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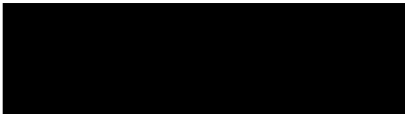
**DECISION AND NOTICE OF DECISION**  
**DECISIÓN Y AVISO DE LA DECISIÓN TOMADA**

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A.L.J. Case No. 016-23858

Mailed and Filed: June 9, 2017

IN THE MATTER OF:



**UBER TECHNOLOGIES INC**  
**1455 MARKET ST STE 400**  
**SAN FRANCISCO CA 94103-1331**

**NICOLE SALK**  
**BROOKLYN LEGAL SERVICES**  
**105 COURT ST 4TH FL**  
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**LITTLER MENDELSON PC.**  
**900 THIRD AVE**  
**NEW YORK NY 10022-3298**

**NY TAXI WORKERS ALLIANCE**  
**ATTN: ZUBIN SOLEMANY**  
**31-10 37TH AVE STE 300**  
**LONG ISL CITY NY 11101-**

Department of Labor Office: 831

Hearing Requested: November 16, 2016

**A.S.O.-NYC-ATT: N. KATEHIS**

**PLEASE TAKE NOTICE** that this decision has been duly mailed on the date listed above. If you appeared at the hearing and are not satisfied with this decision, you may appeal within **TWENTY DAYS** from the date this decision was mailed. **READ IMPORTANT INFORMATION ON REVERSE SIDE REGARDING YOUR RIGHT TO APPEAL.** Any party who failed to appear at the hearing has the right to apply to reopen the case. For the application to be granted, the party must apply within a reasonable time and must establish good cause for its failure to appear.

**POR FAVOR TOME NOTA:** esta decisión ha sido debidamente enviada por correo en la fecha que aparece arriba. Si usted asistió a la audiencia y no está satisfecho con la decisión, puede apelar dentro de **VEINTE DIAS** contados a partir de la fecha en que esta decisión fue enviada por correo. **LEA LA INFORMACIÓN IMPORTANTE AL REVERSO SOBRE SUS DERECHOS DE APELACIÓN.** Cualquiera de las partes que falle en comparecer a la audiencia, tiene el derecho de solicitar que se reabra su caso. Para que dicha solicitud sea otorgada, la parte interesada debe solicitarlo dentro de un periodo de tiempo razonable y debe establecer buena causa por no haber comparecido a la audiencia.

**DOCUMENTO IMPORTANTE. PUEDE OBTENER UNA TRADUCCIÓN DEL MISMO LLAMANDO AL 1-888-209-8124 (FUERA DEL ESTADO DE NUEVA YORK 1-877-358-5306)**

ISSUES: Status of persons as employees as defined by the Law.  
Coverage of employment in base period.  
Employer's objection to claimant's entitlement.

**COMBINED WITH A.L.J. CASE NOS.: 016-23494; 016-20367;016-19369; 016-20726; 016- 19075**

The Department of Labor issued the initial determinations holding claimants eligible to receive benefits, and issued the determinations holding the claimants, and all others similarly situated to claimants to be employees of the employer, UBER TECHNOLOGIES INC., and the employer liable for contributions for claimants and others similarly situated, as of January 1, 2014. The putative employer requested a hearing contending that the claimants and all others similarly situated were independent contractors.

Hearings were held at which testimony was taken. There were appearances by the claimants and on behalf of the employer, and the Commissioner of Labor. The claimant (JH) testified with the assistance of a Bengali language translator.

FINDINGS OF FACT: The putative employer, Uber Technologies, Inc. (hereinafter "Uber") is a corporation that holds proprietary interest in a smart phone accessible application (the "App"). This App is used, by Uber, to facilitate the connection between individuals who want transportation service (the "Riders") with persons who have agreed with Uber to provide such shuttle service, labelled by Uber as partner-drivers (the "Drivers"). Uber markets its App to potential Drivers through online and billboard advertisements. Uber also incentivizes current Drivers, with referral fees, to recommend their family and friends associate with Uber as Drivers.

The named claimants, AK, JH, and JS, who learned of Uber through referrals and its billboard advertising, were associated with Uber during the period under review as Drivers.<sup>1</sup> These claimants held no investment interest in Uber. There were thousands of other Drivers associated with Uber within New York State during the period in issue.

