Uber Everywhere; but Where Is the Driver's Destination in New York

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NOTES

UBER EVERYWHERE;¹

BUT WHERE IS THE DRIVER’S DESTINATION IN NEW YORK?

I. INTRODUCTION

Uber Technologies Inc. ("Uber") was founded in 2009 and arrived in New York City ("NYC") in 2011.² Uber created a smartphone app, called Uber ("Uber app"), where passengers create an account, enter a payment method (usually a credit card), and then type in their destination.³ After a few taps on the phone screen, an Uber driver will be en route to the passenger’s current location to pick up the passenger and ultimately bring them to their desired stop.⁴ After the trip is finished, Uber charges the passenger directly from the Uber app, meaning passengers no longer have to worry about carrying cash.⁵ Within five years, Uber attracted nearly 46,000 vehicles and completes over 222,000 daily trips around NYC.⁶ Uber

¹ MADEINTYO, Uber Everywhere, on YOU ARE FORGIVEN (Privateclub Records 2016) (explicit content warning).
⁴ Id.
⁵ Id.
⁶ Winnie Hu, Yellow Cab, Long a Fixture of City Life, Is for Many a Thing of the Past, N.Y. TIMES, Jan. 15, 2017,
claims that “[n]early 90 percent of drivers say the main reason they use Uber is because they love being their own boss.”\(^7\) Uber, and its competitor Lyft, state, “that their platforms are designed to provide drivers with extra income on top of their existing salaries from other work.”\(^8\) With an ever-growing demand for Uber’s services in one of the busiest cities in the world, it seems drivers have ample opportunity to make “extra income on top of their existing salaries.”\(^9\)

But looks can be deceiving. Across the United States, and internationally,\(^10\) legal battles between Uber and drivers rage on in courtrooms.\(^11\) The issue at the crux of these cases is whether the drivers are “employees” to whom Uber owes benefits, or “inde-
dependent contractors” to whom it does not. Uber currently classifies its drivers as “independent contractors.” The focus of this Note will be on one particular New York Unemployment Insurance Appeal Board decision, In re New York Unemployment Insurance Appeal Board, A.L.J. Case No. 016-23858 (“The Unemployment Insurance Case”), that affirmed a New York State Department of Labor determination, which held that three drivers, AK, JH and JS, who were “deactivated” (“Uber-speak” for being fired or suspended) by Uber were entitled to unemployment benefits. Administrative Law Judge (“A.L.J.”) Michelle Burrowes determined, and the Appeal Board affirmed, that the three claimants, along with “all others similarly situated to claimants to be employees of the employer, [Uber].” Seemingly, these “other[,] similarly situated” drivers would have to be deactivated by Uber in order to be eligible for unemployment benefits. Uber “plans to appeal the decision.”

12 See cases cited supra note 11.
14 The Unemployment Insurance Case, supra note 11.
15 The Unemployment Insurance Case, supra note 11.
17 Id. at 19.
The Unemployment Insurance Case arose from an appeal of a New York Department of Labor ("DOL") decision by Uber.\textsuperscript{19} The DOL and A.L.J. Michelle Burrowes determined that the driver-claimants “and all others similarly situated ... to be employees” of Uber for unemployment benefits purposes.\textsuperscript{20} Uber appealed A.L.J. Burrowes’ decision to uphold the DOL’s determination to the Unemployment Insurance Appeal Board (the “Board”), which affirmed the A.L.J.’s decision.\textsuperscript{21}

Pursuant to N.Y. Labor Law § 102, the Board’s decision is deemed “final.”\textsuperscript{22} However, Uber can appeal the Board’s decision in an Article 78 hearing.\textsuperscript{23} The New York State Appellate Division of the State Supreme Court hearing Uber’s Article 78 appeal will be tasked with determining if the Board’s decision, and thus the A.L.J.’s and DOL’s determination, was “supported by substantial evidence” found within the “entire record.”\textsuperscript{24} This Note will provide an analysis of the facts of the Unemployment Insurance Case with the applicable law in order to determine how a New York State court would likely resolve this classic labor and employment issue arising out of a wholly 21\textsuperscript{st} century employment relationship.

Uber is faced with three options in this appeal: (1) lose in a New York State court and have all drivers “similarly situated” to the three “deactivated” drivers, within the court’s jurisdiction, be reclassified as “employees” who are entitled to unemployment

\url{https://qz.com/1005254/three-uber-drivers-were-ruled-employees-for-unemployment-purposes-by-new-york-state/}.

