommon attribute of workers who engaged by temp agencies and who are undisputedly employees. As my colleague Professor Ben Sachs noted:

> The bottom line is that workers can choose when and how much to work, and can even work without immediate supervision, and still be employees within the meaning of the

[19] "These Startups Are Ditching the Uber Model and Hiring Full Time Workers," Miranda Katz, Wired.com (April 7, 2017); https://www.wired.com/2017/04/these-startups-are-ditching-the-uber-model-and-hiring-full-time-workers/

[20] https://www.forbes.com/pictures/mll45klmm/dan-teran-26/#1066c7d63d7b; https://hub.jhu.edu/2017/01/17/dan-teran-forbes-30-under-30-all-star/; https://www.bizjournals.com/newyork/news/2016/08/24/dan-teran-upstart-100-reinventor-managed-by-q.html

[21] https://hbr.org/2016/11/what-motivates-gig-economy-workers

[22] Hall and Krueger, An Analysis of the Labor Market for Uber's Driver-Partners in the United States, Working Papers (Princeton University Industrial Relations Section) (2015); http://arks.princeton.edu/ark:/88435/dsp010z708z67d

law. Despite the trope, a legal determination that workers are employees does not require the loss of this kind of flexibility.[23]

In their excellent report on this topic, the National Employment Law Project noted cases involving a wide array of workers who both enjoyed the flexibility to accept or decline work and set their schedules, but who were nonetheless determined by courts to be employees, including cake decorators, home researchers, nurses, couriers and restaurant workers.[24]

What is in doubt is how real the promise of flexibility is for online platform workers. They clearly have the flexibility to work when they want to work. Generally, the online platform companies do not impose or assign work schedules on their workers. The platforms do, however, create strong incentives to influence when, where and for how long workers provide services. For example, Uber offers minimum guaranteed income only to drivers who stay on the app for fifty minutes out of every hour and engages in surge pricing to lure more drivers onto the app during peak hours and in high demand areas.[25] In an interview with NPR's Aarthi Shahani, Uber driver David McKee told Shahani, "No, you don't feel like your own boss at all. The only thing you control is the time when you sign on and sign off. Other than that, Uber controls everything." As discussed above, this kind of narrow flexibility can certainly be accommodated within the definition of employee status.

What also is in doubt, however, is how workers balance a desire for flexibility with the burden of low pay and lack of protections and benefits that accompany independent contractor status. Of course, in a world where all else is equal, people like flexibility. There is recent data suggesting that many online platform workers don't want the kind of flexibility that the online platform world offers when they can only get it by giving up basic employment protections. The high turnover rates among online platform workers suggests that many workers are not satisfied working for these platform companies. Research by the JP Morgan Chase Institute found that "one in six online platform workers is new in any given month and more than half of participants quit within a year."[26] Moreover, these researchers found that as the national unemployment rate has declined, indicating an increase in opportunities in other parts of the economy, participation in the online platform sector has decreased. Finally, an earlier JP Morgan Chase Institute study showed that turnover was lower among participants who have the highest levels of income volatility – the young and the poor.[27] Taken together, these data paint a picture of many workers willing to abandon the flexibility of online platform work if they can find other employment.

What Are the Risks of Amending the Law to Accommodate the Online Platform Sector

To fully assess the question posed by this hearing, it is important to examine what the risks would be of acquiescing to calls to amend our bedrock labor and employment laws to make it

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[23] https://onlabor.org/uber-employee-status-and-flexibility/
[24] NELP, Flexibility and the On-Demand Economy, Policy Brief (June 2016); http://www.nelp.org/content/uploads/Policy-Brief-Flexibility-On-Demand-Economy.pdf
[25] NELP, Flexibility and the On-Demand Economy, Policy Brief (June 2016); http://www.nelp.org/content/uploads/Policy-Brief-Flexibility-On-Demand-Economy.pdf
[26] https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-online-platform-econ-brief.pdf
[27] https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf

easier for online platform companies to opt to treat their workers as independent contractors. I believe that the risks are significant:

Continued risk shift: One way of thinking about what happens when a worker is classified as an independent contractor instead of an employee is that much of the risk attendant to acting in the economy shifts from the employer or the government to the individual. The Yale political scientist Jacob Hacker described this phenomenon in his book, "The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream."[28] When workers become independent contractors, they become responsible for negotiating on their own for family sustaining wages, providing a safe workplace, saving for a secure retirement, and sustaining themselves through periods of unemployment. Our basic labor and employment laws were premised in part on the idea that individuals were not best suited to carry so much risk. Any change in the law that further facilitates that risk shift without an assessment of whether those to whom it is being shifted can bear it, risks great damage not just to the individuals involved but to the economy as a whole.

Slippery slope of declining labor standards: While drafters of legislation to address the perceived needs of the online platform economy may intend to enact a narrow fix, the risk of in fact creating a giant loophole is great. Although our current definition of employee and independent contractor might lack laser-like precision, they are the product of decades of interpretation and clarification. The likelihood that Congress could draft new definitions that would be precise enough to preclude companies outside of what we now consider the online platform economy from increasing the classification of workers as independent contractors seems remote. Moreover, a new category risks incentivizing employers who currently treat workers as employees and provide all the attendant protections to moving their workers to a category that diminishes those protections. Thus, rewriting the definitions risks lowering labor standards for a much broader segment of the workforce than intended – not to mention decades of additional litigation to tease out any new standards in terms of how they are applied. This risk is especially unwarranted when viewed in light of the small size of the online platform economy – less than one percent of the workforce.[29]

Need to Raise Labor Standards: In my opinion, the most urgent challenge facing our economy is how to raise labor standards. In last week's release of the August jobs report, we once again saw sluggish wage growth.[30] The recent lackluster increase in Americans' income is a part of a decades-long pattern of wage stagnation[31] and increasing income inequality.[32] In the absence of any evidence that addressing the concerns of the online platform economy will raise wages or reduce income inequality, our national attention is better spent on policies that will: raising the minimum wage, increasing the overtime threshold and encouraging full employment.

[28] https://global.oup.com/academic/product/the-great-risk-shift-9780195335347?cc=us&lang=en&

[29] Katz and Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015," (December 2016); http://arks.princeton.edu/ark:/88435/dsp01zs25xb933

[30] https://www.reuters.com/article/us-usa-economy/u-s-job-growth-slows-in-august-wage-growth-retreats-idUSKCN1BC3Q4

[31] http://www.epi.org/nominal-wage-tracker/

[32] https://www.washingtonpost.com/news/posteverything/wp/2017/08/14/the-whys-of-increasing-inequality-a-graphical-portrait/?utm_term=.9047d8d90336

Conclusion:

The online platform sector is an exciting and vibrant part of our economy. It provides income and convenience for millions of American workers and consumers. It is an admirable goal of the Committee to seek ways to foster its positive attributes – flexibility, innovative spirit, efficiency and convenience. I believe that the choice between those positive attributes and maintaining decent labor standards is a false choice. We should all share the goal of growing the American economy in ways that create a better future for everyone involved in this sector – platform owners, consumers, and workers. The innovation that Americans should be most proud of is our nation's long history of adapting to change – including technological change – in ways that have produced the most enduring and prosperous middle class in history.

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 21, 2018 525233

In the Matter of the Claim of
LUIS A. VEGA,
Respondent.

POSTMATES INC., Appellant.

MEMORANDUM AND ORDER

COMMISSIONER OF LABOR,
Respondent.

Calendar Date: March 27, 2018

Before: Egan Jr., J.P., Lynch, Devine, Clark and Mulvey, JJ.

Quinn Emanuel Urquhart & Sullivan, LLP, New York City (David M. Cooper of counsel), for appellent.

Francis J. Smith, Albany, for Luis A. Vega, respondent.

Barbara D. Underwood, Attorney General, New York City (Mary Hughes of counsel), for Commissioner of Labor, respondent.

Egan Jr., J.P.

Appeal from a decision of the Unemployment Insurance Appeal Board, filed September 29, 2016, as resettled by a decision filed October 11, 2016, which ruled, among other things, that Postmates Inc. was liable for additional unemployment insurance contributions on remuneration paid to claimant and others similarly situated.

Postmates Inc. operates a web-based platform that allows customers to request on-demand pick-up and delivery service from local restaurants or stores, which deliveries are usually made within about an hour. Claimant, who was engaged as a courier for Postmates, applied for unemployment insurance benefits after Postmates terminated its relationship with him based upon alleged negative consumer feedback and/or fraudulent activity. The Unemployment Insurance Appeal Board, reversing a decision by an Administrative Law Judge, determined that an employer-employee relationship existed and deemed Postmates liable for additional unemployment insurance contributions on remuneration paid to claimant and those similarly situated. Postmates now appeals, and we reverse.[1]

"Whether an employer-employee relationship exists is a question of fact, to be decided on the basis of evidence from which it can be found that the alleged employer exercises control over the results produced . . . or the means used to achieve the results" (Matter of Charles A. Field Delivery Serv. [Roberts], 66 NY2d 516, 521 [1985] [internal quotation marks and citation omitted]; see Matter of Bogart [LaValle Transp., Inc.-Commissioner of Labor], 140 AD3d 1217, 1218 [2016]). The Board's determination of an employment relationship will be upheld if supported by substantial evidence; however, "[i]ncidental control over the results produced – without further evidence of control over the means employed to achieve the results – will not constitute substantial evidence of an employer-employee relationship" (Matter of Empire State Towing & Recovery Assn., Inc. [Commissioner of Labor], 15 NY3d 433, 437 [2010] [internal quotation marks and citation omitted]; see Matter of Hertz Corp. [Commissioner of Labor], 2 NY3d 733, 735 [2004]; Matter of Courto [SCA Enters. Inc.-Commissioner of Labor], 159 AD3d 1240, 1241 [2018]).

Here, in order to work as a courier or delivery professional for Postmates, claimant and others similarly situated need only download Postmates' application software platform and provide his or her name, telephone number, Social Security number and driver's license number; there is no

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[1] A resettled decision was filed by the Board on October 11, 2016.

application and no interview. Although Postmates thereafter obtains a criminal background check from a third-party provider and provides an orientation session on how to utilize the application software platform, significantly, claimant and those similarly situated are not thereafter required to report to any supervisor, and they unilaterally retain the unfettered discretion as to whether to ever log on to Postmates' platform and actually work. When a courier does elect to log on to the platform, indicating his or her availability for deliveries, he or she is free to work as much or little as he or she wants – there is no set work schedule, there is no minimum time requirement that a courier must remain logged on to the platform and there is no minimum or maximum requirement with respect to the number of deliveries a courier must perform. In fact, once logged on to the platform, a courier may decline to do anything. When a customer requests a delivery using Postmates' platform, the platform identifies the closest available courier(s) and sends basic information about the delivery request. Couriers, however, may accept, reject or ignore a delivery request, without penalty. Moreover, while logged on to Postmates' platform, couriers maintain the freedom to simultaneously work for other companies, including Postmates' direct competitors. Further, they are free to choose the mode of transportation they wish to use for deliveries, they provide and maintain their own transportation, they choose the route they wish to take for the delivery, they are not required to adhere to a stringent delivery schedule, they are not required to wear a uniform, they are not provided any identification card or logo, they are only paid for the deliveries they complete and they are not reimbursed for any of their delivery-related expenses.

While proof was submitted with respect to Postmates' incidental control over the couriers, including, among other things, the fact that Postmates determines the fee to be charged, determines the rate to be paid, tracks the subject deliveries in real time and handles customer complaints, in our view, such proof does not constitute substantial evidence of an employer-employee relationship to the extent that it fails to provide sufficient indicia of Postmates' control over the means by which these couriers perform their work (see Matter Yoga Vida NYC, Inc. [Commissioner of Labor], 28 NY3d 1013, 1016 [2016]; Matter of

Courto [SCA Enters. Inc.-Commissioner of Labor], 159 AD3d at 1241-1242). Thus, on the record before us, we find that the Board's decision is not supported by substantial evidence as the relationship between claimant and Postmates lacks the requisite indicia of supervision, direction and control necessary to establish an employer-employee relationship (see Matter Yoga Vida NYC, Inc. [Commissioner of Labor], 28 NY3d at 1015-1016; Matter of TMR Sec. Consultants, Inc. [Commissioner of Labor], 145 AD3d 1402, 1403-1404 [2016]; Matter of Bogart [LaValle Transp., Inc.-Commissioner of Labor], 140 AD3d at 1219; Matter of Chan [Market Force Info.-Commissioner of Labor], 128 AD3d 1146, 1146-1147 [2015]; Matter of Jennings [American Delivery Solution, Inc.-Commissioner of Labor], 125 AD3d 1152, 1153 [2015]; Matter of Holleran [Jez Enters., Inc.-Commissioner of Labor], 98 AD3d 757, 758-759 [2012]; compare Matter of Crystal [Medical Delivery Servs.-Commissioner of Labor], 150 AD3d 1595, 1597 [2017]). Accordingly, the Board's decision must be reversed.

Devine and Mulvey, JJ., concur.

Lynch, J. (dissenting).

We respectfully dissent. The record establishes that Postmates, Inc. advertises for and conducts criminal background checks on couriers. It provides an informational session for the couriers on how to utilize the application software platform in order to accept delivery assignments. Postmates provides couriers with a PEX reloadable credit card onto which it can load money in the event that a customer requests that a courier also purchase an item to be delivered. Couriers sign an independent acknowledgment agreement, indicating the mode of transportation they will use for deliveries (e.g., walk or drive). Couriers are free to log onto the platform – indicating their availability – as often or as little as they wish, and they are free to accept or reject any delivery request.

When a customer requests a delivery from Postmates, the platform identifies the closest available couriers, sending basic information about the delivery request. Once a courier accepts, Postmates then provides detailed information about the delivery to the courier and, if necessary, loads funds to the PEX card for any required purchases. Postmates then sends the customer a photograph of and contact information for the courier, as well as an estimated time and cost of the delivery, which are set by Postmates. A courier is prohibited from using a substitute for the delivery. The courier logs into the platform when the delivery is picked up and again when it is delivered so that the delivery can be tracked by the customer and Postmates. Payment is made to Postmates for the delivery and, despite whether such payment is ultimately collected, Postmates directly deposits into the courier's bank account the nonnegotiable 80% of the charged fee within four to seven days of the delivery. Postmates also typically retains liability for incorrect or damaged deliveries. Postmates handles customer complaints and monitors customer feedback, as well as the couriers' acceptance and rejection of deliveries, and can block couriers from logging onto the platform for various reasons, including fraudulent activity or negative customer reviews. Postmates acknowledged that the business would not operate without the couriers.

Although the record contains factors that could support a contrary conclusion, including that couriers are not required to wear any uniform, can work for competitors and determine the route for delivery, substantial evidence supports the Unemployment Insurance Appeal Board's finding that sufficient supervision, direction and control was exercised by Postmates to establish an employment relationship (see Matter of Watson [Partsfleet Inc.-Commissioner of Labor], 127 AD3d 1461, 1462 [2015]; Matter of Caballero [Reynolds Transp.-Hudacs], 184 AD2d 984, 984-985 [1992]; Matter of CDK Delivery Serv. [Hartnett], 151 AD2d 932, 933 [1989]; Matter of Alfisi [BND Messenger Serv.-Hartnett], 149 AD2d 883, 884 [1989]; cf. Matter of TMR Sec. Consultants, Inc. [Commissioner of Labor], 145 AD3d 1402, 1403 [2016]; Matter of Jennings [American Delivery Solution, Inc.-Commissioner of Labor], 125 AD3d 1152, 1153 [2015]). Our recent decision in Matter of Courto (SCA Enterprises-Commissioner of Labor) (159 AD3d 1240 [2018]) does not, as Postmates contends, compel a different outcome. All of these cases are fact specific and there are several key factual distinctions between this case and Courto that substantiate the Board's finding of an employment relationship here, but not in Courto. In Courto, the purported employer engaged in the business of connecting appraisers with insurance carriers to assess automobile damage claims through a computerized operations system, known as a dashboard. Payment was made at a negotiated rate and, once an assignment was accepted, no control was exercised over the results or means used to produce an appraisal. No training was provided to the appraisers, who set their own schedules. Any concerns voiced by the insurance companies were simply passed along to the appraisers. This structure is factually distinct from that of Postmates, which, among other things, sets the fees, provides financing for the transaction through the PEX cards, as necessary, handles customer complaints, bears liability for defective deliveries and actually tracks the delivery. As such, we would affirm the Board's decision, as it is supported by substantial evidence.

Clark, J., concurs.

ORDERED that the decision is reversed, without costs, and matter remitted to the Unemployment Insurance Appeal Board for further proceedings not inconsistent with this Court's decision.

ENTER:

Robert D. Mayberger

Robert D. Mayberger
Clerk of the Court

To Be Argued By: Francis J. Smith, Esq.
Time Requested: 10 minutes

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of the Claim of

LUIS VEGA,

Claimant-Respondent.

POSTMATES INC.,

Case No. 525233

Appellant.

COMMISSIONER OF LABOR,

Respondent.

BRIEF OF CLAIMANT-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

PRELIMINARY STATEMENT

This is an appeal by Postmates Inc. ("Appellant") from a decision of the Unemployment Insurance Appeal Board (the "Board") dated and filed September 29, 2016, that found that claimant Luis Vega ("Claimant") was an employee of Appellant.

Claimant maintains that the decision of the Board is supported by substantial evidence in the record and must be affirmed.

ISSUE PRESENTED

Is the Board's decision that Claimant was an employee of Appellant supported by substantial evidence in the record?

STATEMENT OF FACTS

Appellant operates a package delivery service. Appellant hired Claimant as a delivery person to deliver packages to Appellant's customers. The Commissioner of Labor (the "Commissioner") determined that Claimant was an employee of Appellant. Appellant requested a hearing to challenge the Commissioner's decision. A hearing was held at which the regional manager of Appellant testified.

Appellant operates a delivery service in 38 cities in the Unites Stated, including much of New York City (A 12-14, 16, 60).[1] Appellant's customers connect with Appellant either through Appellant's website or an app on a smartphone, and they input

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1 Page references denominated by the prefix "A" are to the appendix to Appellant's brief.

information about the item to be picked up, the place of pick up, and the place of delivery (A 12, 17, 20, 64). The deliveries are performed by delivery persons such as Claimant.

Appellant advertises online for delivery persons (A 63-64). Interested applicants apply to Appellant online and provide their name, telephone number, date of birth, social security number, and driver's license number (A 14, 21, 37). Appellant hires a third party to perform a background check on applicants based on the information supplied by the applicant (A 36-37). Applicants are required to come to Appellant's office for an orientation to learn how to use Appellant's software and reloadable credit card and to fill out a W 9 form (A 15, 21, 37, 68).

Appellant provides the delivery persons with an app that they must use to perform services for Appellant (A 26, 34). The delivery person does not pay for the app (A 26). A delivery person must be logged in to the app in order to perform services (A 23, 27, 65). When a customer places an order with Appellant, Appellant's software transmits the job to a number of delivery persons who are in the area who are logged in, and they can see the job on the app (A 20-21, 23-24). The delivery person can accept, reject, or ignore the job (A 17, 20, 24). If the job is rejected or ignored, it will pass to the next delivery person (A 24). If no delivery person takes the job, it is considered lost (A 24, 85). The first delivery person to accept the job gets the assignment (A 25). Appellant advises the delivery person of the details of the job, i.e., the item to be picked up, the pick up location, and the delivery location (A 17, 28, 64). The Appellant's software program also provides an estimate of the delivery time to the customer and the delivery person and sends the customer the name and photograph of the delivery person who will be making the delivery (A 46, 48, 51-52, 66-67). The delivery person uses the app to advise Appellant when the item is picked up and when it is delivered (A 41, 64).

Delivery persons do not work a set schedule (A 65). They advise Appellant of when they are available, and that information is inputted into Appellant's software (A 65). Delivery persons need to be logged in to Appellant's software to receive jobs, but there is no requirement that they be logged in during all of the hours that they indicated they would be available (A 23, 27, 65-66, 83). There is no requirement that they be logged in for any particular number of hours or accept any particular number of jobs, but Appellant keeps track of each delivery person's rate of acceptance (A 25-28, 65-66, 83). Appellant makes an estimate of the time for delivery and provides the estimate to the customer and the delivery person, but there is no penalty if the delivery is not made within the estimated time period (A 46, 51-52, 66-67, 83). A delivery person can reject a job after he or she accepted it, and it will be offered to another delivery person (A 48-49, 69). A delivery person cannot assign a job to another person (A 49). Delivery persons may work for other delivery companies or have other jobs (A 28-29, 72).

Delivery persons provide their own transportation, and they are not reimbursed for expenses (A 30-32, 43). Delivery persons are not required to wear a uniform, and they are not given an identification card with Appellant's logo (A 32, 60). Delivery persons determine the route to make the delivery, and, if they accept multiple deliveries, they can choose the sequence of deliveries (A 30, 60, 75).

When the customer places the order, Appellant determines the fee, and the customer provides his or her credit card information (A 39-40). After the delivery person confirms to Appellant on the app that the delivery has been made, Appellant charges the customer's credit card (A 39-40, 42). The delivery person is paid 80% of the fee, and Appellant retains the remaining 20% (A 30-31, 43, 70). Appellant unilaterally sets the fee to the customer and the 80% rate, and the delivery persons have no role in either determination (A 39-40, 43, 70). Appellant pays the delivery persons directly by electronic bank deposit approximately four days after the delivery (A 39-40, 43-44). The delivery person is paid even if Appellant cannot collect from the customer (A 45). Delivery persons are not permitted to collect money directly from the customer (A 87).

In addition to the percentage compensation, Appellant also pays bonuses to delivery persons who refer other delivery persons to Appellant (A 70, 85). Appellant does not provide fringe benefits to delivery persons, and they are not covered by its workers' compensation or other insurance policies (A50-51, 70).

Because some deliveries require the delivery person to purchase the item to be delivered, Appellant provides each delivery person with a reloadable credit card known as a PEX card to be used to purchase the item (A 52-57). A delivery person can choose to purchase the item with a personal credit card, in which case, the delivery person is reimbursed by Appellant (A 56).

Appellant monitors customer satisfaction, and it deals directly with all customer complaints (A 46-47). Appellant does not discuss a complaint with the delivery person unless the delivery person so requests (A 47). Appellant deals directly with the customer regarding damaged or missing packages and assumes responsibility for such packages (A 50, 61-62). Delivery persons are not penalized for lost or damaged packages (A 74).

Appellant can prevent a delivery person from accessing the app based on negative customer feedback or if Appellant discovers fraudulent activity (A 36, 74).

After the hearing, the administrative law judge, by decision dated November 27, 2015, found that Claimant was not an employee of Appellant, but an independent contractor, and overruled the initial determination of the Commissioner (A 121-125). Upon appeal by the Commissioner, the Board, by decision dated September 29, 2016, reversed the decision of the administrative law judge and sustained the initial determination of the Commissioner (A 127-103). This appeal by Appellant ensued (A 131-133). This Court assigned the undersigned to represent Claimant on this appeal.

DISCUSSION

THE BOARD'S FINDING THAT CLAIMANT WAS AN EMPLOYEE OF APPELLANT IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

It is well settled that whether an employment relationship exists is a question of fact to be decided on the basis of evidence from which it can be found that the alleged employer "exercises control over the results produced...or the means used to achieve the results" (Matter of 12 Cornelia St. [Ross], 56 NY2d 895, 897 [1982]). No one factor is determinative, but control over the means is the more important factor to be weighed (Matter of Ted Is Back Corp. [Roberts], 64 NY2d 725, 726 [1984]).

Although control is the most important factor, it has been recognized that the nature of certain occupations or professions precludes close control over the details of the work or the results produced (Matter of Goldstein [Roberts], 61 NY2d 937, 938 [1984];

Matter of Affiliate Artists [Roberts], 132 AD2d 805 [3d Dept 1987], lv denied 70 NY2d 611 [1987]; Matter of Eastern Suffolk School of Music [Roberts], 91 AD2d 1123 [3d Dept 1983], lv denied 60 NY2d 554 [1983]). In such cases, the Board may base its decision on evidence of control over important aspects of the services performed other than results or means (Matter of Concourse Ophthalmology Assoc. [Roberts], 60 NY2d 734, 736 [1983]).

The Board's determination of the issue, if supported by substantial evidence in the record as a whole, must be sustained even if there is evidence in the record to support a contrary conclusion (see Matter of Field Delivery Serv. [Roberts], 66 NY2d 516, 521 [1985]; Matter of Concourse Ophthalmology Assoc. [Roberts], 60 NY2d at 736; Matter of Affiliate Artists [Roberts], 132 AD2d at 807). Further, it is the role of the Board to assess the credibility of witnesses (Matter of Walden [10 Ellicott Sq. Ct. Corp.-Sweeney], 233 AD2d 649 [3d Dept 1996]).

This Court and the Court of Appeals have, on numerous occasions, reviewed Board findings of an employment relationship in cases involving delivery drivers (see, e.g., Matter of Rivera [State Line Delivery Serv.—Commr. of Labor], 69 NY2d 679 [1986], cert denied 481 US 1049 [1987]; Matter of Garbowski [Dynamex Oper. East—Commr. of Labor], 136 AD3d 1079 [3d Dept 2016]; Matter of Gill [Strategic Delivery Solutions—Commr. of Labor], 134 AD3d 1362 [3d Dept 2015]; Matter Voisin [Dynamex Oper. East—Commr. of Labor], 134 AD3d 1186 [3d Dept 2015]; Matter of Mitchum [Medifleet—Commr. of Labor], 133 AD3d 1156 [3d Dept 2015]; Matter of Watson [Partsfleet—Commr. of Labor], 127 AD3d 1461 [3d Dept 2015]; Matter of

Jennings [Amer. Delivery Solutions—Commr. of Labor], 125 AD3d 1152 [3d Dept 2015]; Matter of Kelly [Frank Gallo, Inc.—Commr. of Labor], 28 AD3d 1044 [3d Dept 2006], leave dismissed 7 NY3d 844 [2006]; Matter of McKenna [Can Am Rapid Courier—Commr. of Labor], 233 AD2d 704 [3d Dept 1996], leave denied 89 NY2d 810 [1997]; Matter of Caballero [Reynolds Transport—Hudacs], 184 AD2d 984 [3d Dept 1992]; Matter of CDK Delivery Serv. [Hartnett], 151 AD2d 932 [3d Dept 1989]; Matter of Alfisi [BND Messenger Serv.—Hartnett], 149 AD2d 883 [3d Dept 1989]). A review of these cases demonstrates that they are fact specific and, further, that most of them contain some facts that suggest an employment relationship and some facts that do not. Importantly, a Board finding of an employment relationship must be sustained if it is supported by substantial evidence in the record even if the record also contains some evidence to support a contrary finding (Matter of Field Delivery Serv. [Roberts], 66 NY2d at 516; Matter of Concourse Ophthalmology Assoc. [Roberts], 60 NY2d at 734; Matter of Affiliate Artists [Roberts], 132 AD2d at 805).

A number of facts that were found in the above cases to evidence an employment relationship are present in the instant case.

Appellant advertises online for delivery persons, and applicants apply online and provide their name, telephone number, date of birth, social security number, and driver's license number. Appellant performs a background check on applicants. Applicants are required to come to Appellant's office for an orientation to learn how to use Appellant's software and reloadable credit card. Appellant provides the app that must be used to perform services free of charge. Delivery persons must log in to the app in order to perform services. Appellant provides each delivery person with a reloadable credit card that can be used to purchase the items to be delivered. Appellant provides delivery persons with all of the details for the delivery and an estimate of the delivery time. Appellant transmits to the customer of the name and photograph of the delivery person who will be making the delivery. The delivery person must use the app to advise Appellant when the item was picked up and when it was delivered. Although there is no requirement that delivery persons be logged in for any particular number of hours or accept any particular number of jobs, Appellant keeps track of each delivery person's rate of acceptance. A delivery person can reject a job after he or she accepted it, but cannot assign a job to another person.

Importantly, Appellant unilaterally sets the fee to be paid by the customer and the rate to be paid to the delivery person, and the delivery person has no role in either determination. Appellant pays the delivery persons directly, and they are paid even if Appellant cannot collect from the customer. Delivery persons are not permitted to collect money directly from the customer. In addition to the percentage compensation, Appellant also pays bonuses to delivery persons who refer other delivery persons to Appellant.

Appellant monitors customer satisfaction and it deals directly with all customer complaints. Appellant does not discuss a complaint with the delivery person unless the delivery person so requests. Appellant deals directly with the customer regarding damaged or missing packages and assumes responsibility for such packages. Delivery persons are not penalized for lost or damaged packages. Appellant can prevent a delivery person from accessing the app based on negative customer feedback of if Appellant discovers fraudulent activity.

All of the above-described factors have been held to indicate an employment relationship and, thus, support the Board's conclusion that Claimant was an employee of Appellant.

Appellant points to a number of facts in the record that, it contends, are indicative of an independent contractor relationship: delivery persons set their own schedules, could refuse assignments, used their own transportation and were not reimbursed for expenses, could work for other companies, were paid on a percentage basis instead of a salary, did not receive benefits or have taxes withheld, were not required to wear a uniform or carry an identification card, and signed an agreement stating that they were independent contractors. These facts, however, existed in many of the above-cited cases, and this Court found them not to be dispositive because other evidence supported the Board findings of an employment relationship. Similarly, in this case, while there may be several facts suggestive of an independent contractor relationship, there are numerous facts that demonstrate an employment relationship. It was for the Board to weigh all of the facts, and its finding of an employment relationship is supported by substantial evidence.

It must be noted in particular that the fact that a contract states that Claimant was an independent contractor (A 117) is not determinative because the Board can look beyond the terminology or labels employed by the parties (see Matter of Oakes [Stroehman Bakeries-Roberts], 137 AD2d 927 [3d Dept 1988]; Matter of Gray [Glens

Falls Newspapers-Roberts], 134 AD2d 791; Matter of Webley [Graphic Transmissions-Roberts], 133 AD2d 885 [3d Dept 1987]). Moreover, a claimant may not waive rights under the Unemployment Insurance Law (Labor Law § 595[1]), and the Board is not bound by an agreement between an employer and an employee that an independent contractor relationship exists (Matter of Morton [Spirella Co.-Miller], 284 NY 167, 175 [1940]; Matter of Wilde [Sweeney], 236 AD2d 722, 723 [3d Dept 1997], leave denied 89 NY2d 817 [1997]).

Appellant relies on this Court's decision in Matter of Jennings (Amer. Delivery Solutions—Commr. of Labor) (125 AD3d at 1152), in which this Court reversed a Board finding of an employment relationship, as support for its position. The Jennings case is clearly distinguishable. There, the delivery persons negotiated their own rate of pay, dealt directly with customers to determine delivery times, and were responsible for lost or damaged parcels. In the instant case, on the other hand, the compensation for the delivery persons was unilaterally set by Appellant, the delivery information was supplied by Appellant to the delivery persons, and the delivery persons were not responsible for lost or damaged packages. Thus, in Jennings, unlike here, there were virtually no facts that supported the Board's finding.

Appellant also relies on Matter of Yoga Vida NYC (Commr. of Labor) (28 NY3d 1013 [2016]) to support its position. That case is distinguishable from the instant case in that the yoga instructors in that case chose how they were paid (either hourly or on a percentage basis), were paid only if a certain number of students attended their classes, and were not required to attend meetings or receive training. In the instant case, in addition to the other factors described above, the compensation for the delivery persons was unilaterally set by Appellant, the delivery persons were paid even if Appellant could not collect from the customer, and the delivery persons were required to come to Appellant's office for an orientation to learn how to use Appellant's software and reloadable credit card.

In conclusion, while, as in most cases of this type, there is some evidence in the record which might be indicative of an independent contractor relationship, there certainly is substantial evidence in the record to support the Board's conclusion that the relationship was one of employment.

CONCLUSION

There is substantial evidence in the record to support the Board's conclusion that Claimant was an employee of Appellant. Accordingly, the Board's decision must be affirmed.

Dated: November 8, 2017

Respectfully submitted,

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To be Argued by:
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No. 525233

NEW YORK SUPREME COURT

APPELLATE DIVISION – THIRD DEPARTMENT

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IN THE MATTER OF THE CLAIM OF

LUIS VEGA, CLAIMANT-RESPONDENT

POSTMATES INC., EMPLOYER-APPELLANT

COMMISSIONER OF LABOR OF THE STATE OF NEW YORK, RESPONDENT

REPLY BRIEF OF EMPLOYER-APPELLANT POSTMATES INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

I. INTRODUCTION

This Court should reverse the decision of the Unemployment Insurance Appeal Board ("Board") because Claimant Luis Vega and similarly situated delivery providers ("Delivery Providers") are independent contractors under recent and well-established law. The undisputed evidence shows that Delivery Providers control the means they use to provide their services, and both the New York Court of Appeals and this Court have repeatedly held that a claimant seeking unemployment benefits is an independent contractor where he is free to decide *if, when, how,* and *for whom* he offers his services.

Mr. Vega and the Commissioner of Labor ("Commissioner") do not dispute the uniform case law reversing Board findings of employee status when all these factors are present. Instead, the Commissioner confuses the issue by arguing, without any legal basis or logical rationale, that this Court should only consider cases involving couriers. Regardless, even accepting the Commissioner's flawed argument, in *Matter of Bogart (LaValle Transp., Inc.—Comm'r of Labor)*, 140 A.D.3d 1217, 1218 (3d Dep't 2016), this Court considered a courier relationship involving much *greater* control by the purported employer than Postmates exercised over Mr. Vega, and the Court still found an independent contractor relationship.

Moreover, Mr. Vega and the Commissioner cannot (and do not) refute the facts establishing that, as a Delivery Provider, only Mr. Vega had full control over whether, when, how, and for whom he performed deliveries. Instead, Mr. Vega and the

Commissioner rely on ancillary facts that are irrelevant to Mr. Vega's control over the means by which he provided his delivery services. Further, Mr. Vega and the Commissioner fail to identify any case or legal principle whereby those ancillary facts should be held sufficient to establish employee status.

II. ARGUMENT

In deciding whether a claimant is an employee, "the relevant inquiry is whether the purported employer exercised control over the results produced or the means used to achieve those results, with control over the latter being the more important factor." *Matter of TMR Sec. Consultants, Inc. (Comm'r of Labor)*, 145 A.D.3d 1402, 1403 (3d Dep't 2016) (quotation marks and internal citations omitted). Mr. Vega and the Commissioner largely ignore this standard, instead focusing on facts that do not indicate control over results or means (*see, e.g.*, Vega Br. 7-9; Commissioner Br. 15-17).

Additionally, the Commissioner creates and attacks a straw man by arguing (Br. 13-15) that there is not a "different test" for interactions conducted through a phone app. Postmates has never argued for a different test. Rather, the test of "control" is the same for all companies, but the application of that test may depend on the nature of the company. As Postmates explained (Br. 22), this Court has previously found control absent in cases involving other on-demand services. This makes both legal and intuitive sense because an on-demand platform like Postmates does not exercise anywhere near the control over the people using the Postmates app to provide delivery services that a traditional delivery company exercises over its employees. Here, the undisputed evidence demonstrates that Postmates is a technology and logistics company that coordinates delivery requests between third parties, and not a delivery company itself.

Furthermore, while Mr. Vega and the Commissioner note the "substantial evidence" standard of review, both ignore the recent precedent, cited by Postmates (Br. 11), explaining that this standard does not prevent courts from "engag[ing] in a … detailed, qualitative and arguably less deferential analysis of the various employment factors." *Matter of Mitchell (Nation Co. Ltd Partners—Comm'r of Labor)*, 145 A.D.3d 1404, 1406 (3d Dep't 2016). Mr. Vega and the Commissioner likewise ignore that the ALJ's factfinding should be afforded deference. *See* Postmates Br. 12 n.3. Applying the correct standard supported by the recent precedent directly on point, there is no substantial evidence to support the Board's treatment of Mr. Vega as an employee.

A. MR. VEGA AND THE COMMISSIONER DO NOT REFUTE THAT DELIVERY PROVIDERS ARE INDEPENDENT CONTRACTORS UNDER CONTROLLING PRECEDENT

1. Mr. Vega And The Commissioner Disregard Binding Precedent Directly On Point, Reversing The Board's Finding Of Employee Status In Materially Identical Circumstances

The New York Court of Appeals and this Court have repeatedly held that the *exact* set of factors present here—the claimant's control over whether, when, how, and for whom they perform services—requires reversal of a Board decision that a claimant is an employee. In particular, there are five cases directly on point: *Matter of Yoga*

Vida NYC, Inc. (Comm'r of Labor), 28 N.Y.3d 1013 (2016), *Matter of Ted Is Back Corp. (Roberts)*, 64 N.Y.2d 725 (1984), *TMR*, *Matter of Chan (Confero Consulting Assoc., Inc.–Comm'r of Labor)*, 128 A.D.3d 1124 (3d Dep't 2015), and *Bogart*. *See* Postmates Br. 21-23.

Mr. Vega and the Commissioner make no effort to distinguish *Ted is Back*, *TMR*, and *Chan*. The Commissioner seems to rationalize this oversight (Br. 34 n.2) by arguing that these cases are inapposite because they do not concern couriers. But there is no special test for couriers in deciding independent contractor status. Neither the New York Court of Appeals, nor this Court, nor the Board has ever suggested such a confined analysis. Indeed, they frequently cite cases dealing with a variety of professions when analyzing the issue. *See, e.g.*, *TMR*, 145 A.D.3d at 1403-04. And as Postmates explained (Br. 22-23), the Delivery Providers here enjoyed *all* of the freedoms identified in *Ted is Back*, *TMR*, and *Chan* as the basis for reversing the Board.