#### Uber's On-Boarding Process

Uber has what it terms an on-boarding process for new Drivers. In connection therewith, each of the claimants went to an Uber office where they presented certain documents, as required by Uber, to establish their eligibility to drive in New York State. These documents included, the claimants' driver's license; New York City Taxi & Limousine Commission (the "TLC") for-hire driver license; vehicle registration; and their certification of commercial automobile liability insurance policy. Uber did not subject the claimants to background checks. Uber's confirmation that the claimants held valid TLC license verified that they had already passed a background check, administered by the TLC. At Uber's office the claimants were shown a video that explains how the Uber App works; and depicts certain best practice guidelines—such as maintaining a clean vehicle; keeping water in the car for Riders; and, professional attire—that would be beneficial for the claimants to adopt. But, Uber did not impose a dress code on the claimants. This video includes the advisement, "this video has ESSENTIAL information for new Uber partners. You are responsible for understanding all information in the video before you accept your first trip."<sup>2</sup> During this on-boarding process, claimants AK and JS were also given a map test, by Uber, concerning their knowledge of New York City. Uber made its signage available to claimants at its office, but it did not mandate that claimants use said signs.

Uber published its Code of Conduct, which was made available to the Drivers. This Code enunciates the minimum standards of conduct to which Uber expects its Riders and Drivers to adhere; and advises Drivers that failure to maintain such standards risks deactivation of their access to its App. In 2016 Uber also published a Handbook, referred to as its Welcome Packet, which was made available to the Drivers. This Handbook's preamble read, "[t]his guide contains essential information for new Uber partners. Please read it carefully."<sup>3</sup> This Welcome Packet lists contact information to Uber for Drivers who have questions related to the transportation service. During the period in issue, Uber maintained online support resources for Drivers, accessible at [partnersny@uber.com](mailto:partnersny@uber.com),<sup>4</sup> and also designated a support staff to field Drivers' questions.

<sup>1</sup> AK's association with Uber began in August, 2014 and continued until September 2015 when his TLC license expired; JH's association with Uber began in December, 2015 and continued through approximately April 2016 when Uber disabled his access to its App due to low Rider ratings; and, JS's association with Uber started in November 2015 and ended in or around August, 2016.

<sup>2</sup> See, CLT Ex. 22 (Emphasis in original).

<sup>3</sup> See, CLT Ex. 15.

<sup>4</sup> See, CLT Ex. 5.

In completing the on-boarding process Uber presented the three claimants with its adhesion-styled contracts<sup>5</sup> which required their execution in agreement to Uber's terms, as a pre-requisite for eligibility to access to its App. The claimants did not negotiate the terms of said contracts which designated the claimants as independent contractors. After executing the contracts, Uber issued the claimants' usernames to access its App. In 2016 Uber implemented an Uber App verification process to ensure that only Drivers registered with Uber were accessing its App.

Uber collected the claimants e-mail address to disseminate various correspondence during their association with Uber; for example, updates to its App; and instructions regarding the same; reminders for expiring licenses; notices regarding high-volume areas; or other communication regarding Driver and/or Rider concerns. At sometime during their association, claimants AK and JH opted out of receiving Uber e-mail notifications.

Uber contracted separately with Riders, to provide guaranteed, reliable ride service. When AK started in 2014 Uber then marketed itself as "Everyone's Private Driver."<sup>6</sup> The Riders provide Uber with their credit card for charges associated with the transportation service. The Drivers are not party to the contracts between Uber and the Riders.

#### Fringe or Other Benefits

Uber did not provide claimants with paid vacation, sick leave, health insurance coverage, or other fringe benefits. Uber complies with TLC regulations, and understands it is required to do so as a condition of engaging in its ride-hailing App business. The TLC requires that all companies and/or individuals that provide for-hire transportation service must be affiliated with a TLC licensed car base, an entity that serves as a dispatcher. In compliance with this regulation, Uber's subsidiary, Unter LLC is one of its Black Car bases. The three claimants were all associated with Unter<sup>7</sup>. Further pursuant to TLC regulations, for-hire drivers of limousine, black car and luxury vehicles must have Black Car Fund Insurance—Workers' Compensation Insurance. In compliance with that regulation Unter withheld a small amount of each fare earned by the claimants. The withheld fares were submitted to New York State on a monthly basis, by Unter, on behalf of the claimants for their Black Car Fund insurance.