\textsuperscript{19} The Unemployment Insurance Case supra note 11, at 3.

\textsuperscript{20} The Unemployment Insurance Case supra note 11.

\textsuperscript{21} The Board Decision supra note 16. Uber appealed the A.L.J.’s decision in The Unemployment Insurance Case to the Unemployment Insurance Appeal Board on June 29, 2017, and had its motion to withdraw the appeal denied on July 12, 2018. \textit{Id}. Uber was deemed liable for the A.L.J.’s decision in The Unemployment Insurance Case. \textit{Id}.

\textsuperscript{22} N.Y. LAB. LAW § 102 (McKinney 2019).

\textsuperscript{23} N.Y. LAB. LAW §§ 7801-7806 (McKinney 2019).

\textsuperscript{24} N.Y. LAB. LAW § 7803(4) (McKinney 2019); N.Y. LAB. LAW § 7804(g) (McKinney 2019) (explaining when a “substantial evidence” issue is raised, the appellate division “shall dispose of all issues in the proceeding”).
benefits;\(^{25}\) (2) win the case in the New York State court and continue the status quo with precedential ammunition to defeat further employee benefits cases;\(^{26}\) like courts have done in *McGillis v. Department of Economic Opportunity*\(^{27}\) and *Saleem v. Corporate Transportation Group Ltd.*;\(^{28}\) or (3) attempt a settlement with the drivers,\(^{29}\) like Uber attempted and failed in *O'Connor v. Uber Technologies Inc.*,\(^{30}\) and where it successful settled in *Price v. Uber Technologies Inc.*\(^{31}\)

This Note will analyze the relevant New York State laws and apply the facts of the Unemployment Appeal Board’s decision in an attempt to predict the outcome of a potential appeal in a New York State court. This will include a comparison of the cases cit-

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\(^{25}\) See infra Part V.A.

\(^{26}\) See infra Part V.B.

\(^{27}\) McGillis v. Dep’t of Econ. Opportunity, 210 So. 3d 220, 226 (Fla. Dist. Ct. App. 2017); see infra Part V.B.1.

\(^{28}\) Saleem v. Corp. Transp. Grp., Ltd., 854 F.3d 131 (2d Cir. 2017); see infra Part V.B.3.

\(^{29}\) See infra Part VI.


ed *supra* and the controlling precedents in the New York State court.

II. THE WHO: GREATEST HITS OF WHO IS AN EMPLOYEE IN NEW YORK STATE

New York State’s laws are complex, contradictory, and there seems to be a law for everything.\(^{32}\) Because of this, the definition of “employee,” and “employer,” is hard to pin down.\(^ {33}\) This is problematic because the central issue of determining whether a worker is entitled to benefits under New York State law is determining whether that worker is an “employee” or an “independent contractor.”\(^ {34}\) This is why numerous relevant statutes and cases that define these terms are provided *infra*. One thing to keep in mind is that these definitions only apply to cases and controversies that arise under the relevant statutes and no single definition applies in every context. Nonetheless, examining these definitions will shed some light on what these terms mean in a courtroom located in New York State.

A. New York Labor Law

The current definition found in the New York Labor Law states that an “‘[e]mployee’ means a mechanic, workingman or laborer *working for another for hire.*”\(^ {35}\) The New York Labor Law

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\(^{32}\) See N.Y. LAW (McKinney 2019).

\(^{33}\) See N.Y. LAB. LAW § 511 (McKinney 2016); N.Y. LAB. LAW § 512 (McKinney 2000); N.Y. LAB. LAW § 651 (McKinney 2016); N.Y. LAB. LAW § 701 (McKinney 2010).

\(^{34}\) See N.Y. LAB. LAW § 651 (McKinney 2016); N.Y. LAB. LAW § 701 (McKinney 2010).

\(^{35}\) N.Y. LAB. LAW § 2(5) (McKinney 2011) (emphasis added); see N.Y. LAB. LAW § 2(14) (McKinney, 2011) (addressing the problematic phrase “workingman” by stating “[a]ll references to male employees in this chapter shall be deemed to include female employees”); see also Scott v. Scott’s Landing, Inc., 715 N.Y.S.2d 135 (App. Div. 2000) (“Plaintiff is both the owner of the building where the accident occurred and the sole shareholder, officer, and director of defendant corporation. Plaintiff therefore was not ‘working for an-
defines “[e]mployer” as “the person employing any such mechanic, workingman or laborer, whether the owner, proprietor, agent, superintendent, foreman or other subordinate.” Finally, “[e]mployed” is defined as being “permitted or suffered to work.”

