



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: APRIL 29, 2019

IN THE MATTER OF: Appeal Board No. 603938

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 017-28008)

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)

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 claimant 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 017-28008)

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

(Appeal Board No. 603938 and)

The employer's objection is overruled.

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

RANDALL T. DOUGLAS, MEMBER