


GERALDINE A. REILLY CHAIRMAN MICHAEL T. GREASON RANDALL T. DOUGLAS JUNE F. O'NEILL MARILYN P. O'MARA MEMBERS	STATE OF NEW YORK UNEMPLOYMENT INSURANCE APPEAL BOARD PO Box 15126 Albany NY 12212-5126 (518) 402-0205 FAX:(518) 402-6208	SUSAN BORENSTEIN EXECUTIVE DIRECTOR JAYSON S. MYERS CHIEF ADMINISTRATIVE LAW JUDGE TERESA A. DEMEO CHRISTOPHER M. TATE MATTHEW J. TIERNEY PRINCIPAL ADMINISTRATIVE LAW JUDGE
DECISION OF THE BOARD DECISIÓN DE LA JUNTA		

	Mailed and Filed: July 12, 2018
IN THE MATTER OF:	Appeal Board No. 596722

UBER TECHNOLOGIES INC 1455 MARKET ST STE 400 SAN FRANCISCO CA 94103-1331	NY TAXI WORKERS ALLIANCE ZUBIN SOLEIMANY 31-10 37TH AVE STE 300 LONG ISLAND CITY NY 11101
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A.S.O. - Appeals Section Department of Labor Office: LND	A.L.J. Case No. 016-23494 ER#: 49-91860
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PLEASE TAKE NOTICE that the commissioner, or any other party affected by this decision who appeared before the Appeal Board, may appeal questions of law involved in such decision to the Appellate Division of the Supreme Court, Third Department, by written notice mailed to the Unemployment Insurance Appeal Board, PO Box 15126, Albany, New York 12212-5126 within **THIRTY DAYS** from the date this decision was mailed.

POR FAVOR TOME NOTA que el comisionado o cualquier otra parte afectada por esta decision que haya comparecido ante la Junta de Apelaciones puede apelar aspectos legales de dicha decision a Appellate Division of the Supreme Court, Third Department, enviando un aviso escrito a Unemployment Insurance Appeal Board, PO Box 15126, Albany, New York 12212-5126 dentro de los **TREINTA DIAS** a partir de la fecha en que esta decision fue enviada por correo.

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Combined Appeal Board Nos. 596722, 596723, 596724, 596725, 596726 & 596727

PRESENT: RANDALL T. DOUGLAS, MEMBER

By initial determination dated October 31, 2016, the Department of Labor held **UBER TECHNOLOGIES INC.** (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 A.L.J. Case No. 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 **UBER TECHNOLOGIES INC.** 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. 016-20367). 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 A.L.J. Case No. 016-20726).

By initial determination dated August 5, 2016, the Department of Labor held **UBER TECHNOLOGIES INC.** 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 A.L.J. Case No. 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, 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 **UBER TECHNOLOGIES INC.** 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 A.L.J. Case No. 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 A.L.J. Case No. 016-23858).

The initial determination, holding **UBER TECHNOLOGIES INC.** 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 A.L.J. Case No. 016-20367)

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 A.L.J. Case No. 016-20726)

The initial determination, holding **UBER TECHNOLOGIES INC.** 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 A.L.J. Case No. 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 A.L.J. Case No. 016-19369)

Uber's objection in each case is overruled.

Uber is liable with respect to the issues decided herein.

MB1:DK

RANDALL T. DOUGLAS, MEMBER