#### Required Equipment and Associated Costs

Drivers must have a vehicle and smart phone to provide rides through the Uber App. The claimants assumed the cost of their leased or owned vehicles, fuel insurance and maintenance cost. The claimants were made aware of Uber's list of vehicles it deemed acceptable. In compiling this list, Uber considered TLC's comparable list of acceptable for-hire vehicles. But, Uber went beyond the TLC's regulation in this regard, deeming certain vehicles as unacceptable to use with the Uber App, that were otherwise acceptable by the TLC. The claimants were required to comply with Uber's list of acceptable vehicles. Uber categories its list of acceptable vehicles—as Uber X (the most basic acceptable vehicles); Uber XL; and, Uber Black (luxury vehicles). Uber's App is programmed to apply varying base fares, depending upon the vehicle a Driver uses to provide transportation service. AK owned vehicles in various categories that he used in providing rides under the App.

JH and JS leased their vehicles through an Uber affiliated third-party. Uber referred the claimants to that affiliate who allowed these claimants to lease vehicles despite their poor credit. Uber did not require that claimants use this leasing company. JS and JH contracted with that third-party leasing company for their vehicles. Uber was not a named party to those contracts. JS and JH then executed a Consent and Deduction Waiver; thereby, authorizing Uber to deduct and forward lease payments, from their fares and/or other

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<sup>5</sup> See, Uber Exs. 11, 12, 13.

<sup>6</sup> See, CLT Ex. 36.

<sup>7</sup> AK was initially associated with a different Black Car base in connection with his prior employment as a livery driver before he joined Unter shortly after beginning his association with Uber.

earnings, to the third-party lessor on behalf of claimants. After leasing a vehicle JS became delinquent in his payments. He stopped driving under the Uber App to avoid a lump sum deduction from his fares to pay the arrears. Uber intervened; negotiating, with the third-party lessor for an alternative payment schedule for JS which incentivized JS to resume providing ride service under Uber's App. Another Uber affiliated third-party offered claimants a Fuel Card Program, whereunder they would be issued credit cards to purchase fuel. JS opted to use the Fuel Card Program. JS agreed that Uber would withhold payments from his fares for those credit card payments.

When AK started, Uber's App was accessible only on certain devices. Uber provided AK with a smart phone that was compatible with its App version. Uber required AK limit his use of that phone to accessing its App. Uber withheld payments from AK's fares for costs associated with the smart phone. Uber also provided JH with a phone charger and cable, at no cost.

#### Claimants' Provision of Ride Services under the Uber App

Uber does not impose a work schedule on the drivers. The claimants autonomously decide when, where and how long they will work providing ride services through the Uber App. The claimants were not required to notify, or seek Uber's approval to take time off. Claimant AK's contract read; however, that he agreed to utilize the App a least once per month to accept Uber App's ride requests.<sup>8</sup>

The claimants turned on the Uber App, and enter their username and password to indicate they were available to accept ride requests. The claimants also selected, on the App, the category of vehicle they were driving (Uber X, Uber XL, Uber Black) to alert the App to consider that component in calculating the fare. Drivers cannot select to provide transportation service only for certain riders. And, Riders cannot elect, through the App, to only ride with certain Drivers. When a rider requests shuttle service using their version of the Uber App, the Driver closest to that Rider is alerted of the ride request by a flashing indicator on the App. Uber allows that Driver fifteen seconds to accept the ride request. If that Driver fails to accept, Uber's App alerts the next closest Driver of the ride request.

If the Driver accepts the ride request, Uber then notifies them of the Rider's name, pick-up location, and gives an estimated time they should arrive for said pick-up. Concurrently, Uber notifies the Rider of the Driver's license plate number, their photograph, and estimated time of arrival. Upon arrival for the pick-up Uber requires Drivers to wait ten minutes for the Rider. If the Drivers comply with that wait-time requirement, and the Rider does not appear, Uber self-determines if that Rider should be charged a wait fee which it would pass to the Driver (less its fee from the overall fare). If the Driver does not comply with the required wait-time Uber considers them ineligible for any wait charge. If a Rider cancels the ride request after a driver accepts it, Uber decides in its sole discretion, if a cancellation fee should be charged to the Rider.

The Driver *first* learns of the Rider's requested destination and drop-off address when that Rider enters their vehicle. The Uber App suggests a route. But, the Driver is expected to follow the route suggested by the Rider, if given. The Riders are charged any tolls as part of their overall fare. When the Driver reaches the Rider's required destination, they indicate on the App that the ride request is completed. The Uber App's algorithm then calculates the fare based on current market factors, and displays said fare for the ride. At that time, the claimants had no input with respect to the amount of the fare charged for the transportation service they provided. The claimants were not allowed to collect cash for the fares under the Uber App. Uber instructed claimants that solicitation, or acceptance of gratuities is prohibited, unless the Rider insists. The fare displayed on the Uber App is charged to the Rider's credit card, by Uber. Uber then processed the Riders' bills.