Similarly, *Yoga Vida* is controlling. *Yoga Vida* focused on precisely the factors present here for Postmates: the ability to make one's own schedule, work for competitors, and choose how to accomplish the task. 28 N.Y.3d at 1015. The Commissioner (again) erroneously ignores (Br. 34 n.2) *Yoga Vida* because it does not involve couriers. Mr. Vega attempts (Br. 10) to distinguish *Yoga Vida* on the ground that "the yoga instructors in that case chose how they were paid (either hourly or on a percentage basis), were paid only if a certain number of students attended their classes, and were not required to attend meetings or receive training." This argument is equally unavailing because the ability to choose pay on an hourly or percentage basis is (at most) an extraordinarily minor consideration given that "Yoga Vida generally determines what fee is charged and collects the fee directly from the students." 28 N.Y.3d at 1016. Moreover, the minimum-student requirement considered in *Yoga Vida* shows *greater* control by the company. And as discussed in greater detail below, Mr. Vega's contention that a single orientation session constitutes meetings and/or training sufficient create an employment relationship strains credulity. *See infra* at 15.

Finally, *Bogart* is likewise controlling. The Commissioner argues (Br. 32) that *Bogart* is distinguishable because "the controls exercised by the putative employer over the claimant truck driver in that case were found to be based predominantly on regulatory requirements." This is, however, a distinction without difference because the factors this Court relied upon in *Bogart* are directly applicable here: the drivers "could work when and if they wanted or not at all"; "were free to accept jobs with other companies"; "were not required to lease their vehicles from LaValle"; and "were free to choose whatever routes they desired in transporting loads." 140 A.D.3d at 1219. Indeed, as Postmates explained (Br. 22-23), this is a much *stronger* case for independent contractor status because in *Bogart*, the drivers leased trucks from the business, there were restrictions on use of the trucks, and the claimant was bound by a noncompete agreement. 140 A.D.3d at 1221-22 (Rose, J., dissenting).

2. Mr. Vega And The Commissioner Fail To Refute Any Of The Four Key Factors In The Evaluation Of Control, Which Establish That The Delivery Providers Are Independent Contractors

As Postmates explained (Br. 12-21), there are four key factors here: Delivery Providers choose if and when to perform deliveries, can work for competitors, control how a delivery is performed, and do not receive a salary. Any one of these factors suffices in the vast majority of cases, and together they unequivocally establish that Delivery Providers like Mr. Vega are independent contractors.[1]

First, Delivery Providers choose if and when to perform deliveries. The Commissioner asserts (Br. 30-31) that a handful of cases have found people to be employees even when they set their own schedules. However, in the first case the Commissioner cites (*Ross*), scheduling choice was strictly limited: "Claimants were *required* to call the Majestic dispatcher to find out what work was available. Claimants could turn down assignments but rarely did so. ... They were *required* to check with dispatcher for any additional pickups or deliveries on their route." *Matter of Ross (Roberts)*, 119 A.D.2d 857, 857 (3d Dep't) (Mikoll, J., dissenting), *aff'd sub nom. Matter of Rivera (State Line Delivery Serv.—Roberts)*, 69 N.Y.2d 679 (1986)

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[1] In addition to these factors, as Postmates noted (Br. 4), all Delivery Providers execute an Independent Contractor Acknowledgement Agreement. *See* A117 at § 2(a). This factor, while not dispositive, must be considered. *Carlson v. Am. Int'l Grp., Inc.*, No. 47, 2017 WL 5557948 (N.Y. Nov. 20, 2017) ("[T]he fact that the cartage agreement labels MVP an 'independent contractor' is not dispositive of the issue of control, but is a factor to be weighed with others.") (internal citation omitted).

(emphases added). Similarly, in the second case replied upon by the Commissioner, drivers were "assign[ed] pickups and deliveries" and "required to complete their assignments the same day." *Matter of Voisin (Dynamex Operations E., Inc.—Comm'r of Labor)*, 134 A.D.3d 1186, 1187 (3d Dep't 2015).[2] In contrast, Delivery Providers who choose to use the Postmates app have complete discretion as to whether and when to log in to the Platform (A27:22-28:3; A61:10-13; A65:24-66:8; A83:15-84:4) and even when they are logged in, they can decline any delivery opportunity made available to them (A24:2-6; *see* A117 at § 2(d)).[3]

Second, Delivery Providers can work for competitors. The Commissioner relies (Br. 31) on the few, rare cases where this factor was not (on its own) dispositive. *Kelly*, *CDK*, and *Alfisi* are readily distinguishable because the company required the affected drivers to comply with time and delivery deadlines. *See* Postmates Br. 26-27 & n.7.

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[2] In addition, the "claimants were required to wear uniforms identifying themselves as being contracted through Dynamex," "issued Dynamex identification cards," and "bound by a one-year noncompetition restriction following their termination with Dynamex." *Voisin*, 134 A.D.3d at 1187.

[3] The remaining cases all concerned clear exercise of company control not present here. *Matter of Scott (CR England Inc.—Comm'r of Labor)*, 133 A.D.3d 935, 938-39 (3d Dep't 2015) (The company "required claimants to use electronic on-board recorders in their trucks," "[n]otably, claimants were required to work exclusively for [the company]," and the company "required claimants to contribute to a reserve fund for safety-related truck repairs and maintenance."); *Matter of Kelly (Frank Gallo, Inc.—Comm'r of Labor)*, 28 A.D.3d 1044, 1044 (3d Dep't 2006) (The business (a retail florist) employed full-time delivery drivers who performed the exact same delivery services as the drivers engaged as independent contractors, the claimant was "required to deliver the product within a reasonable time on the same day," and "payment was expressly conditioned upon him being 'polite [and] well-mannered.'").

The remaining authority on which the Commissioner relies is similarly inapposite since "[t]he delivery schedule was set by" the company; the company also "monitored deliveries via the scanner," the claimant "worked out of a warehouse that belonged to one of [the company's] customers," and the claimant was required to "complet[e] route sheets." *Matter of Watson (Partsfleet Inc.—Comm'r of Labor)*, 127 A.D.3d 1461, 1462 (3d Dep't 2015); *see also Matter of Caballero (Reynolds Transp., Inc.—Hudacs)*, 184 A.D.2d 984, 984 (3d Dep't 1992) (the "dispatcher would assign the work to the drivers and instruct them on where the packages would be picked up and delivered," and drivers were paid salaries "on [a] weekly basis").[4]

Third, Delivery Providers control every aspect of how a delivery is performed, including what equipment and mode of transportation they use, what route they follow, what clothing they wear, what stops they make, and how long they take. The only case with anything like this complete control over how to accomplish deliveries *reversed* the Board and found the couriers were independent contractors. *Bogart*, 140 A.D.3d at

[4] The Commissioner's suggestion (Br. 31) that Postmates limited the ability to work for others because it "prohibited couriers from accepting payment from Postmates' customers for services not requested through the platform" is baseless. The Board did not rely on this fact, and this limitation applied only *while* the delivery was being made. It therefore has no bearing on the fact that Delivery Providers had total discretion to work for other companies or their customers at any time when they had not already chosen to offer their delivery services through the Postmates app. Neither of the cases the Commissioner cites (Br. 26-27) says *anything* in support of the idea that a courier is an employee if, while completing a delivery, he or she had contracted not to charge a customer for things other than the courier service.

1219. The Commissioner cites (Br. 31-32) several cases where couriers supposedly had control over routes, time, and/or mode of transportation. But in each of these cases, the company actually controlled timing, what the driver wore, the routes, how the driver performed the deliveries, or some combination of these factors.[5] Thus, these cases are consistent with the precedent establishing that a courier is not an employee when he can perform deliveries in whatever manner he chooses.

Fourth, Delivery Providers do not receive a salary and instead are paid based only on the deliveries they choose to undertake. The Commissioner cites (Br. 32) a handful of cases for the proposition that this factor is not "dispositive." *Ross*, *Kelly*, *CDK*, and *Alfisi* are distinguishable for reasons previously stated. As to the other two cases, in one, the worker received an hourly wage—and, in addition, "claimant

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[5] *Ross*, 119 A.D.2d at 857 (Mikoll, J., dissenting), *aff'd sub nom. Rivera*, 69 N.Y.2d at 680-681 (company required claimants to call the dispatcher and to check in for additional pickups or deliveries on their route); *Voisin*, 134 A.D.3d at 1187 (couriers "required to complete their assignments the same day," wear company "uniforms," and carry company "identification cards"); *Scott*, 133 A.D.3d at 938-39 (company "required claimants to use electronic on-board recorders in their trucks" and "required claimants to load and unload freight"); *Kelly*, 28 A.D.3d at 1044 (the courier was "required to deliver the product within a reasonable time," and "payment was expressly conditioned upon him being 'polite [and] well-mannered'"); *Matter of Gray (Glens Falls Newspapers—Roberts)*, 134 A.D.2d 791, 791 (3d Dep't 1987) ("The delivery routes were established by the publisher with each carrier being assigned a specific territory. ... Both claimants were given a specific pickup time, and delivery was to be completed within a specific time frame."); *Matter of Webley (Graphic Transmissions, Inc.—Roberts)*, 133 A.D.2d 885, 886 (3d Dep't 1987) ("[T]he drivers were given laminated cards identifying them as Graphic's delivery personnel," "the forms used by the drivers while making deliveries bore Graphic's letterhead," "the drivers were required under the contract to keep their vehicles clean, garaged and in good working order," "deliveries were to be made with reasonable promptness," and "drivers were expected to be neatly dressed, courteous and available to Graphic on a regular basis.").

performed most of his work at the employer's premises, ... and he was required to turn in daily time cards." *Matter of Ramirez (Propoint Graphics LLC—Comm'r of Labor)*, 127 A.D.3d 1295, 1296 (3d Dep't 2015). In the other case, the New York Court of Appeals simply remanded for further explanation from the Board, and regardless the drivers were *required* to complete "all pickups and deliveries under respondent's contract with the laboratory ... on the day received" and "[a] driver who is unable to work on a particular day is responsible for finding a replacement driver for that day." *Matter of Charles A. Field Delivery Service, Inc. (Roberts)*, 66 N.Y.2d 516, 517 (1985).

In sum, each of the four factors discussed above generally suffices for independent contractor status, and together they *always* establish that the claimant is an independent contractor. That conclusion necessarily follows both from the uniform case law and from the simple fact that a company does not control means or results if the claimant is free to decide whether, when, how, and for whom to perform services.

B. MR. VEGA AND THE COMMISSIONER FAIL TO JUSTIFY THE BOARD'S ERRONEOUS RELIANCE ON FACTORS IRRELEVANT TO THE ISSUE OF CONTROL

1. None Of The Case Law Mr. Vega And The Commissioner Rely Upon Is Remotely Applicable Here

Just like the Board, Mr. Vega and the Commissioner fail to identify any case finding someone to be an employee in even remotely analogous circumstances. The Commissioner claims (Br. 17) that "numerous" cases have treated couriers as employees even where they "logged in for work when they were available and could decline assignments" and had "discretion as to the delivery route and the timing of the deliveries." But that sentence tellingly comes with no citation to any such case.

Instead, both the Commissioner (Br. 15-16) and Mr. Vega (Br. 6-7) simply string-cite cases that are supposedly applicable here. However, none of these cited cases include all four factors listed above. And, as discussed *supra* at 8-9, the third factor alone—the courier's control over how the delivery is conducted—is much stronger here than in any of the cases Mr. Vega or the Commissioner cites. Specifically, the Commissioner's first three citations (Br. 15) are to one consolidated appeal (*Rivera*), where the facts demonstrated far more control than exists here. In the first, the summary before the opinion states that "the operators were told when and where to make pickups and deliveries and were often given deadlines for the completion of an assignment." *Rivera*, 69 N.Y.2d at 680. The second case, *Ross*, is distinguished *supra* at 6. And in the third case, *Matter of Fox*, the summary states that "the employer provided the drivers with the names of the customer retail outlets, named the drivers as employees on a workers' compensation policy, [and] required drivers to make deliveries and pickups within certain specified times with respect to the 24-hour service guarantee requirements; … the drivers were [also] required to obtain specific liability insurance coverage on their vehicles and name the employer as additional insured." *Rivera*, 69 N.Y.2d at 680-81. In short, all three consolidated cases involved couriers who were *required* to complete deliveries in a particular manner.

The cases Mr. Vega and the Commissioner rely upon from this Court likewise address scenarios involving company control over when and how deliveries were performed. For instance, in *Matter of Crystal (Medical Delivery Services—Comm'r of Labor)*, 150 A.D.3d 1595 (3d Dep't 2017), "MDS required claimant to adhere to a strict delivery schedule, report each delivery via his cell phone and submit specific invoices to MDS for each delivery." *Id.* at 1597; *see also id.* ("MDS also imposed a dress code, providing claimant with polo shirts bearing its logo, and furnished him with an identification badge, lanyard and clipboard advertising its name. Furthermore, in the event that claimant wanted to take time off, he needed to provide MDS with advance notice, and MDS, not claimant, selected the replacement driver."). This Court considered even greater company-exercised control in *Matter of Garbowski (Dynamex Operations East, Inc.—Comm'r of Labor)*, 136 A.D.3d 1079 (3d Dep't 2016), where the claimant was required "to wear a uniform and have a badge identifying himself as being contracted with Dynamex," the company "assign[ed] … pickups and deliveries," and there was a "one-year noncompetition restriction following the termination of services." *Id.* at 1080. Finally, *Matter of Mitchum (Medifleet, Inc.—Comm'r of Labor)*, 133 A.D.3d 1156 (3d Dep't 2015), provides a useful comparison to the type of control that is absent from the instant matter:

Medifleet … established delivery routes and supplied drivers with daily

> manifests. Drivers were required to wear photo identification and uniforms reflecting Medifleet's logo, to purchase or lease specific scanners that allowed Medifleet to track their location and movement and to call in when their deliveries were complete. Medifleet would call the drivers directly if they were not on schedule or not in a proper location. ... The drivers were required to accept additional unscheduled deliveries assigned by Medifleet and could not use substitute drivers.

Id. at 1157.[6] None of those facts—established routes, required clothing, monitoring of the driver's moves, and additional assignments that must be accepted—is present here.

In sum, the cases where this Court found the drivers to be employees are ones where the company controlled how the deliveries were performed, often to an extraordinary degree. Here, in contrast, Postmates did not control the performance of the deliveries in any way: they did not have a required schedule or route, monitor Delivery Providers, have Delivery Providers wear any Postmates identification, or contact Delivery Providers at all aside from the initial offer of the delivery opportunity. There is a clear line in the case law, whereby the absence of such control—as in the cases discussed *supra* at 3-5—establishes an independent contractor relationship.

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[6] Two other cases the Commissioner cites relied on similar corporate control over deliveries. *Matter of Varrecchia (Wade Rusco, Inc.—Sweeney)*, 234 A.D.2d 826, 826 (3d Dep't 1996) ("Once claimant had accepted an assignment, his relationship with Wade Rusco was identical to that enjoyed by its acknowledged employees. Wade Rusco had complete control over the destination and timing of claimant's deliveries" and "required claimant to submit proof of delivery on a form provided by Wade Rusco ...."); *Webley*, 133 A.D.2d at 886 ("[T]he drivers were given laminated cards identifying them as Graphic's delivery personnel and specifying a date described as the drivers' 'employment date'; ... the drivers were required under the contract to keep their vehicles clean, garaged and in good working order; ... deliveries were to be made with reasonable promptness; and ... drivers were expected to be neatly dressed, courteous and available to Graphic on a regular basis.").

2. Mr. Vega And The Commissioner Fail To Show The Significance Of The Factors Relied Upon The Board

The laundry list of 14 facts the Board relied upon are irrelevant (or at most incidental) to the issue of control. *See* Postmates Br. 23-38. The Commissioner (Br. 18-29) and Mr. Vega (Br. 7-9) provide largely overlapping lists of ancillary facts. Like the Board, they fail to show that these facts are actually evidence of control—and none of the facts undermines the crucial and dispositive point that Delivery Providers are free to decide whether, when, how, and for whom to perform deliveries.

a. Postmates' Administrative And Safety Practices (Facts 1 And 8) Are Irrelevant.

The Commissioner relies (Br. 18) on the fact that Postmates placed advertisements to attract Delivery Providers and conducted a criminal background check. However, the Commissioner simply ignores the case law Postmates cited (Br. 28), establishing that these factors are irrelevant to the independent contractor inquiry. The cases the Commissioner cites (Br. 18-19) simply mention the use of advertisements as a background fact, and none states that a criminal background check is evidence of employee status. They discuss "screening" of employees, *Crystal*, 150 A.D.3d at 1597; *Matter of Gill (Strategic Delivery Solutions LLC—Comm'r of Labor)*, 134 A.D.3d 1362, 1363 (3d Dep't 2015), or "applications" and a "review process," *Matter of McKenna (Can Am Rapid Courier—Sweeney),* 233 A.D.2d 704,704 (3d Dep't 1996), not the mere criminal background check Postmates does here (*see* Postmates Br. 29 n.8). Regardless, the screening of employees was barely mentioned in the opinions, in the background discussion of the facts, and it certainly was not treated as a dispositive factor.

b. Postmates' Offer To Provide Delivery Providers With Information On How To Use Its Technology (Fact 2) Is Irrelevant.

The Commissioner also relies (Br. 19) on the supposed training Postmates provided to Delivery Providers. However, the Commissioner's characterization of Postmates' activity as "training" does not change the undisputed fact that it consisted solely of one session in which Postmates offered information to Delivery Providers on how to use its application. A21:6-17; A26:6-24; A37:13-20. And the Commissioner ignores the numerous cases Postmates cited (Br. 29) holding that such an information session is "neutral in its implications." *Matter of Werner (CBA Indus.—Hudacs)*, 210 A.D.2d 526, 528 (3d Dep't 1994). The cases the Commissioner cites (Br. 19), in contrast, concerned seemingly great training, not merely a one-time information session. *See, e.g.*, *Crystal*, 150 A.D.3d at 1597 (noting training with hazardous materials). And the cases still relied on this only as a minor factor in the analysis. *See, e.g.*, *id.*

c. The Alleged Fact That Postmates Controls The Amount Of Information Passed On To Delivery Providers (Fact 3) Is Not Supported By The Record And Is Irrelevant.

The Commissioner further relies (Br. 20-22) on the idea of "Postmates' predominant control over the delivery process." However, the Board made no such finding and there is no evidence to support it. The Commissioner attempts to inflate

Postmates' control by claiming that Postmates "assigned" deliveries (Br. 21), and repeatedly using the word "assignments" (Br. 5, 6, 10, 13-14, 16-17, 20-22). But there are no assignments: as the Board recognized (A128), customers made "requests" and Delivery Providers "are free to accept, reject or ignore requests." In support for the assertion of "predominant control," the Commissioner provides (Br. 20-21) a series of bullet points, which amount to nothing more than the fact that Postmates uses its technology to match people who want deliveries to Delivery Providers who might be willing to perform the deliveries. The undisputed facts establish that *if, how,* and *when* the delivery is performed is entirely in the hands of the Delivery Provider. The individual autonomy and discretion exercised by Mr. Vega belies the Commissioner's attempt to mischaracterize his reviewing, accepting, declining, or ignoring delivery opportunities as an "assignment."

To the extent the Commissioner relies on the finding the Board did make—that Postmates controls the amount of information passed along to Delivery Providers—the Commissioner ignores Postmates' response (Br. 30-31) that there is no evidence that Postmates withholds any information from the Delivery Providers after a request is accepted. The Commissioner likewise ignores Postmates' response (Br. 31) that any withholding of information until a request has been accepted is completely irrelevant to Postmates' control over the results produced by Delivery Providers or the means they used to achieve those results. Once again, the Commissioner simply provides (Br. 22) a string cite of cases, none of which suggests that the withholding of information before (or even after) offering the opportunity for a delivery is relevant to the inquiry.

d. The Fact That Postmates' Software Offers Delivery Opportunities Based On Preset Factors (Fact 4) Is Irrelevant.

The Commissioner's reliance (Br. 20) on Postmates' use of an algorithm to identify Delivery Providers to offer a requested delivery is likewise misplaced. As Postmates explained (Br. 32), an exercise of much greater company control—hand-picking the workers—did not undermine the fact that they were independent contractors in *Yoga Vida*. It is telling that the Commissioner does not cite a single case suggesting the offering of opportunities is evidence of employee status.

e. The Alleged Facts That Postmates Has Access To Acceptance Rates And Attends To Consumer Satisfaction (Facts 5 And 14) Are Irrelevant.

The Commissioner also errs in relying (Br. 27-29) on Postmates' tracking the acceptance rates of Delivery Providers and customer satisfaction. As Postmates explained (Br. 32) and the Commissioner ignores, "'[t]he requirement that the work be done properly is a condition just as readily required of an independent contractor as of an employee and not conclusive as to either.'" *Yoga Vida*, 28 N.Y.3d at 1016 (quotation marks and internal citation omitted). The Commissioner ignores the inescapable conclusion in the numerous cases Postmates cited (Br. 32-33), holding that monitoring of service providers, even with much greater vigilance than Postmates exercised, does not constitute evidence of employee status. Moreover, all the cases the Commissioner cites (Br. 28-29) predate *Yoga Vida*, and, regardless, treat the handling of customer complaints as (at most) a minor factor regarding independent contractor status.

f. The Alleged Fact That Postmates Replaces Delivery Providers (Fact 6) Is Contradicted By The Record And Is Irrelevant.

The Commissioner does not attempt to defend the Board's statement that Postmates replaces Delivery Providers. As to the Commissioner's point that Delivery Providers cannot choose their own replacements (Br. 27), no case has found this relevant, as both independent contractors and employees generally cannot replace themselves.

g. The Fact That Postmates Provides An Estimated Time Of Delivery (Fact 7) Is Irrelevant.

The Commissioner relies (Br. 22) on the fact that Postmates provides customers an estimated time of delivery, and then attempts (Br. 23) to expand that fact into the idea that Delivery Providers effectively had to complete deliveries within a prescribed timeframe. The Board made no such finding; the undisputed evidence establishes that there was no time requirement, and the estimates were non-binding. A66:22-67:2; A82:23-83:14. Similarly, the Commissioner cites no precedent for the idea that such estimates render a courier an employee. In any event, the Commissioner ignores *Yoga Vida*'s holding that even a set schedule constitutes only "incidental control." 28 N.Y.3d at 1016.

h. Postmates' Payment Arrangements (Fact 9, 10, 11, And 12) Do Not Render Delivery Providers Employees.

The Commissioner also errs (Br. 25-26) in relying on Postmates' payment arrangements as establishing employee status. As to the prepaid expense cards, the Commissioner fails to explain how this convenience says anything about whether a Delivery Provider is an employee. As to Postmates' determining the rate of pay, the Commissioner ignores clear authority (Postmates Br. 36) holding this factor of little, if any, relevance. Indeed, independent contractors are often paid a set rate. And, setting aside that Delivery Providers can choose to offer their services at times when they know they will receive a higher rate of pay, the cases the Commissioner cites (Br. 25) treat a set rate of pay as, at most, a minor factor. *See, e.g.*, *Crystal*, 150 A.D.3d at 1597.

The Commissioner also mentions (Br. 25) the fact that Postmates "paid the claimant directly on an established basis, and bore the risk of customer nonpayment." But the Commissioner ignores that the exact same form of collection took place in *Yoga Vida*. 28 N.Y.3d at 1016. Moreover, this Court has held that "[t]he fact that customer payments and complaints are delivered to [the company] is nothing more than a testament to [the company's] intended function as an intermediary between the customers and drivers." *Matter of Pavan (UTOG 2-Way Radio Assn.—Hartnett)*, 173 A.D.2d 1036, 1038 (3d Dep't 1991). Indeed, it is hardly uncommon for an independent contractor to be paid by the company hiring him or her rather than by the customer.

i. The Supposed Fact That Postmates Retained Liability For Incorrect Or Damaged Deliveries (Fact 13) Is Unsupported By The Record And Is Irrelevant.

Finally, the Commissioner briefly mentions (Br. 26) the Board's finding that Postmates is the responsible party for incorrect or damaged deliveries. However, the pages the Board cites (A61, A74) are the exact same ones that Postmates showed (Br. 38) *refute* the Board's finding. Contrary to the Commissioner's contention, these documents establish that responsibility for a damaged product is determined on a "case-by-case basis" (A61:16-24; A74:24-75:5), and there is no evidence to the contrary. In any event, liability does not indicate control. The lone case the Commissioner cites merely noted assumption of liability while focusing on the key facts that the company set "delivery dates and times," provided the truck for deliveries, and bound the claimant to "a one-year noncompetition restriction after the termination of his services." *Matter of Youngman (RB Humphreys Inc.—Comm'r of Labor)*, 126 A.D.3d 1225, 1226 (3d Dep't 2015). Postmates exercised no such control here.

III. CONCLUSION

The Board's decision, contrary to the decision of the ALJ, should be reversed and this Court should hold that Delivery Providers like the claimant here are independent contractors, not employees.

Dated: December 13, 2017

Respectfully submitted,

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No. APL-2018-00143

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State of New York
Court of Appeals

LUIS A. VEGA,

Respondent,

v.

POSTMATES, INC.,

Respondent,

COMMISSIONER OF LABOR,

Appellant.

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATE STATUTES

ARTICLES AND REPORTS

ADMINISTRATIVE DECISIONS

MISCELLANEOUS

PRELIMINARY STATEMENT

Postmates Inc. operates a website and a smartphone application (app) that allows customers to order food from local restaurants or other items from local stores and to have them delivered within a short period of time by one of Postmates' couriers. Luis A. Vega worked as a courier for Postmates until his termination in 2015. The Unemployment Insurance Appeal Board (Board) found that Mr. Vega was an employee of Postmates, rather than an independent contractor, and was thus eligible to receive unemployment benefits. The Appellate Division, Third Department, annulled the Board's decision for lack of substantial evidence. Two Justices dissented, and the Commissioner of Labor (Commissioner) appealed as of right.

This Court should reverse. Substantial evidence supports the Board's finding that Postmates exercised sufficient control over its couriers' delivery work to create an employer-employee relationship. Among other things, Postmates (1) unilaterally set the fees charged to customers and the commissions paid to couriers, (2) controlled the timing of deliveries by sending customers an estimated delivery time and allowing customers to track their couriers' location in real time, (3) controlled the assignment of deliveries through a "blind dispatch" system that precluded couriers from seeing the details of a delivery job until after it was assigned, (4) precluded couriers from delegating assignments to subcontractors, (5) possessed the right to unilaterally terminate couriers for poor performance, (6) handled all aspects of marketing and customer relations, and (7) bore the risk of loss when customers failed to pay for delivered items.

In reversing the Board's finding of an employment relationship, the Third Department departed from a long line of cases, including several from this Court, recognizing such indicia as sufficient to support a Board finding that couriers or other delivery persons were employees. Indeed, Postmates exercised more control than the employers did in those cases, by virtue of an online platform that allowed it to track and control virtually every aspect of the delivery process. Like other on-demand platforms, Postmates' system of algorithmic management allowed it to give workers the nominal freedom to set their own working schedule, while retaining strict control over the work actually performed.

The Third Department also misapplied the substantial evidence standard. This Court has recently reiterated that the substantial evidence standard is a deferential standard that gives agencies broad discretion to weigh the evidence and only requires that their ultimate conclusion have a rational basis in the record. Ignoring this settled rule, the Third Department majority substituted its own judgment for that of the Board by discounting the evidence that supported the Board's finding and focusing instead on the evidence that suggested a contrary result. Applying the appropriate deference to the Board's view of the evidence, this Court should reverse the Third Department's judgment and sustain the Board's finding that Postmates' couriers were employees eligible to receive unemployment benefits.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that Mr. Vega was an employee of Postmates for unemployment insurance purposes, where Postmates controlled key aspects of its couriers' delivery work, including fees and commissions, the timing and assignment of deliveries, the ability to delegate work, the screening and termination of couriers, all aspects of marketing and customer relations, and assumption of the risk of loss when customers failed to pay for delivered items.

STATEMENT OF THE CASE

A. The State's Unemployment Insurance Law

Eighty years ago, the New York Legislature determined that "[i]nvoluntary unemployment" and its resulting financial insecurity were a threat to the "health, welfare, and morale of the people" of the State. Labor Law § 501. The Legislature enacted the State's unemployment compensation law, L. 1935, ch. 468, to "alleviat[e] the adverse financial condition that frequently accompanies . . . the cessation of income from an employer," *Matter of Van Teslaar v. Levine*, 35 N.Y.2d 311, 316 (1974).

The State's unemployment compensation law is a "remedial statute designed to protect the wage earner from the hazards of unemployment by providing money benefits to individuals 'unemployed through no fault of their own.'" *Matter of Ferrara (Catherwood)*, 10 N.Y.2d 1, 8 (1961) (quoting Labor Law § 501). Through compulsory contributions from a worker's employer, *see* Labor Law § 570, the State maintains "financial reserves" for the benefit of those who become unemployed, *id.* § 501. In most instances, an employer must contribute to this unemployment fund on behalf of all employees once the employer pays $300 or more in wages in a calendar quarter. *See id.* § 560(1).

The Commissioner of Labor is charged with administering the State's unemployment insurance law, including making initial determinations of workers' eligibility for benefits. Labor Law § 520. The Commissioner's determinations are subject to review by the Unemployment Insurance Appeal Board. *Id.* §§ 620–626. The Board consists of five members who are appointed by the Governor for a term of six years, and no more than three of such members may belong to the same political party. *Id.* § 534. The Board has the power to convene evidentiary hearings before an administrative law judge, *id.* § 620, and its factual findings are binding on the courts if supported by substantial evidence, *see In re Electrolux Corp.*, 288 N.Y. 440, 446 (1942). Labor Law § 623 specifically provides that a "decision of the appeal board shall be final on all questions of fact and, unless appealed from, shall be final on all questions of law."

B. The Board's Discretion to Determine Whether a Worker Is an Employee Eligible to Receive Unemployment Benefits

Unemployment benefits are available only to employees. *See* Labor Law § 511 (defining employment). Accordingly, in assessing whether a worker is eligible to receive unemployment benefits, the Board must determine whether the worker is an employee, or rather is an independent contractor operating a separate business. This question "necessarily is a question of fact," *Matter of Villa Maria Inst. of Music (Ross)*, 54 N.Y.2d 691, 692 (1981), which requires considering all aspects of the relationship to determine whether the employer retains the right to control "the results produced or the means used to achieve the results." *Matter of 12*

Cornelia St (Ross), 56 N.Y.2d 895, 897 (1982). For eight decades, the Board has decided this highly intensive fact question in hundreds of cases across a range of industries, applying a deep expertise to which courts have long accorded deference. *See, e.g.*, *Claim of England*, 38 N.Y.2d 829, 830 (1976); *In re Electrolux Corp.*, 288 N.Y. at 446.

When the Legislature has seen fit to restrict or eliminate the Board's discretion to decide whether workers in a particular industry are employees entitled to receive unemployment benefits, it has done so explicitly. The Legislature has thus enacted several laws excluding various classes of workers from the definition of employment for purposes of unemployment benefits, including agricultural laborers, Labor Law § 511(6), freelance shorthand reporters, *id.* § 511(18), and licensed insurance agents or brokers, *id.* § 511(21), among others. *See generally id.* § 511(6)–(23). Conversely, the Legislature has declared certain workers to be employees for unemployment insurance purposes, regardless of what the Board might otherwise have found. This includes certain musicians, *id.* § 511(1)(b)(1-a), and professional models, *id.*

§ 511(1)(3). *See also id.* § 511(1)(b)(1-b) (creating rebuttable presumption that construction workers are employees); *id.* § 511(1)(b)(1-c) (same as to workers in the commercial goods transportation industry).

Following the lobbying efforts of technology companies, including respondent Postmates, as well as Uber, Lyft, Handy, and TaskRabbit, legislatures in a number of other states have recently enacted laws categorizing the workers of the so-called "gig economy" (sometimes called "gig workers")[1] as independent contractors for the purpose of specified labor protections. *See* National Employment Law Project, *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It* (2019), *available at* https://s27147.pcdn.co/wp-content/uploads/ Rights-at-Risk-4-2-19.pdf. In New York, the Legislature has enacted no such carve-out

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[1] The "gig economy" refers to a sector of the economy where online platforms hire workers to perform one-off jobs or "gigs" requested by consumers through those platforms. *See* Cornell University Worker Institute, *On-Demand Platform Workers in New York State: the Challenges for Public Policy* (2019), *available at* https://www.ilr.cornell.edu/sites/default/files/OnDemandReport. Reduced.pdf.

for gig workers. Instead, the Legislature has chosen to leave in place the Board's discretion to decide in particular cases whether such workers are employees eligible to receive unemployment benefits.[2]

C. The Work Performed by Postmates' Couriers

Postmates provides on-demand pickup and delivery services to customers via a proprietary online platform. (Appellant's Appendix [A.] 9, 16-18.) Customers can access the platform via Postmates' website or by downloading Postmates' app on a

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[2] The New York Assembly recently considered, but did not advance, a bill that would have assured gig workers treatment as employees for purposes of specified wage protection and collective bargaining laws. A8343 (2019). The bill would also have required the Commissioner of Labor to hold public hearings and draft a report recommending whether such workers should similarly be assured treatment as employees for purposes of, among other things, unemployment insurance. The proponents of the bill explained that gig workers are often misclassified as independent contractors even though they are "wholly dependent on the control and direction of their employer" and "experience low and unstable earnings." Assembly Mem. in Support, A8343. The bill thus sought to eliminate for such workers "the uncertainty, delay and denial that may result when their employment status is disputed." A8343, § 2. The bill remained under committee review at the close of the last legislative session.

smartphone. (A. 20.) Once logged on to the platform, customers can request that a Postmates courier pick up items at a local venue—for example, food from a local restaurant or merchandise from a store—and deliver the items to their homes or other designated locations. (A. 16-18.) The advantage that Postmates offers over other delivery methods is speed. (A. 18-19.) Postmates markets itself to customers as completing most deliveries within an hour. (A. 19.)

1. Courier Recruitment and Orientation

Postmates acknowledges that couriers are indispensable to its business. (A. 69.) Postmates recruits couriers through online advertisements. (A. 63-64.) It requires prospective couriers to fill out an online form with their name, phone number, driver's license number, date of birth, and social security number. (A. 14, 37.) Using this information, Postmates engages a third party to conduct a criminal background check on prospective couriers. (A. 10, 15, 36-37.) Postmates assures its customers via its app that it has conducted a criminal background check on all of its couriers. (A. 37.)

Postmates' couriers attend orientation sessions to learn how to use the smartphone app. (A. 15, 21, 26, 37, 55, 68.) While the record does not definitively establish that such sessions are mandatory, Postmates explains that couriers "would have no way of knowing how to utilize [the] app" without attending a session. (A. 68.) At the session, Postmates also provides couriers with prepaid-expense ("PEX") cards for those customers who choose to have couriers pay for delivered items initially and then to reimburse them upon delivery, and Postmates advises the courier on the use of these cards. (A. 52-56.) Postmates also advises its couriers that if they choose not to use the PEX card for such deliveries, they can pay for customers' items with their own money and seek reimbursement from Postmates. (A. 55.)

Postmates requires couriers to sign a written agreement entitled "Postmates PEX Card Usage and Independent Contractor Acknowledgement Agreement." (A. 58-59, 117.) Section 1 of the agreement provides that couriers can "only use the Postmates provided PEX card for purchases dispatched or assigned to [them] by Postmates" and that couriers may be suspended or subject to penalties if they "use the PEX card for any reason other than Postmates job related duties." (A. 117.) Section 2 of the agreement requires couriers to acknowledge that they are "an independent contractor, and not an employee, of Postmates." (A. 117.) And Section 3 of the agreement requires couriers to select the mode of transportation they will use while performing services for Postmates. (A. 117.)

2. Courier Assignments

Couriers log in and out of the Postmates platform at their discretion and are considered available to handle on-demand requests only when logged in. (A. 21, 26-27, 34, 61, 64-66, 69.) Postmates asks couriers to provide information regarding their expected availability and uses this information to "maximize [its] software to make sure that resources are appropriate." (A. 65-66, 83.) Couriers are not penalized, however, if they do not log in during the times they indicated they would be available. (A. 66, 83.)

Once a customer submits a delivery request, Postmates sends the request to available couriers located within a geographic area determined by an algorithm. (A. 21-23.) Postmates provides the couriers selected by the algorithm with some, but not all, of the information about the delivery request; notably, it does not provide the pickup and delivery addresses at this stage. (A. 17, 20, 28.) The selected couriers must decide whether to accept, reject, or ignore the request based on the information provided. (A. 17, 20-21, 24.) Postmates assigns the delivery to the first courier to accept the request. (A. 25, 38-39, 69.)

If none of the originally selected couriers accepts the request within the timeframe set by Postmates, Postmates sends the request to a progressively broader group of couriers. (A. 24-25, 38, 85.) If a courier accepts a request and then withdraws from the request, Postmates informs the customer and seeks to find another available courier. (A. 48-49, 69.) If no courier accepts the request, it is considered lost and no revenue is generated. (A. 24, 85.) Although couriers are not subject to a minimum or maximum number of deliveries (A. 28, 75), Postmates keeps track of couriers' responses to delivery requests (A. 25-26, 28).

3. Logistics of Deliveries

Once Postmates assigns a delivery to a courier, it sends the courier further details regarding the customer's delivery request, including the pickup and delivery addresses. (A. 17, 28-30, 64, 76.) It sends the customer a photograph of and contact information for the assigned courier. (A. 47-48, 73.) And it calculates and sends the customer an estimated time of delivery based on the average completion time for similar past deliveries. (A. 46-47, 66-67, 82-83.) Postmates then tracks the assigned courier's location in real time and permits the customer to view that location on the platform throughout the delivery process. (A. 19.)