B. The New York State Labor Relations Act

The New York State Labor Relations Act (“NYSLRA”), New York State’s equivalent to the National Labor Relations Act (“NLRA”), provides detailed definitions of “employer” and “employee” for workers involved with labor organizations and unions. Many Uber drivers belong to one labor union or another. The NYSLRA defines “employer” as:

[A]ny person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, and shall include any person who is the purchaser of services performed by a person described in paragraph (b) of subdivision three of this section, but a labor organization or any officer or agent thereof shall only be considered an other for hire’ (Labor Law §2[5]) and did not come within the class of persons protected by the Labor Law.’).  

36 LAB. § 2(6).
37 LAB. § 2(7).
39 N.Y. LAB. LAW § 701(2)-(3) (McKinney 2010).
employer with respect to individuals employed by such organization.\textsuperscript{41}

The NYSLRA adopts much of the same language of the NLRA when defining "employee."\textsuperscript{42} The Court of Appeals de-

\textsuperscript{41} LAB. §701(2)
\textsuperscript{42} Compare N.Y. LAB. LAW § 701(3)(a) (McKinney 2010), with 29 U.S.C. § 152(3) (McKinney 1935).

The term "employees" includes but is not restricted to any individual employed by a labor organization; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in the domestic service of and directly employed, controlled and paid by any person in his home, any individual whose primary responsibility is the care of a minor child or children and/or someone who lives in the home of a person for the purpose of serving as a companion to a sick, convalescing or elderly person or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers or, any individual who participates in and receives rehabilitative or therapeutic services in a charitable non-profit rehabilitation facility or sheltered workshop or any individual employed in a charitable non-profit rehabilitation facility or sheltered workshop who has received rehabilitative or therapeutic services and whose capacity to perform the work for which he is engaged is substantially impaired by physical or mental deficiency or injury.

N.Y. LAB. LAW § 701(3)(a) (McKinney 2010).

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural
clared in Metropolitan Life Insurance Co. v. New York State Labor Relations Board that despite the variations of the NLRA language adopted by the New York State Legislature, the overall principle governing both of the Acts were congruous: to allow employees to organize and collectively bargain with employers. The main contention of Metropolitan Life Insurance was that NYSLRA omitted "the phrase 'any employee'" which is found in the NLRA. The Court determined that the omission of "any employee" from the NYSLRA did not change the overarching policy implemented by the statute. Thus, the Court firmly declared that white collar workers, typically not represented by labor organizations, were protected by the NYSLRA. The decision in Metropolitan stands for the notion that the NYSLRA is at least as encompassing as the NLRA and covers the hard-to-define "employees" that wish to collectively bargain.

C. New York State Minimum Wage Act

Additionally, the New York State Minimum Wage Act provides its own definitions for these terms. The Act states,

laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

44 Id. at 205.
45 Id. at 205-06.
46 N.Y. LAB. LAW § 701(5) (McKinney 2002) ("Labor organization' means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection and which is not a company union as defined herein.").
47 Metropolitan Life Ins. Co., 280 N.Y. at 205-06.
48 N.Y. LAB. LAW. § 651 (McKinney 2016).
""[e]mployee’ includes any individual employed or permitted to work by an employer in any occupation, but shall not include any individual who is employed or permitted to work: . . . as a driver engaged in operating a taxicab."" 49 ""Employer’ includes any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer."" 50

D. The Unemployment Insurance Law

The most relevant statute for this Note’s purpose is the Unemployment Insurance Law (“UIL”). 51 Ironically, the UIL does not expressly define “employee,” rather the law defines “employment” instead. 52 The UIL provides a “general definition” of “employment” as “(a) any service under any contract for employment for hire, express or implied, written or oral and (b) any service by a person for an employer.” 53 This is followed by twenty-three subsections with further subsections therein. 54 Further, the UIL also defines kinds of work that is not “employment.” 55 The “services” exempt from UIL protection are hyper-specific and do not help determine whether a person is an “employee” unless the worker fits within the exception. 56

As shown, the New York State legislature has chosen time and again to define “employee” as broadly and vaguely as possible. This has led to the courts developing tests, as shown below, to determine whether a person’s employment relationship falls within the scope of “employee” or an independent contractor.