After completion of the trip and payment by the Rider, the Driver is allowed to challenge the fare charged. Claimant AK submitted e-mails to Uber's online support to challenge that certain fares charged were too low. Uber unilaterally reviewed the disputed fares, and decided if an adjustment was warranted.

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<sup>8</sup> See, Uber Ex. 13 (Uber Software License and Online Services Agreement ¶4.2.2).

Uber's Corrective Actions

During the time period that Drivers are logged-in to the App, Uber has the capacity to collect and review data regarding the Drivers' activities. Uber analyzes the Driver's acceptance and cancellation of ride requests rates. Uber's "Driver Deactivation Policy"<sup>9</sup> places Drivers on notice of the types of conduct that can result in Uber's suspension or deactivation of their access to its App. This policy reads that "our goal at Uber is transportation as reliable as running water everywhere, and for everyone."<sup>10</sup> The policy alerts Drivers that Uber might deactivate access because of low Rider ratings, high cancellation rates, low acceptance rates. The policy advises, further, that "we will alert you over time if your rating is approaching this limit, and you'll also get information about quality improvement courses that may help you improve. If you're 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."<sup>11</sup> The Deactivation Policy also placed Drivers on notice that their access to its App might be deactivated if they allow others to use their account, or accept a trip request using an unapproved vehicle.

Uber advised claimants that, once logged-in to the App, they are expected to accept ninety percent of ride requests received. Uber takes corrective action if a Driver fails to meet that acceptance standard, by temporarily deactivating their access to the App. If the claimants failed to accept two consecutive ride requests Uber deactivated their App access for ten-minute periods. Uber logged-out JS from its App after he failed to accept certain of ride requests. JS was contacted, by Uber, and questioned about such refusals. After JS explained that the ride requests were outside of his work area, Uber reactivated his access to the App.

A Driver cancellation occurs where a Driver cancels a trip requests, after accepting the same. Uber determines the threshold for acceptable cancellation rates. Uber sends that Driver message notification that they were logged-out with the explanation that they, "rejected too many riders" and further comment about their acceptance history.<sup>12</sup> Uber determined that Claimant AK had excessive cancellations, and in October 2014 Uber deactivated AK's access to the App for twenty-four hours. Uber contacted and questioned AK about his cancellations. After an exchange of e-mails with Uber in which AK explained his reason for such cancellations, Uber decided to reactivate his access to the App.<sup>13</sup>

Claimants' Rating/Performance Review

At the end of each ride, the Uber App prompts Riders to rate the Driver's performance and their ride experience, using Uber's five-star rating system. Uber notified the claimants that there is a minimum star rating they must maintain for continued use of the App. That minimum rating of at least a 4.7 is set, and subject to change, exclusively by Uber. Uber deems star-ratings below 4.3 unacceptable. Uber reviews the Driver's star-rating, and includes an anonymous sampling of Riders' comments on the Driver's weekly Pay Statements. Uber adds its own characterization to the Driver's rating, commenting for example on AK's and JS' Pay Statements, "nice work, your driver rating was above average."<sup>14</sup> When a Driver's star rating falls below Uber's minimum acceptable rating, Uber notifies said Driver by e-mail or other means, that their rating has caused concern and places them at risk of deactivation. If that Driver's maintains a persistent low-rating Uber will deactivate their access to its App. Uber deactivated HK's access to its App based on persistent low Rider ratings. HK contacted Uber to discuss the possible reasons for his low ratings, and to seek reactivation. At its office, Uber displays flyers for Quality Improvement Courses, provided by a third-party. HK was advised,

<sup>9</sup> See, Uber Ex. 15.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See, CLT Ex. 19.

<sup>13</sup> See, CLT Ex. 7.

<sup>14</sup> See, CLT. Exs. 4, 17.

by Uber, that completion of that course might lead to his reactivation. HK completed the course, at his expense. Thereafter, his access to the App was reactivated. On April 27, 2016 Uber notified claimant JH, by e-mail, that his account was permanently deactivated. In deactivating his account Uber notified JH that "due to repeated issues with trip and service quality, your account has been deactivated. Providing quality trips to riders is extremely important to us; based on substantial amount of ratings and feedback received . . . it is apparent that you are not maintaining the level of quality we strive to provide."<sup>15</sup>

#### Payment of Fares; Other Earnings; and, Reporting of Income Taxes

Drivers are paid on a per trip basis. Uber provided claimants with weekly direct deposit service, and issued claimants weekly Pay Statements. The Pay Statements reported the fares collected by claimants; less Uber's fee from each ride; and, any withholdings, if applicable (for example, withholdings by Uber for third-party vehicle lease payments, or fuel card usage for payment to such vendors on behalf of claimants). Uber unilaterally set its fee deducted from the Driver's fare—that fare varied from twenty to thirty percent per fare—and depended in part, on the type of vehicle the Drivers used in providing the transportation service. Uber, acting in its sole discretion, increased or decreased the base fares charged based on its market analysis. In 2016 Uber unilaterally lowered its fares.