Postmates does not allow couriers to arrange for substitutes or subcontractors to handle deliveries. (A. 49-50, 73.) Postmates explains that customers would complain if the person who shows up to make a delivery is different from the person in the photo Postmates provides. (A. 73.) Postmates also believes that allowing substitutes would "defeat[] the whole purpose of doing a background check" on couriers. (A. 73.)

Customers can modify requests en route, for example by asking the courier to pick up a soda from a store if none was available at a restaurant. (A. 70-72.) Couriers cannot charge customers extra for any such added stops. (A. 72.)

Couriers must designate in advance the mode of transportation they will use to perform deliveries. (A. 58-59, 117.) Couriers are permitted to take any route they choose and to stop off en route. (A. 30-31.) They are also permitted to accept more than one delivery request and to complete the requests in any order they wish. (A. 75.) Postmates requires couriers to report on the platform when they have picked up a customer's items and again when they have delivered those items. (A. 41, 64.)

Postmates allows its couriers to deliver for other companies, including while logged on to the Postmates platform. (A. 28-29, 72-73.) But when couriers deliver an item for Postmates, they are advised not to accept payment from the customer for any services not requested through the Postmates platform. (A. 86-87.)

4. Financial Aspects of the Platform

Once the courier reports that a delivery is complete, Postmates charges a delivery fee to the customer's credit card. (A. 39-40, 42.) Postmates unilaterally sets the fee based solely on the delivery distance; couriers have no ability to adjust the fee to account for the number of stops or items that the customer requests. (A. 71-72.) Postmates pays the courier a non-negotiable commission equal to 80% of the delivery fee by depositing this sum directly into the courier's bank account within four to seven business days of the delivery. (A. 10, 39-40, 42-44, 59, 69-70, 84-85, 117.)

As noted above, Postmates offers its customers a payment service whereby customers can choose to have a Postmates courier pay for delivered items at the pickup locations and then reimburse the courier upon delivery, rather than arrange to pay the vendors directly. (R53-54.) Postmates advises its couriers during their orientation sessions that they can provide this additional service one of two ways. (A. 55-56.) First, they can use the PEX card that Postmates provides them. If the courier chooses this method, Postmates loads the purchase amount onto the PEX card, the courier makes the purchase using the card, and Postmates charges the customer's credit card for the purchase amount. (A. 54-55.) Alternatively, couriers can make customer purchases with their own credit cards. Postmates then reimburses the couriers for the purchase amount after they present Postmates with a sales receipt. (A. 55-56.) Couriers are not otherwise reimbursed for delivery-related expenses, nor are they provided with fringe benefits, uniforms, telephones, or business cards. (A. 32, 43, 51, 60, 70, 86.) They are provided with bags bearing Postmates' logo to use for carrying delivery items, but they are not required to use the provided bags for that purpose. (A. 68, 82.)

If Postmates is unable to collect the delivery fee from a customer, Postmates assumes the loss and the courier still earns the fixed commission. (A. 44-45, 56.) Similarly, when an item is lost or damaged en route, Postmates considers itself responsible and works directly with customers to resolve the issue. (A. 30, 61-62, 74-75; *see also* A. 62 ["[W]e'll have a conversation with the requester and see how they want to handle the situation."]).

5. Termination of Couriers

Customers can rate couriers' services on Postmates' platform. (A. 32-33, 41.) Postmates monitors customer ratings of couriers and contacts customers who have given their couriers poor ratings. (A. 36, 41, 50, 67.) Postmates also handles all customer complaints. (A. 46-47.)

Postmates terminates its relationship with couriers for a variety of reasons, including negative customer feedback, fraudulent activity, or use of the PEX card "for any reason other than Postmates job related duties." (A. 36, 41, 74, 108, 117.) When it has decided to discontinue a courier's services, Postmates blocks the courier from logging on to the platform. (A. 36, 74, 117.)

6. Mr. Vega's Work as a Courier

Consistent with the above framework, Postmates engaged Mr. Vega as an on-demand courier. (A. 12-13, 117.) Mr. Vega indicated on his written agreement with Postmates that his mode of transportation would be walking. (A. 58, 117.) He logged on to the Postmates platform during the period June 8 through June 15, 2015. (A. 33-34, 120.) He rejected or ignored about 50% of the assignments offered by Postmates through the platform. (A. 25-26.) Postmates terminated Mr. Vega's relationship based on negative consumer feedback or fraudulent activity. (A. 107-109.)

D. Administrative Proceedings and the Board's Decision

Mr. Vega filed an application for unemployment benefits, effective June 15, 2015. (A. 118-119.) Based on the information that Mr. Vega provided, the Commissioner determined that Postmates exercised sufficient control over Mr. Vega's work to create an employer-employee relationship. The Commissioner thus credited Mr. Vega with remuneration from Postmates in connection with his claim for unemployment benefits and determined that Postmates was liable for additional unemployment insurance contributions, effective the third quarter of 2014, on the remuneration paid not only to Mr. Vega, but also to other persons similarly employed. (A. 118-119.) The Commissioner had the power to determine that liability because, under Labor Law § 620(1)(b), the Commissioner's determination that a claimant is an employee "shall be deemed a general determination of such questions with respect to all those employed by such person or employer."

Postmates objected that Mr. Vega was an independent contractor and requested a hearing before an ALJ. Although the ALJ sustained Postmates' objections and overruled the Commissioner's determination (A. 121-123), the Board thereafter reversed the ALJ's decision and sustained the Commissioner's initial determination that Mr. Vega and others similarly situated were Postmates employees. (A. 124-127.[3])

Rejecting Postmates' argument that Postmates is simply a "technology platform that connects persons who need things delivered ('Requesters') with delivery professionals available to make deliveries" (Postmates Br. to the Board at 2), the Board found sufficient evidence that Postmates exercised, or reserved the right

[3] The Board issued its initial determination on September 29, 2016, but issued a resettled decision on October 11, 2016 (A. 124-127), correcting a sentence that mistakenly referred to Postmates' couriers as "teaching artists."

to exercise, sufficient supervision, direction, or control over the services of Mr. Vega to create an employment relationship.

In addition to reciting the facts discussed above (A. 124-125), the Board relied on evidence that Postmates (1) advertised for and screened on demand couriers via an online application and criminal background check, (2) provided and educated the drivers regarding its proprietary software and PEX cards, (3) controlled the amount of information passed along to its couriers before and after accepting a request, (4) chose which couriers to offer a request, (5) kept track of a courier's rate of acceptance, (6) handled replacement of couriers, (7) calculated and provided an estimated time of delivery, (8) procured and sent the courier's photo of the consumer, (9) deposited the requisite amount of money into the account associated with the PEX card provided, (10) established the delivery fee and the courier's non-negotiable rate of pay, (11) handled collections and paid couriers on a regular basis even if a delivery fee was uncollected, (12) provided a monetary referral incentive, (13) retained liability for incorrect or damaged deliveries, and (14) fielded complaints and monitored consumer satisfaction ratings. (A. 126.)

Acknowledging this Court's mandate to decide like cases in a like manner, *see Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 517 (1985), the Board cited numerous cases involving on-demand couriers or delivery drivers where similar factors were deemed sufficient to create an employment relationship, including this Court's decision in the three appeals consolidated in *Matter of Rivera (State Line Delivery Serv.—Roberts)*, 69 N.Y.2d 679 (1986), *cert. denied*, 481 U.S. 1049 (1987).[4] (A. 126-127.) The Board distinguished *Matter of Jennings (American Delivery Solution, Inc.—Commissioner of Labor)*, 125 A.D.3d 1152 (3d Dep't 2015), on the grounds that the luggage delivery drivers at issue in that case, unlike Postmates' couriers,

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[4] The three appeals consolidated in this Court's *Matter of Rivera* decision are appeals from the Third Department's decisions in *Matter of Rivera (State Line Delivery Service, Inc.—Ross)*, 120 A.D.2d 852 (3d Dep't 1986); *Matter of Ross (Majestic Messenger Service, Inc.—Roberts)*, 119 A.D.2d 857 (3d Dep't 1986); and *Matter of Fox (Whalen's Service—Roberts)*, 119 A.D.2d 868 (3d Dep't 1986).

negotiated their rates of pay, received no training, and bore responsibility for lost or damaged luggage. (A. 127.)

E. The Third Department's Decision

Over a two-judge dissent, the Third Department annulled the Board's determination for lack of substantial evidence. *Matter of Vega v. Postmates Inc.*, 162 A.D.3d 1337 (3d Dep't 2018). (A. 128-133.) The Third Department majority relied on evidence that Postmates' couriers (1) did not undergo an application or interview process, (2) were not required to report to any supervisor, (3) decided whether and when to log on to the platform and whether to accept delivery requests, (4) had no set work schedule or delivery quota, (5) chose their own route and mode of transportation, (6) were not required to wear a uniform or carry an identification card or logo, (7) were paid only for completed deliveries, and (8) were not reimbursed for delivery-related expenses. *Id.* at 1338-89. The court acknowledged some of the indicia of employer control cited by the Board—including that Postmates determined the customer's fee and the courier's rate of pay, tracked the deliveries in real time, and handled customer complaints—but characterized those factors as demonstrating merely "incidental control." *Id.* at 1339.

The two dissenting Justices would have affirmed the Board's finding of an employment relationship based on the numerous indicia of employer control cited by the Board. *Id.* at 1339-40. The dissent cited multiple cases relying on similar indicia to affirm Board findings that couriers or delivery drivers were employees, even where the record contained evidence that could support a contrary conclusion. *Id.* at 1340.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S DETERMINATION THAT COURIERS LIKE MR. VEGA WERE EMPLOYEES OF POSTMATES

As the Third Department dissent would have found, substantial evidence supports the Board's determination that Postmates exercised sufficient control over Mr. Vega's delivery work to create an employment relationship. Applying the proper deference to the Board's resolution of this fact-intensive question, this Court should reverse the Third Department's judgment and reinstate the Board's determination.

Whether an employer-employee relationship exists is a question of fact that turns on whether the alleged employer "exercises control over the results produced or the means used to achieve the results." *Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 521 (quoting *Matter of 12 Cornelia St.*, 56 N.Y.2d at 897). Although control over the means is the more important factor to be considered, *Matter of Ted Is Back Corp. (Roberts)*, 64 N.Y.2d 725, 726 (1984), no one factor is determinative. *Matter of Concourse Ophthalmology Assoc., P.C.*, 60 N.Y.2d 734, 736 (1983); *see also Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 521. Rather, "[a]ll aspects" of the arrangement must be examined to determine whether the degree of control and direction reserved to the employer establishes an employment relationship. *Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 692.

The Board's determination of this question of fact must be upheld if it is supported by substantial evidence. *Matter of Rivera*, 69 N.Y.2d at 682; *see also Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 692 (explaining this principle). As this Court recently reiterated, the substantial evidence standard is "a minimal standard," demanding only that a given inference is "reasonable and plausible, not necessarily the most probable." *Matter of Haug v. State Univ. of New York at Potsdam*, 32 N.Y.3d 1044, 1046 (2018) (internal quotations marks, citations, and alterations omitted). Where the record contains evidence that rationally supports an agency's determination, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently. *Id.* That is, where conflicting inferences may be drawn from the evidence, "the duty of weighing the evidence and making the choice rests solely upon the Board." *In re Electrolux Corp.*, 288 N.Y. at 443.

Here, while acknowledging that the Board's determination "will be upheld if supported by substantial evidence," *Matter of Vega*, 162 A.D.3d at 1338, the Third Department failed to apply these settled principles. Instead, it usurped the Board's duty to weigh the evidence by discounting the factors that supported the Board's finding of an employment relationship, focusing instead on the evidence that suggested a contrary result, and thereby substituting its own judgment for that of the Board.[5] In so doing, the court departed from a long line of cases upholding Board findings that couriers or other delivery persons were employees under substantially similar circumstances. Indeed, Postmates exercised even more control than the employers in those cases: Its online platform allowed it to track and control the delivery process in ways that are not feasible for a traditional delivery service.

A. The Record Contains Numerous Well-Recognized Indicia of an Employer-Employee Relationship.

The record before the Board permitted a rational conclusion that Postmates was not simply an "online marketplace" connecting "requesters" with independent "delivery professionals," as Postmates argued (A. 11, 13, 20, 51, 98), but rather a delivery

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[5] The approach of the Third Department majority in this case appears to perpetuate the mistaken view that this Court's decision in *Matter of Yoga Vida NYC, Inc. (Commissioner of Labor)*, 28 N.Y.3d 1013 (2016), implicitly "refin[ed] the substantial evidence standard" in unemployment cases to require "a more detailed, qualitative and arguably less deferential analysis of the various employment factors." *In re Mitchell*, 145 A.D.3d 1404, 1406 & n.1 (3d Dep't 2016) (Egan, J.). But after *Mitchell*, this Court in *Matter of Haug*, 32 N.Y.3d at 1046, confirmed that *Yoga Vida* had not altered the basic principles of the substantial evidence inquiry.

company that depended vitally on the services of its couriers and unilaterally controlled the key aspects of their work. In an open marketplace, requesters and independent delivery professionals would negotiate terms. Postmates, by contrast, precluded its couriers from negotiating their own fees and commissions, establishing their own delivery times, competing with other couriers on price or speed, bidding on jobs outside their geographic area, or hiring subcontractors to complete those jobs, among many other restrictions. Postmates could also modify any aspect of its delivery platform or discharge any of its couriers unilaterally and without advance notice.

Taken together, these and other related factors discussed below demonstrate significant "control over the results produced or over the means used to achieve the results." *Matter of 12 Cornelia St.*, 56 N.Y.2d at 897. More than twenty appellate cases have relied on similar factors to sustain Board findings that couriers or other delivery persons were employees. (*See* Addendum, listing these cases.) Indeed, this Court's decision in the three appeals consolidated in *Matter of Rivera*, 69 N.Y.2d at 679-82, upheld such

Board findings based on a mere subset of the factors present in this case. That decision controls here.

1. Postmates controlled the cost and speed of deliveries.

Postmates unilaterally controlled the two most important aspects of any delivery business: cost and speed. Courts have upheld Board findings of an employment relationship in every courier case in which the employer controlled these two critical aspects. *See, e.g.*, *Matter of Rivera*, 69 N.Y.2d at 679-82; *Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross)*, 59 N.Y.2d 638, 641 (1983); *Matter of Kelly (Frank Gallo, Inc.—Commissioner of Labor)*, 28 A.D.3d 1044, 1045 (3d Dep't 2006), *lv. dismissed*, 7 N.Y.3d 844 (2006); *Matter of Alfisi (BND Messenger Service, Inc.—Hartnett)*, 149 A.D.2d 883, 883 (3d Dep't 1989); *cf. Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 517 (reversing Board finding of independent contractor relationship where employer controlled these aspects of business). And here, Postmates' algorithms and continuous GPS tracking allowed it to exercise even greater control over these aspects of the business.

First, it is undisputed that, as in all three *Rivera* appeals, Postmates unilaterally set the fee charged to the customer and the commission paid to the courier. Postmates' algorithms calculated the fee based exclusively on delivery distance, precluding couriers from modifying the fee to account for the number of stops, the time required to complete the delivery, the travel conditions, or the time of day (e.g., late at night or during rush hour). (A. 71-72.) Postmates' algorithm also dictated the percentage of the customer fee that it permitted couriers to retain as a commission, imposing this percentage on a take-it-or-leave-it basis and precluding any further negotiation. (A. 30-31.) Postmates also handled all aspects of customer billing, from collecting customers' credit card information to charging customers following delivery (A. 30-31, 39-42, 42, 71-72), thus ensuring that couriers could not depart from its rigid fee structure.

If Postmates were truly an online marketplace mediating between customers and delivery professionals, its couriers could set their own fees and compete with other couriers on factors such as price, speed, or reputation. Postmates could then take a small service fee from whatever price the customer and the courier agreed upon—like the online auction company eBay, to which Postmates repeatedly sought to compare itself at the hearing (A. 11, 32-33, 98, 101). But Postmates' platform precluded any such negotiation or competition. Instead, Postmates unilaterally controlled *all* financial aspects of the delivery process, using its outsize bargaining power to extract the maximum utility from its couriers' labor.

Second, as in all three *Rivera* appeals, Postmates unilaterally controlled the other most critical aspect of the delivery process—timing. Although couriers were nominally free to deliver items when they wished (A. 17, 24), Postmates placed significant constraints on that freedom. Most obviously, Postmates marketed itself based on its speedy deliveries, typically within an hour, explaining that speed is the primary reason customers choose their platform over traditional delivery methods. (A. 18-19.) Consistent with this core feature of its business model, Postmates sent customers an estimated time of delivery for each delivery request. Couriers had no input into or ability to modify this estimated time.

Postmates also tracked couriers' location in real time and allowed customers to view that location throughout the entire delivery process. (A. 19, 46-47, 66-67, 82-83.) And Postmates closely monitored customer feedback and unilaterally terminated couriers for, among other things, negative customer reviews. (A. 36, 41, 74, 108.)[6]

Postmates thus gave customers an expectation of virtually immediate delivery, and it enforced that expectation by allowing consumers to track couriers and terminating couriers who received bad customer reviews. This Court has long acknowledged that such indirect compulsion carries the same or even greater weight than a direct command. In *In re Electrolux Corp.*, the Court sustained the Board's finding of an employment relationship in large part because

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[6] Postmates did not explain how many negative reviews it viewed as sufficient to terminate a courier, leaving the Board to draw its own inference from this lack of detail. In concluding that various Postmates couriers were employees under the National Labor Relations Act, the National Labor Relations Board's (NLRB) Office of General Counsel found that Postmates' managers had unfettered discretion to terminate couriers whose average customer rating fell below 4.7 out of 5. *See* Advice Mem., NLRB Case No. 13-CA-163079 (Sept. 19, 2016), at 3, *available at* apps.nlrb.gov/link/document.aspx/09031d45826e0080.

the employer's practice of discharging workers for poor performance "effectively regiment[ed] the activities of its representatives into a pattern desired by respondent of minute and detailed control." 288 N.Y. at 446.

Postmates' control over timing was far more restrictive than in other delivery cases where courts nonetheless sustained the Board's finding of an employment relationship. For example, in the *Fox* appeal consolidated in *Matter of Rivera*, 69 N.Y.2d at 682, the courier had to complete delivery within a 24-hour window imposed by the customer. *See also Matter of Kelly*, 28 A.D.3d at 1045 (noting employer control over deliveries completed within a "reasonable time on the same day"); *cf. Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 517 (reversing Board finding of independent contractor relationship where deliveries had to be "completed on the day received"). Here, by contrast, Postmates' couriers were expected to complete deliveries almost immediately, and this expectation was enforced by continuous GPS tracking. A more invasive form of control is hard to imagine.

To understand the extent of Postmates' control over timing, consider a courier who, consistent with the example Postmates gave at the hearing (A. 67, 76), accepts an assignment to deliver a burrito bowl. Based on Postmates' marketing, the customer expects a speedy delivery and may even have chosen to forego the restaurant's own delivery service for the speed and tracking function offered by Postmates. (A. 18-19.) As soon as the courier accepts the job, Postmates sends the customer an estimated time of delivery—say, a half hour—and allows the customer to track the courier's location continuously. If the courier exercises his supposed freedom to "stop for lunch" or "take a longer route . . . to drop off a sweater" for his child (A. 30), as Postmates suggested at the hearing, the courier will arrive with a cold burrito bowl and undoubtedly receive a negative review. With enough such reviews, Postmates will terminate his employment. (A. 36.)

A courier subject to these conditions has no real discretion as to timing, or even as to delivery route or order of deliveries. At a minimum, a reasonable factfinder could conclude that Postmates' couriers lacked any meaningful discretion with respect to these key delivery parameters.

2. Postmates controlled the assignment of deliveries.

Postmates also exercised significant control over the assignment process—another crucial aspect of any delivery system. As in all three *Rivera* appeals, Postmates' couriers received all the details of their assignments from Postmates, and not from customers directly. (A. 17, 28-30, 64-66, 76.) Postmates told couriers where and when to pick up and drop off requested items, precluding couriers from negotiating these critical delivery parameters with the customer.

Postmates' algorithms allowed it to exercise even more control over the assignment process than in the *Rivera* appeals or other traditional delivery cases. Postmates used a "blind dispatch" system under which it did not provide the most critical information about the delivery—including the pick-up and drop-off locations—until after the job was assigned. (A. 17, 28-30, 64, 76.) As a result, couriers had to decide whether to accept or reject a job without even knowing the nature of the job. By thus controlling the flow of information, Postmates ensured that couriers could not reject delivery jobs that were undesirable or unprofitable, which in turn allowed Postmates to maximize the number of deliveries from which it could extract a fee. *See* Cornell University, *supra*, at 10, 23-26 (explaining how blind dispatch systems decrease worker autonomy). Postmates also offered delivery jobs only to couriers within a narrow geographic area (A. 21-23), limiting couriers' freedom of choice in order to ensure speedier deliveries.

Similarly, Postmates' algorithms unilaterally set the rule for assigning deliveries—i.e., "first come, first served"—rather than allowing couriers to bid on delivery jobs, or allowing customers to choose their courier based on, say, past customer ratings. (A. 25, 38-39, 69.) And Postmates kept track of the rate at which couriers accepted delivery requests. (A. 26.) Given that Postmates retained the right to unilaterally terminate a courier at its discretion, a reasonable factfinder could infer that Postmates gathered this information for the purpose of penalizing couriers whose rate of acceptance was too low.[7]

3. Postmates precluded couriers from delegating assignments or otherwise operating as independent businesses.

Postmates precluded couriers from delegating assignments to subcontractors (A. 49-50, 73). Such authority to delegate is the hallmark of an independent contractor relationship. The ability to delegate was a critical factor in the only three unemployment cases where courts found delivery persons to be independent contractors. *See Matter of Bogart (LaValle Transportation, Inc.—Commissioner of Labor)*, 140 A.D.3d 1217, 1219-20 (3d Dep't 2016); *Matter of Jennings*, 125 A.D.3d at 1153; *Matter of Werner (CBA Industries, Inc.—Hudacs)*, 210 A.D.2d 526, 526-28 (3d Dep't 1994), *lv. denied*, 86 N.Y.2d 702 (1995).

By precluding Postmates' couriers from delegating their assignments, Postmates constrained their ability to determine "the

[7] This inference is consistent with the finding of the NLRB's Office of General Counsel that Postmates terminated couriers based on what individual managers subjectively considered to be "poor performance." NLRB Advice Mem., *supra*, at 19-20.

means used to achieve the results." *Matter of Ted Is Back Corp.*, 64 N.Y.2d at 726. Independent contractors are commonly understood to be professionals with the judgment and resources to "choose the method for accomplishing" the tasks entrusted to them. Black's Law Dictionary, "Independent Contractor" (11th ed. 2019). This includes the ability to hire, train, and delegate all or part of the work to subcontractors whom the contractor believes, in her independent business judgment, to be qualified and trustworthy to perform the delegated tasks.

In the context of a delivery service, the right to delegate implies the right of an independent contractor to hire a network of couriers who could perform deliveries on the contractor's behalf in different locations and during different times of day. With the proper vetting and training, the contractor could build a team of couriers whose deliveries are generally faster and more reliable than those of competitors. And with the proper marketing, the contractor could leverage these qualities to attract more customers. In short, like a true independent business person, the contractor would possess "the opportunity for profit from sound management."

United States v. Silk, 331 U.S. 704, 719 (1947). Conversely, the contractor would bear all the legal and business risks associated with entrusting work to others, confirming that the contractor is running an independent business rather than working for another company.

But Postmates' couriers enjoyed no such freedoms. Postmates did its own vetting and training of couriers (A. 15, 36-37, 55-56, 68), and precluded couriers from delegating any delivery jobs or even employing an occasional substitute (A. 49, 73). And Postmates enforced this rule by sending customers a photograph of their assigned courier, ensuring that the customer would leave a negative review or simply refuse to accept delivery if another courier showed up. (A. 49, 73.)

Indeed, Postmates admitted that its couriers lacked the ability to operate their own delivery platform and were thus wholly dependent on Postmates' platform to monetize their labor. (A. 97 [acknowledging that couriers lacked "the time or skills to make a Website" or "to figure out how to get connected to customers"]). And Postmates further limited couriers' ability to develop an independent business by precluding them from competing with other couriers on price, speed, or reputation (A. 17, 28-30, 64-66, 76); bidding on delivery jobs outside their narrow geographic area (A. 21-23); or accepting payment from customers for services not requested through Postmates' platform (A. 86-87).

These factors permit—if they do not require—a rational conclusion that Postmates' couriers were not independent contractors running their own businesses, but rather employees providing unskilled labor for Postmates' delivery business.

4. Postmates handled all aspects of customer relations.

Postmates also controlled all aspects of customer relations—a form of employer control recognized in *Rivera* and other cases. Postmates handled all marketing and customer acquisition, demonstrating that the customers obtained were customers of Postmates rather than any individual courier. *See Matter of Rivera*, 69 N.Y.2d at 682; *Matter of Alfisi*, 149 A.D.2d at 883. Postmates also tracked customer feedback and handled all customer complaints, communicating to the public that Postmates retained ultimate responsibility for the quality of its deliveries. (A. 32, 41, 46-47, 50, 67.) *See Matter of Garbowski (Dynamex Operations East, Inc.—Commissioner of Labor)*, 136 A.D.3d 1079, 1080 (3d Dep't 2016) (sustaining Board finding that courier was employee where employer handled customer feedback); *Matter of Voisin (Dynamex Operations East, Inc.—Commissioner of Labor),* 134 A.D.3d 1186, 1187 (3d Dep't 2015) (same); *Matter of Mitchum (Medifleet, Inc.—Commissioner of Labor),* 133 A.D.3d 1156, 1157 (3d Dep't 2015) (same); *Matter of Youngman (RB Humphreys Inc.—Commissioner of Labor)*, 126 A.D.3d 1225, 1226 (3d Dep't 2015) (same).

Similarly, Postmates worked directly with customers to resolve issues relating to lost and damaged deliveries, explaining that it is responsible in such situations. (A. 61-62.) *See Matter of Di Martino*, 59 N.Y.2d at 641 (sustaining Board finding that courier was employee where employer assumed responsibility for incorrect deliveries); *Matter of Youngman*, 126 A.D.3d at 1226 (same); *Matter of Kelly*, 28 A.D.3d at 1045; *cf. Matter of Jennings*, 125 A.D.3d at 1153 (holding that a delivery driver who bore sole responsibility for lost or damaged items was an independent contractor).

Postmates also assumed the risk that customers would fail to pay for delivered items. (A45-46.) Courts have long found this fact probative of an employment relationship because employees, unlike independent contractors, do not typically assume business risks, including the risk of customer nonpayment, and instead are paid for their labor regardless of whether that labor ultimately generates revenue. *See Matter of Rivera*, 69 N.Y.2d at 682; *Matter of Gill (Strategic Delivery Solutions LLC—Commissioner of Labor),* 134 A.D.3d 1362, 1363-64 (3d Dep't 2015); *Matter of Voisin,* 134 A.D.3d at 1187; *Matter of Watson (Partsfleet Inc.—Commissioner of Labor)*, 127 A.D.3d 1461, 1462 (3d Dep't 2015); *Matter of Wilder (RB Humphreys Inc.—Commissioner of Labor)*, 133 A.D.3d 1073 (3d Dep't 2015); *Matter of Alfisi*, 149 A.D.2d at 883.

5. Postmates could unilaterally alter any aspect of its delivery platform.

As noted above, this Court has emphasized that "control over the means is the more important factor to be considered" in assessing the existence of an employment relationship. *Matter of Ted Is Back Corp.*, 64 N.Y.2d at 726. Here, a critical means by which couriers carried out their delivery jobs was Postmates' online platform. That platform dictated virtually every aspect of the delivery process, from the assignment and timing of deliveries to the fees assessed and the collection of payment.

There is no dispute that Postmates exercised complete and unilateral control over its platform. It therefore had the ability to modify any aspect of its delivery service without notice to or input from its couriers. For example, Postmates could decide tomorrow that it will guarantee all deliveries within 20 minutes, terminate all couriers who receive a single bad review, give priority in the assignment of deliveries to those couriers with the fastest delivery times, require its couriers to wear uniforms or carry liability insurance, or cut couriers' commissions in half.

In short, with the proverbial click of a button, Postmates could impose on couriers, on a take-it-or-leave-it basis, virtually any work rule it desires. This absolute right of control demonstrates the existence of an employer-employee relationship, regardless of whether Postmates actually exercised the full extent of its control. *See In re Morton*, 284 N.Y. 167, 172-73 (1940) (explaining that "[t]he test is the existence of a *right* of control over the agent") (emphasis added); *see also MNORX, Inc. v. Ross*, 46 N.Y.2d 985, 988 (1979) (Jones, J., dissenting) (acknowledging majority's premise "that a finding of employer-employee relationship may properly be predicated on a reserved right to control, even though there be no evidence that such right was in fact ever exercised by the 'employer'").

6. Postmates possessed the ability to unilaterally discharge couriers.

Postmates also possessed the ability to discharge a courier at any time, without advance notice and without giving the courier an opportunity to contest their removal from the platform. (A. 36, 74, 108.) This Court has long recognized that a unilateral power of discharge is probative of an employer-employee relationship because it reflects the employer's ability to enforce its desired method of performing the work. *See, e.g.*, *Matter of Rivera*, 69 N.Y.2d at 682; *In re Electrolux Corp.*, 288 N.Y. at 446.

7. The record contains additional well-recognized indicia of employer control.

Under this Court's decision in *Rivera*, the numerous indicia of employer control set forth above are more than sufficient to support the Board's determination that Mr. Vega was an employee. But the record here contains at least three additional indicia of employer control that courts have cited in sustaining Board findings that delivery persons were employees.

First, Postmates screened and trained all of its couriers, refuting the claim that it operated as a mere "middleman." (A. 20.) Postmates conducted a criminal background check on all new couriers and assured customers that it had thus vetted its couriers. (A. 15, 36-37). *See Matter of Watson*, 127 A.D.3d at 1462 (upholding Board finding of employment relationship where employer screened prospective drivers by checking their motor-vehicle records). Postmates also held an orientation session where it taught couriers how to use its online platform and instructed them on the use of its PEX card (A. 55-56, 68). *See id.* at 1462 (upholding Board finding of employment relationship where employer "trained [the delivery driver] on the operation of a scanner used to schedule and track customer deliveries"); *Matter of Mitchum,* 133 A.D.3d at 1157 (same, where employer provided "orientation and training" to delivery drivers). Because couriers had to handle all delivery requests through Postmates' online platform, this training reflected a form of direct control over the "means used to achieve the results." *Matter of 12 Cornelia St.*, 56 N.Y.2d at 897. Indeed, Postmates acknowledged that couriers "would have no way of knowing how to utilize [the] app" without attending the training session. (A. 68.)

Second, Postmates sought to find a back-up courier when the courier originally assigned became unavailable. (A. 24-25, 48-49, 69.) This fact provides evidence of an employment relationship because, unlike independent contractors, employees are not typically responsible for finding their own substitutes. *See Matter of Werner*, 210 A.D.2d at 527 (delivery person responsible for finding his own replacement was an independent contractor). The fact that Postmates undertook to find substitutes also confirms that it did not act as a mere marketplace or middleman, but rather as a delivery company responsible for ensuring that customers receive prompt delivery.

And third, Postmates required couriers to report via its online platform when they picked up an item and again when they delivered it. (A. 41, 64.) Courts have repeatedly held that such reporting requirements—which reflect direct control over the manner of performing the work—support Board findings that delivery persons are employees. *See Matter of Crystal (Medical Delivery Servs.—Commissioner of Labor)*, 150 A.D.3d 1595 (3d Dep't 2017); *Matter of Gill*, 134 A.D.3d at 1363-64; *Matter of Mitchum*, 133 A.D.3d at 1157; *Matter of Watson*, 127 A.D.3d at 1462; *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of Varrecchia (Wade Rusco, Inc.—Sweeney)*, 234 A.D.2d 826, 826 (3d Dep't 1996); *Matter of McKenna (Can Am Rapid Courier, Inc.—Sweeney),* 233 A.D.2d 704, 704 (3d Dep't 1996)*, lv. denied,* 89 N.Y.2d 810 (1997); *Matter of CDK Delivery Service, Inc. (Hartnett)*, 151 A.D.2d 932, 932 (3d Dep't 1989).

Taken together, these indicia provide ample evidence to support a rational finding that Postmates exercised predominant control over both the means and results of couriers' delivery work.

B. The Factors Cited by Postmates Do Not Render the Board's Decision Irrational.

To be sure, the record also contains some indicia of courier independence. But these indicia do not render irrational the Board's finding of an employer-employee relationship based on all the countervailing evidence. As this Court has repeatedly explained, where the record as a whole contains substantial evidence supporting the Board's determination of an employment relationship, the determination must be upheld, even if the record also contains evidence that would support a contrary conclusion. *Matter of Rivera*, 69 N.Y.2d at 682; *Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 692. Here, the Board's determination is amply supported by the numerous indicia of employer control cited above.

Postmates relies heavily on couriers' purported freedoms to (1) determine their own work schedule—i.e., when to log on to the platform and what delivery jobs to accept; (2) choose their own delivery method and route; and (3) work for other companies. Postmates argues that, collectively, these factors compel the finding of an independent contractor relationship as a matter of law—i.e., that *no* reasonable factfinder could find an employment relationship where these factors are present. In fact, however, Postmates constrained couriers' freedoms in important respects. And this Court has in any event already rejected the same extreme position, a position that would categorically deprive almost all "gig workers" and many other contingent and temporary workers of unemployment benefits. It should do so again here.

1. Postmates constrained couriers' purported freedoms.

As an initial matter, the record shows that Postmates imposed three important constraints on couriers' purported freedoms.

First, Postmates constrained couriers' ability to meaningfully exercise discretion to accept or reject delivery jobs by withholding the details of such jobs until *after* assignment to particular couriers. (A. 17, 28-30, 64, 76.) As explained *supra* at 35-36, this type of "blind dispatch" system limits couriers' autonomy by forcing them to accept deliveries based on incomplete information and to take on low-value deliveries they might have otherwise rejected. Postmates also precluded couriers from accepting delivery jobs outside their narrow geographic area or from bidding on jobs based on price or delivery time. (A. 21-23.) The couriers' freedom was thus limited to accepting or rejecting a narrow subset of delivery jobs about which they knew little and whose main parameters were dictated by Postmates.[8]

Second, Postmates constrained couriers' freedom to choose a particular delivery route by giving customers an expectation of nearly immediate delivery and allowing customers to track their courier's location in real time, creating a significant disincentive for couriers to take an indirect route. *See supra* at 31-35. And because couriers could accept deliveries only within their narrow geographic area, any discretion they retained to choose their route—e.g., to take Fifth Avenue instead of Sixth Avenue—was minimal. Similarly, as to mode of transportation, Postmates' adhesion contract required couriers to select a particular mode of transportation in advance (i.e., walking, biking, or car), limiting

[8] Couriers' nominal freedom to "work when they want" was further undermined by the reality that on-demand platforms like Postmates create "an excess supply of labor, resulting in significant underemployment for app workers and downward pressure on their earnings." As a result, their scheduling flexibility "is largely a false sense of freedom, as platform workers need to be on-call and available when demand for their services will surge." Cornell University, *supra*, at 27.

their ability to vary their mode of transportation from delivery to delivery. (A. 117.)

Third, Postmates constrained couriers' ability to work for other companies by advising them not to accept payment from customers for services not offered through Postmates' platform. (A. 86-87.) Postmates' rigorous timing constraints reinforced this restriction: A courier subject to a narrow delivery window and constant GPS tracking could not feasibly perform other delivery work while completing a delivery for Postmates.

2. This Court in *Rivera* affirmed the Board's finding of an employment relationship despite the presence of the same freedoms Postmates' couriers enjoyed.

In any event, this Court has already rejected the blanket rule Postmates advocates. In the three appeals consolidated in *Matter of Rivera*, 69 N.Y.2d at 682—*Rivera*, *Ross*, and *Fox*—this Court affirmed the Board's determination that couriers were employees, even though those appeals involved each of the three purported freedoms on which Postmates relies, among others. Those freedoms mainly reflect the couriers' ability to decide *when* to work, but say little about the control exercised over *how* they work.

In rejecting the employers' reliance on such freedoms, this Court recognized that workers who lack a fixed working schedule or work for multiple employers may nonetheless remain subject to many other forms of employer control, including those present here. This holding has even more force in today's economy, where the traditional nine-to-five job is on the wane and new forms of fragmented and temporary work, like the "gig economy," are on the rise. *See* Cornell University, *supra*, at 6 (citing estimates that contingent or on-demand work accounts for up to a third of the American workforce).[9]

Rivera involved a courier who worked for a package delivery service called State Line. Like Postmates' couriers, the courier in

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[9] In recent years, there has been a steady trend toward working arrangements in which employees have scheduling flexibility. *See* Human Resource Management, *National Study of Employers* (2017), *available at* https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/National-Study-of-Employers.aspx. There has likewise been an increase in the number of employees who work for more than one employer; such employees now represent over 8% of the American workforce. *See* Julia Beckhusen, "About 13M U.S. Workers Have More Than One Job," U.S. Census Bureau (June 18, 2019), *available at* https://www.census.gov/library/stories/2019/06/about-thirteen-million-united-states-workers-have-more-than-one-job.html.