49 Lab. § 651(5)(e) (emphasis added).
50 Lab. § 651(6).
51 N.Y. Lab. Law §§ 500-643 (McKinney 1944).
52 Lab. § 511.
53 Id.
54 Id.
55 Lab. § 511(7), (8), (10), (12), (15), (17), (23).
56 Id.
III. NINE-TO-FIVE DEGREES OF SEPARATION FROM EMPLOYEE TO INDEPENDENT CONTRACTOR: THE EVOLUTION OF THE DEGREE OF CONTROL TEST IN NEW YORK

A. Morton/Restatement 220 Degree of Control Test

The dispositive issue here is that none of these statutes have defined precisely what an “independent contractor” is. These statutes only state what an employee is and, in a few instances, is not.57 The New York Court of Appeals, the State’s highest court,58 decided a seminal case in New York labor classification in In re Morton.59 The court in Morton explained:

Employment, except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all contracts entered into by helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer, in which all or the greater part of the work is to be performed within this state.60

The Morton court also provided “‘employee’ means any person, including aliens and minors, employed for hire by an employer in an employment subject to this article, except any person whose wages exceed three thousand dollars in any calendar year.”61

57 See supra note 61.
59 In re Morton, 30 N.E.2d 369 (1940).
60 Id. at 371.
61 Id. (citing N.Y. LAB. LAW § 502 (McKinney, 1995)). Morton was decided in 1940, explaining the $3,000 qualifier, but § 502 has since been amended.
The court in *Morton* further provided the test for determining whether a person is an "employee" or an "independent contractor" "within the meaning of the Unemployment Insurance Law" with a modified factor-based "Degree of Control" test based on the Restatement (First) of Agency § 220. Later cases have relied on *Morton*’s test and have made further developments by refining and reducing the § 220/ *Morton* Degree of Control factors. The *Morton* court stated:

The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an

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62 *In re* Morton, 30 N.E.2d 369, 369-71 (1940); *Restatement (First)* of Agency § 220(a)-(i) (AM. LAW INST. 1933)

(1) A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control. (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relationship of master and servant.

*Id.*

agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used.64

The court also stated:

From the nature of the problem, the *degree of control* which must be reserved by the employer in order to create the employer-employee relationship cannot be stated in terms of mathematical precision, and various aspects of the relationship may be considered in arriving at the conclusion in a particular case.65

A more recent case, *In re Watson*, articulated this notion more succinctly: "[t]he 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."66

The United States Supreme Court has also supported the § 220 factor-based test in its 1992 decision of *Nationwide Mutual Insurance Company v. Darden*.67 The Supreme Court stated that

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64 *In re Morton*, 30 N.E.2d at 371 (citing Hexamer v. Webb, 4 N.E. 755 (1886)).

65 *Id.* (emphasis added); see cases cited supra note 63.


In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the
the § 220 “list[] [is] nonexhaustive criteria for identifying master-
servant relationship[s],” 68 and that § 220 test “contains “no short-
hand formula or magic phrase that can be applied to find the an-
swer, . . . all of the incidents of the relationship must be assessed
and weighed with no one factor being decisive.” 69 While Darden
is a United States Supreme Court case, thus it is not binding on
New York State Courts interpreting New York State law, and
Darden pertained to an Employee Retirement Income Security Act
of 1974 (“ERISA”) action, 70 it nonetheless supports the validity
of New York’s Court of Appeals Degree of Control test articulated in
Bynog v. Cipriani Group Inc. 71

B. Let Bynogs be Bynogs: The Bynog Degree of Control
Factor Test

In 2003, the Court of Appeals of New York in Bynog artic-
ulated that the Degree of Control factor-based test is the standard
all New York courts must use when determining whether a worker
is an “employee” or an “independent contractor.” 72 Bynog’s De-
gree of Control test is rooted in and has evolved from the factors
contemplated by Morton. 73

Like the Darden / § 220 / Morton factor-based test, the
Bynog test attempts to determine a worker’s labor classification by

right to assign additional projects to the hired party; the extent
of the hired party's discretion over when and how long to
work; the method of payment; the hired party's role in hiring
and paying assistants; whether the work is part of the regular
business of the hiring party; whether the hiring party is in
business; the provision of employee benefits; and the tax
treatment of the hired party.

Id.

68 Id. at 324.
69 Id. (citing NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968)).
70 Id. at 319; Employee Retirement Income Security Act of 1974
72 Id. at 1093.
73 Id.
inquiring into "the degree of control exercised by the purported employer over the results produced or the means used to achieve the results." Instead of the nine factors used in Darden and Morton, the Bynog test has whittled it down to five factors. The factors of the Bynog test are: "whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer’s payroll and (5) was on a fixed schedule."