Uber offered the claimants additional means of increasing their fare earnings through incentives or promotions. Claimants were not obliged to accept such incentives. At times Uber imposed surge pricing; thereby, increasing fares in certain geographic locations based on market demands. Claimants were alerted of the surge pricing by flashing sections of the map on the App, and they elected if they would take advantage of the surge pricing. JH accepted such promotions. In one instance JH accepted a promotion that promised he would earn \$1,500.00 if he drove 1,500 hours in specified areas. After complying with the promotion's hours and area requirements, JH did not earn \$1,500.00 in fares. Uber took steps to rectify this, by paying JH the difference of \$556.94. Uber also designated certain Riders and Drivers as VIP. Those VIP Drivers, typically have high Rider ratings and low cancellations rates, are eligible for longer trips that realize higher fares. VIP Drivers are also eligible for certain Uber gift giveaways.

The claimants' weekly Pay Statements and summaries for the same, reported how long the claimants were online on the App on particular dates; and addresses their acceptance rate during those periods. It detailed if claimant met any accepted promotion requirements, and if not, why.<sup>16</sup> The Statement also explains why Uber might have made deductions to the claimant's fare disbursement; for example, for adverse Rider reports.<sup>17</sup> The Drivers reported any errors to their Pay Statements to Uber, for its review and correction. AK asked that Uber review his Statement for missing trips. In response Uber reviewed the issue to determine if a trip payment was missing; if the Rider should be charged; and if AK's fare disbursement should be adjusted.

Uber's Black Car base, Unter, issues claimants' IRS Form 1099 to report claimants fare-based income to the Internal Revenue Service, and Form 1099 Miscellaneous to report non-fare base earnings, such as incentive and promotion payments. JH was issued both tax forms to by Unter.

#### Uber Considers Claimants' Requests for Clean-up and Repair Costs; and, other Reimbursement

Uber's App includes a feature that allows Drivers to request reimbursement from Uber for damages caused to their vehicle by Riders. Drivers submit photographic evidence of the damage, evidence of receipts for repair or clean-up cost attributable to the Rider, to Uber through its App. Uber reviews such requests for repair and/or reimbursement, and in its discretion, determines if the Rider should be charged and the monies recovered passed to the Driver; if Uber will cover the cost; or, if the damage does not meet its threshold for

<sup>15</sup> See, CLT Ex. 1.

<sup>16</sup> See, Uber Ex. 6 (JH's Pay Statement).

<sup>17</sup> *Id.*

repair or reimbursement. In 2015 AK notified Uber that a Rider soiled his vehicle with food. Uber reviewed AK's cleaning report and replied to claimant that while the mess left by the client was unfortunate Uber deemed it a minor mess that does not warrant a cleaning fee, and suggested that going forward, AK should politely ask riders not to eat in the car. In a series of e-mails claimant continued to protest he should be reimbursed for the cleaning costs, but Uber remained unpersuaded.<sup>18</sup> AK was not reimbursed.

Uber has also assumed the cost for certain traffic violations incurred by the Drivers. In January 2016 claimant JH was issued a Notice of Violation and Summons, and charged a \$1,500.00 fine for operating Nassau County, without proper registration. Uber paid that fine for JH.

#### Uber Addresses Complaints

Riders reported their complaints against Drivers to Uber.<sup>19</sup> The Uber App includes a feature that allows Riders to report complaints against Drivers. In one such instance, a rider complained that claimant AK took an inefficient route. Uber contacted AK to question him about the Rider's complaint and the route he took. AK and Uber then exchanged a series of e-mails about the Rider's inefficient route complaint.<sup>20</sup> Uber counselled AK that he should take the Rider's preferred route. Uber resolved the Rider's complaint by reducing the fare charged to the Rider; thereby reducing the fare earned by AK.<sup>21</sup> Uber deducted the fare charged for that ride without notifying or consulting with AK. In response to a Rider's complaint about JH's driving, Uber sent JH an admonition that "operating your vehicle in a dangerous or careless manner creates a negative rider experience and puts both you and the riders at risk. . . . Further feedback of this nature could result in permanent deactivation of your account. Please let me now if you have any questions or concerns."<sup>22</sup>

#### Claimants Allowed to Procure Rides from Uber's competitors

Uber is aware, and does not prohibit, Drivers from also procuring rides from its competitors. Claimants JH and JS also accepted ride requests from Uber's competitors while simultaneously using the Uber App.