Rivera "committed himself to no particular amount of services"; rather, "when he wished to make himself available, he telephoned State Line's dispatcher and accepted such work as he desired from that made available by the dispatcher." *Matter of Rivera*, 120 A.D.2d at 853. Moreover, the courier "was free to choose any route to perform the services" and "was not prohibited from carrying on his business with one or more additional companies while performing services for State Line." *Id.* He paid his own expenses and received no fringe benefits. *Id.* And unlike here, he was "free to hire helpers without notification to the company." *Id.*

Despite these factors, this Court annulled the Third Department's contrary ruling and affirmed the Board's finding that the *Rivera* courier was an employee in light of the facts that, like those here, provided indicia of an employment relationship. 69 N.Y.2d at 680-82. As explained in the Third Department's two-Justice dissent, the employer unilaterally set the courier's rate of pay, separately billed the customer, assumed the risk of customer nonpayment, and had couriers complete bills of lading on employer letterhead. 120 A.D.2d at 854 (Yesawich, J., dissenting). Moreover, the employer told the courier when and where to make pickups and deliveries, and the courier often had to comply with a time limitation for deliveries imposed by the customer. 120 A.D.2d at 853.

In *Ross*, this Court affirmed a Third Department ruling sustaining a Board finding that drivers for a similar delivery service were employees where the drivers had even more freedom. The drivers in *Ross* "had no schedule or specific route to follow and no directions were given to them as to method or route of delivery." *Matter of Ross*, 119 A.D.2d at 857-58 (Mikoll, J., dissenting). Moreover, the drivers could turn down assignments at their option, bore their own expenses, carried their own business cards, could engage substitutes, and could work for competitors even when working for the employer. *Id.* Nonetheless, this Court upheld the Board's finding that the delivery drivers were employees based on evidence that (1) the employer unilaterally set the customer's fee and the courier's commission; (2) couriers received the details of their assignments from the employer's dispatchers upon calling in to seek work; and (3) the clients were clients of the employer and not the individual driver. *Matter of Rivera*, 69 N.Y.2d at 682.

And in *Fox*, this Court reversed the Third Department and affirmed the Board's finding that delivery drivers for a photographic film pickup and delivery service were employees, despite evidence that the drivers "set up [their] own schedule of pickups and delivers," "accepted or declined to take [deliveries] at their option," were not required to wear uniforms or other employer insignia, and were free to work for competitors. *Matter of Fox*, 119 A.D.2d at 869. Indeed, in *Fox*, unlike here, drivers could delegate work to substitutes, and they individually negotiated their compensation, received no training, made their own delivery arrangements directly with customers, and handled customer complaints. *Id.* at 869-870. Despite these factors, this Court held that the Board's finding of an employment relationship was supported by evidence that (1) the employer provided delivery drivers with the names of customer outlets; (2) drivers were required to comply with a 24-hour guaranteed delivery window imposed by customer stores; and (3) the employer named its drivers on its workers' compensation policy as a precautionary measure. *Matter or Rivera*, 69 N.Y.2d at 680-82.

The *Rivera* appeals thus involved all of the key indicia of courier independence that Postmates relied upon below, as well as additional indicia of independence not present here. This Court nonetheless upheld the Board's determinations that the couriers in those appeals were employees, not independent contractors. For example, unlike here, the couriers in all three appeals could delegate their assignments. Unlike here, the *Ross* couriers had business cards "holding themselves out to the public as self-employed messenger service drivers." *Matter of Ross*, 119 A.D.2d at 858 (Mikoll, J., dissenting). Unlike here, the couriers in *Fox* could individually negotiate their rates of pay and handled customer complaints directly. And the 24-hour window within which *Fox* couriers had to complete deliveries was far less restrictive than the expectation of nearly immediate delivery on which Postmates' business model is predicated, as explained *supra* at 31-35.

3. Many other cases are in accord.

Many other appellate cases have affirmed Board findings that delivery persons were employees, notwithstanding evidence that such persons:

- determined their availability for work, *see Matter of Voisin,* 134 A.D.3d at 1187; *Matter of Scott (CR England Inc.—Commissioner of Labor)*, 133 A.D.3d 935, 938-939 (3d Dep't 2015); *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of CDK Delivery Service*, 151 A.D.2d at 932; *Matter of Alfisi*, 149 A.D.2d at 883;

- could accept or reject assignments at their option, *see Matter of Wilder*, 133 A.D.3d at 1073; *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of Caballero (Reynolds Transport, Inc.—Hudacs)*, 184 A.D.2d 984, 984 (3d Dep't 1992); *Matter of Alfisi*, 149 A.D.2d at 883; *Matter of CDK Delivery Service*, 151 A.D.2d at 932;

- could choose their own delivery route, *see Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Wells* appeal); *Matter of Scott*, 133 A.D.3d at 938-939; *Matter of Gray (Glens Falls Newspapers—Roberts)*, 134 A.D.2d 791, 791 (3d Dep't 1987);

- were permitted to work for other companies, *see Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Wells* appeal); *Matter of Watson*, 127 A.D.3d at 1462; *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of Gray*, 134 A.D.2d at 791; *Matter of Caballero*, 184 A.D.2d at 984; *Matter of Alfisi*, 149 A.D.2d at 883;

- were paid on a per-delivery basis, *see Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Wells* appeal); *Matter of Kelly*, 28 A.D.3d at 1045;

- did not receive fringe benefits or expense reimbursements, *see Matter of Kelly*, 28 A.D.3d at 1045; *Matter of CDK Delivery Service*, 151 A.D.2d at 932;
- signed a contract specifying that they were independent contractors, *see Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Di Martino* and *Wells* appeals); *Matter of Scott*, 133 A.D.3d at 938-939; *Matter of Kelly*, 28 A.D.3d at 1045; and
- were not required to wear uniforms or bear other employer insignia, *see Matter of CDK Delivery Service*, 151 A.D.2d at 932.

Many of these factors merely reflect the respective employers' disproportionate bargaining power and ability to dictate the terms of the employment relationship on a unilateral basis. For example, the fact that an employer declines to provide employees with any fringe benefits, or forces employees to sign an adhesion contract stating that they are independent contractors, as Postmates did here, simply confirms the extent of the employer's economic leverage over its workers. This Court has long held that such formalistic factors "may not preclude an examination to determine whether *the actual relationship* is such as to bring the parties within the scope of the law." *In re Morton*, 284 N.Y. at 175 (emphasis added).

By contrast, there are only three cases in which courts have annulled Board findings that couriers or other delivery persons were employees—specifically, the Third Department's decisions in *Bogart*, *Werner*, and *Jennings*. (Addendum at 3.) Even assuming that these cases can be reconciled with this Court's decision in the *Rivera* appeals—and the nearly twenty Appellate Division cases that accord with that decision—all three of these cases are readily distinguishable from the present case. In *Bogart* and *Werner*, the delivery drivers could negotiate higher rates of pay and were free to delegate jobs to other drivers, and the drivers in *Bogart* also carried their own independent business cards. *Matter of Bogart*, 140 A.D.3d at 1219-20; *Matter of Werner*, 210 A.D.2d at 526-28. In *Jennings*, the drivers could similarly negotiate their own rates of pay, and they also contacted customers directly to establish delivery times and assumed ultimate liability for lost or damaged luggage. *See Matter of Jennings*, 125 A.D.3d at 1153. None of those circumstances are present here.

Finally, contrary to Postmates' contention below, this Court's decisions in *Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d at 1013-16, and *Matter of Ted is Back Corp.*, 64 N.Y.2d 725 (1984), do not support a contrary result. Those cases involved jobs—yoga teacher and sales agent, respectively—that differ from courier work in ways that significantly alter the analysis. Fees and timing, for example, are a much less significant part of the yoga and sales businesses than they are of the delivery business. Moreover, unlike yoga teachers or salespeople, Postmates' couriers perform unskilled labor that involves little to no discretion. The threshold for establishing their lack of independence is correspondingly lower. *See* Restatement (Second) of Agency § 220, cmt. i (under the common-law test, "[u]nskilled labor is usually performed by those customarily regarded as servants [i.e., employees], and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price").

In sum, the record as a whole contains substantial, indeed ample, evidence to support the Board's determination that Mr. Vega was an employee of Postmates rather than an independent contractor operating his own businesses. The Third

Department's judgment should therefore be reversed and the Board's determination reinstated.

C. The Remedial Purpose of the Unemployment Insurance Law Supports the Board's Decision.

It is well settled that remedial legislation should be construed liberally to effectuate its purpose. *See Matter of Scanlan v. Buffalo Pub. Sch. Sys.*, 90 N.Y.2d 662, 676 (1997). Because the unemployment insurance law is "a remedial statute designed to protect the wage earner from the hazards of unemployment," *Matter of Ferrara*, 10 N.Y.2d at 8, close cases should be resolved in favor of recognizing an employment relationship to give full effect to this remedial purpose. Here, the statute's broad remedial purpose supports the Board's finding that Mr. Vega was an employee eligible to receive unemployment benefits.

Postmates' couriers suffer from precisely the type of "[e]conomic instability" that the unemployment insurance law was intended to alleviate. Labor Law § 501. A recent study conducted by Cornell University found that on-demand platform workers like Postmates' couriers "[e]xperience low and unstable earnings" and rely "on second or third jobs, other family members' incomes, and various types of public aid" to survive. Cornell University, *supra*, at 3. Of the Postmates couriers surveyed, none could cover living expenses with their app work; as a result, 50% held other jobs and 38% resorted to other forms of income support. *Id.* at 55. Many gig workers also belong to vulnerable populations excluded from the traditional labor market. And because of unpredictable pay and the lack of workplace benefits and protections, they have "very high turnover rates, with estimates ranging from 50 to 100% annually." *Id.* at 6.

In sum, not only is the Board's determination amply supported by evidence that Postmates unilaterally controlled its couriers' delivery work, but also that determination advances the broad remedial goal of the unemployment insurance law to assist workers unemployed through no fault of their own. The Court should uphold the Board's determination for this additional reason.

D. The Existence of Divergent Views About the Employment Status of Gig Workers Heightens the Importance of Judicial Deference.

As courts have long recognized, "[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 121 (1944). The advent of new working arrangements, such as the "gig economy," have only increased the possibility of divergent conclusions. *See, e.g.*, Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 Harv. L. & Pol'y Rev. 479 (2016) (describing conflicting views as to employment status of gig workers). The fact that reasonable minds can differ on this fact-intensive issue lends still greater importance to the policy of deference that courts apply in reviewing agency determinations.

Whether a worker is classified as an employee or independent contractor determines the worker's coverage under a host of labor protections, including unemployment insurance, workers compensation, family and medical leave, wage and hour protection, workplace health and safety, pension security, anti-discrimination statutes, and statutes protecting the right to organize and bargain collectively, among other things. Under this mosaic of laws, "an individual may be considered an employee for some purposes but an independent contractor for others." 19 Williston on Contracts § 54:2 (4th ed.). This can happen in either of two ways. First, the Legislature can deem certain workers to be employees or independent contractors for the purpose of specified labor laws but not others, as explained *supra* at 7-8. And second, different agencies or factfinders can weigh the evidence differently and draw different inferences from the same or similar facts. Indeed, different agencies applying the same common-law test may develop a practice over time of emphasizing certain factors more than others, creating a body of administrative precedent that can lead agencies to reach different outcomes in similar cases.

Postmates' operation provides an example of such divergent outcomes. In the decision under review, the Board found that a Postmates courier was an employee for unemployment insurance purposes. The NLRB's Office of General Counsel likewise concluded under the same common-law test that various Postmates couriers in Chicago were employees for purposes of the National Labor Relations Act (which protects, among other things, the right to unionize). *See* NLRB Advice Mem., *supra*. By contrast, the New York Workers' Compensation Board recently found on the record created in that case that a Postmates courier (not Mr. Vega) was an independent contractor for workers' compensation purposes after weighing many of the same factors that were considered here. *See Postmates Inc.*, N.Y. Work. Comp. Bd. Case No. G191 7469, 2019 WL 496350 (Jan. 31, 2019). (The courier in that case did not seek judicial review of the Workers' Compensation Board's decision.)

The possibility of divergent outcomes is part and parcel of an administrative system under which different agencies are authorized to determine a worker's employment status for the purpose of specific statutory protections based on the specific administrative records before them. The fact that agencies may reasonably reach different conclusions in resolving this fact-intensive question is a natural consequence of the deference that courts accord to each agency's determination. As explained above, under New York's longstanding administrative law, an agency's factfinding is upheld if it is supported by substantial evidence—that is, if it has a rational basis in the record—even if a contrary result might also be reasonable. *Matter of Haug*, 32 N.Y.3d at 1046. This deferential standard acknowledges not only that "[o]ften there is substantial evidence on both sides of an issue disputed before an administrative agency," *id.* (quoting *Matter of Marine Holdings, LLC v. New York City Commn. on Human Rights*, 31 N.Y.3d 1045, 1047 [2018]), but also that different agencies are entrusted with different policy goals and must generally follow their own precedent, regardless of how other agencies may have ruled in similar cases, *Matter of Charles A. Field Delivery Serv.,* 66 N.Y.2d at 517.

If the Legislature disagrees with the way an agency exercises its discretion for some class of cases, or believes that the policies entrusted to it would be better served by a bright-line rule, the Legislature may enact legislation to address the issue, as it has done repeatedly in both limiting and expanding the definition of employment as applied to specific industries. *See supra* 7-8. Gig workers like Mr. Vega, however, are currently subject to no such legislation. The Board thus retains discretion to determine under the common-law test whether such workers are employees eligible to receive unemployment benefits, regardless of how other agencies or factfinders may come out in other cases involving different statutory schemes or different evidentiary records.

Postmates, by contrast, advocates a per se rule that would effectively eliminate the discretion reserved to the Board and other agencies to determine whether gig workers like Mr. Vega are employees. Postmates seeks a ruling that no rational agency or factfinder could conclude that such workers are employees, notwithstanding that both a state and federal agency have already reached precisely that conclusion. This result is directly at odds with the deference accorded to administrative factfinders under settled New York law. If Postmates seeks a bright-line rule that all of its couriers—and, by extension, all workers in the gig economy—are independent contractors for all purposes, its remedy is with the Legislature, not the courts.

CONCLUSION

The Third Department's judgment should be reversed and the Board's determination reinstated.

Dated: Albany, New York
July 15, 2019

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Joseph M. Spadola, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 11,990 words, which complies with the limitations stated in § 500.13(c)(1).

JOSEPH M. SPADOLA
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ADDENDUM

A. Cases Affirming Board Findings That Couriers or Delivery Drivers Were Employees

Matter of Rivera (*State Line Delivery Serv., Inc.—Roberts*), 69 N.Y.2d 679 (1986), *cert. denied*, 481 U.S. 1049 (1987),

> *reversing Matter of Rivera (State Line Delivery Service, Inc.—Ross)*, 120 A.D.2d 852 (3d Dep't 1986),
>
> *affirming Matter of Ross (Majestic Messenger Service, Inc.—Roberts)*, 119 A.D.2d 857 (3d Dep't 1986),
>
> *reversing Matter of Fox (Whalen's Service—Roberts)*, 119 A.D.2d 868 (3d Dep't 1986);

Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross), 59 N.Y.2d 638 (1983),

> *affirming Matter of Di Martino (Buffalo Courier Express Co.—Ross)*, 89 A.D.2d 829 (3d Dep't 1982),
>
> *affirming Matter of Wells (Utica Observer-Disptach & Utica Daily Press, Inc.—Roberts)*, 87 A.D.2d 960 (3d Dep't 1982);

Matter of Crystal (Medical Delivery Servs.—Commissioner of Labor), 150 A.D.3d 1595 (3d Dep't 2017);

Matter of Garbowski (Dynamex Operations East, Inc.—Commissioner of Labor), 136 A.D.3d 1079 (3d Dep't 2016);

Matter of Gill (Strategic Delivery Solutions LLC—Commissioner of Labor), 134 A.D.3d 1362 (3d Dep't 2015);

Matter of Voisin (Dynamex Operations East, Inc.—Commissioner of Labor), 134 A.D.3d 1186 (3d Dep't 2015);

Matter of Mitchum (Medifleet, Inc.—Commissioner of Labor), 133 A.D.3d 1156 (3d Dep't 2015);

Matter of Wilder (RB Humphreys Inc.—Commissioner of Labor), 133 A.D.3d 1073 (3d Dep't 2015);

Matter of Scott (CR England Inc.—Commissioner of Labor), 133 A.D.3d 935 (3d Dep't 2015);

Matter of Watson (Partsfleet Inc.—Commissioner of Labor), 127 A.D.3d 1461 (3d Dep't 2015);

Matter of Youngman (RB Humphreys Inc.—Commissioner of Labor), 126 A.D.3d 1225 (3d Dep't 2015);

Matter of Kelly (Frank Gallo, Inc.—Commissioner of Labor), 28 A.D.3d 1044 (3d Dep't 2006), *lv. dismissed*, 7 N.Y.3d 844 (2006);

Matter of Varrecchia (Wade Rusco, Inc.—Sweeney), 234 A.D.2d 826 (3d Dep't 1996);

Matter of McKenna (Can Am Rapid Courier, Inc.—Sweeney), 233 A.D.2d 704 (3d Dep't 1996)*, lv. denied,* 89 N.Y.2d 810 (1997);

Matter of Caballero (Reynolds Transport, Inc.—Hudacs), 184 A.D.2d 984 (3d Dep't 1992);

Matter of Alfisi (BND Messenger Service, Inc.—Hartnett), 149 A.D.2d 883 (3d Dep't 1989);

Matter of CDK Delivery Service, Inc. (Hartnett), 151 A.D.2d 932 (3d Dep't 1989);

Matter of Gray (Glens Falls Newspapers—Roberts), 134 A.D.2d 791 (3d Dep't 1987);

Matter of Webley (Graphic Transmissions, Inc.—Roberts), 133 A.D.2d 885 (3d Dep't 1987).

B. Cases Reversing Board Findings That Couriers or Delivery Drivers Were Employees

Matter of Bogart (LaValle Transportation, Inc.—Commissioner of Labor), 140 A.D.3d 1217 (3d Dep't 2016);

Matter of Jennings (American Delivery Solution, Inc.—Commissioner of Labor), 125 A.D.3d 1152 (3d Dep't 2015);

Matter of Werner (CBA Industries, Inc.—Hudacs), 210 A.D.2d 526 (3d Dep't 1994), *lv. denied*, 86 N.Y.2d 702 (1995).

C. Other Cases

Matter of Charles A. Field Delivery Service, Inc. (Roberts), 66 N.Y.2d 516 (1985) (reversing Board finding that delivery drivers were independent contractors, because facts were similar to cases in which Court affirmed Board finding that delivery drivers were employees).

To be Argued by:
DAVID M. COOPER
(Time Requested: 15 Minutes)

APL-2018-00143
NYS Unemployment Insurance Appeal Board Nos. 588563, 588564
Third Department No. 525233

Court of Appeals

of the

State of New York

LUIS A. VEGA,

Respondent,

– against –

POSTMATES, INC.,

Respondent,

– and –

COMMISSIONER OF LABOR,

Appellant.

BRIEF FOR RESPONDENT POSTMATES, INC.

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October 4, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f), Postmates Inc. declares that it has no parent corporation. Postmates Inc. has four subsidiary companies wholly owned by Postmates: Curated.by Inc., a Delaware corporation, which in turn has one subsidiary, Kuwalu Limited (an English and Welsh corporation); Postmates Ltd. (a Canadian corporation); Postmates Servicios, S. de R.L. de C.V. (a Mexican corporation); and Postmates, S. de R.L. de C.V. (a Mexican corporation).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutory Authorities

Additional Authorities

INTRODUCTION

The Third Department correctly determined that Claimant Luis Vega and similarly situated delivery providers ("Delivery Providers") are independent contractors based on the undisputed facts that Delivery Providers: (1) exercise unfettered discretion to accept or reject any delivery opportunities presented to them by Postmates, (2) enjoy complete freedom to work for competitors, and (3) decide if, when, and how they perform the deliveries they choose to complete. This Court and the Appellate Division have consistently reversed the Unemployment Insurance Appeal Board ("Board") and held claimants to be independent contractors based on *exactly* these same factors. Recently, in *Matter of Yoga Vida NYC, Inc. (Comm'r of Labor)*, 28 N.Y.3d 1013 (2016), this Court held yoga instructors were independent contractors where they made their own schedules and were not on payroll. Here, Postmates gives Delivery Providers all the freedoms this Court found supported independent-contractor status in *Yoga Vida*. In fact, Postmates exerts far *less* control than the business in *Yoga Vida*, which could terminate a working relationship with instructors if they advertised classes with competitors and which limited how and when yoga instructors could offer classes. Given that this case presents the exact same question addressed by this Court in *Yoga Vida,* which held that even greater control than Postmates exercises here did not support employee status, *Yoga Vida* requires affirmance of the Third Department in this case.

The Board, however, ignored *Yoga Vida* entirely. Instead, to support its decision, the Board provided a laundry list of supposed facts that this Court and the Third Department have repeatedly held are irrelevant or, at most, incidental to employment status. Indeed, none of the facts on which the Board relied speak directly to the applicable "control" test for worker classification. As the Third Department correctly found, the undisputed facts establish that Postmates does not control if, when, or how Delivery Providers perform deliveries.

In arguing for this Court to overturn the Third Department decision, the Commissioner repeatedly asks for deference to the Board. But rather than defend the factors relied upon by the Board, the Commissioner advances numerous supposed facts that the Board did not find and rationales that the Board did not adopt. In particular, the Commissioner's argument relies almost entirely on the idea—never mentioned by the Board and unsupported by the record—that Postmates controls the timing of deliveries. However, as a matter of well-established law, an agency decision cannot be affirmed based on reasons the agency never articulated.

In short, based on the undisputed evidence on the record, the Third Department correctly concluded that the Board performed the wrong analysis and erred as a matter of law in reversing the administrative law judge's finding of an independent contractor relationship. Under the correct analysis, this case falls well within the precedents establishing that there is no substantial evidence of control. This Court and the

Appellate Division have repeatedly held that delivery persons can be independent contractors. And if delivery persons are ever independent contractors, they are here, where they can turn down delivery opportunities at will, work for competitors *at the same time* they are using the Postmates app, and complete the deliveries they choose to undertake according to the manner and means they desire. This Court should affirm the Third Department's same conclusion based on well-established law.

In the alternative, regardless of whether there is substantial evidence to support the Board's decision (and there is not), the Board's decision still must be vacated because it is inconsistent with the decision of the New York Workers' Compensation Board. Applying the same law to exactly the same facts at issue here, the Workers' Compensation Board recently found in a 10-1 full board decision that a former Delivery Provider for Postmates was an independent contractor. This unexplained inconsistency between two boards within the Department of Labor is unsupportable as a matter of law.

QUESTIONS PRESENTED

1. Whether the Third Department correctly held that Postmates' Delivery Providers are independent contractors where they have total freedom to choose when they work, whether to work for others, and how to perform any deliveries they choose to undertake.

2. Whether this Court should reject the Commissioner's attempt to uphold the

Board's decision based on reasons and facts not adopted by the Board.

3. Whether, in the alternative, the Board's decision should be vacated where there is no explanation for its inconsistency with the Workers' Compensation Board's finding that Postmates' Delivery Providers are independent contractors.

STATEMENT OF THE CASE

A. The Postmates Platform

Postmates is a company that created and operates a web-based and mobile Platform. *See* A8:2-5; A18:24-A19:13. Unlike online retailers that ship items to customers from remote distribution centers, Postmates facilitates a marketplace of deliveries from local businesses through a network of freelance Delivery Providers. A18:24-A19:13; A20:20-24; A24:2-6. By connecting local customers, local merchants, and local Delivery Providers, the Postmates marketplace makes it possible for customers to search, view, purchase, and (as applicable) request delivery of their desired goods quickly while also supporting local businesses and offering Delivery Providers a convenient way to earn money.

Postmates' customers and Delivery Providers access the online marketplace through the Postmates Platform. A12:13-22. Once a customer makes a delivery request on the Platform, the Platform alerts Delivery Providers who are logged onto the system and are nearby the pickup location for the delivery. A21:18-25. Upon receiving notification of the available delivery opportunity, Delivery Providers are free to accept, reject, or ignore the proposed delivery at their discretion. A24:2-6; *see* A117 at § 2(d). Postmates engages all of its Delivery Providers as independent contractors, and all Delivery Providers who use the Postmates Platform execute an Independent Contractor Acknowledgement Agreement. *See* A117 at § 2(a).

If a Delivery Provider chooses to accept a delivery request, he or she: (i) receives information on the specifics of the customer's request; (ii) picks up the requested item(s); and (iii) delivers the order to the customer. A17:3-17. The Delivery Provider then marks the order as complete on the Platform and the customer's credit card is charged for the order. A40:12-41:6. That charge includes a delivery fee. A71:21-72:2; A84:8-12.

Postmates does not create work schedules for Delivery Providers, nor does it set minimum or maximum delivery thresholds. A28:10-14; A64:24-65:3; A117 at § 2(d). Postmates does not punish Delivery Providers for rejecting or ignoring any particular delivery requests. A26:3-5; A117 at § 2(d). Moreover, if a Delivery Provider is unable to complete a particular delivery after accepting it, absent fraud or theft, he or she can drop a request and still remain active on the Platform. A48:20-49:8.

Delivery Providers also enjoy substantial autonomy when completing orders. Postmates does not require that Delivery Providers wear a uniform or display the company's logo. A32:4-8; A117 at § 2(g). Postmates also does not require that

Delivery Providers take any specific route or means of transportation to complete deliveries. A30:15-23; A59:23-60:4; A117 at § 2(f). Postmates does not reimburse Delivery Providers for the costs associated with making deliveries. A43:9-11; A117 at § 2(b). While the Platform does provide the customer with an estimated time of arrival for the delivery, Delivery Providers are not required to make the delivery within that timeframe. A46:2-8; A47:11-15. Delivery Providers are also free to offer their services to Postmates' competitors and may even complete deliveries placed through a competing service at the same time they are completing deliveries placed through Postmates. A28:18-24.

Assuming a Delivery Provider passed the background check, they were invited to attend a brief information session on how to operate the Postmates app. A15:17-21; A68:22-69:3.[1] During that information session, Delivery Providers were also given a PEX card (along with information about that card), which they can use to purchase customer orders in situations where a merchant requires on-location payment. A52:7-20; A53:4-13; A53:20-54:11. Even after Delivery Providers begin accepting delivery requests, they are never subjected to direct supervision by anyone at Postmates, nor are they required to file any reports. A64:11-19.

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[1] Shortly after Mr. Vega's time as a Delivery Provider, this informational session was presented to prospective Delivery Providers via a video on the Postmates website. Today, Postmates does not conduct any information sessions, online or offline, for Delivery Providers.

Postmates does not provide Delivery Providers with hourly wages or salaries and does not maintain an ordinary payday for them. A84:22-23; A117 at §§ 2(e), (h). Instead, Postmates pays Delivery Providers a delivery fee for completed orders on a rolling basis. A84:24-25; A117 at § 2(e).

B. Claimant Luis Vega

Mr. Vega used the Platform over the course of one week, during which time he sporadically accepted delivery opportunities during self-selected windows of time on six non-consecutive days. *See* A120. Postmates eventually blocked Mr. Vega from accessing its Platform following customer complaints regarding his failure to deliver requested items in contravention of the terms he accepted in his Independent Contractor Agreement. A109:6-9.

C. The ALJ Decision

On August 28, 2015, following Postmates removing Mr. Vega from its Platform, the New York State Department of Labor notified Postmates of its decision to classify Mr. Vega as an employee of Postmates for purposes of the New York State Unemployment Insurance Law. *See* A118-19. Postmates appealed this decision, and on November 20, 2015, participated in a hearing on the merits at which live witness testimony and documentary evidence was offered. *See* A1-116.

On November 27, 2015, Administrative Law Judge ("ALJ") Wendy Pichardo issued an opinion holding that Mr. Vega was not an employee of Postmates. *See*

A121-A126 (ALJ Opinion). The ALJ found that Postmates did not exercise sufficient supervision, direction, and control over Mr. Vega to make him an employee because he: (i) was free to reject, ignore, or accept deliveries at his discretion; (ii) was free to work for other companies and set his own schedule; (iii) was free to choose his own mode of transportation for making deliveries and was not reimbursed for his out-of-pocket delivery expenses; (iv) was not required to make a minimum or maximum number of deliveries; (v) was not required to report to Postmates or submit any paperwork to the company; and (vi) was not provided with Postmates business cards or decals. *See* A122.

D. The Board Decision

The Department of Labor appealed, and the Board reversed. *See* A127 (Board Decision). The Board's decision held that Postmates was "akin" and "similar" to traditional delivery businesses. *See* A126. The Board did not dispute or set aside the ALJ's key factual findings supporting the ALJ's independent contractor determination. *See id.* Instead, the Board focused on other factors entirely, providing the following list of supposed facts upon which it relied:

> Postmates [1] advertised for and screened on-demand couriers via an online application and criminal background check; [2] it provided and educated the drivers regarding its proprietary software and PEX cards; [3] it controlled the amount of information passed along to its couriers before and after accepting a request; [4] it chose which couriers to offer a request; [5] it kept track of a courier's rate of acceptance; [6] it handled replacement of couriers; [7] it calculated and provided an estimated time of delivery; [8] it procured

> and sent the courier's photo to the consumer; [9] it deposited the requisite amount of money onto the provided PEX card; [10] it established the delivery fee and the courier's non-negotiable rate of pay; [11] it handled collections and paid couriers on a regular basis even if a delivery fee was uncollected; [12] it provided a monetary referral incentive; [13] it retained liability for incorrect or damaged deliveries; and [14] it fielded complaints and monitored consumer satisfaction ratings.

Id. (adding numbering to facts cited).

E. The Third Department Decision

Postmates appealed, and the Third Department reversed. The majority (Egan, Jr., J.P., joined by Devine and Mulvey, JJ.) held that there was no substantial evidence to support the Board's employee determination. The majority explained that Delivery Providers:

- Have "no application and no interview";
- do not "report to any supervisor";
- "unilaterally retain the unfettered discretion as to whether to ever log on to Postmates' platform and actually work";
- are "free to work as much or little as he or she wants";
- "may accept, reject or ignore a delivery request, without penalty";
- "maintain the freedom to simultaneously work for other companies, including Postmates' direct competitors";
- "are free to choose the mode of transportation they wish to use for deliveries";
- "provide and maintain their own transportation";
- "choose the route they wish to take for the delivery";

- "are not required to wear a uniform";
- "are not provided any identification card or logo";
- "are only paid for the deliveries they complete"; and
- "are not reimbursed for any of their delivery-related expenses."

Matter of Vega (Postmates Inc.—Comm'r of Labor), 162 A.D.3d 1337, 1338-39 (3d Dep't 2018). The Third Department further explained that other facts relied upon by the Board do "not constitute substantial evidence of an employer-employee relationship to the extent that it fails to provide sufficient indicia of Postmates' control over the means by which these couriers perform their work." *Id.* at 1339 (citing *Yoga Vida*, 28 N.Y.3d at 1016).

Judge Lynch (joined by Clark, J.) dissented, accepting the Board's decision because Postmates "sets the fees, provides financing for the transaction through the PEX cards, as necessary, handles customer complaints, bears liability for defective deliveries and actually tracks the delivery." *Id.* at 1341.

STANDARD OF REVIEW

A decision of the Board should be reversed if it is not supported by substantial evidence. *Matter of Yoga Vida NYC, Inc. (Comm'r of Labor)*, 28 N.Y.3d 1013, 1015 (2016). "Substantial evidence" means "proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached factfinder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably—probatively and logically." *Id.* (quotation marks omitted).

Contrary to the Commissioner's suggestion (Br. 26-27), this is exactly the test applied by the Third Department here, *see* 162 A.D.3d at 1338-39, in exactly the same manner that this Court has applied it. In particular, the Commissioner ignores the meaning of the substantial-evidence standard in the context of reviewing the employee determination of the Board. In this context, where "the record as a whole does not demonstrate that the employer exercises control over the results produced ... [and] the means used to achieve the results, the Board's determination that the company exercised sufficient direction, supervision and control over the instructors to demonstrate an employment relationship is unsupported by substantial evidence." *Yoga Vida*, 28 N.Y.3d at 1015 (internal citations and quotation marks omitted; brackets in original). "Incidental control over the results produced—without further evidence of control over the means employed to achieve the results—will not constitute substantial evidence of an employer-employee relationship." *Matter of Hertz Corp. (Comm'r of Labor)*, 2 N.Y.3d 733, 735 (2004).

The Commissioner asserts (Br. 27 n.5) that "this Court in *Matter of Haug* [*v. State University of New York at Potsdam*, 32 N.Y.3d 1044, 1046 (2018)] confirmed that *Yoga Vida* had not altered the basic principles of the substantial evidence inquiry." But *Haug* did not even mention *Yoga Vida*, and this framing of the issue mischaracterizes *Yoga Vida*; it did not purport to alter the substantial-evidence standard, but to show how it applies in the context of the independent-contractor inquiry. Moreover, to the extent the Commissioner suggests that the issue is purely one of fact (Br. 24-25), the question whether there is substantial evidence is a question of law. *See Matter of Barrier Window Sys., Inc. (Comm'r of Labor)*, 149 A.D.3d 1373, 1375 (3d Dep't 2017) ("Whether [the Board's] determination is shored up by substantial evidence is a question of law to be decided by the courts.") (quoting *300 Gramatan Ave. Associates v. State Div. of Human Rights*, 45 N.Y.2d 176, 181 (1978)). Indeed, if otherwise, there would be no jurisdiction in this case. *See* CPLR § 5601(a) ("An appeal may be taken to the court of appeals as of right . . . where there is a dissent by at least two justices on a *question of law* in favor of the party taking such appeal.") (emphasis added).[2]

[2] The Commissioner also suggests (Br. 61) that close cases should be resolved in favor of employment, but this Court has never applied such a "close case" rule in deciding whether a claimant is an employee. The lone case the Commissioner cites also did not apply such a rule, and in fact did not address the employee/independent-contractor issue at all. *See Matter of Ferrara (Catherwood)*, 10 N.Y.2d 1 (1961).

ARGUMENT

I. THE THIRD DEPARTMENT CORRECTLY HELD THAT THERE IS NO SUBSTANTIAL EVIDENCE TO SHOW THAT POSTMATES CONTROLS THE RESULTS OR MEANS USED BY DELIVERY PROVIDERS

"An employer-employee relationship exists when the evidence shows that the employer exercises control over the results produced or the means used to achieve the results. However, control over the means is the more important factor to be considered." *Matter of Empire State Towing and Recovery Ass'n, Inc. (Comm'r of Labor)*, 15 N.Y.3d 433, 437 (2010) (internal citations and quotation marks omitted). Here, there is no substantial evidence of control. Rather, as the Third Department recognized, Delivery Providers enjoy unfettered freedom to choose if, how, and when they work, which makes them independent contractors as a matter of law.

A. Delivery Providers Using Postmates Meet All The Factors Identified By This Court To Support Independent-Contractor Status

"Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule." *Bynog v.*

Cipriani Group, 1 N.Y.3d 193, 198 (2003).[3] All five factors weigh entirely in favor of the Third Department's decision that Delivery Providers are independent contractors.

1. Delivery Providers Work At Their Own Convenience

Delivery Providers unquestionably work at their convenience. They have complete discretion as to whether and when to log in to the Platform. A27:22-28:3; A61:10-13; A65:24-66:8; A83:15-84:4. The contract is unequivocal on this point: "I understand I am permitted to determine my own work schedule …." A117 at § 2(d); *see also* A64:24-65:3; A83:15-84:7. There is no rule concerning how long or how often Delivery Providers must be logged in to the Platform, and Mr. Vega logged in on only six days total. A26:25-27:3; A33:6-8; A120; *see also* A33:13-35:21. Delivery Providers do not require Postmates' knowledge or approval to take "time off" since they are *never* required to sign into the Platform in the first place. A61:5-9; A69:4-6. As the Commissioner concedes (Br. 12), "[c]ouriers log in and out of the Postmates platform at their discretion and are considered available to handle on-demand requests only when logged in." Furthermore, even when they are logged in,

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[3] *Bynog* was not an Unemployment Insurance Appeal Board case, but it was deciding whether a person was an employee under the Labor Law, it applied the test of "control," it cited an Unemployment Insurance Appeal Board case, and there has never been any suggestion that the test should be different depending on whether evaluating unemployment insurance or other consequences of independent-contractor status. The same is true for other case law discussed below applying the "control" test outside the Unemployment Insurance Appeal Board context.

Delivery Providers can decline or ignore a proposed delivery opportunity at will. A24:2-6; *see* A117 at § 2(d) ("I understand that I am permitted to … reject or accept any particular job offered on the platform."). The Commissioner recognizes (Br. 13) that couriers can "decide whether to accept, reject, or ignore the request based on the information provided." The Board did not dispute these facts (*see* A125) and did not even attempt to explain why this factor could be disregarded.

2. Delivery Providers Are Free To Work For Others

The undisputed evidence also establishes that Delivery Providers have the unfettered ability to work for other companies, *including Postmates' competitors*. A28:18-24 (unrefuted testimony of Hugo Durand, Postmates' East Coast Regional Manager: "Q. And can he -- could he make deliveries on other platforms? A. He could have, yes. … Q. Meaning he could work for other companies at the same time? A. Yes."). This freedom continues even when the Delivery Provider is in the midst of performing a delivery opportunity obtained on Postmates' Platform. A28:15-24; A29:8-16; A63:16-22; A72:18-73:4; A117 at § 2(c). The Commissioner does not dispute this fact and concedes (Br. 15) that "Postmates allows its couriers to deliver for other companies, including while logged on to the Postmates platform."[4] Likewise,

[4] The Commissioner argues (Br. 15) only that "when couriers deliver an item for Postmates, they are advised not to accept payment from the customer for any services not requested through the Postmates platform." However, the Board did not rely on this point, and it therefore cannot be the basis for affirming the Board's decision. *See*

the Board recognized that Postmates "imposed no restriction to work elsewhere or for competitors," A126, but provided no explanation of why it disregarded this factor in its analysis.

