

Appendix A



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DECISION OF THE BOARD
DECISION DE LA JUNTA

JUL 12 2018

Mailed and Filed:

Appeal Board No. 596727

IN THE MATTER OF:



NICOLE SALK, ESQ.
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UBER TECHNOLOGIES INC
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A.S.O. - Appeals Section
Department of Labor Office: 831

A.L.J. Case No. 016-19369

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,¹ in part, as follows:

- Uber shall own and have all rights in and to the Device (Uber's proprietary smartphone), the Software, the Uber Service, the Driver ID and the Data (§ 2.4)
- Driver shall safeguard, protect and keep the Rider Information received from Uber, and the details of any Ride, at all times confidential and shall not disclose it to any person or store the information in any manner (§ 3.7)
- Driver will immediately notify Uber of any actual or suspected security breach or improper use of the Device, the Driver App, the Driver ID, the Data or of the Rider Information (§ 3.8)
- Uber may suspend or revoke the Driver App if Drivers unlawfully, unfairly or in bad faith disparage Uber (§ 3.9); Uber will issue a Driver ID for each Driver to access and use the Driver App and the Device (§ 4.1.1)
- Upon accepting a trip request, Uber will provide to Driver the Rider Information (including Rider's location), and Uber will provide to Rider specific information (including the Driver's name, photo, geolocation, and phone number) (§§ 4.2.1 and 11.1)
- Driver shall accept a trip request at least once a month (§ 4.2.2)
- Rider must comment on and rate the Driver on the App, and Uber reserves the right to post these comments and ratings on the App or the Website (§ 4.3.1)
- Driver must comment on and rate the Rider on the Driver App (§ 4.3.1)
- Uber reserves the right to refuse, edit or remove unfavorable reviews (§ 4.3.2)
- Driver must maintain a high standard of professional attire (§ 4.3.3)
- Driver must maintain Uber's minimum rating to continue to use the Driver App (§ 4.3.3)
- At Uber's sole discretion, Uber reserves the right to reclaim, prohibit, suspend, limit or otherwise restrict the Driver from accessing or using the Driver App or the Device (§§ 4.1.1 and 4.3.3)
- Uber reserves the right to advertise and market that tipping Drivers is "voluntary," "not required," and/or "included" in a Rider's fare (§ 5.1.3)

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

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