#### Drivers Allowed to use Sub-Contractor Drivers

Uber allows Drivers to hire others to operate their vehicles. These Sub-Drivers must individually establish eligibility to drive in New York State, and secure their individual Uber App access. None of the named claimants had Sub-Drivers.

OPINION: Pursuant to Labor Law § 560 (1), any employer shall become liable for contributions under Labor Law, Article 18, if the employer has paid remuneration of \$300 or more in any calendar quarter. Such liability shall commence on the first day of such calendar quarter. Pursuant to Labor Law § 517 (1), remuneration means every form of compensation for employment paid by an employer to an employee; whether paid directly or indirectly by the employer, including salaries, commissions and bonuses.

Pursuant to Labor Law § 511 (1a) Employment means any service under any contract of employment for hire, express or implied, written, or oral and any service by a person for an employer as a professional musician or a person otherwise engaged in the performing arts, and performing services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar

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<sup>18</sup> See, CLT Ex. 6.

<sup>19</sup> See, e.g., Uber Exs. 4, 14.

<sup>20</sup> See, CLT Ex. 7.

<sup>21</sup> See, CLT Ex. 8.

<sup>22</sup> See, Hrg. Ex. 2.

establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter.

The credible evidence establishes that the three named claimants were associated with Uber as Drivers. In determining if an employee-employer relationship exist, the “pertinent inquiry is whether the purported employer retained control over the results produced or the means used to produce those results, with control over the latter being more important.” *Matter of Watson*, 127 A.D.3d 1461 (3d Dep’t 2015) The court instructed in *Matter of Concourse Ophthalmology Associates, P.C.*, 60 N.Y.2d 734, 736 (1983), that the analysis of whether an employment relationship exist for purposes of unemployment insurance benefits is not dependent on any one fact, but that such relationship may be found where the putative employer exerts control over important aspects of the services provided even where certain evidence would support a contrary conclusion. It is uncontested that claimants and Uber entered into certain contracts that designated claimants as independent contractors. These contracts, drafted solely by Uber, were adhesion contracts, the nature of which did not allow claimants to negotiate the terms of said agreements. The contractual designation of claimants as independent contracts, standing alone, does not end the inquiry. I note that Uber correctly asserts that claimants AK and JS identified themselves as independent contractors to the Department of Labor in pre-hearing questionnaires. But, the claimants’ laymen designation of their employment status is not controlling. It remains necessary to consider the actual interactions and continuing relationship between claimants and Uber throughout their association. Certainly, it is significant that as the parties agree, claimants set their own work schedule; selected their work areas; were not obliged by Uber to report their absences or other leaves; and, were not provide fringe benefits by Uber—all factors indicative of an independent contractor status.<sup>23</sup>

The credible evidence also establishes; however, that during the time periods that claimants provided transportation service under its App, that Uber exercised sufficient supervision and control over substantial aspects of their work as Drivers. Uber’s assertion that it is not a transportation company; but instead that, it is only a technology company that generates leads for Drives is a *non sequiter*. Uber determined that it must comply with the rules and regulations of the NYC TLC which governs the for-hire driver industry. Indeed, Uber acknowledges that compliance with TLC’s regulations is a prerequisite for its continued operations with respect to monetizing its App. Uber holds the subsidiary, Unter LLC, which is its TLC licensed Black Car base that represents its dispatch, as required by the TLC. Moreover, Uber describes itself as a transportation company—advertising itself in 2014 as “Everyone’s Private Driver”, and more recently in its 2016 internal publication stating, “our goal at Uber is transportation as reliable as running water everywhere, and for everyone.”<sup>24</sup> Uber is a transportation company. It is a *sine qua non* therefore, that as a transportation company, claimants’ role as Drivers was a crucial aspect of Uber’s operation. While Uber did not subject the claimants to background checks during its on-boarding process for new Drivers, Uber acknowledges that its confirmation the claimants held valid TLC licenses sufficed to verify claimants had passed the TLC’s background check. Uber also showed the claimants a video that depicted how its App worked, and suggested best practices the Drivers should adopt for success. Additionally, Uber tested claimants AK and JS’ knowledge of the city before they were allowed access to its App. I note Uber also informed the claimants of its online and other support services, delegated to field Drivers’ inquiries.