3. Delivery Providers Receive No Fringe Benefits

The undisputed evidence establishes that Delivery Providers do not receive fringe benefits. They are responsible for their own expenses and equipment (A32:2-3; A43:9-11), and receive no benefits of any kind (A51:21-23; A70:5-8; *see also* A26:6-14). Indeed, the Commissioner concedes (Br. 17) that Delivery Providers are not "reimbursed for delivery-related expenses, nor are they provided with fringe benefits, uniforms, telephones, or business cards." The Board noted that there was no expense reimbursement, A126, but again ignored this point in its analysis. Moreover, while the Commissioner asserts (Br. 58) that the lack of fringe benefits shows only Postmates' "economic leverage," the Board made no such finding and the Commissioner's unsupported theory is therefore inapposite. *See infra* at 40-41.

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infra at 40-41. Regardless, this limitation applied only while the delivery was being made and for the particular customer who made the delivery request. This degree of control is negligible by any measure. Similarly, the Commissioner's suggestion (Br. 51) that Delivery Providers do not have time to perform other delivery work while completing a delivery for Postmates was not found by the Board and is entirely unsupported by the record.

4. Delivery Providers Are Not On Postmates' Payroll

Delivery Providers do not receive a salary from Postmates; they are paid based only on the deliveries they choose to undertake. A84:18-85:3. The Independent Contractor Agreement states: "I understand that I will be paid for jobs 7 days after such jobs are completed, and not on any specific, regularly scheduled payday." A117 at § 2(e); *see also id.* at § 2(h) ("I understand that I get compensated per delivery, and not on an hourly or salary basis."). The Commissioner does not dispute this point. The Board also did not mention the lack of salary in its decision.

Instead, the Board relied on the uncited proposition that Postmates "paid couriers on a regular basis even if a delivery fee was uncollected." A126; *see also* 162 A.D.3d at 1340 (dissenting opinion making the same point). However, this statement is true only to the extent it means that Delivery Providers are paid based on the particular delivery after each delivery is completed. A40:9-20; A42:8-43:8; A84:18-85:3. The record is clear and undisputed that Postmates does not pay Delivery Providers a set hourly rate or on scheduled paydays. A84:18-23 ("Q. Now, you indicated about payments that… they're paid after each job with just the ACH delay. Is that correct? A. That is correct. Q. So there are no scheduled paydays? A. There are no scheduled paydays."). The Commissioner does not argue otherwise.

5. Delivery Providers Are Not On A Fixed Schedule

Delivery Providers have the very opposite of a fixed schedule: as discussed *supra* at 4-5, 14-15, they can work at any time, as much or as little as they want. Once again, the Commissioner concedes (Br. 13) the point: "couriers are not subject to a minimum or maximum number of Deliveries." The Board also recognized the entirely flexible schedule and the fact that "Postmates imposed no minimum or maximum number of requests to accept or reject …." A126. But the Board once again ignored this factor in its analysis.

B. Other Relevant Factors Further Establish That Delivery Providers Are Independent Contractors

Two other factors also support the Third Department's conclusion that Delivery Providers are independent contractors.

First, all Delivery Providers execute an Independent Contractor Acknowledgement Agreement specifying that they are independent contractors, not employees. *See* A117 at § 2(a). This factor, while not dispositive, *must* be considered. *Carlson v. Am. Int'l Grp., Inc.*, No. 47, 2017 WL 5557948 (N.Y. Nov. 20, 2017) ("[T]he fact that the cartage agreement labels MVP an 'independent contractor' is not dispositive of the issue of control, but is a factor to be weighed with others.") (internal citation omitted). However, the Board and Commissioner's brief fail to consider this factor at all.

Second, Delivery Providers have complete control over how they perform the deliveries. Workers who exercise sole discretion over how they perform work are independent contractors. *See, e.g.*, *Empire State Towing*, 15 N.Y.3d at 437 (rejecting Board finding of employee status and holding that attorney who "enjoyed autonomy and discretion" was independent contractor); *Matter of Bogart (LaValle Transp., Inc.—Comm'r of Labor)*, 140 A.D.3d 1217, 1219 (3d Dep't 2016) (reversing the Board and holding that delivery drivers were independent contractors where they "were not required to lease their vehicles from LaValle," "there was no dress code," "[n]o one from LaValle supervised the drivers," and drivers "were free to choose whatever routes they desired in transporting loads").

This factor applies fully here. Delivery Providers alone determine what equipment to buy and utilize for the delivery (A31:24-32:3): Mr. Vega used his own phone (A86:2-7) and made his own decision as to whether to go on foot, to pay for a subway or cab ride, or to buy and use a bicycle or vehicle. A43:9-11; A57:24-25; A58:9-15; A117 at §§ 2(b), (c), (g). Moreover, the choice as to what clothing to wear was the Delivery Providers' alone, as Mr. Vega was not required to wear a uniform or identifier. A32:4-8; A60:18-21; A117 at § 2(g). Finally, Delivery Providers use whatever mode of transportation they wish (A30:15-18; A31:16-23; A58:9-15), take whatever route suits them, make any stops they desire (A30:19-23), and take as long as they want (A30:19-21; A47:11-15; A83:4-14). Delivery Providers' exclusive control over mode, route, stops, and timing—exactly like the delivery workers in *Bogart*—weighs heavily in favor of independent-contractor status. Once again, the Board did not dispute these facts or explain why it chose to disregard their importance.

C. The Lack Of Control For All Of The Factors Discussed Above Makes Delivery Providers Independent Contractors As A Matter Of Law

As discussed above, all of the factors this Court has established as germane to an analysis of independent-contractor status—the five factors in *Bynog* and the two discussed *supra* Part I.B—support the Third Department's determination that Postmates does not exercise any meaningful control over the means or results of the delivery, and that Delivery Providers are therefore independent contractors. The reason is simple: a business does not "control" a person's work if the individual need not accept the company's work assignments at all, can work for competitors, and can determine how to complete the assignments they choose.

1. This Court's Precedents Establish That A Person Is An Independent Contractor Based On The Factors Present Here

This Court has held that the *exact* set of factors discussed above (or even a subset thereof) requires reversal of a Board decision that a worker is an employee. *Yoga Vida* is directly on point. In *Yoga Vida*, this Court reversed the Board and held that non-staff yoga instructors were independent contractors. The bases for this decision were: the instructors "make their own schedules," "the studio does not place any restrictions on where the non-staff teachers can teach," and they are not on payroll. 28 N.Y.3d at 1015. Delivery Providers enjoy *all* of the same freedoms cited by *Yoga Vida*.[5] Indeed, *Yoga Vida* was a much closer case because, as Justice Fahey noted in dissent, "Yoga Vida determines the class schedule," along with the "length of the class, the type of class taught, [and] the difficulty level," and "although non-staff instructors are free to tell their students about other locations at which they teach, Yoga Vida considers whether a non-staff instructor has advertised for a class directly conflicting with a Yoga Vida class in determining whether to continue its relationship with that instructor." *Id.* at 1017. Here, in contrast, Postmates does not control the schedule or how the task is performed and does not punish Delivery Providers for working with competitors.

Similarly, in *Ted Is Back*, this Court reversed the Board and held that the salespeople were independent contractors where they "worked at their own convenience, were free to hold outside employment[,]," "were not reimbursed for expenses and received no salary or drawing account," and "were paid strictly on a commission basis." 64 N.Y.2d at 726. And in *Scott v. Mass. Mut. Life Ins. Co.*, 86 N.Y.2d 429 (1995), this Court held summary judgment was correctly granted that an

[5] The only other factor this Court mentioned in *Yoga Vida* is that the instructors are not "required to attend meetings or receive training," 28 N.Y.3d at 1015, and the same is true here with the sole exception of a one-time information session, which plainly does not constitute control. *See infra* at 31-32.

insurance agent was an independent contractor because she "was responsible for financing her own operating expenses and support staff, was paid by performance rather than a salary, did not have Federal, State or local taxes withheld from her pay, could sell competitors' products and had agreed by contract to operate as an independent contractor." *Id.* at 433-34. Just like *Yoga Vida*, *all* of the factors relied upon in *Ted is Back* and *Scott* are also present here. In short, this Court's precedents establish that the claimant's control over whether, when, how, and for whom he or she performs services requires reversal of a Board decision that the claimant is an employee.

2. The Board's Attempt To Distinguish This Court's Precedents On Grounds Not Mentioned By The Board Is Meritless

The Board and the dissenting opinion ignore *Yoga Vida*, *Ted Is Back*, and *Scott* entirely. The Commissioner attempts (Br. 59-60) to distinguish *Yoga Vida* and *Ted Is Back* because they involved a yoga instructor and a salesperson rather than a delivery person. But this attempt fails for several reasons.

First, this reasoning was *not* adopted by the Board, and therefore cannot be the basis for affirming its decision. *See infra* at 40-41. Indeed, the Commissioner does not cite any Board decision *ever* holding there is a different analysis depending on the nature of the business.

Second, *Yoga Vida* and *Ted Is Back* never suggested the nature of the business as the basis for deciding independent-contractor status. The Commissioner cites no case—from this Court or any other—suggesting that the nature of the work (rather than the control thereof) is relevant to the inquiry. Thus, the Commissioner's suggestion that certain kinds of business are categorically or presumptively excluded from having independent contractors is legally baseless.

The only citation the Commissioner provides (Br. 60) to support its theory is Restatement (Second) of Agency § 220, cmt. i, but the New York courts have never adopted Section 220. And the Restatement test, which expressly considers the "kind of occupation" and the "skill required" in addition to the "extent of control," Restatement (Second) of Agency § 220, is plainly inconsistent with this Court's repeated holdings that the test is solely one of "control."

Third, the Commissioner's theory—by relying on the supposed nature of the business rather than the control it exercises over particular workers—is inconsistent with the test of control. In *Yoga Vida* itself, this Court recognized that staff instructors (who were paid regardless of whether anyone attends a class and cannot work for competitors) were employees and non-staff instructions were not. 28 N.Y.3d at 1015. Likewise, whether a business exercises control over a delivery person depends on the actual control it exercises, not an assumption about the supposed nature of the delivery business.

The Commissioner's attempts to distinguish the businesses is also unavailing. The Commissioner asserts (Br. 60) that "[f]ees and timing … are a much less significant part of the yoga and sales businesses than they are of the delivery business," but there is no factual basis to believe that yoga instructors care any less about how much they are paid and when they work than do Postmates' delivery workers. Similarly, the Commissioner's suggestion (Br. 60) that "Postmates' couriers perform unskilled labor that involves little to no discretion" is factually unsupported, and ignores the freedom in *choosing* assignments and *how* to complete those assignments.

Fourth, this Court has held that workers whose tasks are seemingly just as "unskilled" as delivery persons are independent contractors. For instance, this Court held that banquet waiters are independent contractors where (as here) they "worked at their own discretion" and "worked for other caterers, including … competitors, without restriction." *Bynog*, 1 N.Y.3d at 198-99. Similarly, in *Ferber v. Waco Trucking, Inc.*, 36 N.Y.2d 693, 694 (1975), this Court held that a delivery company "was an independent contractor, and not an employee," where it "provide[d] for a fee, the manpower necessary to unload … trucks upon its arrival in New York City." *Id.* at 694.

Finally, to the extent the nature of the business matters, the crucial consideration here is that Postmates is an on-demand platform, *not* a delivery company. The Third Department has repeatedly reversed the Board and held that on-demand platforms that simply match people who want to perform a service with those people looking for the service to be performed—where those service providers could choose which assignments to take—do *not* give rise to employment relationships. *See Matter of Walsh (TaskRabbit Inc.—Comm'r of Labor),* 168 A.D.3d 1323, 1324-25 (3d Dep't 2019) (on-demand odd jobs); *Matter of Courto (SCA Enters. Inc.—Comm'r of Labor),* 159 A.D.3d 1240, 1241 (3d Dep't 2018) (on-demand appraisers); *Matter of TMR Security Consultants, Inc. (Comm'r of Labor)*, 145 A.D.3d 1402, 1403-04 (3d Dep't 2016) (on-demand security guards); *Bogart*, 140 A.D.3d at 1219 (on-demand delivery drivers); *Matter of Chan (Confero Consulting Assoc., Inc.–Comm'r of Labor)*, 128 A.D.3d 1124, 1125-26 (3d Dep't 2015) (on-demand "mystery shopper"). This case law recognizes that such platforms function as a matching service, benefitting the people on both sides of the transaction by helping them find each other efficiently, but not *controlling* the provision of services. Once again, the Board ignores these cases, and with the exception of *Bogart*, discussed *infra* at 26-27, so does the Commissioner.

3. The Case Law Specific To Delivery Persons Also Establishes That The Delivery Providers Here Are Independent Contractors

Even if the relevant case law were inexplicably limited to delivery persons, this Court has recognized them as independent contractors where, as here, there was at most incidental control. In *Shapiro v. Robinson*, 102 A.D.2d 822 (2d Dep't 1984), the Appellate Division held that summary judgment should have been granted that a courier was not an employee where the courier "furnished his own truck, set his own route, was paid by the job, had his own business and worked for Scodek only on specific jobs." *Id.* at 822.[6] This Court affirmed, holding that "[w]e agree with the Appellate Division that there is no tender of evidence sufficient to support the contention that Robinson was an employee of Scodek." *Shapiro v. Robinson*, 63 N.Y.2d 896, 897 (1984).

Furthermore, notwithstanding the Commissioner's erroneous assertion (Br. 59) that only three cases have found delivery persons to be independent contractors, the Appellate Division frequently holds that delivery persons are independent contractors where, as here, they are free to accept or reject assignments, are not paid a salary, and do not have set delivery times. In the unemployment insurance context, there are several such cases. *Bogart*, 140 A.D.3d at 1219-20; *Matter of Werner (CBA Indus.—Hudacs)*, 210 A.D.2d 526, 526-28 (3d Dep't 1994); *Matter of Jennings (Am. Delivery Sol., Inc.—Comm'r of Labor)*, 125 A.D.3d 1152, 1153 (3d Dep't 2015); *Claim of Pavan*, 173 A.D.2d 1036, 1038 (3d Dep't 1991). The Commissioner attempts (Br. 59) to distinguish these cases principally because the drivers could negotiate their pay, but this Court held as a matter of law that fixed fees do not establish control. *See Yoga Vida*, 28 N.Y.3d at 1016 ("[T]hat Yoga Vida generally determines what fee is charged

[6] While this was not an unemployment insurance case, the court applied the same legal standard of "control." 102 A.D.2d at 822.

and collects the fee directly from the students … does not supply sufficient indicia of control over the instructors."); *see also Mace v. Morrison & Fleming*, 293 N.Y. 844, 844-45 (1944). Indeed, this is a much *stronger* case for independent-contractor status than *Bogart*, where the drivers leased trucks from the business, there were restrictions on use of the trucks, and the claimant was bound by a noncompete agreement. 140 A.D.3d at 1221-22 (Rose, J., dissenting).

Outside the unemployment insurance context, but still applying the same test of "control," numerous cases have likewise held delivery persons independent contractors. *See, e.g.*, *Chaouni v. Ali*, 105 A.D.3d 424 (1st Dep't 2013) (holding Supreme Court should have found on summary judgment that driver was an independent contractor because "[t]he undisputed evidence showed that Dial 7's drivers own their own vehicles, were responsible for the maintenance thereof, paid for the insurance, and had unfettered discretion to determine the days and times they worked … and are even permitted to work for other livery base stations"); *see also Zeng Ji Liu v. Bathily*, 145 A.D.3d 558, 558-59 (1st Dep't 2016); *Alves v. Petik*, 136 A.D.3d 426, 427 (1st Dep't 2016); *Barak v. Chen*, 87 A.D.3d 955, 957-58 (2d Dep't 2011); *Abouzeid v. Grgas*, 295 A.D.2d 376, 377-79 (2d Dep't 2002).

The Commissioner relies (Br. 28-31, 51-56) heavily on a one-paragraph memorandum opinion from this Court in three consolidated cases. *See Matter of Rivera (State Line Delivery Serv.—Roberts)*, 69 N.Y.2d 679 (1986). But this Court's opinion did not discuss *any* of the facts or *any* of the factors that bore on its decision. Moreover, to the extent that some of the facts can be culled from the decisions below, they demonstrate ample basis for distinguishing the outcome. In the first case, "the employer, at its pleasure, daily dispensed delivery assignments—most of which had time deadlines for completion" and "workers like claimant were responsible for completing bills of lading displaying, not theirs, but the employer's letterhead." *Claim of Rivera*, 120 A.D.2d 852, 854 (3d Dep't 1986) (Yesawich, Jr., J., dissenting), *rev'd*, *Matter of Rivera*, 69 N.Y.2d 679 (1986). In the second case, scheduling choice was strictly limited: "Claimants were *required* to call the Majestic dispatcher to find out what work was available. Claimants could turn down assignments but rarely did so. … They were *required* to check with dispatcher for any additional pickups or deliveries on their route." *Matter of Ross (Roberts)*, 119 A.D.2d 857, 857 (3d Dep't) (Mikoll, J., dissenting), *aff'd sub nom. Matter of Rivera*, 69 N.Y.2d 679 (1986) (emphases added). And in the third case, "[t]he Board concluded that claimant was required to make pickups and deliveries at certain times" and the business "carried workers' compensation coverage on the drivers." *Claim of Fox*, 119 A.D.2d 868, 870 (3d Dep't), *rev'd sub nom. Matter of Rivera*, 69 N.Y.2d 679 (1986). In short, all three consolidated cases involved couriers who were required to get assignments or complete deliveries in a particular manner.[7]

The Commissioner lists in an addendum and sprinkles throughout the brief Third Department cases to support the idea that a particular fact matters in deciding employee status, while ignoring the other facts that were critical to the results in those cases. The vast majority of the cases concerned delivery persons who were *required* to accept assignments, which is a clear exercise of control not present here.[8] Of the remaining cases, in one, the business would take away the delivery person's leased

[7] The Commissioner briefly mentions (Br. 29, 33, 41) two other cases from this Court, both of which concerned delivery persons who were—unlike the Delivery Providers here—*required* to make assigned deliveries. *See Matter of Charles A. Field Delivery Service, Inc. (Roberts)*, 66 N.Y.2d 516, 517 (1985); *Matter of Wells (Utica Observer-Disptach & Utica Daily Press, Inc.—Roberts)*, 87 A.D.2d 960, 960 (3d Dep't 1982), *aff'd*, *Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross)*, 59 N.Y.2d 638 (1983).

[8] *See Matter of Crystal (Medical Delivery Services—Comm'r of Labor)*, 150 A.D.3d 1595, 1597 (3d Dep't 2017); *Matter of Garbowski (Dynamex Operations East, Inc.—Comm'r of Labor)*, 136 A.D.3d 1079, 1080 (3d Dep't 2016); *Matter of Gill (Strategic Delivery Sols. LLC—Comm'r of Labor)*, 134 A.D.3d 1362, 1363-64 (3d Dep't 2015); *Matter of Voisin (Dynamex Operations E., Inc.—Comm'r of Labor)*, 134 A.D.3d 1186, 1187 (3d Dep't 2015); *Matter of Mitchum (Medifleet, Inc.—Comm'r of Labor)*, 133 A.D.3d 1156, 1157 (3d Dep't 2015); *Matter of Watson (Partsfleet Inc.—Comm'r of Labor)*, 127 A.D.3d 1461, 1462 (3d Dep't 2015); *Matter of Youngman (RB Humphreys Inc.—Comm'r of Labor)*, 126 A.D.3d 1225, 1226 (3d Dep't 2015); *Matter of McKenna (Can Am Rapid Couier—Sweeney)*, 233 A.D.2d 704, 704-05 (3d Dep't 1996); *Matter of Caballero (Reynolds Transp., Inc.—Hudacs)*, 184 A.D.2d 984, 984 (3d Dep't 1992); *Matter of Gray (Glens Falls Newspapers—Roberts)*, 134 A.D.2d 791, 791 (3d Dep't 1987); *Matter of Webley (Graphic Transmissions, Inc.—Roberts)*, 133 A.D.2d 885, 886 (3d Dep't 1987).

truck if he refused assignments. *See Matter of Wilder (RB Humphreys Inc.—Comm'r of Labor)*, 133 A.D.3d 1073, 1073-74 (3d Dep't 2015). In another, there was a noncompetition requirement. *See Matter of Scott (CR England Inc.—Comm'r of Labor)*, 133 A.D.3d 935, 938-39 (3d Dep't 2015). And in the rest, the business exercised control over the timing of deliveries. *See Matter of Kelly (Frank Gallo, Inc.—Comm'r of Labor)*, 28 A.D.3d 1044, 1044 (3d Dep't 2006) (also noting that the supposed independent contractors were treated exactly the same as the business's acknowledged employees); *Matter of Varrecchia (Wade Rusco, Inc.—Sweeney)*, 234 A.D.2d 826, 826 (3d Dep't 1996); *Matter of CDK Delivery Serv., Inc. (Harnett)*, 151 A.D.2d 932, 932 (3d Dep't 1989); *Matter of Alfisi (BND Messenger Serv.—Harnett)*, 149 A.D.2d 883, 883 (3d Dep't 1989). In short, there is a clear line in the case law—consistent with the plain meaning of control—whereby a delivery person is an employee only if the business requires taking assignments, prevents work for others, or dictates timing. The absence of such control establishes an independent contractor relationship.

D. The Board Erroneously Relied On Factors Irrelevant To The Issue Of Control

Rather than considering the factors and case law discussed above, the Board relied on a laundry list of purported facts, *see supra* at 8-9, that—as the Third Department correctly held—do not constitute substantial evidence of control as a matter of law. Instead, they concern steps that businesses would take equally for employees or independent contractors.

1. Postmates' Administrative And Safety Practices (Facts 1, 2, And 8)

The first fact cited by the Board—placing ads to attract Delivery Providers to use its Platform—clearly does not constitute control over means or results. *See Werner*, 210 A.D.2d at 528 (holding that whether workers were "solicited through advertising … [is] neutral in its implications"). Similarly, Postmates' performing a criminal background check (fact number 8) is a basic safety measure (A37:2-8) that has nothing to do with whether the worker is an employee. *See, e.g.*, *Yoga Vida*, 28 N.Y.3d at 1013 (licensing requirement showed merely "incidental control" consistent with an independent-contractor relationship); *Zeng Ji Liu*, 145 A.D.3d at 559 ("All Taxi's background check of Bathily" is "indicative of mere incidental or general supervisory control that does not rise to the level of an employer-employee relationship.") (quotation marks omitted). The Commissioner cites no case law to the contrary.

Furthermore, with respect to the second fact cited by the Board—that Postmates offers a one-time information session to Delivery Providers on how to use its technology (and no further training), A26:6-14—initial training or informational sessions are inconsequential to the classification determination. *See, e.g.*, *Hertz Corp.*, 2 N.Y.3d at 735 ("That Hertz gave claimant instruction on what to wear, what products to promote and how to make a presentation does not support the conclusion that claimant was an employee."); *Werner*, 210 A.D.2d at 528 ("The information supplied would have to have been given to an independent contractor in the same measure as to an employee."); *see also, e.g.*, *Matter of Holleran (Jez Enters., Inc.—Comm'r of Labor)*, 98 A.D.3d 757, 758 (3d Dep't 2012); *Simonelli*, 286 A.D.2d at 806. Indeed, this Court has held even "regular company meetings … are not inconsistent with [a person's] status as an independent contractor." *Scott*, 86 N.Y.2d at 434. The sole cases the Commissioner cites (Br. 45) on this issue relied principally on the fact that the delivery persons were *required* to accept delivery assignments, a key indicator of control not present here. *See Matter of Mitchum (Medifleet, Inc.—Comm'r of Labor)*, 133 A.D.3d 1156, 1157 (3d Dep't 2015); *Matter of Watson (Partsfleet Inc.—Comm'r of Labor)*, 127 A.D.3d 1461, 1462 (3d Dep't 2015).

2. The Information And Opportunities Passed On To Delivery Providers (Facts 3 and 4)

The third and fourth facts cited by the Board are that Postmates controls the information and opportunities passed along to Delivery Providers. But the Board provided no explanation as to how these facts have any bearing on the level of Postmates' control over the results produced by Delivery Providers or the means they used to achieve those results. Since Delivery Providers can drop an opportunity even after accepting it (A69:18-23), the fact that they receive full information about the request only after accepting does not indicate any control by Postmates. And in *Yoga Vida*, the yoga studio hand-picked the finite group of yoga instructors to whom it offered teaching opportunities. 28 N.Y.3d at 1016. The Board cites no case law to the contrary, and instead posits (Br. 35-36, 49) that Postmates did not provide all information so that "couriers could not reject delivery jobs that were undesirable or unprofitable." But the Board made no such finding, and it conflicts with the undisputed fact that Delivery Providers could always choose not to perform a delivery, in which case Postmates simply would choose another Delivery Provider (if one was available).

3. Keeping Track Of Acceptance Rates And Consumer Satisfaction (Facts 5 And 14)

That Postmates "kept track" of the acceptance rates of Delivery Providers and customer satisfaction also has nothing to do with any supposed exercise of control. "The requirement that the work be done properly is a condition just as readily required of an independent contractor as of an employee and not conclusive as to either." *Yoga Vida*, 28 N.Y.3d at 1016 (quotation marks omitted). Accordingly, "that [the business] received feedback about the instructors from the students does not support the Board's conclusion" that they were employees. *Id.*; *see also, e.g.*, *Hertz Corp.*, 2 N.Y.3d at 735 (requirement that work be done properly is a condition equally applicable to independent contractors and employees). The Commissioner ignores this clear language in *Yoga Vida* and *Hertz*, and the Third Department cases she cites (Br. 41) all concerned situations where the delivery person was required to accept deliveries (among other exercises of control not present here). Absent this key factor, the Third Department has recognized that keeping track of quality does not indicate that the claimant is an employee. *See Werner*, 210 A.D.2d at 528 ("[T]he spot checks made by the distributor as to delivery of the flyers [were] a wise business decision" that did "not support a finding of control over the means to achieve the results" because the distributor "was entitled to know if its deliverers were doing their work."); *Chan*, 128 A.D.3d at 1126 ("The fact that claimant was required to submit a questionnaire to [respondent's] editorial staff upon completing an assignment, which was then reviewed for completeness and scored, amounts to no more than a requirement that the assignment be done properly[.]"). The Commissioner argues (Br. 36-37) that "a reasonable factfinder could infer that Postmates gathered this information for the purpose of penalizing couriers whose rate of acceptance was too low." But the factfinder was the Board, and it found no such fact. The Commissioner's attempt to invent such a fact is therefore improper. *See infra* at 40-41.

4. Replacement of Delivery Providers (Fact 6) And Liability For Incorrect Or Damaged Deliveries (Fact 13)

That Postmates supposedly replaces Delivery Providers is also irrelevant. The record is clear and undisputed that if no Delivery Providers accept a delivery request, the request is unfulfilled. A24:2-14 ("Q. What if no delivery professional takes the request? A. The request at that point is considered lost."); *see also* Comm'r Br. 13. Regardless, this Court has held that providing a replacement is something businesses would do equally for independent contractors as for employees. *Yoga Vida*, 28 N.Y.3d at 1016; *see also TMR*, 145 A.D.3d at 1403. The Commissioner cites (Br. 37, 46) three cases where the ability to delegate was briefly mentioned as *supporting independent-contractor status*, but no case relying on the inability to delegate as a factor (let alone a dispositive factor) in treating a person as an employee. Indeed, there is nothing remotely unusual about a company wanting the independent contractor of its choice to do the job rather than allowing anyone to do it.

Similarly, the Board's statement that Postmates retained liability for incorrect or damaged deliveries (fact 13) is irrelevant. The record establishes that liability is determined on a case-by-case basis. A61:16-24; A74:24-75:5. The Commissioner previously recognized at much. *See* Comm'r Letter Br. 6 (Postmates "assumes liability in at least certain cases"). And there is no legal or logical basis for treating a case-by-case assessment of liability as an exercise of control. The Commissioner now does an about-face and asserts (Br. 40) that Postmates claimed it was responsible for lost and damaged deliveries. However, the pages of the record she cites state expressly that responsibility is decided on a "case-by-case basis." A61-62. Regardless, the Commissioner fails to explain how Postmates' alleged responsibility for lost or damages deliveries is an exercise of control over the Delivery Provider.

5. Estimated Time Of Delivery (Fact 7)

Postmates' providing an estimated time of delivery, and thereby giving customers an idea as to when a delivery might arrive, is irrelevant in showing that Postmates *controls* the deliveries. The Commissioner cites no case law supporting the relevance of providing a non-binding estimate to customers. Indeed, even far greater control over timing is not indicative of an employment relationship. *See Yoga Vida*, 28 N.Y.3d at 1016 ("The proof of incidental control relied upon by the Board, including that Yoga Vida . . . published the master schedule on its website . . . does not support the conclusion that the instructors are employees.").

6. Postmates' Payment Arrangements (Facts 9, 10, 11, And 12)

That Postmates provides Delivery Providers with prepaid expense cards (PEX cards) is inconsequential. As the Commissioner recognizes (Br. 11), the Delivery Provider had the choice of whether to use the PEX card or pay with his own money and get reimbursed later. And the Commissioner provides no argument as to why the

PEX cards indicate control. An independent contractor, as much as an employee, can be provided with a means to perform the task more efficiently, which is all that PEX cards do. *See Hertz Corp.*, 2 N.Y.3d at 735 (client marketing materials provided to sales representative to assist in promoting client's services were not reflective of control); *Shapiro*, 63 N.Y.2d at 898 ("The fact that Scodek's president … gave Robinson a credit card (which was never used) to enable him to obtain repairs to the tractor trailer cannot serve to create a[n employment] relationship.").

Postmates' determining Delivery Providers' rate of pay also does not support an employment relationship. Since Delivery Providers have complete discretion in determining whether to accept any particular delivery request, they can reject the fee arrangement if they desire. In any event, having the rate of pay determined by the business does not render the provider an employee. *Yoga Vida*, 28 N.Y.3d at 1016 ("[T]hat Yoga Vida generally determines what fee is charged and collects the fee directly from the students … does not supply sufficient indicia of control over the instructors."); *see also Chan*, 128 A.D.3d at 1126 (holding that worker was independent contractor where "claimant was paid a nonnegotiable fixed fee that was set by [Appellant]"); *Matter of John Lack Assoc., LLC (Comm'r. of Labor)*, 112 A.D.3d 1042, 1043 (3d Dep't 2013) (holding that worker was independent contractor where claimant had no input into pay rate); *Best*, 95 A.D.3d at 1537 (subcontractors held to be independent contractors where contractor would "give [subcontractors] the particulars of the job, including what the job would pay"). The Board's argument to the contrary (Br. 30) relies on the premise that "[i]f Postmates were truly an online marketplace mediating between customers and delivery professionals, its couriers could set their own fees." But the question is not whether Postmates' model fits within the Commissioner's definition of an online marketplace, but rather whether Postmates exercises control over the results and the means used to achieve them—and payment has nothing to do with either. Indeed, it would be a dramatic and inexplicable change in the law if a business could never choose how much to pay an independent contractor.

As for the Board finding that Postmates "pays couriers on a regular basis," as noted *supra* at 17, this means only that Delivery Providers are paid based on the particular deliveries they choose to undertake. And the Commissioner does not defend this finding as evidence of control.

Similarly, that Postmates "handle[s] collections" is irrelevant because the exact same form of collection took place in *Yoga Vida*. 28 N.Y.3d at 1016 ("[T]hat Yoga Vida … collects the fee directly from the students … does not supply sufficient indicia of control over the instructors."); *see also Zeng Ji Liu v. Bathily*, 145 A.D.3d at 559. And while the Commissioner mentions this finding (Br. 21, 43), she provides no argument or case law to show why it indicates control.

Finally, it is irrelevant to the question of control that there is a $50 monetary referral incentive to encourage other delivery people to engage the Postmates Platform. A85:20-25. The Commissioner does not even attempt to defend the relevance of this finding.

II. THE BOARD'S DECISION CANNOT BE UPHELD BASED ON THE REASONS THE COMMISSIONER PROVIDES NOT MENTIONED BY THE BOARD

A. The Commissioner Errs In Relying Extensively On Facts Not Found By The Board

Rather than rely on the fourteen facts cited by the Board, the Commissioner creates her own list of seven facts (Comm'r Br. 1-2, 27-47) that largely depart from the Board's reasoning. In particular, of the seven facts, only three were relied upon by the Board: Postmates did not reveal all information to Delivery Providers before a request was accepted, handled replacement of couriers if one could be found, and set the fees for Delivery Providers. *See* A126 (Board factors 3, 6, and 10); Comm'r Br. 1-2 (Commissioner factors 3, 4, and 1). The Commissioner does not argue—nor could she—that these three factors alone suffice to treat a claimant as an employee.

The other four factors concern factual findings not made by the Board and not cited as the basis for the Board's decision: that Postmates supposedly "controlled the timing of deliveries" (Commissioner factor 2); "possessed the right to unilaterally terminate couriers for poor performance" (Commissioner factor 5); "handled all aspects of marketing and customer relations" (Commissioner factor 6); and "bore the risk of loss when customers failed to pay for delivered items" (Commissioner factor 7). And beyond the seven listed factors, the Commissioner also relies upon several other supposed facts not mentioned by the Board: Postmates could modify its delivery platform (Comm'r Br. 28); Postmates constrained Delivery Providers' choice of route and mode of transportation (Comm'r Br. 50); and Delivery Providers reported when they picked up and delivered items (Comm'r Br. 46-47).

Indeed, Postmates' supposed control over timing is the *principal* basis for the Commissioner's argument here, given the Commissioner's repeated reliance on it. In particular, the Commissioner asserts (Br. 29) that "Postmates unilaterally controlled the two most important aspects of any delivery business: cost and speed." The Commissioner likewise asserts (Br. 30) that "as in all three *Rivera* appeals, Postmates unilaterally controlled the other most critical aspect of the delivery process—timing." Thus, the Commissioner's entire argument depends on the proposition—not adopted by the Board—that Postmates controls the timing of deliveries.

However, the Board's decision cannot, as a matter of law, be affirmed on grounds not stated in the Board's opinion. "A fundamental principle of administrative law long accepted by this court limits judicial review of an administrative determination solely to the grounds invoked by the agency, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis." *Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 593 (1982). Thus, this Court cannot substitute the Commissioner's new facts and arguments for those adopted by the Board. And the Board's own facts and arguments are—under the well-established case law discussed above—insufficient to constitute substantial evidence of employee status.

Furthermore, the Commissioner's new grounds for decision fail on their own terms.

First, there is no evidence to suggest that Postmates controlled the timing of deliveries. According to the Commissioner (Br. 32-33), because Postmates marketed itself based on fast delivery and provided an estimated time of delivery, it implicitly required fast delivery—or else the Delivery Provider might receive negative customer reviews and he might then be terminated. The problem with this string of hypotheticals is that it comes with no citation to the record. There is simply nothing to suggest that Postmates treats immediate delivery as a requirement, that customers commonly give negative reviews for failing to meet the estimated time, or that Postmates terminates Delivery Providers for this reason. Indeed, the unrefuted evidence establishes that there was no time requirement, and the estimates were non-binding. A66:22-67:2; A82:23-83:14.

Second, the Commissioner errs in relying (Br. 44) on the idea that Postmates had the right to terminate couriers, and in particular for poor performance. As an initial matter, the Commissioner conflates termination with not providing additional delivery opportunities. And it is perfectly consistent with the status of an independent contractor for a company not to continue to utilize them if they do not perform the work. *See Yoga Vida*, 28 N.Y.3d at 1016. The Commissioner cites two cases for the idea that the power to discharge reflects employee status, but one does not mention the power of discharge at all, *Matter of Rivera*, 69 N.Y.2d at 682, and the other mentions it only because it was used as a tool for an extremely detailed level of control over how the work was performed, *In re Electrolux Corp.*, 288 N.Y. 440, 446 (1942). Here, there is no evidence to suggest that the right to take a Delivery Provider off of the Postmates app was used to exercise control over how the work was performed.

Third, there is no evidence that Postmates handled all aspects of marketing and customer relations. To begin with, Delivery Providers obviously engaged with customers when making deliveries. Regardless, whatever Postmates does in marketing and customer relations does not control the work of Delivery Providers, and thus has no bearing on whether they are employees. The Commissioner cites no case to the contrary.

Fourth, the Commissioner's reliance (Br. 42) on the idea that Postmates assumed the risk of non-payment is also misplaced. There is no sense in which

Postmates exercises control over a Delivery Provider or makes him or her more of an employee by paying him or her even where the customer does not pay. The cases the Commissioner cites (Br. 42) are the same ones discussed above, where there was much greater exercise of control, and little (if any) reliance placed on this factor.

Finally, the Commissioner's additional supposed facts (beyond her own seven-factor list and the Board's fourteen-factor list) are likewise unsupported and irrelevant. That Postmates could modify its delivery platform ignores that the freedom for Delivery Providers is established in the Independent Contractor Agreement. Regardless, the Commissioner's theory would essentially abolish independent contractors because any company can change how it conducts business over time, and there is no evidence that Postmates at any time intended to exercise more control over Delivery Providers.[9] Furthermore, there is no evidence that Postmates controlled Delivery Providers' choice of route or mode of transportation. The unrefuted evidence was to the contrary:

> Q. Um, now, how did Mr. Vega figure out how to get there, where to go and what motor transportation to take?
>
> A. That was up to him.