By taking all of the statutory definitions of "employee" found within New York State’s laws and applying the Bynog test, this Note will determine what the court will likely decide in Uber’s appeal of the A.L.J.’s decision, which was affirmed by the Board. Furthermore, this Note can also determine how the driver-claimants and “other similarly situated” drivers may be classified. This Note argues that the New York State court hearing Uber’s appeal on this matter will find in favor of the driver-claimants based on the Bynog test analysis, which is set forth below.

IV. THE BYNOG DEGREE OF CONTROL TEST APPLIED TO THE UNEMPLOYMENT INSURANCE CASE

The New York State court that will hear Uber’s Article 78 hearing will be constrained by In re Concourse Ophthalmology Associates, P.C.’s (“Concourse Ophthalmology”):

Whether an employment relationship exists within the meaning of the unemployment insurance law is a question of fact, no one factor is determinative and the determination of the appeal board, if sup-

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74 Bynog, 802 N.E.2d at 1093 (emphasis added).
75 Compare Bynog, 802 N.E.2d at 1093, with RESTATEMENT (FIRST) OF AGENCY § 220(a)-(i) (AM. LAW INST. 1933).
77 See supra part I.
ported by substantial evidence on the record as a whole, is beyond further judicial review even though there is evidence in the record that would have supported a contrary conclusion.  

A.L.J Burrowes determined driver-claimants are “employees” of Uber for unemployment benefits purposes, and this decision was affirmed by the Appeal Board. Accordingly, Uber bears the burden of showing that the A.L.J and the Appeal Board made this determination without such “substantial evidence.” The facts presented in the A.L.J.’s decision will be subjected to the Bynog test in order to determine whether the driver-claimants are “employees” or “independent contractors”, but the A.L.J.’s decision is given the presumption of being correct according to Concourse Ophthalmology’s standard of review.

A. Whether the Worker Worked at His Own Convenience

Merriam-Webster Dictionary defines “convenience” as “freedom from discomfort.” According to Uber, “[n]early 90 percent of drivers say the main reason they use Uber is because they love being their own boss.” This claim is supported by the fact that drivers are free to choose “when, where and how long they will work” while using the Uber App, and that “Uber does not impose a work schedule on the drivers.” Also, drivers do not

79 The Unemployment Insurance Case, supra note 11, at 19; The Board Decision, supra note 16.
80 Concourse Ophthalmology, 456 N.E.2d at 1201.
81 Id.
83 Hamilton, supra note 8.
84 The Unemployment Insurance Case, supra note 11, at 7; Hamilton, supra note 8.
85 The Unemployment Insurance Case, supra note 11, at 7.
have to request time off from Uber.86 With all that being said, one claimant’s contract stated that the driver must accept ride requests on the Uber App “at least once per month.”87 Additionally, drivers must sign a non-negotiable contract prior to being “eligib[le]” to use the Uber App, which “designate[s] . . . [drivers] as independent contractors.”88

In order to drive a “shift” for Uber, drivers must log on to the Uber App with a username provided by Uber.89 While using the Uber App, drivers receive a notification when a potential passenger requests a ride,90 and the driver has the option to accept the fare or to decline the fare.91 If accepted, the driver is given directions to the location of the passenger and upon arrival must wait ten minutes for the passenger to get into the vehicle.92 If the driver leaves before ten minutes, “Uber considers them ineligible for any wait charge.”93 However, if the passenger makes the driver wait longer than ten minutes or cancels, Uber has “sole discretion” to determine if the passenger will be charged a fee for remittance to the driver.94 That in and of itself is certainly discomforting to a driver who is working for income, whether “extra” or not. Once the passenger is in the driver’s vehicle, the Uber App notifies the driver of the passenger’s destination for the first time and suggests a route.95 The passenger can suggest a different route than the route suggested by Uber and the driver is “expected” to follow the passenger’s suggested route.96

Even though they cannot decide which route is best, drivers are nonetheless required to be experienced and knowledgeable

86 The Unemployment Insurance Case, supra note 11, at 7.
87 Id.
88 Id. at 5; Uber Terms of Use, supra note 13; Tech. Services Agreement, supra note 13 at §§ 2.4, 13.1.
89 See The Unemployment Insurance Case, supra note 11, at 7.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
of the area, evidenced by the fact that Uber administers a "map test" to ascertain the claimants "knowledge of New York City" prior to their "approval" to drive for Uber.\footnote{97} Despite having the knowledge and skill to determine the "best" route, i.e. quickest, safest, avoid traffic, etc., Uber has handcuffed the drivers to its App.\footnote{98} There is no freedom from control for drivers in performing the functions of their service, let alone a "freedom from discomfort." For example, an NFL player requested a ride on Uber from Chicago to Buffalo, a ride that lasted nine hours one way, presumably causing the driver to have an at least eighteen-hour round trip.\footnote{99} While, this may be an extreme example, it nonetheless demonstrates the lack of freedom Uber drivers actually have in determining how long they drive for Uber.