Uber did not employ an arms’ length approach to the claimants as would typify an independent contractor arrangement. Uber remained involved with the means by which claimants provided transportation services for its Riders. Claimants acknowledged they were responsible for their own vehicles and associated

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<sup>23</sup> I note Uber posits that the claimants’ ability to set their own work schedule should be dispositive, but in doing so it relies upon cases that are inapposite. In *Matter of Jarzabek*, 292 A.D. 668, *Matter of Rukh*, 208 A.D.2d 1105 (3 Dep’t 1994); and, *Salem v. Corp. Transp. Gen. Ltd.*, 52 F.Supp. 3d 526 (S.D.N.Y. 2014) the courts determined that the putative employer/franchisor exercised only incidental control over the claimant/franchisees. The instant case does not involve a franchise agreement, and the rights and obligations that would attach thereto. Similarly, in *Matter of Pavan*, 173 A.D.2d 1037 (3d Dep’t 1994) where the court held the claimant to be an independent contractor, that claimant purchased a membership, valued at \$ 40,000.00, for access to the putative employer’s frequency to procure rides—an arrangement decidedly different than that at issue here.

<sup>24</sup> See, *supra* notes 3, 6.



costs. It is notable that the claimants were restricted to use vehicles deemed acceptable by Uber—requiring compliance with a list that exceeded the governing TLC regulation concerning acceptable for-hire vehicles. Additionally, Uber does not dispute that when claimants JS and JH lacked proper credit to secure their own vehicles, Uber not only referred them to their third-party affiliates to lease vehicles without credit; but also, Uber took the additional step of withholding monies from these claimants' fares and making lease payments on their behalf. Uber even intervened when claimant JS was delinquent in his lease payments to the third-party lessor, to arrange an alternate payment plan on behalf of JS to address his arrears.

The parties agree that claimants indicated they were available to accept ride requests when they signed-into the App with their Uber designated usernames. Uber agrees that when the claimants accepted a ride request they were informed *only* of the Rider's name and pick-up location, and that, the claimants *first* learned of the requested drop-off location after picking-up the Rider. This belies Uber's assertion that it serves only as a lead generator for rides for the Drivers. It would seem reasonable to assume that an independent Driver would be afforded information about the length of the requested trip, and drop-off site to autonomously decide if they should accept that lead. Additionally, the claimants testified, and Uber does not dispute, that they were expected to allow the Riders a ten-minute wait period before leaving the pick-up site; and that, if Riders failed to appear it was within Uber's sole discretion to determine if that Rider be charged a wait fee. Similarly, the parties agree that if a Rider cancels their trip after a Driver had accepted the ride request it was solely within Uber's discretion if the Rider should be charged a cancellation fee. Significantly, all claimants consistently testified that they had no input in determining the fare charged for the transportation services they provided; but instead, that fare was determined solely by Uber's App algorithm. Uber agrees that claimants were advised not to solicit or accept tips, unless the Riders insists; and that, the Drivers were not allowed to accept cash for the rides under its App. Riders' fares were charged to the credit cards they previously provided to Uber, and their bill processed by Uber, and fares passed to the Drivers. Uber's reliance on *Matter of Yoga Vida*, 28 N.Y.3d 1013 in support of its proposition that the putative employer's role in fee setting and payment collection and processing is not dispositive of an employer-employee relationship is not availing here. Unlike the instant case, in the context of *Yoga Vida*, the court's analysis that the instructors were independent contractors, and not employees, repeatedly referenced that the putative employer had its own staff of instructors, and that the claimants were part-time and not subject to the employment rules applicable of its employees. The claimants in *Yoga Vida* were not therefore, a crucial aspect of that putative employer's ongoing operations, as are the claimants here. Uber does not contend that it has its own staff of Drivers who could have provided services to those provided by the claimants.