---

[9] Plaintiff cites (Br. 43) one case mentioning a "right of control," *In re Morton*, 284 N.Y. 167, 172-73 (1940), but *Morton* did not remotely suggest that the mere possibility that a business could change to exercise more control sufficed; rather, it analyzed employee status based on the actual control exercised by the company, *id.* at 173-74.

> Q. Um, can he take a longer route if he wanted to drop off a sweater at -- where his child goes to school?
>
> A. Yeah, sure.
>
> Q. Could he stop for lunch?
>
> A. He could have, yes.

A30:15-23; *see also* A59:23-60:1 ("Q. And so are these delivery people limited -- are -- are they given a designated, um, route? A. Nope."). The Independent Contractor Agreement said the same: "I understand that I am permitted to take any route in order to complete a delivery . . . ." A117 at § 2(f). And the ALJ found (in a finding not mentioned by the Board) that "[t]he delivery professionals are free to choose the mode of transportation utilized for deliveries." A122. As to the Commissioner's suggestion that Delivery Providers reported pick-ups and deliveries, this is not an exercise of control over results or means, and would be equally true for an independent contractor as for an employee.

B. The Commissioner Errs In Relying On Policy Arguments Not Addressed By The Board

The Commissioner's policy argument for treating Delivery Providers as independent contractors is improper and erroneous on the merits. To begin with, the Board never addressed such a policy argument or suggested in any way that gig economy workers should be treated differently than any other workers for purposes of determining whether they are employees. Thus, just like the facts discussed *supra* Part II.A, this argument *cannot* be the basis for affirming the Board's decision and should be wholly rejected for this reason alone.

Furthermore, any policy issue here is a matter for the legislature, not the courts. When the legislature wants to treat certain businesses as categorically or presumptively requiring treatment of their workers as employees, it does so explicitly. *See* Labor Law § 511(1). The legislature has made no such special category for couriers or gig economy workers. Thus, the same legal standard applies here as in the usual case: Delivery Providers are employees if and only if there is control over means or results, and here, there is none (or at most *de minimis*, incidental control).

To the extent policy arguments are relevant here, they strongly support treating Postmates' Delivery Providers as independent contractors. The Commissioner's policy argument rests on a mistaken premise (Br. 67) that Postmates advocates a *per se* rule that gig economy workers are independent contractors. But Postmates has advocated no such thing, and the Third Department's decision holds no such thing. Rather, Postmates has consistently argued and the Third Department held based on the specific facts here that Postmates' Delivery Providers have an extraordinary degree of freedom that makes them independent contractors. Other gig economy workers may not have the same freedom—for instance, if they cannot work for competitors, if they cannot turn down assignments, or if the company controls how they perform the work.

And if there is such control, then they may reasonably be treated as employees. Similarly, there is no bright-line rule for couriers, and certainly there are companies that exercise much greater control over couriers, which makes them employees. The Third Department has had no difficulty in recognizing such cases. *See, e.g.*, *Matter of Jung Yen Tsai (XYZ Two Way Radio Service, Inc.—Comm'r of Labor)*, 166 A.D.3d 1252, 1254 (3d Dep't 2018) (affirming Board finding of employee status where "XYZ established detailed written Daily Guidelines prescribing driver dress code, hygiene, code of conduct, procedure and language to be used in interacting with clients and claimant was subject to monetary fines and dismissal for violating XYZ's rules").

In contrast, the Commissioner effectively advocates for a *per se* rule of employee status for gig economy workers. That is apparent from the policy arguments the Commissioner makes concerning the supposed and unsubstantiated harm to workers from the gig economy. It is also apparent from the fact that if Postmates' Delivery Providers are not independent contractors, despite the freedoms afforded them, then seemingly every gig economy worker is an employee. The Commissioner's only response (Br. 65-66) to its advocacy of a bright-line rule is that it is simply giving discretion to the Board. But as discussed above, that argument is disingenuous given that the Commissioner does not support the reasoning provided by the Board here. It also ignores the need for consistency in administrative judgments, which is plainly absent here. *See infra* at 48-49.

Finally, even if this case were wrongly treated as a referendum on gig economy workers, this Court should recognize that where such workers have the freedom afforded to Postmates' Delivery Providers, they are properly treated as independent contractors. Gig economy workers like Postmates' Delivery Providers benefit from substantial freedom that an employee never has: the freedom to work or not work whenever they wish, to turn down assignments, to work for competitors, and to work without the company dictating how the work is performed. Those benefits are often crucial for individuals that cannot work on a set schedule or that wish to work for more than one company.

While the Commissioner posits that the treatment of gig economy workers is simply a function of companies' economic leverage, the fact is that there is enormous competition among companies in the gig economy, and that competition extends to how workers are treated and paid. The Commissioner relies (Br. 61-62) on a lone article, not in the administrative record or considered by the Board, for the proposition that Postmates' Delivery Providers generally also work for other companies. But the idea that Delivery Providers often work part-time for Postmates, and use it as a supplement to other income, shows that the freedom of this work is crucial to thousands of people—not that this option should be abolished by the Commissioner's order.

III. IN THE ALTERNATIVE, THE BOARD'S DECISION SHOULD BE VACATED GIVEN THE UNEXPLAINED INCONSISTENCY WITH THE DECISION OF THE WORKERS' COMPENSATION BOARD

Even assuming there were substantial evidence to support the Board's decision—and there is not—the Board's decision still must be vacated because it is inconsistent with the decision of the Workers' Compensation Board. The New York Workers' Compensation Board, in a 10-1 full board decision, decided that a former Delivery Provider for Postmates was an independent contractor and not an employee based on the very same facts:

> The claimant was free to turn down delivery jobs, was able to work for other companies, and was not required to sign into Postmates software application. With the exception of the insulated bag, Postmates provided no equipment and did not instruct the claimant on how to complete his delivery jobs. Moreover, the claimant was not directly supervised and not given feedback on his performance from Postmates nor was he restricted from working his full-time job. As such, the preponderance of the evidence in the record supports the finding that the claimant was an independent contractor who controlled his own work and hours rather than an employee of Postmates.

Postmates Inc., N.Y. Work. Comp. Bd. Case No. G191 7469, 2019 WL 496350, at *4 (Jan. 31, 2019); *see also* Comm'r Br. 65 (recognizing that the Workers' Compensation Board reached a conflicting decision "after weighing many of the same factors that were considered here"). Moreover, the Workers' Compensation Board applies the exact same legal test of control applied by the Unemployment Insurance Appeal

Board. *See, e.g.*, *Claim of Campbell (TDA Indus., Inc.—Comm'r of Labor)*, 143 A.D.3d 1026, 1027 (3d Dep't 2016).

The inconsistency between the Unemployment Insurance Appeal Board and Workers' Compensation Board is legally unsupportable. As this Court has explained, "[t]he policy reasons for consistent results, given essentially similar facts, are . . . largely the same whether the proceeding be administrative or judicial—to provide guidance for those governed by the determination made; to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice." *Matter of Charles A. Field Delivery Service, Inc. (Roberts)*, 66 N.Y.2d 516, 519 (1985) (internal citations omitted). Thus, "in administrative, as in judicial, proceedings 'justice demands that cases with like antecedents should breed like consequences.'" *Id.* This Court accordingly held:

> [W]hen an agency determines to alter its prior stated course it must set forth its reasons for doing so. Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision. Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made.

Id. at 520.

Here, the decisions of the Unemployment Insurance Appeal Board and the Workers' Compensation Board are inconsistent on their face and no explanation was offered for the inconsistency. Indeed, there could be no explanation because the Workers' Compensation Board decision post-dated the Unemployment Insurance Appeal Board decision, and the Workers' Compensation Board had no need to explain any inconsistency because the Third Department had already reversed the Unemployment Insurance Appeal Board. But if the Third Department decision were itself reversed, then there would be a clear and unexplained inconsistency between the two administrative decisions. The proper course, then, would be to vacate and remand to the Board to provide such an explanation.

The Commissioner argues (Br. 64-66) that inconsistent administrative decisions are not a problem. But the Commissioner cites no precedent for this proposition. The Commissioner's theory (Br. 65-66) is that "[t]he possibility of divergent outcomes is part and parcel of an administrative system under which different agencies are authorized to determine a worker's employment status for the purpose of specific statutory protections based on the specific administrative records before them." However, this theory disregards the fact that the Unemployment Insurance Appeal Board and Workers' Compensation Board are part of the *same* agency: the New York

State Department of Labor. And it likewise disregards that both are applying the *same* legal test for employee status under the Labor Law.[10]

Moreover, even if the Commissioner were correct that inconsistency is acceptable, the point remains that *unexplained* inconsistency is not. If unemployment insurance should be provided to workers even where workers' compensation is not, then the Department of Labor should provide an explanation for this discrepancy. That is especially true because seemingly it would be important to provide workers' compensation more broadly given that a worker might need such compensation for an injury even if he has worked only part-time or for a short time and was thus ineligible for unemployment insurance. In short, the Board decision here cannot be affirmed without an explanation for why the same agency applying the same law to the same facts reached the opposite conclusion.[11]

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[10] The Third Department has held that a workers' compensation decision is not binding for purposes of unemployment insurance, *Matter of Simonelli v. Adams Bakery Corp.*, 286 A.D.2d 805, 806 (3d Dep't 2001), but the only precedent it cited in support of this holding concerned whether one agency could bind "another agency," not inconsistency between boards of the same agency. And while *Simonelli* noted that the boards in the Department of Labor function autonomously, *id.* at 806 n.*, that does not suggest that they can also function inconsistently without explanation.

[11] While largely ignoring the decision of the Workers' Compensation Board, the Commissioner relies (Br. 32 n.6, 65) upon a 2016 advice memorandum from the National Labor Relations Board's (NLRB) Office of General Counsel regarding Postmates. However, that memorandum is irrelevant because it was not mentioned by the Board (*see supra* at 40-41) and does not concern New York law, but rather a host of factors that have nothing to do with New York's test of control. *See* Advice Mem.,

CONCLUSION

The decision of the Third Department should be affirmed. In the alternative, and at a minimum, the Board decision should still be vacated with an instruction to address the inconsistency with the decision of the Workers' Compensation Board.

Dates: October 4, 2019

Respectfully submitted,

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NLRB Case No. 13-CA-163079 (Sept. 19, 2016), at 10, *available at* apps.nlrb.gov/link/document.aspx/09031d45826e0080. In any event, the NLRB case against Postmates was ultimately withdrawn and dismissed with no finding against Postmates. *See* Order Approving Withdrawal Request, Dismissing Complaint, and Withdrawing Notice of Hearing, NLRB Case No. 13-CA-163079 (Dec. 22, 2017).

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(l), David M. Cooper, attorney for Postmates Inc., hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 12,300 words, which complies with the limitations stated in § 500.13(c)(1).

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State of New York
Court of Appeals

LUIS A. VEGA,

Respondent,

v.

POSTMATES, INC.,

Respondent,

COMMISSIONER OF LABOR,

Appellant.

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

STATE STATUTES

PRELIMINARY STATEMENT

As the Commissioner demonstrated in her opening brief, the record contains substantial evidence to support the Board's finding that Postmates sufficiently controlled the work of couriers like Mr. Vega to create an employment relationship. Postmates' online platform dictated virtually every aspect of couriers' delivery work, including the timing and assignment of deliveries, the delivery fee and the couriers' non-negotiable rate of pay, the ability to delegate work, and the screening and termination of couriers. While couriers were free to accept delivery jobs at their discretion and to work for competitors, those freedoms do not render the Board's finding of an employment relationship irrational. Several appellate courts have already held as much, including this Court in *Matter of Rivera (State Line Delivery Serv.—Roberts)*, 69 N.Y.2d 679 (1986).

Postmates' response brief does nothing to undermine the rationality of the Board's determination. Despite its heavy reliance on cases involving different kinds of businesses and business models, Postmates ultimately concedes that control over timing *by itself* is sufficient to support the Board's finding that its couriers are employees. And the record in this case contains ample evidence that Postmates controlled the timing of its deliveries, along with the other aspects of couriers' work listed above, notwithstanding Postmates' contrary arguments.

POINT I

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT POSTMATES' COURIERS ARE EMPLOYEES

A. Postmates Concedes that Control over Timing By Itself Is Sufficient to Support a Rational Finding that Delivery Persons Are Employees.

Postmates acknowledges that control over timing plays a critical role in assessing whether delivery persons are employees. Indeed, Postmates posits (Br. at 30) a "clear line in the case law" whereby courts have upheld Board findings that delivery persons are employees whenever "the business requires taking assignments, prevents work for others, *or* dictates timing" (emphasis added). Postmates' use of the disjunctive is apt because, in delivery cases, control over timing is a crucial form of control "over the results produced or the means used to achieve the results." *Matter of 12 Cornelia St (Ross)*, 56 N.Y.2d 895, 897 (1982).

Such control not only dictates how quickly delivery persons perform their work; it also constrains their freedom as to delivery route, mode of transportation, and order of deliveries.

Despite its concession that control over timing can be dispositive in delivery cases, much of the analysis in Postmates' brief contradicts this basic premise. For instance, Postmates structures its brief around the five factors mentioned in this Court's decision in *Bynog v. Cipriani Grp.*, 1 N.Y.3d 193 (2003), which addressed whether professional banquet waiters were employees entitled to recover gratuities under Labor Law § 196-d. While timing was not among the five factors mentioned in that case, this Court never suggested that timing is not a relevant or critical factor for other businesses, such as delivery businesses. On the contrary, the Court made clear that the five factors it invoked in that case were neither exhaustive nor dispositive when it stated that the relevant factors "include" those five factors. *Id.* at 198.

B. There Is Ample Evidence that Postmates Controlled the Timing of Deliveries.

Here, the record contains more than ample evidence to permit a rational inference that Postmates dictated the timing of deliveries (among many other factors). The Board's finding of an employment relationship must therefore be upheld under Postmates' own interpretation of the case law (Br. at 30).

In arguing that it does not control timing, Postmates relies (Br. at 41) on the hearing testimony of its representative suggesting that its estimated delivery times were "non-binding." Postmates asks the Court to disregard the testimony from the same representative establishing that:

- Postmates marketed itself based on fast deliveries, and customers chose Postmates over other delivery methods for its speed and tracking feature (A. 18-19);
- Postmates unilaterally calculated its estimated delivery times and sent customers those times without input from couriers (A. 46, 66-67, 82-83);
- Postmates tracked couriers' location throughout the delivery process and allowed customers to view that location (A. 19); and
- Postmates terminated couriers who received negative customer reviews (A. 36, 41, 74, 108).

As the Commissioner explained (Opening Br. at 32-35), these undisputed facts establish that Postmates gave customers an expectation of fast delivery—reinforced with one of the most invasive forms of surveillance and control imaginable: continuous GPS tracking—and penalized couriers who failed to meet that expectation by terminating couriers who received negative customer reviews. At a minimum, these facts permit a rational inference that Postmates controlled the timing of its deliveries.

Indeed, it would be irrational to draw the contrary inference advocated by Postmates (Br. at 41): that although Postmates' entire platform is predicated on fast delivery, couriers could deliver items whenever they wished—without customers leaving negative reviews and without Postmates terminating couriers who accumulated enough such reviews. But this Court need not decide whether Postmates' view of the evidence is rational or not. It is sufficient under the substantial evidence standard that an inference of control is "rational and plausible, not necessarily the most probable." *Matter of Haug*, 32 N.Y.3d at 1046 (internal quotation marks and citation omitted). That standard is amply satisfied here.

To the extent Postmates argues (Br. at 40) that the Board never discussed the *facts* demonstrating Postmates' control over timing, it is mistaken. In fact, the Board expressly found that Postmates "calculated and provided an estimated time of delivery," that "[c]onsumers could track the progress of their request on a map in real time," and that Postmates "terminated its relationship with couriers by prohibiting them from logging onto to the platform for various reasons (including, negative consumer feedback and/or fraudulent activity)." (A. 125-126.) Although the Board did not specifically explain that these factors established control over timing, the connection is so obvious it requires no explanation.

In any event, Postmates is incorrect (Br. at 4, 22, 40) that this Court may not consider any evidence or reasoning not explicitly recited in the Board's decision. Where, as here, the Legislature has entrusted an administrative body with resolving a specific factual question based on evidence presented at a hearing, *see* C.P.L.R. 7804(4), the agency's determination will not be disturbed so long as "the record as a whole" provides substantial evidence to support the decision. *Matter of Villa Maria Inst. of Music (Ross)*, 54 N.Y.2d 691, 693 (1981). Under this standard, reviewing courts must "search[ ] the record for the presence of substantial evidence," *Matter of Axel v. Duffy-Mott Co., Inc.*, 47 N.Y.2d 1, 6 (1979), considering all the evidence introduced at the hearing as well as "the inferences reasonably to be drawn therefrom." *Vlack v. Ternullo*, 53 N.Y.2d 1003, 1004 (1981); *see also Matter of American Tel. & Tel. Co. v. State Tax Commn.*, 61 N.Y.2d 393, 400 (1984).

Under this settled law, courts applying the substantial evidence test are not limited in their review to the evidence specifically cited by the administrative agency, much less to the explanations articulated by the agency as to why that evidence supports its decision. If "taken as a whole the proof in the record" would permit a rational conclusion that Postmates' couriers were employees, the Board's determination must be upheld. *Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross)*, 59 N.Y.2d 638, 641 (1983); *see also Matter of Mar. Holdings, LLC v. New York City Commn. on Human Rights*, 31 N.Y.3d 1045, 1047 (2018) (judicial inquiry ends "when *a* rational basis for the conclusion adopted by the [agency] is found") (emphasis added), *rearg. denied*, 32 N.Y.3d 903 (2018).

In this sense, substantial evidence review differs from judicial review of an agency determination resolving an issue of law on a particular ground. As Postmates notes (Br. at 40-41), a court may not uphold such a determination on a ground not invoked by the agency. *See Matter of Trump—Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 593 (1982) (agency determination that tax exemption did not apply on one statutory basis could not be upheld on alternative statutory basis). But even this general principle merely requires the agency to *invoke* the applicable ground, not to recite every fact or articulate every line of reasoning supporting that ground, as Postmates suggests.

In any event, the Board cited (A. 124-126) nearly every piece of evidence on which the Commissioner now relies. To be sure, the Commissioner's brief explains in more detail why this evidence supports the finding of an employment relationship, and cites a few additional portions of the record not specifically cited by the Board.

But such explanations and citations are entirely permissible under the substantial evidence standard requiring review of the "record as a whole." *Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 692.

POINT II

THE BOARD'S DECISION IS SUPPORTED BY OVER TWENTY FACTUALLY ANALOGOUS DELIVERY CASES

As the Commissioner explained (Opening Br. at 28 & Addendum), there is a long line of cases in which appellate courts—including this Court—have upheld Board findings that delivery persons are employees based on the same or similar indicia of employer control present here. Postmates cannot distinguish those cases. And Postmates' reliance on cases involving different lines of work, such as banquet waiters or yoga instructors, is misplaced. Given the large number of factually analogous delivery cases, this Court should reject Postmates' context-blind analysis.

A. The Nature of the Work Is Relevant to the Control Analysis.

Postmates mistakenly asserts (Br. at 22-23) that the nature of the work being performed is irrelevant to the control analysis.

This position defies both common sense and this Court's mandate to consider "[a]ll aspects of the arrangement" to assess the level of control reserved to the employer. *Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 693. Without examining in detail the type of work that an employee performs, there is no way to assess the level of control that an employer exercises over the means and results of that work. What constitutes significant control for one job may constitute incidental control for another.

As Postmates acknowledges (Br. at 23), the importance of the nature of the work performed is expressly reflected in the Restatement of Agency § 220, which articulates the canonical "right of control" test. In adopting this test in the unemployment context, this Court expressly cited § 220 for the proposition that "various aspects of the relationship may be considered in arriving at the conclusion in a particular case." *In re Morton*, 284 N.Y. 167, 172-73 (1940). Among the factors that § 220 lists as relevant to the control analysis are "the kind of occupation" and "the skill required in the particular occupation." Restatement (First and Second) of Agency § 220(2)(c), (d). These factors reflect the common-sense idea that where a job requires little skill and discretion, control over any particular aspect of the work reflects greater control than it would for a job involving broader discretion. That is why unskilled workers like Postmates' couriers are "almost always" considered employees. Restatement (Second) of Agency § 220, cmt. i.[1]

B. Postmates Fails to Distinguish the Commissioner's Delivery Cases.

Postmates's effort (Br. at 26-28) to distinguish this Court's controlling decision in the three appeals consolidated in *Matter of Rivera*, 69 N.Y.2d at 679-82, is unpersuasive. The fact that this Court did not recite the facts of those cases in its opinion in no way diminishes their precedential value. As Postmates' acknowledges (Br. at 28), the relevant facts are set forth in the Appellate Division's majority and dissenting opinions. If the Board's finding

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[1] The Workers' Compensation Board decision on which Postmates relies also explicitly identified the "relative nature of the work at issue" as a factor relevant to the control analysis. *See Postmates Inc.*, N.Y. Work. Comp. Bd. Case No. G191 7469, 2019 WL 496350, *3 (Jan. 31, 2019) (internal quotation marks and citation omitted). And Postmates itself insists (Br. at 50-51) that the Workers' Compensation Board applied "the *same* legal test for employee status" as the Board did here (emphasis in original).

of an employment relationship was rational under the facts presented in those cases, then it was necessarily rational here, where there is still more evidence of employer control. (*See* Opening Br. at 51-56.)

Postmates attempts to distinguish the first case, *Rivera*, on the basis that "the employer, at its pleasure, daily dispensed delivery assignments—most of which had time deadlines for completion." (Br. at 28, quoting *Matter of Rivera* [*State Line Delivery Serv., Inc.—Roberts*], 120 A.D.2d 852, 853 [3d Dep't] [Yesawich, J., dissenting], *rev'd*, 69 N.Y.2d 679 [1986].) The same is true here: Postmates' algorithm dispensed job assignments and imposed de facto time limitations. Those limitations in fact reflected more employer control than in *Rivera*, where "the time limitation for delivery [was] established, not by State Line [the employer], but by the customer involved." *Id*. Here, it was Postmates, not customers, that set the estimated delivery times. Postmates also relies (Br. at 28) on the fact that the couriers in *Rivera* completed bills of lading on the employer's letterhead. But this practice reflects no more employer control than Postmates' requirement that couriers report the completion of deliveries on Postmates' proprietary software. (A. 41, 64.)

Postmates seeks to distinguish the second case, *Ross*, on the basis that "[c]laimants were required to call the Majestic dispatcher to find out what work was available." (Br. at 28, quoting *Matter of Ross [Majestic Messenger Service, Inc.—Roberts]*, 119 A.D.2d 857, 857 [3d Dep't] [Mikoll, J., dissenting], *aff'd sub nom. Matter of Rivera*, 69 N.Y.2d 679 [1986].) Postmates omits the crucial fact that the couriers "were not obliged to call but, of course, if they wished to work and profit, the dispatcher was the only source of information as to available delivery work." *Id.* at 857-58. The same is true here: Postmates couriers could not determine what work was available unless they logged onto the platform—and even then, unlike in *Ross*, they were not provided with the key details of a delivery job until after they accepted and were assigned the job. (A. 17, 20, 28.)

And Postmates seeks to distinguish the third case, *Fox*, on the basis that once a delivery driver accepted an assignment, the driver "was required to make pickups and deliveries at certain times." (Br.

at 28, quoting *Matter of Fox [Whalen's Service—Roberts]*, 119 A.D.2d 868, 870 [3d Dep't], *rev'd sub nom. Matter of Rivera*, 69 N.Y.2d 679 [1986].) The same is true here. As the Commissioner explained (Opening Br. at 33), the expectation of fast delivery on which Postmates based its entire business model is far stricter than the 24-hour delivery guarantee at issue in *Fox*. And the delivery drivers in *Fox*, unlike Postmates' couriers, "made their own arrangements and changed them in conjunction with store owners without any control being exercised by" the employer. *Id*. They also individually negotiated their rates of pay and handled customer complaints directly, which Postmates' couriers could not do.

Postmates attempts (Br. at 29-30) to distinguish the many other delivery cases the Commissioner cites on the basis that some of those cases involved couriers who were required to take assignments or, in one case, were precluded from working for competitors. But as Postmates acknowledges (Br. at 30), many cases involved neither of those factors; control over timing was the dispositive factor. In any event, the fact that some cases involved a few different or additional indicia of employer control does not diminish their recognition of the other indicia present here.

C. Postmates' Non-Delivery Cases Are Inapposite.

Postmates cites no cases involving delivery persons other than the three that the Commissioner distinguished in her opening brief at page 59. Postmates instead cites (Br. at 26-27) a handful of taxi cab and limousine cases.[2] All of those cases are distinguishable because they lack any indication that the employer controlled the key factors Postmates controlled here, including timing. Indeed, limousine and cab drivers, unlike Postmates' couriers, can generally decide timing on their own, or in direct consultation with the customer.

Postmates also cites a few additional cases that involved entirely different lines of work. As noted above, Postmates relies

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[2] *Chaouni v. Ali*, 105 A.D.3d 424 (1st Dep't 2013); *Zeng Ji Liu v. Bathily*, 145 A.D.3d 558 (1st Dep't 2016); *Alves v. Petik*, 136 A.D.3d 426 (1st Dep't 2016); *Barak v. Chen*, 87 A.D.3d 955 (2d Dep't 2011); *Abouzeid v. Grgas*, 295 A.D.2d 376 (2d Dep't 2002); *Matter of Pavan (UTOG 2-Way Radio Assn.—Hartnett)*, 173 A.D.2d 1036 (3d Dep't 1991).

heavily (Br. at 13-14, 20, 24) on this Court's decision in *Bynog v. Cipriani Grp.*, 1 N.Y.3d 193 (2003). But *Bynog* involved the opposite fact pattern from the one presented here. There, a temporary personnel agency hired professional banquet waiters to provide services to various restaurants and banquet facilities. *Id.* at 197-199. The issue before the Court was whether the waiters were employees of the particular banquet facility they were hired to serve. The Court concluded that they were not, because the banquet facility had little direct contact with or control over the waiters; it was the personnel agency that interviewed them, hired them, paid them, and supervised them. *Id.* at 199-200.

To the extent that *Bynog* has any relevance here, it establishes that Postmates' couriers were not employees of Postmates' individual customers; it says nothing about whether the couriers were employees of Postmates. If anything, *Bynog* refutes Postmates' claim (Br. at 25) that acting as a "matching service" that connects customers with service providers necessarily implies a lack of control over the work performed.

Postmates also relies heavily on this Court's decision in *Matter of Yoga Vida NYC, Inc. (Commissioner of Labor)*, 28 N.Y.3d 1013 (2016). But as the Commissioner explained (Opening Br. at 59-60), that case is distinguishable because factors like timing and fees are far less central to yoga instruction than to delivery work. That is why this Court held that control over such factors *was* sufficient to find an employment relationship in the delivery context, *see Matter of Rivera*, 69 N.Y.2d at 682; *Matter of Di Martino*, 59 N.Y.2d at 641, but insufficient in the yoga context, *Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d at 1016.

Postmates additionally cites (Br. at 25) a handful of cases involving other matching services or on-demand platforms. But in all of those cases, the workers had far greater autonomy and the business exercised far less control than the record shows here. For example, in *Matter of Walsh (TaskRabbit Inc.—Comm'r of Labor)*, 168 A.D.3d 1323 (3d Dep't 2019), the business provided an online platform that connected clients seeking to have certain odd jobs performed with individuals, known as taskers, who possessed "the skills and abilities to perform those jobs." *Id.* at 1324. Taskers could "bid on jobs posted by clients through the platform," and the client "select[ed] the tasker and communicate[d] directly with him or her regarding the job specifications and scope of work." *Id.* Here, by contrast, Postmates' couriers could not freely bid on jobs; clients could not select couriers based on skills or abilities; and couriers and clients could not negotiate the key parameters of the job, such as fees and timing.

Finally, Postmates' reliance (Br. at 24) on *Ferber v. Waco Trucking, Inc.*, 36 N.Y.2d 693, 694 (1975), is misplaced. That case addressed whether a corporate entity, not an individual, was an employee within the meaning of an insurance contract. None of the relevant facts are discussed in this Court's or the Appellate Division's decisions, and neither decision indicates whether it applied the control test applicable here.

POINT III

THE SUBSEQUENT DECISION OF THE WORKER'S COMPENSATION BOARD DOES NOT REQUIRE VACATUR OF THE BOARD'S DECISION

The Court should reject Postmates' strained argument (Br. at 48-51) that the Board's decision must be vacated because it conflicts with a subsequent decision of the Workers' Compensation Board. That decision was based on a separate administrative record involving a different Postmates courier. The decision also post-dates the Board's decision here and was never appealed, meaning that the rationality of that decision was never subject to judicial review.[3]

In any event, as the Commissioner explained (Opening Br. at 25-26, 65-66), it is well settled that "[o]ften there is substantial evidence on both sides of an issue." *Matter of Haug*, 32 N.Y.3d at 1046 (internal quotation marks and citations omitted). Accordingly, "the existence of other, alternative rational conclusions does not

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[3] While stressing the supposed inconsistency between the decisions of these two independent state boards, Postmates simultaneously seeks to minimize the significance of the opinion of the NLRB's Office of General Counsel, which is consistent with the Board's finding that Postmates couriers are employees. Contrary to Postmates' suggestion (Br. at 51-52 n.11), the NRLB opinion was based on the same control test applied here. Postmates asserts that the unfair labor practice charge that gave rise to the NLRB opinion was ultimately withdrawn, but it does not indicate the reason for the withdrawal (e.g., settlement). Nor in any event does the withdrawal undermine the point that another agency rationally found Postmates couriers to be employees based on substantially similar facts.

warrant annulment" of an administrative determination reviewed for substantial evidence. *Matter of Jennings v. New York State Off. of Mental Health*, 90 N.Y.2d 227, 239 (1997).

To be sure, an administrative factfinder must decide cases in a manner consistent with its *own* precedent, or else explain the departure. *See Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 517 (1985). But Postmates cites no authority for its novel argument (Br. at 50) that two independent administrative bodies established within the same agency, as are the Unemployment Insurance Appeal Board and the Workers' Compensation Board, must also follow each other's precedents or explain any departure. As Postmates acknowledges (Br. at 51), the two boards operate independently, apply separate statutory schemes, and are not subject to any control or oversight by the Commissioner of Labor. *See Matter of Simonelli v. Adams Bakery Corp.*, 286 A.D.2d 805, 806 n.1 (3d Dep't 2001), *lv. dismissed*, 98 N.Y.2d 671 (2002).

Ultimately, if Postmates wants its couriers to be classified in the same manner for the purposes of both workers' compensation and unemployment insurance, its remedy is with the Legislature. The existing framework gives each administrative body authority to make its own determination based on the specific record before it, provided only that the determination has a rational basis in the record.

POINT IV

IT IS POSTMATES, NOT THE COMMISSIONER, THAT SEEKS A "REFERENDUM ON THE GIG ECONOMY"

Postmates distorts the Commissioner's position in suggesting (Br. at 48) that she calls for a "referendum on the gig economy." On the contrary, the Commissioner advocates a narrow ruling that the Board's finding of an employment relationship was rational based on the specific evidentiary record in this case. As explained above, such a ruling does not preclude other factfinders from rationally reaching the opposite conclusion in other similar cases. As the Commissioner candidly acknowledged (Opening Br. at 63-67), whether an employment relationship exists is a difficult and fact-intensive question on which reasonable minds can disagree, especially for novel work arrangements within the gig economy.

This difficulty counsels in favor of judicial deference to the administrative factfinders charged with deciding this question in particular cases.

It is Postmates that advocates a sweeping rule. It argues that no reasonable factfinder could infer an employment relationship where a worker enjoys the handful of nominal freedoms that Postmates' couriers enjoy. Because those freedoms are common to many gig-economy platforms, Postmates' rule would mean that most gig workers would be classified as independent contractors and not employees for purposes of *all* state benefits that depend on employee status. Indeed, Postmates' analysis does not even allow distinctions to be drawn based on the type of services being provided.

In short, Postmates seeks to obtain from this Court the same result that it and its gig-economy counterparts have obtained in other states via legislation classifying all gig workers as independent contractors, regardless of how state agencies or other factfinders might have classified them. (Opening Br. at 8.) This Court should decline to adopt such a sweeping rule and instead conclude that the Board's finding of an employment relationship was a rational—if not the only rational—interpretation of the evidence presented here.

CONCLUSION

The Third Department's judgment should be reversed and the Board's determination reinstated.

Dated: Albany, New York
November 8, 2019

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Joseph M. Spadola, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4,042 words, which complies with the limitations stated in § 500.13(c)(1).

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Matter of Vega (Postmates Inc.--Commissioner of Labor)
2020 NY Slip Op 02094
Decided on March 26, 2020
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DiFiore, J.
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Decided on March 26, 2020

No. 13

[*1]In the Matter of the Claim of Luis A. Vega, Respondent, Postmates Inc., Respondent, Commissioner of Labor, Appellant.

Joseph M. Spadola, for appellant.

David M. Cooper, for respondent Postmates, Inc.

New York State AFL-CIO; Legal Services NYC et al., amici curiae.

DiFIORE, Chief Judge:

The issue before us is whether the decision of the Unemployment Insurance Appeals Board (the Board) that claimant, a former Postmates, Inc. courier, and others similarly-situated are employees for whom Postmates is required to make contributions to the unemployment insurance fund was supported by substantial evidence. Because there was record support for the Board's finding that the couriers were employees, we reverse the Appellate Division order and reinstate the Board's decision.

Postmates is a delivery business that uses a website and smartphone application to dispatch couriers to pick-up and deliver goods from local restaurants and stores to customers in cities across the United States—deliveries that are, for the most part, completed within an hour. Postmates solicits and hires its couriers, who undergo background checks before being approved to work by Postmates. Once they are approved, the couriers decide when to log into the application and which delivery jobs to accept. Once a courier accepts a delivery job made available through the application, the courier receives additional information about the job from Postmates, including the destination for the delivery. After completing a job, Postmates pays the couriers 80% of the delivery fees charged to customers, and payments are made by the customer directly to Postmates, which pays its couriers even when the fees are not collected from customers. Couriers' pay and the delivery fee are both nonnegotiable.

Claimant Luis Vega worked as a Postmates courier in June 2015. Based on negative reviews from customers alleging fraudulent activity, Postmates blocked claimant from using the application. Thereafter, claimant filed for unemployment benefits. In August 2015, the Department of Labor, based in part on a statement of Mr. Vega, initially determined that claimant was an employee of Postmates, requiring that Postmates pay unemployment insurance contributions on Mr. Vega's earnings, as well as on the earnings of "all other persons similarly employed."[FN1] After Postmates disputed the determination, a hearing was held before an administrative law judge (ALJ) who sustained Postmates' objection, concluding that claimant was an independent contractor and reasoning that Postmates did not exercise sufficient supervision, direction and control over claimant to establish an employer-employee relationship. The Commissioner appealed the ALJ's decision to the Board, which reversed the ALJ, overruled Postmates' objection and sustained the Department's initial determination that claimant was an employee. After making findings of fact regarding the operation and logistics of Postmates' delivery business, the Board concluded that "claimant and any other on-demand couriers (delivery drivers) similarly situated" were employees because Postmates exercised, or reserved the right to exercise, control over their services. [FN2]

Postmates appealed to the Appellate Division. With two Justices dissenting, the Appellate Division reversed the Board's determination and remitted to the Board for further proceedings not inconsistent with the court's decision. The Appellate Division concluded that "[w]hile proof was submitted with respect to Postmates' incidental control over the couriers," the proof "d[id] not constitute substantial evidence of an employer-employee relationship to the extent that it fail[ed] to provide sufficient indicia of Postmates' control over the means by which these couriers perform their work" (162 AD3d 1337, 1339 [3d Dept 2018]). The dissenting Justices would have confirmed the Board decision, concluding that there was substantial evidence supporting its determination that claimant was an employee of Postmates. The Commissioner appeals, pursuant to CPLR 5601 (a).

Unemployment insurance is temporary income for eligible employees who lose their jobs through no fault of their own (*see* Labor Law § 501). The Commissioner of Labor is responsible for administering the State's unemployment benefits scheme (*see id.* § 530)—meaning the Department of Labor is the body that determines, on a case-by-case basis, whether workers are employees for whom contributions to the unemployment insurance fund must be made rather than independent contractors for whom no such contribution need be made (*see id.* § 570). The Department's determinations are subject to review by the Board upon appeal (*id.* § 621). A determination of the Board "if supported by substantial evidence on the record as a whole, is beyond further judicial review even though there is evidence in the record that would have supported a contrary conclusion" (*Matter of Concourse Ophthalmology Assoc. [Roberts]*, 60 NY2d 734, 736 [1983]; *see also Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 521 [1985]). Substantial evidence is a "minimal standard" requiring "less than a preponderance of the evidence" (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045 [2018] [quotation marks and citations omitted]). As such, if the evidence "reasonably supports the [B]oard's choice, we may not interpose our judgment to reach a contrary conclusion" (*Matter of MNORX, Inc. [Ross]*, 46 NY2d 985, 986 [1979]; *see also Matter of Villa Maria Inst. of Music [Ross]*, 54 NY2d 691, 693 [1981]).