I note, but do not accept Uber's assertion that it did not monitor the claimants. Uber took steps to modify the claimants' behavior, as typical in an employer-employee relationship. Uber published, and made available to claimants, its Code of Conduct that placed them on notice of what constituted acceptable behavior and what consequences might attach; for example, deactivation, if they engaged in unacceptable conduct. In 2016 Uber also published its Deactivation Policy, applicable to certain named claimants that notified them of the types of conduct that might result in deactivation from its App and suggested means to avoid such consequences. It is unrefuted that Uber advised claimants that they were expected to accept ninety percent of all ride requests, and that failure to meet such acceptance threshold would result in deactivation. To that end, Uber testified that Drivers who failed to accept two consecutive ride requests were logged-out of the App, by Uber, for ten-minute periods. Claimants AK and JS were so logged-out for refusal of ride requests. Uber agrees that Drivers were similarly deactivated for what it deemed excessive cancellations after they had accepted ride requests. Claimant AK was deactivated, by Uber, for twenty-four hours for cancellations. Uber also used its Riders' responses on its five-star rating system—which riders were prompted to complete at the end of each trip—to monitor and evaluate a Driver's performance in providing ride service; and, to determine if that Driver's rating was unacceptable such that he should be deactivated from its App. Uber unilaterally sets, and modifies the acceptable star rating based on its market analysis. In reviewing these Rider star-ratings, Uber determined that claimant JH's ratings were below its acceptable standard and his App access was deactivated.

Claimants testified that Uber provided them with weekly direct deposit services, and issued claimants weekly Pay Statements. These weekly Pay Statements, prepared by Uber, reported the fares claimant earned based on completed rides, and deductions from those fares for Uber's fee; and any withholdings (for Uber's

payments to third-party vendors such as the above mentioned leasing company, on behalf of the claimants). Uber unilaterally set, and modified the base rates charged to the Riders; and in doing so, affected the claimants' earning potential. It is undisputed that Uber determined the amount of its fee which varied from twenty to thirty percent based on the type of vehicle claimant used to provide the transportation service.

Claimants did not negotiate the terms of Uber's fee. Uber offered claimants additional means to increase their earnings through various optional incentives and promotions. The parties agree that JK accepted such promotions. And, in one instance where JK drove the required number of hours without realizing the fares promised by the promotion, Uber paid JK the difference of \$ 556.94.

Uber determines if Drivers should be compensated for damages caused to their vehicles by Uber Riders. AK testified that after a Rider soiled his car, he contacted Uber for clean-up costs. Uber agreed that following an extended conversation with claimant, it decided that any damages caused by the Rider did not warrant collection of clean-up costs and that AK was not compensated. Uber also agrees that it responds to Riders complaints against claimants. In connection therewith Uber acknowledged that in response to a Rider's complaint that AK took an inefficient route it decided to resolve the matter by reducing the fare collected for that trip; which tangentially reduced the fare/earnings AK collected from the transportation service he provided. Uber also agreed that in further response to that Rider's complaint, that AK was counselled about to follow the Rider's desired route. Moreover, Uber does not dispute that acting without notice to AK, it deducted that fare from AK's earnings.

Claimants JH and JS testified that while providing ride requests under Uber's App, they were also accepting rides from Uber's competitors. Uber testified they were aware of that this, and did not object. I find that the lack of any restrictive covenant here is not necessarily dispositive. Uber agrees that it has thousands of Drivers in New York City, and that if one Driver refuses a ride request, the request is relayed to the next closest Driver. Indeed, Uber testified that if a Driver does not accept a ride request within fifteen seconds, that request is relayed to a different Driver. As such, the Uber Rider is not left without ride service because a Driver did not accept the request. While the named claimants did not share mirrored experiences during their associations with Uber, I find a review of the record shows that they each subjected to substantial supervision and control by Uber. Based on these aforementioned factors and current New York Labor Law, I find that while there are some indicia of claimant's independence, the overriding evidence establishes that Uber exercised sufficient supervision, direction, and control over key aspects of the services rendered by claimants such that an employer-employee relationship was created.<sup>25</sup> I, conclude, therefore, that the claimants, and others similarly situated, are/were employees of the employer, Uber. Accordingly, I, conclude that the employer is liable for contributions under the Labor Law.

**DECISION:** The initial determinations holding claimants eligible to receive benefits, and issued the determinations holding the claimants, and all others similarly situated to claimants to be employees of the employer, UBER TECHNOLOGIES INC., and the employer liable for contributions for claimant and others similarly situated as of January 1, 2014, are sustained.

The employer's objection, contending that the claimants and all others similarly situated were independent contractors, is overruled.

The claimants are allowed benefits with respect to the issues decided herein.

  
/s/ Michelle Burrowes

Administrative Law Judge

<sup>25</sup> Uber's citation to *McGills v. Dep't of Econ. Opportunity*, 210 So.3d 220 (3d DCA 2017) where the court, applying Florida Law, held that certain Uber drivers were independent contractors is non-controlling.