As relevant here, under the Labor Law, "employment" is broadly defined as "any service under any contract of employment for hire, express or implied, written, or oral" (Labor Law § 511[1][a]). Traditionally, the Board considers a number of factors in determining whether a worker is an employee or an independent contractor, examining "[a]ll aspects of the arrangement" (*Villa Maria*, 54 NY2d at 692). But the touchstone of the analysis is whether the employer exercised control over the results produced by the worker or the means used to achieve the results (*see Concourse Ophthalmology*, 60 NY2d at 736)[FN3]. The doctrine is necessarily flexible because no [*2]enumerated list of factors can apply to every situation faced by a worker, and the relevant indicia of control will necessarily vary depending on the nature of the work.[FN4]

Here, there is substantial evidence in the record to support the Board's determination that Postmates exercised control over its couriers sufficient to render them employees rather than independent contractors operating their own businesses. The company is operated through Postmates' digital platform, accessed via smartphone app, which connects customers to Postmates couriers, without whom the company could not operate. While couriers decide when to log into the Postmates' app and accept delivery jobs, the company controls the assignment of deliveries by determining which couriers have access to possible delivery jobs. Postmates informs couriers where requested goods are to be delivered only after a courier has accepted the assignment. Customers cannot request that the job be performed by a particular worker. In the event a courier becomes unavailable after accepting a job, Postmates—not the courier—finds a replacement. Although Postmates does not dictate the exact routes couriers must take between the pick-up and delivery locations, the company tracks courier location during deliveries in real time on the omnipresent app, providing customers an estimated time of arrival for their deliveries. The couriers' compensation, which the company unilaterally fixes and the couriers have no ability to negotiate, are paid to the couriers by Postmates. Postmates, not its couriers, bears the loss when customers do not pay. Because the total fee charged by Postmates is based solely on the distance of the delivery and couriers are not given that information in advance, they are unable to determine their share until after accepting a job. Further, Postmates unilaterally sets the delivery fees, for which it bills the customers directly through the app. Couriers receive a company sponsored "PEX" card which they may use to purchase the customers' requested items, when necessary. Postmates handles all customer complaints and, in some circumstances, retains liability to the customer for incorrect or damaged deliveries.

Postmates exercises more than "incidental control" over its couriers—low-paid workers performing unskilled labor who possess limited discretion over how to do their jobs. That the couriers retain some independence to choose their work schedule and delivery route does not mean that they have actual control over their work or the service Postmates provides its customers; indeed, there is substantial evidence for the Board's conclusion that Postmates dominates the significant aspects of its couriers' work by dictating to which customers they can deliver, where to deliver the requested items, effectively limiting the time frame for delivery and controlling all aspects of pricing and payment.

Although the operative technology has changed in the interim decades, this case is indistinguishable from *Matter of Rivera*, where we held that substantial evidence supported the Board's conclusion that a similar delivery person was an employee of the delivery company—even though he set his own delivery routes and did not have a set work schedule but called the company's dispatcher whenever he wished to engage in work, accepting only the jobs he desired (*see Matter of Rivera [State Line Delivery Serv. — Roberts]*, 69 NY2d 679 [1986], *cert denied* 481 US 1049 [1987]; *see also Matter of Di Martino [Buffalo Courier Express Co. — Ross]*, 59 NY2d 638 [1983]). The dissent's [*3]attempt to distinguish *Matter of Rivera*, as well as its efforts to shoehorn the facts here into our precedent involving distinct industries and work conditions, is unavailing.

Matter of Yoga Vida NYC, Inc. (Commissioner of Labor), where this Court held that the Board's determination that certain yoga instructors were employees was not supported by substantial evidence, does not dictate a different result (*see* 28 NY3d 1013 [2016]). That decision did not change the substantial evidence standard that applies to judicial review of the Board's determinations; instead, it explicitly reaffirmed that standard. Further, as already stated, the importance of different indicia of control will vary depending on the nature of the work, and yoga instructors are not couriers. A yoga instructor provides a service that is, in some respects, unique to that instructor and his or her personal characteristics, and that was significant in *Matter of Yoga Vida* where the non-staff instructors were free to create their own customer following and invite students to attend their classes at competing studios. Moreover, Yoga Vida's non-staff instructors were paid only if a certain number of students attended their class and, therefore, needed to ensure some degree of a customer following to be successful. They also chose the method by which Yoga Vida would calculate their pay (either hourly or on a percentage basis). In these ways, the non-staff yoga instructors, in contrast to the other staff instructors, operated as independent contractors who were in business for themselves. The same cannot be said of the couriers here. Customers cannot choose, nor do they have reason to choose, a particular individual to perform the delivery and thus, unlike the non-staff instructors in *Matter of Yoga Vida*, Postmates' couriers do not have the ability to create a following or generate their own customer base [FN5]. Instead, Postmates has complete control over the means by which it obtains customers, how the customer is connected to the delivery person, and whether and how its couriers are compensated. Therefore, there is record support for the Board's conclusion that Postmates exercised more than incidental control over the couriers. "There being substantial evidence to sustain the determinations, the judicial inquiry is complete" (*Matter of Rivera*, 69 NY2d at 682).

Accordingly, the order of the Appellate Division should be reversed, with costs, and the decision of the Board reinstated. Matter of Vega (Postmates)

RIVERA, J. (concurring in result):

According to Postmates, Inc., its "couriers"—persons who make up the company's delivery staff, like claimant Luis Vega—are independent contractors because they exercise a modicum of choice in how to conduct their work. Even a cursory look at Postmates's structure reveals the fallacy of this argument. Postmates has adopted an atomized business model which prevents these workers from providing delivery services as independent business [*4]owners. During their employ, "couriers" have no meaningful way to commodify their efforts into a self-sustaining business. The structure of their work and the realities of the service economy do not permit them to develop a client base by exercising control over their business choices. To put it bluntly, Postmates did not hire entrepreneurs as delivery persons, and Postmates' attempt to create the illusion of entrepreneurialism does not transform these employees into a fleet of independent contractors.

The majority correctly describes our multi-factor test for determining whether a worker is an employee (*see* majority op at 7; *see also Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003] [considering "whether the worker . . . was free to engage in other employment"]; *Matter of Wells [Utica Observer-Dispatch & Utica Daily Press—Roberts]*, 87 AD2d 960 [3d Dept 1982], *affd sub nom Matter of Di Martino [Buffalo Courier Express Co.-Ross]*, 59 NY2d 638 [relying on fact that workers could subcontract responsibilities and work for competitors]), and reasonably considers the Board's application of the relevant factors here [FN6]. Nevertheless, while the test is well-suited to most cases, it has its limits and may prove difficult to apply to electronically mediated work arrangements. I would adopt as the better approach the Restatement of Employment Law's test for determining employee status, which alternatively considers the worker's entrepreneurial control over their services and the extent to which the employer "effectively prevents" such worker control (*see* Restatement of Employment Law § 1.01). Therefore, I write to clarify how the Restatement of Employment Law test applies to Postmates and similar business models.[FN7]

I.

A. New York's Legislature Enacts the Unemployment Insurance Law to Address the Devastating Effects of Unemployed Worker Economic Insecurity

New York's Unemployment Insurance Law is intended to "alleviat[e] the adverse financial condition that frequently accompanies . . . the cessation of income from an employer" (*Matter of Van Teslaar [Levine]*, 35 NY2d 311, 316 [1974]). According to the legislature's stated public policy, which "guide[s] the interpretation and application of [the Law],"

> "[e]conomic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and [the worker's] family . . . . [T]he legislature therefore declares that in its considered judgment the public good and the well-being of the wage earners of this state require the enactment of this measure for the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own" (Labor Law § 501).

Shortly after the Law was enacted, in the depths of the Great Depression, this Court rejected a substantive due process challenge to the mandatory employer contribution provisions adopted by the Legislature (*Chamberlin, Inc. v Andrews*, 271 NY 1 [1936]). Regarding the Law's purpose, Chief Judge Crane explained,

> "The courts can take judicial notice of the fact that unemployment for the last five or six years has been a very acute problem for State and Federal government. There have always been from earliest times the poor and unfortunate whom the State has had to support by means of money raised by taxation. We have had our homes for the poor and the infirm, hospitals, infirmaries and many and various means for taking care of those who could not take care of themselves. . . .
>
> "Another problem has faced society which has been a source of study, discussion, agitation and planning. Unemployment, from whatever cause, has increased enormously in every part of the country, if not throughout the world. Is there any means possible to provide against unemployment, the loss of work, with its serious consequences to the family, to the children and to the public at large? When such a matter becomes general and affects the whole body politic, a situation has arisen which requires the exercise of the reserve power of the State, if there be a practical solution. Some have suggested that for the periodical recurrence of panics and hard times, the actuary might be able to work out a scheme of insurance. We need not pause to determine whether this can be done or not. The fact is that in the past few years enormous sums of State and Federal money have been spent to keep housed and alive the families of those out of work who could not get employment. Such help was absolutely necessary, and it would be a strange kind of government, in fact no government at all, which could not give help in such trouble.

> "The Legislature of the State, acting after investigation and study and upon the report of experts, has proposed what seems to it a better plan. Instead of solely taxing all the people directly it has passed a law whereby employers are taxed for the help of the unemployed, the sums thus paid being cast upon the public generally through the natural increase in the prices of commodities. Whether relief be under this new law of the Legislature or under the dole system the public at large pays the bill" (*id.* at 8-9).

This State's Unemployment Insurance Law was one part of a nationwide push to counter the deleterious effects of the Depression on the lives and livelihoods of working people (*see generally* Edwin E. Witte, *Development of Unemployment Compensation*, 55 Yale L J 21 [1945]). As another part of that effort, the federal government enacted the Social Security Act, which among other things provides for financial assistance to states that administer unemployment compensation laws (*see id.* at 28-32). The Senate Report accompanying that legislation observed that "[u]nemployment compensation is financed the world over through contributions measured as a percentage of pay roll," and found that "[p]artial compensation during a relatively short period following unemployment, while a work[er] is seeking other employment or waiting to return to [their] old job, is very properly to be regarded as a part of the legitimate costs of production" (S Rep No 74-628, 74th Cong, 1st Sess at 12; *see also* Eveline N. Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 Yale L J 1, 7-8 [1945]). Thus, in creating modern [*5]unemployment insurance, the state and federal governments responded to the plight of workers who might be reduced to joblessness and penury by forces beyond their control, while ensuring that employers internalized part of the costs they imposed on society by terminating workers (*see* Labor Law § 570). The fiscal integrity of this system depends on proper classification of workers as employees, which in turn ensures an employer does not avoid its share of contributions. While by its nature the extent of misclassification in this country remains unknown, a 2000 study commissioned by the Employment and Training Administration found that at least ten per cent, and up to thirty per cent, of employers misclassified employees at that time (Lalith De Silva et al., Planmatics, Inc., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* iii [2000]; *see also* Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 Minn L Rev 907, 912-913 [2017] [collecting studies]).

Although the legislature has not defined the term "employee," it has designated certain workers as such (Labor Law § 511) and authorized the Commissioner of Labor to determine eligibility for unemployment insurance benefits for all other workers (*id.* §§ 596, 597, 620).

This determination necessarily requires a factual finding of an employment relationship (*see e.g. Matter of Conklin*, 262 AD2d 687, 688 [3d Dept 1999] [Graffeo, J.]), reviewable by an Administrative Law Judge, and whose decision may be appealed to the Unemployment Insurance Appeal Board (Labor Law §§ 620, 622, 621, 623). However, because the Law does not apply to independent contractors, this employee-independent contractor binary drives the administrative determinations.

If substantial record evidence supports the Board's conclusion that a worker is an employee, then the Board's determination is beyond further judicial review (*see Matter of Concourse Ophthalmology Assoc. [Roberts]*, 60 NY2d 734, 736 [1983]). A reviewing court may not reweigh the factors considered; it may only search the record to determine whether substantial evidence supports the Board's ultimate decision (*see Matter of Morton*, 284 NY 167, 169-170 [1940]; *see generally Matter of Stork Rest. v Boland*, 282 NY 256, 267 [1940]).

B. The Multifactor Test for Determining an Employment Relationship

Under our precedent, the existence of an employer-employee relationship is measured under a multifactor test to determine the control exercised by the employer over the results produced and the means by which services are rendered, leading to the distinction between employee and independent contractor (*see Matter of Empire State Towing & Recovery Assn., Inc. [Commissioner of Labor], 15 NY3d 433*, 437 [2010]). The Court has recognized, however, that a variety of occupations and services covered by the law "do not lend themselves to such [employer] control" (*Concourse Ophthalmology*, 60 NY2d at 736). In those cases, the analysis focuses on whether the employer exercises "control over important aspects of the services performed other than results or means" (*id.*). In other words, in the unemployment insurance context, the level of employer control that distinguishes an employee from an independent contractor is determined by the nature of the work and the ways in which supervision is both consequential to the employer's business and meaningfully exercised over the worker **[FN8]**. The employer control test has its foundation in torts and the unfortunately labeled "master-servant" relationship (*see Morton*, 284 NY at 172-173; Restatement of Employment Law § 1.01 Comment d). Under the common-law test, if an employer ("master") retains the right to control aspects of the services rendered, the worker is an employee ("servant") and the employer is vicariously liable for the employee's acts leading to tortious injury of a third party **[FN9]**. The factors applied in our case law and the Board's decisions are summarized in the Restatement (First) of the Law of Agency § 220, which this

Court cited approvingly in *Matter of Morton* (284 NY at 173 ["the degree of control which must be reserved by the employer in order to create the employer-employee relationship cannot be stated in terms of mathematical precision, and various aspects of the relationship may be considered in arriving at the conclusion in a particular case"], citing Restatement (First) of Agency § 220).

Section 220 of the Restatement (First) of the Law of Agency provides that,

> "[i]n determining whether one acting for another is a servant [i.e., an employee] or an independent contractor, the following matters of fact, among others, are considered:
>
> the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> whether or not the one employed is engaged in a distinct occupation or business;
>
> the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> the skill required in the particular occupation;
>
> whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> the length of time for which the person is employed;
>
> the method of payment, whether by the time or by the job;
>
> whether or not the work is a part of the regular business of the employer; and
>
> whether or not the parties believe they are creating the relationship of master and servant" (Restatement [First] of Agency § 220 [2]).

Since *Morton*, the American Law Institute has issued the Second and Third Restatements of Agency. Both retain the common law right to control test [FN10]. The Restatement (Third), issued in 2006, consolidated various sections of the previous iterations, including section 220, into a new section 7.07, which retains the employer right to control test and recognizes the same factors listed in the Restatement (First) and (Second), as well as the employer's control of the details of the employee's work (Restatement [Third] of Agency § 7.07, Comment *f*). Both of the newer Restatements of Agency also explain that the employer's right to control may be attenuated, and the Restatement (Third) emphasizes that "all employers retain a right of control, however infrequently exercised" (*see id.*). Although the definition of "servant" continues to resonate for purposes of the employer's liability to third parties, the Restatement (Second) acknowledges that certain persons not fitting the definition have been held to be employees for purposes of a statutory scheme unrelated to employer tort liability because such treatment furthers the legislative goals of that scheme (*see* Restatement [Second] of Agency § 220, Comment *g*).

C. Restatement of Employment Law

The Restatement of Employment Law, issued in 2015, distinguishes between an employee and an independent businessperson. Under section 1.01, titled Conditions for Existence of Employment Relationship, this Restatement explains that, when the worker and employer agree that the worker will provide services for the employer, the worker is an employee if "the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson" (Restatement of Employment Law § 1.01 [a]). The analysis draws from the common-law right of control test described in the Restatements of Agency, but recognizes the test "looks not only to the principal's control of the physical details of how the service provider performs the service, but also to the principal's control of other aspects of the service provider's performance that determines whether [they are] able to provide those services as an independent businessperson" (*id.* Comment *e*). Like our Court in *Concourse Ophthalmology* (*see* 60 NY2d at 736), the Restatement recognizes that some workers' roles may not be susceptible to "close employer supervision," but nevertheless they should be treated as employees (*id.* Comment *d*).

The Restatement further describes an "independent businessperson" as a worker who "in [their] own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers" (*id.* § 1.01 [b]). It further explains the distinction:

> "Under this test, employees are service providers who, because of the employer's control over their performance, do not provide their services to the employer as independent businesspersons. In many cases, the employer exercises a degree of control over the physical details of how the services are performed that denies the service providers any ability to make entrepreneurial decisions. In other cases, even

> when the employer does not closely supervise the service providers, the employer's control of such matters as the scheduling of performance, the use of equipment, and the hiring of assistants effectively prevents the service providers from making entrepreneurial decisions in their own economic interest. By contrast, service providers who do have entrepreneurial control over business decisions can seek to increase their personal economic returns not simply by working harder in performing the service for the principal but also by working at their discretion for other customers, by hiring assistants and by deploying or substituting for labor their own equipment or capital. Those independent businessperson-service providers are in a different economic position from employee-service providers who do not have such entrepreneurial control. On that ground, the latter service providers have been treated differently by the employment laws" (*id.* Comment *e*).

Workers who are prevented by their employers from acting as independent businesspersons "are employees" under the second prong of the Restatement test, "regardless of the manner of their compensation or the flexibility of their work hours" (*id.*).

With respect to worker entrepreneurialism, Comment *f* further explains:

> "Under § 1.01(a)(3), the employer's close supervision of the physical details of how the service provider performs the services is sufficient, but not necessary, for employee status. As a practical matter, an employer might not need to monitor closely the details of the work performed by an employee-service provider because of the nature of the work performed, the place where it is performed, or the employee's skills in performing the work. When that is true, the question of the service provider's employee status turns on whether the employer's control over the service provider's performance effectively prevents the service provider from providing the services as an independent businessperson.
>
> "As set forth in § 1.01(a)(3) and § 1.01(b), individuals provide services as independent businesspersons if they are able to serve their own economic interests through entrepreneurial control over a significant part of their costs or opportunities for profit. Such entrepreneurial control is control over important business decisions, such as the hiring and assignment of assistants, the purchase and use of equipment, and whether and when to serve other customers. Employee-service providers, by contrast, can affect their remuneration or other economic interest only by working harder or more skillfully on their employer's behalf; they are not entrepreneurs operating as independent businesspersons.
>
> "Under the foregoing test, highly skilled or highly trained professionals are employees if the employer controls the cost of providing, and the timing of, their work; such individuals can seek to improve their economic returns only by providing the employer more or better services. The same is also true of executives who are subject only to the general control of a corporation's board of directors but

> who are expected to exercise their discretion solely to further the corporation's business objectives and not any independent business objectives of their own" (*id.* Comment *f*).

Notably, the Reporter's Notes to the Restatement of Employment Law highlight two important considerations relevant to a worker's exercise of entrepreneurial control. First, "[u]nskilled workers who provide no additional input [*6]other than their own labor ordinarily will not be held to be providing services as independent businesspersons even when the employer does not control the physical details of their work performance" (*id.* at Reporter's Note, Comment *f*, citing *United States v Silk*, 331 US 704, 716-718 [1947] and *Zheng v Liberty Apparel Co.*, 355 F3d 61, 68-69 [2d Cir 2003]). Second,

> "[t]he requirement that the employment relationship effectively prevent the employee from rendering services as part of an independent business ties the entrepreneurial-control test to the right-to-control test. It is the actual relationship with the recipient of the services that is determinative. In order for a service provider to be operating an independent business, therefore, that relationship must not preclude the provider from exercising entrepreneurial control in [the worker's] own interest. If the actual relationship has not changed, it should not be relevant that an employer has given an employee an opportunity to modify an employment relationship and become an independent business operator" (*id.*).

The approach of the Restatement of Employment Law addresses the concerns to which this Court responded in *Concourse Ophthalmology* (60 NY2d at 736). The Restatement's treatment of entrepreneurial control also fits with our case law holding that an independent contractor is their "own master" (*Morton*, 284 NY at 172; *see also Matter of Pedraza [Cablemasters Corp.-Hartnett]*, 149 AD2d 829, 830 [3d Dept 1989] [determining that the record supported "the finding that claimant did not operate an independent business of his own, but instead that claimant worked for the employer"]).

At the intersection of these principles are concepts of worker autonomy, employer control over work, individual business development by a worker in furtherance of self-interest, and the effects of worker exploitation on society and the economy. Given our legislature's recognition that "[e]conomic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state," and the Unemployment Insurance Law's remedial purpose to provide benefits to workers who become unemployed through no fault of their own, a determination about who is eligible for remuneration from the insurance fund should be informed by the realities of the worker's experience. We should not equate independent contractor status with illusory opportunities for worker entrepreneurialism.

The fact that an employer profits from unskilled labor without having to supervise a worker in the traditional sense does not render the worker an independent contractor merely by dearth of oversight. An illusory opportunity to be your own businessperson is insufficient to establish independent contractor status where the employer controls significant aspects of the work that meaningfully impact the employer-employee relationship, and by so doing, "effectively prevents the individual from rendering those services as an independent businessperson" (Restatement of Employment Law § 1.01 [a] [3]). The conditions establishing an employment relationship set forth in the Restatement of Employment Law, drawing in part from the multifactor test of the Restatement (Third) of Agency, should be applied to unemployment insurance cases.

II. Postmates's Business Model

Postmates describes itself as "a company that created and operates a web-based and mobile Platform" which "facilitates a marketplace of deliveries from local businesses through a network of freelance Delivery Providers." Notwithstanding this attempt to distinguish itself from other delivery services, the record makes clear that Postmates is in the business of making timely deliveries and uses technology to atomize this service. Postmates does not "match" an individual who can then negotiate in their own interests the best way to meet a client's needs. Postmates' "marketplace" is illusory as Postmates' business model depends on unskilled workers who have no ability to work as independent delivery persons and develop a client base while in Postmates' employ.

To be precise, Postmates created an algorithm that permits an individual to place an online delivery order. The request is made on the Platform and then Postmates finds a person from its pool of hired workers to make the delivery. Delivery persons—called "couriers"—access delivery assignments through the Platform, i.e., the Postmates app. Postmates does a criminal background check on couriers and trains them on how to use the app. Couriers must sign an "Independent Contractor Acknowledgement Agreement." Although couriers may use their preferred means of transportation to conduct their deliveries, they must give Postmates advance notice of their choice. Couriers log into the app at will, and may accept or decline a posted delivery assignment, but they do not receive details about the nature of the assignment in advance of acceptance. Postmates retains the right to unilaterally terminate couriers

[*7]without notice, such as for poor customer ratings or other poor performance. As I discuss below, Postmates' business model depends on a delivery staff of "couriers" who are employees, not independent contractors.

III. Restatement of Employment Law Applied to Postmates

"Couriers" do not have an exclusive employment contract with Postmates, but being able to work simultaneously for another employer does not make a courier an independent businessperson. Couriers cannot build a client-base through their business savvy; apart from the moment of delivery, customer contact is through Postmates, and customers do not choose a delivery person. Nor does the work lend itself to the "exercise[] of entrepreneurial control over important business decisions" (Restatement of Employment Law § 1.01 [b]). Indeed, the model depends on a courier not providing the same services as an independent businessperson.

To illustrate the point, we need only consider what the parties present as a typical Postmates delivery assignment: the request to pick up a burrito bowl from a store and deliver it to the customer's home. Postmates informs couriers of the pickup location for this delivery request through the app, and once a courier accepts the assignment, Postmates forwards the details. The courier is then tracked by both Postmates and the customer. At no time during the course of this delivery does the courier make important business decisions that would serve his entrepreneurial interests. The point is to get the delivery done and get paid by Postmates. There is no value in an independent relationship with any one customer since it will not lead to economically beneficial future business. You simply cannot individually deliver enough of those types of orders to make a business out of it.[FN11]

During Vega's term as a courier for Postmates, he accepted approximately half of the assignments he was offered. According to his written agreement with the company, he carried his assigned deliveries on foot. He was involuntarily terminated from this role based, according to Postmates, on negative customer feedback related to his failure to deliver one or more of the items assigned to him. He was not hired as an independent contractor, and Postmates failed to provide evidence of how Vega was able to act as an entrepreneur in the course of delivering to Postmates customers. Put another way, the record evidence showed that Vega and other similarly situated couriers "can affect their remuneration or other economic interest only by working harder or more skillfully on [Postmates'] behalf; they are not entrepreneurs operating as independent businesspersons" (Restatement of Employment Law § 1.01, Comment *f*).

The fact is that Postmates benefits from the labor of unskilled workers and persons of low income—both vulnerable to employer exploitation, as well as misclassification under the statute. In 2015, when Vega worked for Postmates, nearly three million New Yorkers, or 15.4% of the population, lived below the poverty line; nationally, fully 14.7% of persons in the United States lived in poverty (*see* United States Census Bureau, *Poverty: 2014 and 2015*, at 3 [2016]). Among individuals over 25, those without four-year college degrees were far more likely to be in poverty and/or unemployed (*see* United States Census Bureau, *Income and Poverty in the United States: 2015*, at 13 [2016] [poverty levels declined from 28.9% for individuals without high school degrees to 5% for those with four-year degrees]; United States Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey: 2015 Annual Averages — Household Data — Table 7: Employment status of the civilian noninstitutional population 25 years and over by educational attainment, sex, race, and Hispanic or Latino ethnicity* [2015] [unemployment levels declined from 8% for individuals without high school degrees to 2.6% for those with four-year degrees]). The majority of workers in the app-enabled gig economy come from this economically vulnerable demographic (*see* [*8]United States Bureau of Labor Statistics, *Electronically mediated work: new questions in the Contingent Worker Supplement* 23 [Sept 2018], https://www.bls.gov/opub/mlr/2018/article/pdf/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.pdf; *see also* dissenting op at 23 n 11). Although the Unemployment Insurance Law was passed decades before the digital age, today's app-enabled gig worker is subject to the same devastating financial "insecurity" faced by prior generations of unemployed wage earners and which initially motivated legislators to act (*see* Labor Law § 501).

IV. Substantial Evidence Supports the Board's Determination

The Unemployment Insurance Appeals Board's determination that claimant Vega was Postmates's employee during his tenure as a courier is supported by substantial record evidence. I reach that conclusion by application of the Restatement of Employment Law, which considers the extent to which an employer prevents worker entrepreneurialism and the worker's exercise of entrepreneurial control over important business decisions. The Appellate Division should be reversed and the Board's decision reinstated.

WILSON, J. (dissenting):

The majority's opinion suffers from two independent defects. The first is a failure to examine the record to determine whether the findings of the Commissioner of Labor were supported by substantial evidence. Many of those findings were so lacking in support as to appear to have been cut and pasted from the decision in some other matter, or from a form list of all the possible factors that might warrant the conclusion that someone was an employee. Under those circumstances, reversal is required. The second is a failure to recognize that the realities of the contemporary working world have outpaced our jurisprudence. The multitude of factors identified in our caselaw as pertinent to determining whether a claimant is an employee or independent contractor — reflective of a time when employees received a gold watch upon retiring from the sole company at which they spent their entire careers — coupled with our deferential standard of review, has left only two undesirable paths open: either we adhere to the [*9]caselaw and standard of review, leaving all agency decisions unreviewable, or we make haphazard reversals without explanation, based on an *ad hoc* test we do not articulate because it defies explanation. We have chosen the latter approach, which has nothing to recommend it except that it is marginally better than the former.

I.

The majority begins by asserting that "[t]he issue before us is whether the decision of the Unemployment Insurance Appeals Board (the Board) that claimant, a former Postmates, Inc. courier, and others similarly-situated are employees for whom Postmates is required to make contributions to the unemployment insurance fund was supported by substantial evidence" (majority op at 1-2). That is not correct.

At the inception of the hearing before the ALJ, the following colloquy occurred:

ALJ PICHARDO: This two-page document is marked as an exhibit for the record as Hearing Exhibit 1 as of today's date. And so where on this document does it say similarly situated, Ms. Claxton?

MS. CLAXTON [Counsel for the Commissioner]: I don't see it. I don't see it, you're right.

ALJ PICHARDO: So then it's only for —

MS. CLAXTON: For the claimant.

ALJ PICHARDO: — claimant?

MS. CLAXTON: Yes, Judge.

ALJ PICHARDO: All right.

After the close of evidence, the ALJ reiterated that "my decision in this case . . . only relates to Mr. Vega and not any other employees." Thus, this appeal concerns only Mr. Vega: whether there is substantial evidence supporting the determination that he was an employee of Postmates. The Board's determination, erroneously purporting to apply its decision to all similarly situated Postmates workers, is itself a freestanding basis to reject the Board's determination (*see Pell v Board of Education*, 34 NY2d 222, 230-231 [1974] [the action of an administrative tribunal is arbitrary when "taken without regard to the facts"]).**[FN12]**

Anyone can download the Postmates Fleet app to become a courier for Postmates. I could be a Postmates courier, so long as I passed a criminal background check. I could make Postmates deliveries when and where I pleased, and extemporaneously indicate my availability at moments when I need a break from the press of court business. I could make my deliveries by any form of locomotion I choose: walk, bicycle, scooter, car, rollerblade, etc.

Luis Vega, at least briefly, thought more of the Postmates opportunity than did I. He downloaded the app, provided sufficient information to pass the criminal check, and was thereafter authorized to use the Postmates service to make deliveries. Mr. Vega indicated he would be walking to make deliveries. He first logged on to Postmates on June 8, 2015, and last logged on to Postmates on June 15, 2015. At that point, he had worked for Postmates for less than a week and had logged on 12 times for an average of 3 hours and 15 minutes at a time. During those six days, Mr. Vega rejected or ignored about 50% of the assignments offered to him. The record was unequivocal that, even if Mr. Vega requested to make a specific delivery assignment and obtained it, he could thereafter change his mind and reject it, causing it to be dumped back into the pool of assignments available to others. Mr. Vega had no set schedule; he had no supervisor **[FN13]**; and, he chose what deliveries interested him, how to perform deliveries, the route he would [*10]take, and the times at which he would log on and off. Of the jobs he accepted over those six days, "a lot of requesters' feedback" indicated that "they weren't receiving the items requested." Postmates therefore blocked Mr. Vega from the app. Mr. Vega then filed for unemployment benefits.

In its determination of the matter in August 2015, the Department of Labor classified Mr. Vega as an employee for the purposes of New York Unemployment Insurance Law. The Department of Labor's determination that Mr. Vega was Postmates' employee lists 24 factors supporting that determination. A large number of those factual findings are directly contradicted by the record [FN14]. Among those factors are: Mr. Vega was told "when, where, and how the work was to be performed"; he was required to report to a supervisor and work an established schedule; he was required to deliver the packages within a set time; his work would be reviewed; he could not take time off without Postmates' approval; he was covered by a workers' compensation policy; he was not free to determine the route of the delivery; and, he could not perform other deliveries while on route with Postmates.

None of these factors has support in the record. Each of those factors was undermined by the testimony before the ALJ, who found that the Postmates couriers chose when they worked, how they worked, and where they worked; couriers could and did choose their own routes; Mr. Vega was not covered by workers' compensation; couriers were free to reject, ignore, or accept assignments as they chose; and, couriers were free to work for other companies at the same time as they worked for Postmates (*id.*). Although the Commissioner found that Mr. Vega "could not engage substitutes or other couriers without your permission," the record evidence was that Mr. Vega could "hand his phone to a complete stranger" to complete deliveries. Additionally, the Department noted as a factor that: "Individuals performing such services as couriers were previously determined to be your employees." However, the ALJ expressly stated that she was "not going to be considering it" because Postmates and its counsel "weren't aware of this determination." Moreover, counsel for the Commissioner stated, "I didn't really want to make it a part of the record," after which the ALJ reiterated, "that's not going to be before me."

Based on the record, which included both exhibits and testimony, the ALJ held that Mr. Vega was an independent contractor not entitled to unemployment benefits. Although the Board did not make any finding of fact contrary to the ALJ's findings, the Board reversed the ALJ's determination. The Appellate Division reversed the Board's determination for lack of substantial evidence, citing our decision in *Yoga Vida* (*Matter of Vega v Postmates Inc.*, 162 AD3d 1337 [3d Dept 2018]). The court noted the lack of application or review process, the lack of supervision, the courier's choice to log on and accept delivery requests, the courier's choice of route and mode of transportation, the lack of a required uniform or identification, the payment system (allowing for payment only upon the completion of a delivery), and the lack of reimbursements for delivery-related expenses (*id.* at 1338-1339). Although some indicia of control remained, the court concluded it only showed incidental control, insufficient to render Mr. Vega an employee (*id.* at 1339). To recap: the Commissioner, the Board and majority conclude that Mr. Vega's slapdash week of activity made him Postmates' employee; the ALJ and Third Department concluded, as do I, that it did not **[FN15]**. What accounts for that disagreement? The failure of our precedent to keep up with the times.

II.

"Any employer shall become liable for contributions under [Article 18, the Unemployment Insurance law] if it has paid remuneration of three hundred dollars or more in any calendar quarter" (Labor Law § 560 [1]). "Remuneration" in this part of the Labor Law means "every form of compensation for employment paid by an employer to his employee" (Labor Law § 517 [1]) and "employment" is defined as "any service under any contract of employment for hire, express or implied, written or oral" (Labor Law § 511 [1] [a]), subject to many additions not relevant here **[FN16]** . Thus, Postmates' obligation to pay unemployment insurance contributions for Mr. Vega turns on [*11]whether its agreement with him was "a contract of employment for hire." That definition of "employment" is circular, so we have interpreted it to apply what is described as the "common law test" of employee status (*In re Morton*, 284 NY 167, 173 [1940], *cf. Community for Creative Non-Violence v Reid*, 490 US 730, 740 [1989]), often described as the "control test," when determining liability for unemployment insurance payments.**[FN17]**

Under the control test of employee status, "the critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results" (*Bynog v Cipriani Group, Inc.*, 1 NY3d 193, 198 [2003]). We further explained that "control over the means is the more important factor to be considered," and distinguished "incidental control over the results produced without further indicia of control over the means employed to achieve the results" from other forms of control that would evince an employment relationship (*Matter of Ted Is Back Corp. [Roberts]*, 64 NY2d at 726; *see Matter of Hertz Corp. [Commissioner of Labor]*, 2 NY3d at 735). However, that means-ends test coexists uneasily with a separate test, the "overall control" test, where "substantial evidence of control over important aspects of the services performed other than results or means is sufficient to establish an employer-employee relationship" (*Matter of Empire State Towing and Recovery Assn., Inc.*, 15 NY3d 433, 437-438 [2010]; *Matter of Concourse Ophthalmology Assocs., P.C.*, 60 NY2d 734 [1983] ["The board's determination is . . . supported by substantial evidence of control over important aspects of the services performed other than results or means"]). The "overall control" test is said to apply only "where the details of the work performed are difficult to control because of considerations such as professional and ethical responsibilities" (*Empire State Towing*, 15 NY3d at 437-438).

A.

Putting aside the clear lack of record support for a multitude of the factors relied on by the Department of Labor, the majority's conceptual error in resolving this case (and, I suspect, a good deal of the confusion below on the application of the control test) stems from a lack of decisional clarity about what factors matter when and why. Every contractual relationship for the provision of services will involve some control — whether overall or over means-ends — being ceded to the service-provider and some control being held by the requestor. No sensible enterprise gives even an indisputably independent contractor complete control over the "results produced or the means used to achieve the results." Imagine instructing a contractor to build a house, with no specification as to the size, layout, style or features to be included (ends) or a requirement that the contractor comply with local building laws (means). Absent a more defined legal standard it is unclear how much control the employer may have over an independent contractor before that contractor becomes an "employee," or, for that matter, what makes control "incidental" as compared to non-incidental.[FN18]

Matters are especially unclear in the semi-professional world of the "overall control" test, which tells us only that sometimes control over "important aspects" other than ends or means matters. But even the means-ends test is no panacea. Means and ends are not perfectly polarized. Here, for example, Postmates allows its couriers to choose whatever method of delivery they wish, but had Mr. Vega opted to deliver by pogo stick, turning sushi into a poke bowl or burritos into taco salads, surely he would have been bounced from the app expeditiously. Postmates undoubtedly cares that its customers receive their dinners intact, but Postmates' concern for that end, or a ban on the [*12]means of pogo stick deliveries, does not address the question of control for employment purposes. Both the means (no pogo) and ends (no mush) would be required whether the delivery person was an independent contractor or an employee.

Because "control" standing alone is relatively unhelpful, we have responded by creating a multifactor analysis where no one factor is determinative and where, as the majority correctly observes, "no enumerated list of factors can apply to every situation faced by a worker" (majority op at 5). The Supreme Court of the United States, reviewing a similar proliferation of factors, noted dryly that "the traditional agency law criteria offer no paradigm of determinacy" (*Nationwide Mut. Ins. Co. v Darden*, 503 US 318, 327 [1992]). This approach has given us a hash of factors that may be held more or less probative to the "control" determination depending on who is performing the analysis; indeed, in the briefing on this case, the parties point to more than twenty factors, each supported by one or more of our cases, none of which overruled the other, all of which are claimed to bear on the control analysis. Yet without providing guidance as to which factors ought to be weighed, and how weighed, and when weighed — without providing some precision and clarity as to what the factors are meant to support — the existing paradigm ends up giving the agency free rein to make whatever legal determinations it pleases until, usually with little explanation, we reverse the Board's findings for want of "substantial evidence" in an opinion that usually wants for substantial explanation (*cf. Matter of Charles A. Field Delivery Services [Roberts]*, 55 NY2d 516, 517 [1985]).[FN19]

B.

Our inconsistent, summary precedent makes it nearly impossible to arrive at a decision in this case that seems in perfect harmony with what has come before. Reading today's decision, one might think that, in the future, the Board's employment-status determinations will unfailingly be affirmed on the grounds of substantial evidence. Instead, today's decision is just one more bounce of the ball in the opposite direction whence it came.

In *12 Cornelia St.* (56 NY2d 895 [1982]), a memorandum opinion, we held that the Unemployment Insurance Appeal Board's determination that real estate salespersons were employees was not supported by substantial evidence, because that "determination must rest on evidence that the company exercises control over the results produced by its salespersons or the means used to achieve the results" — and "such control [wa]s lacking" where the salespersons: (1) were paid commissions; (2) worked whatever hours they chose; (3) were free to engage in outside employment; (4) bore their own expenses; (5) were not required to attend meetings or trainings; (6) paid their own premiums for health insurance; and, (7) found their own leads. Those salespeople were independent contractors even though the real estate corporation supplied them with business cards, held regular sales meetings, and provided them with workers' compensation (*12 Cornelia St., Inc. v Ross*, 83 AD2d 681, 682 [3d Dept 1981]). Mr. Vega — like the salespeople — was paid by commission (he received a percentage of the fee charged to the customer by Postmates for each delivery, which fee varied by distance), worked whatever hours he chose, was free to engage in outside employment, bore his own expenses, was provided no health insurance, and was not required to attend meetings or trainings (other than one initial meeting on how to use the app). Yet, despite the "evidence in the record that would have supported a contrary conclusion" (majority op at 4, citing *Concourse Ophthalmology*, 60 NY2d 734 [1983]), in *12 Cornelia St.,* we reversed the Board's determination as not supported by substantial evidence.

In *Concourse Ophthalmology* (60 NY2d at 736 [1983]), another memorandum decision, we upheld the Board's determination that doctors were employees, laying stress on the alleged employer's control of: (1) employee schedules; (2) the place of employment; (3) the appointment-making process; (4) the fee schedule; (5) ownership of [*13]key equipment; (6) administration of bills; and, (7) allocation of record-keeping responsibilities, even though the purported employer did not control the "results or means" of the doctors' work. However, those doctors maintained their own malpractice insurance, operated substantial outside practices, and "functioned completely autonomously" (*Matter of Concourse Ophthalmology Assocs., P.C.*, 89 AD2d 1047, 1048 [3d Dept 1982] [Levine, J., dissenting]). We did not dispute the putative employer's contention that "the record is devoid of evidence of control over results or means." Instead, we brushed the means-ends test aside because "professional services do not lend themselves to such control." Thus, we affirmed the Board's decision on the grounds that substantial evidence existed in the record. Following that precedent, then, where the factors cut in different directions, the Board may have had "substantial evidence" for its determination here, because Postmates controlled the delivery-assignment process, the fee schedule, administration of bills and allocation of record-keeping responsibilities, even though the first two factors we cited in *Concourse Ophthalmology* (regular work schedule and employer determination of place of work) cut against finding Mr. Vega an employee.

In yet another memorandum, we reversed the Board's decision that salespeople for an aluminum siding installation company were employees, holding that decision was not supported by substantial evidence (*Ted Is Back*, 64 NY2d at 726; *see also Matter of Ted Is*

Back Corp., 103 AD2d 932, 932 [3d Dept 1984]). We held that "incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship" (*Ted Is Back*, 64 NY2d at 726). That "incidental control" included the corporation's supply of form contracts and its retained right to approve contracts (*id.*). That the salespeople were "agents" of the company was not "decisive, for this is equally true where salespeople are determined to be independent contractors" (*id.*). The Court cited factors including that the salespeople: (1) worked at their own convenience; (2) were free to hold outside employment; (3) were not limited to a particular territory; and, (4) were paid on commissions. Applying that analysis to this case, we would affirm the order of the Appellate Division that the Board lacked substantial evidence for its determination because each of the above factors from *Ted Is Back* applies to Mr. Vega; that "incidental control" is insufficient, as a matter of law, to deem Mr. Vega an employee.

We yet again reversed the decision of the Board that a salesperson was an employee, on the ground that substantial evidence did not support its determination in *Hertz* (2 NY3d at 733). There, the claimant was a salesperson for Hertz: she visited travel agencies to promote Hertz's products by making presentations and distributing sales materials (*id.* at 734-735). She was compensated per-visit, was not required to attend meetings, and had minimal supervision (*id.* at 735). On the other hand, Hertz told her what to wear during her visits, instructed her on what products to promote, barred her from promoting competing products, and instructed her on how to present Hertz products (*id.*). Despite those factors, which could have supported the Board's determination under the substantial evidence standard, we said that she was not an employee as a matter of law, because Hertz exerted merely "incidental control" (*id.*). Mr. Vega was compensated per delivery; the Hertz salesperson per visit. Mr. Vega was told where and what to pick up and deliver, just as the Hertz representative was told what products to promote. Neither was supervised; neither had to attend meetings. But Mr. Vega was not prohibited from delivering for competing services even while engaged in a Postmates delivery and could wear whatever he liked. *Hertz* would lead one to conclude that the order of the Appellate Division must be affirmed here because the factors determining Mr. Vega's status point more strongly to independent contractor than the factors on which we reversed the Board's determination in *Hertz*.

Our most recent decision in this area, also a memorandum, is *Yoga Vida*. There, as here, the Department of Labor initially determined Yoga Vida was liable for unemployment insurance for its non-staff yoga instructors; as here, an ALJ overruled that determination; next, the Unemployment Insurance Appeal Board reversed the ALJ's decision, sustaining the Department's initial determination (*Yoga Vida*, 28 NY3d at 1015). The Appellate Division sustained the Board's determination that the non-staff yoga instructors were employees. We reversed, holding the Board's determination was not supported by substantial evidence because the non-staff instructors made their own schedules, were paid only if students attended their classes, could work for competitors, and were not required to attend meetings or trainings (*id.*)**[FN20]**. Each of those factors — which are the factors that justified our reversal as a matter [*14]of law — is true as to Mr. Vega: Mr. Vega made his own schedule, was paid only for deliveries he made, could work and perform deliveries for other companies even while making deliveries for Postmates, and was not required to attend meetings or trainings. Moreover, Mr. Vega did not have to work on a prearranged schedule; the non-staff instructors did. Mr. Vega did not have to work at his employer's place of business; the non-staff instructors did. In *Yoga Vida*, we emphasized that Yoga Vida's determination and collection of the fees that the non-staff instructors received did "not supply sufficient indicia of control" (*id.* at 1016). So too, Postmates' control over the fees Mr. Vega received should be insufficient to support an employer-employee relationship **[FN21]**. That the outcome today is the diametric opposite of the outcome arrived at just three years ago in *Yoga Vida*, an outcome that the majority contends was reached by the same standard as applied here (majority op at 8), shows just how inconstant our "test" has become.

The facts surrounding Mr. Vega's six-day adventure as a courier neatly fit into the exertion of mere "incidental control," which does not provide substantial evidence for a Board's determination of employee status (*see e.g. Ted Is Back*, 64 NY2d at 726). Mr. Vega retained more than just "some independence to choose [his] work schedule and delivery route" (majority op at 6) — he had complete control over his schedule, the hours he logged on, the jobs he accepted or rejected (or rejected even after accepting them), and the routes he took when, having accepted a job, he actually made the promised delivery. Nor does Mr. Vega need to have actual control over "the *service* Postmates provides its customers" (majority op at 6 [emphasis added]), for that is not the test. The control test applies only to the company's control over the worker's labor; the worker need not have control over, or anything to do with, the service provided by the company. Our precedent may not be consistent, and it certainly makes it difficult for litigants and lower courts to apply the control test, but at least it provides this answer: Mr. Vega is far more an "independent contractor" than the real estate salespeople given business cards by their company in *12 Cornelia St.*, the product promoter who was told what to wear and how to present in *Hertz*, or the yoga instructors told when, where and what to teach in *Yoga Vida*.

III.

The overarching problem in our control test jurisprudence is exemplified by Mr. Vega's case. The parties here attempt to rely on two dozen different factors, all of which derive from previous Court of Appeals' decisions and all of which we have suggested may have some bearing on the control analysis. However, those factors fail to aid us in this decision. Factors that seem in some of our cases to provide support for the determination of an employer-employee relationship do not always do so (*compare Concourse Ophthalmology*, 60 NY2d at 736 [where the company collected and determined fees, supporting the decision that ophthalmologists were employees] *with Yoga Vida*, 28 NY3d at 1017 [Fahey, J., dissenting] [where Yoga Vida collected and fixed the fees of the non-staff instructors, but substantial evidence did not support the Board's decision that the non-staff instructors were employees]), [FN22] whereas factors that we previously identified as showing merely incidental control insufficient to [*15]establish an employment relationship, such as setting one's own schedule, the ability to work for other companies, and being paid on commission (*see e.g. Ted Is Back*, 64 NY2d at 726) are today eschewed by the majority.

It is no surprise, then, that reading the procedural history of this case or our prior decisions feels like watching a ping-pong match: no one, not even this Court, knows which combinations of factors are determinative and which are not. We have held that no one factor is determinative (*Concourse Ophthalmology*, 60 NY2d at 736), and the majority emphasizes the formlessness of our jurisprudence by observing that "no enumerated list of factors can apply to every situation faced by a worker" (majority op at 5). At the same time, the majority adds a new factor to the list: "the nature of the work" (*id.*). It wields that new factor based on unsupported judgments, contrasting couriers as "low-paid workers performing unskilled labor who possess limited discretion over how to do their jobs" (*id.* at 6), with yoga instructors who perform work that "is not comparable to that of a delivery person," because a yoga instructor provides a "service . . . unique to that of the instructor and his or her personal characteristics" (*id.* at 7). We have never before mentioned the "nature of the work" in the employment context, let alone held that factor determinative in such cases.[FN23]

In any event, adding that factor to our litany makes no sense. The purpose of the control test, and even the variegated factor analysis, is to prevent the over-reliance on the *kind* of work in the determination of employment status. Forcing that factor into the control test provides the opportunity for every courier — regardless of any analysis of the factors or the degree of control exerted over them — to be an employee because of the nature of delivery work: if Mr. Vega is an employee, so is everyone who delivers a tangible good. Had the "nature of work" been determinative in *Yoga Vida*, non-staff yoga instructors and staff instructors alike would need to have been deemed employees. Instead, however, this Court held that substantial evidence did not support the Board's determination that non-staff yoga instructors were employees by relying on dissimilarities — having nothing to do with the nature of the work — between the non-staff instructors and the staff instructors (*Yoga Vida*, 28 NY3d at 1015). If the nature of the work holds as much importance as the majority declares it does today, the dissimilarities between the non-staff and staff instructors would have been irrelevant.

For that reason, the majority's reliance on *Matter of Rivera* (69 NY2d 679 [1986]), is misplaced. Simply because the employees at issue in *Rivera* were delivery persons does not make that case "indistinguishable" (majority op at 7). Although similar in many respects, there are several notable differences: Mr. Vega could accept a delivery assignment and then later change his mind at any time, even after a customer had been told that Mr. Vega would deliver it, whereas there is no indication that the *Rivera* couriers could turn back a delivery assignment after accepting it; Mr. Vega was not given a time limit for completing deliveries, whereas the *Rivera* couriers were; Mr. Vega was free to choose any means of transportation he wished (which he could vary at will with no need to inform Postmates), whereas *Rivera* required its couriers to use motor vehicles and to purchase both ordinary insurance as well as special cargo insurance for their vehicles (*Claim of Rivera*, 120 AD2d 852, 854 [3d Dept 1986]).

The addition of a new factor to the control test illustrates the most concerning aspect of our ever-changing employment determination decisions. Because the test depends on innumerable factors, which vary from case to case and opinion to opinion, and we review the Board's determinations for substantial evidence, the Board is given unbounded discretion. We will never be able adequately to review their determinations because they will always rely on factors that we — at one point or another — have sanctified. "Substantial evidence" review of a smorgasbord of flavorless factors authorizes unrestrained agency decision-making.

Without regular examination, modification and explication of our common law, common-law tests risk falling into incoherence or vagueness. In the broader sense, this case implicates many factors upon which our Court and the [*16]Appellate Division have relied to reverse an agency determination as "unsupported by substantial evidence" because the courts have concluded that the facts relied on by the agency do not really speak to the ultimate issue of control (*see e.g. Empire State Towing*, 15 NY3d at 437; *12 Cornelia St.*, 56 NY2d at 897-898; *Ted Is Back*, 64 NY2d at 726; *Hertz*, 2 NY3d at 733; *Yoga Vida*, 28 NY3d at 1015-1016). Our several prior reversals of the Board's decisions, though offering that "the determination of the appeal board, if supported by substantial evidence on the record as a whole, is beyond further judicial review even though there is evidence in the record that would have supported a contrary decision'" (*Empire State Towing*, 15 NY3d at 437 [2010]), are best understood as reflecting our recognition that we cannot allow the deferential standard of review to shield the Board from all review, even if the Board has relied exclusively on factors we have deemed relevant in determining who is an employee. Of course, the most important concern for us is to ensure that the law is clear and consistent as to what employers, workers and the lower courts must consider in forming and evaluating work relationships. Our terse memorandum decisions do not serve that purpose.

We need a clear understanding, comprehending the modern realities of our rapidly evolving economy, of who should be an employee and who an independent contractor, including whether work relationships should continue to be measured on that dichotomy. It is past time for the law to reexamine the definition of work and its application to different forms of entitlement and obligation. Our current framework, as inconsistently applied, fails to provide clarity to anyone involved. The agencies tasked with applying our cases and the courts that attempt to review those decisions for substantial evidence oscillate in result and rationale. The common-law test for status as an employee developed in a vastly different time, when employment was monotonic. Now, it is cacophonic. The number of workers performing multiple or alternative jobs has grown dramatically. New technology and the rise of the sharing economy have driven further changes, including the crowdsourcing of flexible and low-barrier-to-entry jobs upon which many workers are less reliant than our traditional notion of career employees. The challenge is how to apply our inconsistent common-law test in a world where work looks much different than it did when that test was developed and where we cannot, if we hold true to the deferential standard of review, reverse an agency determination so long as it has relied on some of the factors we have identified as relevant.

The stakes are high. As the California Supreme Court, confronting a similar question, phrased the matter (*Dynamex Operations W. v Superior Ct.*, 4 Cal 5th 903, 912-13 [2018] [Cantil-Sakaute, C.J.]):

> "On the one hand, if a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and, most relevant for the present case, complying with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families."
>
> "Although in some circumstances classification as an independent contractor may be advantageous to workers as well as to businesses, the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state [*17]governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled."[FN24]

Although it is well within the purview of the courts to alter a common-law test, that is best done incrementally; the complete overhaul of our common-law employment test to adapt it to the present and future economy is not a task to which courts are well suited [FN25]. Whether, to what degree, and on what basis we wish to provide unemployment benefits to Postmates couriers generally, or to other workers in the gig economy, is a policy question best left to the legislature. Whether the test for that entitlement should be the same as the test for Postmates' liability if a courier, speeding on an electrified bicycle to make a timely delivery of a hot dinner, injures a pedestrian, is also a question best suited to legislative determination. The role of the courts is to interpret the law and to clarify it when we can. The accumulation of indecisive, unweighted factors articulated in our past cases, scrutinized under our highly deferential standard of review, typically produces either a de facto lack of review or an uninformative summary reversal. The resulting body of law is difficult to reconcile and does little to advise agencies and lower courts (to say nothing of business enterprises or workers) how any particular work relationship will or should be adjudicated. Today's decision places further stress on that test through its contradiction of our recent decision in *Yoga Vida* and its incompatibility with several others in which we found the Board lacked substantial evidence in circumstances less compelling than this. Nevertheless, until the legislature steps in, we have an obligation to do our best to reach consistent results so that both businesses and workers can structure their affairs with a sound understanding of when the benefits and obligations of "employment" are imposed or conferred upon them. Whether other Postmates couriers are employees is not before us. Mr. Vega's case is, and he is not.

Order reversed, with costs, and decision of the Unemployment Insurance Appeal Board reinstated. Opinion by Chief Judge DiFiore. Judges Stein, Fahey and Feinman concur. Judge Rivera concurs in result in an opinion. Judge Wilson dissents and votes to affirm in an opinion in which Judge Garcia concurs.

Decided March 26, 2020

Footnotes

Footnote 1: The parties do not dispute that, consistent with the Department's initial decision, the Board's determination imposes a contribution requirement for similarly situated couriers employed by Postmates (*see* Labor Law § 620[1][b]), nor does Postmates direct any argument at that aspect of the Board's decision.

Footnote 2: The record does not indicate whether Mr. Vega actually received or was eligible for unemployment insurance benefits and that issue is not before this Court.

Footnote 3: Both the dissent and the concurrence suggest that we should devise a different test for analyzing whether a worker is an employee or independent contractor. But that assertion is neither preserved for review nor argued by any party in this Court. As the dissent recognizes, overhauling the test "is not a task to which courts are well suited" and "is a policy question best left to the legislature" (dissenting op at 24). The Legislature defined "employment" in the context of the unemployment insurance law. Whether a different definition or test should now apply to employees generally, or to couriers in particular, is a policy question for the Legislature to be implemented by the administrative agency authorized to make those determinations.

Footnote 4: The factors the agency considers in assessing control will vary depending on the type of work; for example, that a worker in one industry is not limited to a particular territory (dissenting op at 14) may be irrelevant to the inquiry relating to a worker in a different industry. Because of the variability of work relationships, employment status for unemployment insurance purposes requires a case-by-case analysis. It is nonetheless appropriate to consider precedent and view the factors in context when determining whether the Board's determination is supported by substantial evidence. While the "nature of the work" is not determinative of whether a worker is an employee, it does impact how control is (or practically can be) manifested in a particular work environment and in this way is integral to the analysis. To recognize this — which is obvious from our precedent — is not to add a "new factor" (dissenting op at 14, 18-19) to the analysis.

Footnote 5: Although the dissent asserts otherwise (dissenting op at 16 n 10), yoga instructors' interest in creating and maintaining their own customer followings is nothing like customers' online ratings of their Postmates couriers. Postmates customers have no ability to choose their courier when placing a delivery request. Further, there is no evidence in the record that Postmates' couriers can determine the compensation they will receive from a delivery job before accepting it (*id.* at 17 n 10).

Footnote 6: As to the majority's application of our common-law test, I disagree insofar as the majority attempts to explain the holding in *Matter of Yoga Vida NYC, Inc. (Commissioner of Labor)* (28 NY3d 1013 [2016]). As the Appellate Division opinion here demonstrates, *Yoga Vida*'s erroneous focus on factors that the majority apparently believed outweighed the Board's rationale (see *id.* at 1016-18 [Fahey, J., dissenting]) has created confusion as to the proper application of the substantial evidence test when an employer alleges that it exercises limited to no supervision over a worker (*see* 162 AD3d 1337, 1339 [2018]; *see also Matter of Mitchell [Nation Co. Ltd Partners—Commissioner of Labor]*, 145 AD3d 1404, 1406-1407 & n 1 [3d Dept 2016] [reading *Yoga Vida* as requiring "a more detailed, qualitative and arguably less deferential analysis of the various employment factors" than had been required by the Court's prior decisions]). Although the majority states that *Yoga Vida* did not purport to "change the substantial evidence standard that applies to judicial review of the Board's determinations" (majority op at 8), the majority reaffirms the mistake of that case by, in turn, focusing on the facts in *Yoga Vida* that supported a conclusion contrary to that of the Board as the basis for distinguishing that case from the instant appeal. This part of the majority analysis clouds the issue before us, for as I discuss, there is ample evidence that Vega was an employee and not a businessperson serving his own entrepreneurial interests.

Footnote 7: Contrary to the majority's assertion our rules of preservation are not implicated by my analysis. Our task on this appeal is to decide whether substantial evidence supports the Board's determination that the couriers are employees. The only way to do that is by determining the test for establishing an employment relationship under the Unemployment Insurance Law, which does not define an employment relationship. We have applied common law principles to fill in this statutory gap, and the majority does so again today, acknowledging that "no enumerated list of factors can apply to every situation faced by a worker" (majority op at 5). I consider whether, in this gap-filling role, we should apply the Restatement of Employment Law approach, which draws from the common-law test but also considers as a factor whether workers can act without impediment as entrepreneurs. As I explain, that test addresses concerns the Court has previously raised as a basis for recognizing various relevant factors.

Footnote 8: While the *Concourse Ophthalmology* (60 NY2d 734) branch of the doctrine may have "been typically applied in the context of professionals such as physicians and attorneys" (*Empire State Towing and Recovery Assn., Inc.*, 15 NY3d at 438), its logic has force in other areas as well. For example, a job might not be susceptible of close control because it can "be done only one way" (*S.G. Borello & Sons, Inc. v Department of Indus. Relations*, 48 Cal3d 341, 345, 769 P2d 399 [1989]).

Footnote 9: A similar "control" test is applied by the federal government and by many of our sister states in similar contexts (*see Eisenberg v Advance Relocation & Storage, Inc.*, 237 F3d 111, 114-115 [2d Cir 2000] [collecting cases]).

Footnote 10: The Restatement (Second), issued in 1958, adds one more factor to the original list: "(j) whether the principal is or is not in business" (Restatement [Second] of Agency § 220 [2] [j]).

Footnote 11: The record shows that Postmates pays its couriers 80% of the fee it charges its customers, which varies based on the distance that the courier travels. According to Postmates's website, the fee varies from $0.99 to $9.99 per delivery (*see* Postmates, *How do fees work?*, available at https://support.postmates.com/buyer/articles/360032280952-article-How-do-fees-work-#:~:text=). Thus, assuming an average delivery fee of $5, a courier would make $4 per delivery. To make the New York City minimum wage of $15 per hour over a 40-hour work week (*see* Labor Law § 652), a courier would have to deliver 150 food orders per week over those 40 hours. Even if the courier makes the maximum of $8 per delivery every single time—an unrealistic prospect—the courier would have to make 75 deliveries per week. Setting aside the sizeable costs of healthcare and other benefits, which Postmates couriers must provide for themselves, it is obvious that these couriers cannot create an independent business out of delivering food orders or other similar items for Postmates.

Footnote 12: Not only was Postmates given no opportunity to present evidence as to other couriers, but the parties were expressly informed by the ALJ, at the start of the hearing, that the ALJ's determination would be limited to just Mr. Vega. That neither party addressed the ALJ's limited determination does not change that determination's scope (majority op at 3 n 1). Thus, the Board's subsequent decision, if read to impose a contribution requirement on Postmates for Mr. Vega and all other similarly situated couriers, would implicate due process concerns because Postmates was expressly instructed that the proceeding would relate solely to Mr. Vega's claim and not others similarly situated (*see e.g. Martin v Ronan*, 47 NY2d 488, 490 [1979]["a requisite of due process (is) the opportunity to be heard before one's rights or interests are adversely affected"]).

Footnote 13: Postmates' witness before the ALJ, the regional manager, believed Mr. Vega had been a bicycle courier, which just goes to show how much "supervision" of Mr. Vega actually took place.

Footnote 14: Incidentally, Mr. Vega did not appear and presented no evidence at the hearing; the sole evidence presented came from Postmates.

Footnote 15: At oral argument, counsel for the Board had difficulty pinpointing when Mr. Vega became an employee of Postmates, eventually settling for the moment he made his first Postmates delivery.

Footnote 16:I note that "employment" under Article 18 expressly includes "any service by a person for an employer as an agent-driver or commission-driver engaged in distributing meat, vegetable, fruit, or bakery products; beverages other than milk; or laundry or dry-cleaning services" (Labor Law § 511 [1] [b] [1]), a definition that might arguably sweep in Mr. Vega if the record showed what he had delivered (or promised to deliver), but the parties do not direct any arguments to the possible application of this definition and accordingly I do not consider it.

Footnote 17: Of course, the Legislature may, for unemployment compensation purposes, adopt a different definition of "employee." It has done so in other parts of the Labor Law, providing at Labor Law § 2(7) that one is employed simply when one is "permitted or suffered to work" for an employer (*cf. Nationwide Mut. Ins. Co. v Darden*, 503 US 318, 326 [1992] [discussing similar language in the federal Fair Labor Standards Act]). However, that broader definition does not apply to the unemployment insurance article, which uses the definition discussed above (Labor Law § 510).

Footnote 18: We have never defined "incidental control." Doing so might better allow us, even if we cannot reach consensus on what meets the substantial evidence standard, to determine when the facts are not supported by substantial evidence.

Footnote 19: Of our opinions in the unemployment insurance cases since 1981, *Villa Maria Inst. of Music v Ross* (54 NY2d 691 [1981]), *12 Cornelia St., Inc. v Ross* (56 NY2d 895 [1982]), *Matter of Concourse Ophthalmology Assoc., P.C.* (60 NY2d 734 [1983]), *Matter of Ted Is Back Corp*. (64 NY2d 725 [1984]), *Matter of Rivera* (69 NY2d 679 [1986]), *Matter of Salamanca Nursing Home, Inc.* (68 NY2d 901, 903 [1986]), *Matter of Hertz Corp. (Commissioner of Labor)* (2 NY3d 733 [2004]), and *Matter of Yoga Vida NYC, Inc.* (28 NY3d 1013 [2016]) were all summary, memoranda judgments. We have treated this question in a full opinion only in *Matter of Charles A. Field Delivery Serv., Inc.* (66 NY2d 516 [1985]) and *Matter of Empire State Towing and Recovery Assn., Inc*. (15 NY3d 433 [2010]). The profusion of summary memoranda in this area underscores the incoherence of the conventional test for independent contractor/employee status when applied to an evolving economy that encompasses new styles of working.

Footnote 20: The majority's claim that our decision in *Yoga Vida* "reaffirmed" the substantial evidence standard (majority op at 8) illustrates the amorphousness of that standard when applied in the unemployment insurance context. For example, even though "Yoga Vida generally determines what fee is charged and collects the fee directly from the students [that] does not supply sufficient indicia of control over the instructors" to constitute substantial evidence of employment (*Yoga Vida*, 28 NY3d at 1016). If the majority is reaffirming the standard we applied in *Yoga Vida*, that standard has become so elastic as to be whimsical.

Footnote 21: The majority cites a few other distinctions between the non-staff yoga instructors and Mr. Vega, but those sound more different than they really are. The yoga instructors' interest in maintaining a "customer following to be successful" is akin to the customer ratings Mr. Vega needed to remain successful on the Postmates app (majority op at 7). Likewise, the ability of the yoga instructors to affect their compensation to some degree by choosing hourly compensation or a percentage of class fees corresponds to Mr. Vega's ability to affect his compensation by taking, e.g., high dollar volume jobs or short-haul jobs that he could consolidate and deliver simultaneously. Indeed, Mr. Vega had more control of his compensation than did the yoga instructors, inasmuch as he could accept a job, immediately see the compensation he would receive from it, and reject it if it was not to his liking. There is nothing to suggest the yoga instructors could decline to teach a class or switch from percentage to hourly compensation if only two customers appeared for class.

Footnote 22: Judge Rivera's concurring observation that *Yoga Vida* was wrongly decided further emphasizes the incoherence of our decisional law in this area.

Footnote 23: Although the majority points to no prior precedent of ours listing "nature of the work" among the factors to be considered, we are advised that because "indicia of control will vary depending on the nature of the work," it is "obvious" that nature of the work should be included in the list of factors (majority op at 5 n 3, 8). I do not think it "obvious" — one way or the other — that differences in the work of ophthalmologists and aluminum siding salespeople tend to make the former more controllable than the latter, or that our determination that the former were employees and the latter independent contractors had anything to do with the intrinsic nature of their occupations.

Footnote 24: *See also* Joint Task Force on Employee Misclassification, *Annual Report 2015*, https://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2015.pdf (discussing at length the effect of employee misclassification on New York state in particular); Sarah Jeong, *Strike All You Want. Uber Won't Pay a Living Wage*, NY Times (May 10, 2019), https://www.nytimes.com/2019/05/10/opinion/uber-ipo.html (discussing studies showing that in New York City, about half of ride-hailing drivers are supporting families with children, but earn so little that 40 percent of those drivers qualify for Medicaid and another 18 percent qualify for food stamps); Noam Scheiber, *Uber and Other Gig Companies Maneuver to Shape Labor Rules*, NY Times (Mar. 26, 2019), https://www.nytimes.com/2019/03/26/business/economy/gig-economy-lobbying.html (discussing the "highly disruptive" effect of proposals to classify large numbers of gig workers as employees).

Footnote 25: Our call for a new test need not be preserved (majority op at 5 n 3). In fact, because the employment test is one created by the courts, it is our job to change it if necessary — regardless of if the parties call for it. However, it is the role of the legislature to make policy; here, where the majority's holding overturns a decision of this Court from just three years prior, it is clear we are in sore need of legislative decision-making, not solely judicial re-interpretation.

Return to Decision List

New York Legislative Materials

Dependent Workers Act **S 6538** SAVINO Same as A 8343 Crespo

Text at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S06538&term=2019&Summary=Y&Text=Y

NEW YORK STATE SENATE

INTRODUCER'S MEMORANDUM IN SUPPORT

submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S6538

SPONSOR: SAVINO

TITLE OF BILL: An act to amend the labor law, in relation to dependent workers

PURPOSE OR GENERAL IDEA OF BILL:

The purpose of this bill is to extend wage payment and collective bargaining protections to dependent workers and examine other labor and related laws to identify additional employment rights and benefits which could be provided to such workers in the future.

SUMMARY OF PROVISIONS:

Section 1 of the bill would establish that the title of this act shall be known and cited as the "Dependent Worker Act."

Section 2 of the bill would set forth the legislative findings and intent.

Section 3 of the bill amends Subdivision 16 of section 2 of the labor law, and renumbers subdivision 16-a and a new subdivision 17 is added defining a "dependent worker" as an individual that provides personal services to a consumer through a private third-party that establishes the amounts earned by the worker or charged to the consumer, or collects payment from the consumer, or pays the individual, or any combination thereof.

Section 4 of the bill Amends Subdivision 2 of section 190 of the labor law to include dependent workers under the definition of "employee" for the purposes of: frequency and method of wage payments; wage notice and record-keeping requirements; retaining tips; filing wage complaints; initiating wage theft claims; criminal and civil penalties for wage violations; and anti-retaliation provisions.

Section 5 of the bill add a new paragraph (c)to subdivision 3 of section 701 to the labor law to include dependent workers under the definition of "employee" for the purposes of the New

York State Employment Relations Act, granting them the right to unionize, collectively bargain, strike, and participate in union activities.

Section 6 of the bill would require the Commissioner of Labor to hold public meetings with representatives of businesses, employees, and dependent workers to examine various employment rights and benefits which could be extended to such workers in the future.

Section 7 of the bill would authorize the Commissioner of Labor to hold separate public meetings, or convene committees, to examine different industries and services with regard to the potential extension of such rights and benefits.

Section 8 of the bill would require the Commissioner of Labor to create, a report of his or her findings with recommendations for further action and legislation to the Governor, the Temporary President of the Senate, and the Speaker of the Assembly within one year of the first public meeting.

Section 9 of the bill would set forth the provisions of law to be examined by the Commissioner, which would include, but not be limited to: unemployment insurance, workers' compensation; disability benefits, and paid family leave; notices and compensation under the New York State Worker Adjustment and Retraining Notification (WARN) Act; continuation of coverage for health insurance following termination; antidiscrimination, equal opportunity, sexual harassment prevention, and privacy protections; minimum wage and other wage laws; hours of work, day of rest, and the employment of minors; and health and safety requirements.

Section 10 of the bill would set forth an effective date of 60 days after enactment.

JUSTIFICATION:

In the modern "gig economy", many people have begun working several part-time jobs or using their existing skills and assets (e.g., homes, cars, professional services) just to make ends meet. Combined with the rapid development of new technology over the last decade, these factors have enabled the on-demand gig economy to flourish. However, the classification of on-demand workers, who obtain their work on a job-by-job basis through online platforms or "apps", has led to ambiguity in the law and continued uncertainty for these individuals.

A report released in April 2019 by the Worker Institute at Cornell University's ILR School found that New York's regulatory structure does not provide the necessary level of oversight to curb abuse and obscurity in the on-demand economy. On-demand platform companies determine the rules that workers must follow, discipline workers for poor performance, specify how and when the work must be done, and control the exchange of payment between the worker and consumer, making these workers wholly dependent on the control and direction of their employer. However, these "dependent workers" are not afforded the same protections and benefits under the law as traditional employees, making them vulnerable to various forms of exploitation, abuse, misclassification, harassment, and discrimination.

While estimates of the size of the on-demand workforce vary due to a lack of a clear definition of what constitutes "dependent worker" under the law, it has become clear that these individuals continue to experience low and unstable earnings, lack important worker protections and benefits, and often face dangerous health and safety hazards on the job.

This legislation will help protect worker, business, and taxpayer interests by awarding dependent workers crucial wage and collective bargaining protections now, while requiring the New York State Department of Labor to examine additional employment rights and benefits that may be extended to such workers in the future.

PRIOR LEGISLATIVE HISTORY:

2019 Session - New bill.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS: To be determined.

EFFECTIVE DATE:

This act shall take effect on the sixtieth day after it shall have

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Glick and Jackson Bill ***A8721-A*** *Glick Same as S 6699-A JACKSON*

8721–A
https://nyassembly.gov/leg/?default_fld=%0D%0A&leg_video=&bn=a8721&term=2019&Summary=Y&Text=Y

Krueger S. 2650 Establishes the task force on jobs and the new economy

https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S02650&term=2019&Summary=Y&Actions=Y&Text=Y

Federal Materials - GIG Economy

H. R. 5419 “Gig Is Up Act’’

https://www.congress.gov/116/bills/hr5419/BILLS-116hr5419ih.pdf

H.R. 76 (IH) - Protect the Gig Economy Act of 2019

https://www.govinfo.gov/content/pkg/BILLS-116hr76ih/pdf/BILLS-116hr76ih.pdf

HR 6254

To require the Securities and Exchange Commission to extend exemptions for securities offered as part of employee pay to other individuals providing labor or services for remuneration,

https://www.govinfo.gov/content/pkg/BILLS-116hr6254ih/pdf/BILLS-116hr6254ih.pdf

Remarks of Eleanor Holmes Norton on Protecting Independent Contractors from Discrimination Act, and HR 4235

https://www.govinfo.gov/content/pkg/CREC-2019-09-06/pdf/CREC-2019-09-06-pt1-PgE1092.pdf

https://www.govinfo.gov/content/pkg/BILLS-116hr4235ih/pdf/BILLS-116hr4235ih.pdf

EXPLORING THE ‘‘GIG ECONOMY’’ AND THE FUTURE OF RETIREMENT SAVINGS

Senate Hearing 2/6/2018

https://www.govinfo.gov/content/pkg/CHRG-115shrg28635/pdf/CHRG-115shrg28635.pdf

THE DISRUPTER SERIES: HOW THE SHARING ECONOMY CREATES JOBS, BENEFITS CONSUMERS, AND RAISES POLICY QUESTIONS House Hearing

September 29, 2015

https://www.govinfo.gov/content/pkg/CHRG-114hhrg20105/pdf/CHRG-114hhrg20105.pdf

Additional Resources

Elizabeth Dougart's June 6, 2018 testimony to Congress at the "Millennials and the Gig Economy" hearing

https://congressional-proquest-com.albanylaw.idm.oclc.org/congressional/docview/t39.d40.06063803.d76?accountid=51181

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https://www.cityandstateny.com/articles/policy/technology/california-passed-ab5-what-does-mean-new-york.html

https://www.nydailynews.com/news/politics/ny-cuomo-lawmakers-have-competing-ideas-when-it-comes-to-gig-worker-20200127-7mqlr7u3yzbwdoggpelb63v5ra-story.html

https://news.bloomberglaw.com/daily-labor-report/new-york-governor-lays-down-ultimatum-on-gig-worker-rights

https://gothamist.com/news/gig-workers-freelancers-ny-still-anxiously-awaiting-unemployment-checks

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https://www.politico.com/news/2020/04/15/workers-struggle-to-claim-unemployment-relief-188814

https://www.politico.com/states/new-york/albany/story/2020/01/08/comparing-the-gig-economy-to-sweatshops-cuomo-vows-to-end-the-fraud-1247392

https://www.gothamgazette.com/state/9065-cuomo-promising-gig-economy-regulations-new-york-leaders-consider-california-model

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https://www.politico.com/states/new-york/albany/story/2020/03/23/cuomo-seeks-federal-unemployment-relief-for-gig-workers-1268739

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https://www.nytimes.com/2019/09/12/opinion/california-gig-economy-bill-ab5.html

https://nypost.com/2019/12/25/how-america-is-reverting-back-to-the-feudal-age/

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Andrew G. Malik, *Worker Classification and the Gig-Economy*, 69 Rutgers U.L. Rev. 1729 (2017).

Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. Chi. Legal F. 177 (2017).

Melissa Luna, *The Gig Economy and Worker Classification*, 62 Advocate 30 (2019).

Miriam A. Cherry & Antonio Aloisi, *Dependent Contractors in the Gig Economy: A Comparative Approach*, 66 Am. U. L. Rev. 635 (2017).

Miriam A. Cherry, *Corporate Social Responsibility and Crowdwashing in the Gig Economy*, 63 St. Louis U. L.J. 1 (2018)

Seth C. Oranburg, *Unbundling Employment: Flexible Benefits for the Gig Economy*, 11 Drexel L. Rev. 1 (2018).

Hilary Hogan, *Rewinding the Clock: Workers' Rights in the Gig Economy*, 9 King's Inns Student L. Rev. 114 (2020).

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Emily C. Atmore, *Killing the Goose That Laid the Golden Egg: Outdated Employment Laws Are Destroying the Gig Economy*, 102 Minn. L. Rev. 887 (2017).

Mark Yurich, *The Uber Drive: Self-Driving Cars Could Create More Uncertainty with Gig Economy's Independent Contractors*, 18 Sustainable Dev. L. & Pol'y 36 (2017).

Casey Thomas, *Ride Oversharing: Privacy Regulation within the Gig Economy*, 36 Cardozo Arts & Ent. L.J. 247 (2018).