In addition, Uber's policy to "hide" pick-up and drop-off locations has led to drivers becoming victims of crime.\footnote{100} Being able to pick and choose when one works is convenient, but the "freedom from discomfort" ends when it can result in being a victim of crime due to Uber's policies.

Further diminishing the "convenience" to work wherever and whenever, Uber offers drivers numerous promotions that could lead to an increase of earnings for the driver.\footnote{101} While that sounds like a benefit to the drivers, this promotion system emphasizes driving \textit{when} and \textit{where} Uber decides. Promotions include "surge pricing," where Uber "increase[s] fares in certain geo-

\footnotesize{97 See The Unemployment Insurance Case, supra note 11, at 3.  
98 See id. at 7.  
101 Id. at 11.}
graphic locations based on market demands,"¹⁰² such as during "[b]ad weather, rush hour, and special events" or when "unusually large numbers of people . . . want to ride Uber all at the same time."¹⁰³ In essence, Uber was and still is directing drivers to service certain areas at specific times and paying a premium to attract drivers to those areas. One such promotion, accepted by claimant JH, "promised he would earn $1,500.00 if he drove 1,500 hours in specified areas."¹⁰⁴ Essentially, Uber promised one additional dollar per hour if the driver drove in the promotional areas. JH complied, but Uber did not.¹⁰⁵ Instead of JH earning the promoted $1,500, he earned significantly less, leading to Uber paying JH "the difference of $556.94" to "rectify" the "so-called" situation.¹⁰⁶

Furthermore, while drivers are using the Uber App, "Uber has the capacity to collect and review data regarding the Drivers' activities."¹⁰⁷ "Uber analyzes the Drivers' acceptance and cancellation . . . rates,"¹⁰⁸ "how long the [drivers] were online on the App on particular dates,"¹⁰⁹ and the driver's rating, which is based on passenger's post-ride review on a one-to-five scale.¹¹⁰ Uber has advised drivers that it "expected" a "ninety-percent" acceptance rate and to maintain at least a "4.7" star-rating.¹¹¹ "Uber deem[ed] star-ratings below 4.3 unacceptable."¹¹² Like the contract the drivers must sign, these expectations are non-negotiable. They were "subject to change, exclusively by Uber."¹¹³ Each driver's ratings and rates are included in the weekly payment

¹⁰² The Unemployment Insurance Case, supra note 11, at 11.
¹⁰⁴ The Unemployment Insurance Case, supra note 11, at 11.
¹⁰⁵ Id.
¹⁰⁶ Id.
¹⁰⁷ Id. at 9.
¹⁰⁸ Id.
¹⁰⁹ Id. at 11
¹¹⁰ Id. at 9.
¹¹¹ Id. at 9, 17.
¹¹² Id.
¹¹³ Id. at 9.
statement Uber provides its drivers, as well as Uber’s feedback and comments. Two driver-claimants received a comment from Uber stating: “nice work, your driver rating was above average.”

In addition to incentivizing drivers to work when and where Uber wants, Uber also punishes drivers for not doing so. Based on their acceptance and cancellation rates as well as their star ratings, drivers can face disciplinary action from Uber. For example, if a driver’s 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.” Uber maintains a “Driver Deactivation Policy” which provides that Uber “might deactivate access [to the Uber App] because of low Rider ratings, high cancellation rates, [and] [sic] low acceptance rates.” Pursuant to the Policy, driver-claimant AK was deactivated by Uber for “twenty-four hours” for “excessive cancellations.” Additionally, Uber would “log[] out,” or lock out, “[d]rivers who failed to accept two consecutive ride requests.”

A.L.J Burrowes determined that Uber’s practices of incentivizing, punishing, and monitoring drivers was “steps to modify the claimant’s behavior, as typical in an employer-employee relationship.”

1. The Convenience of FedEx – How the NLRB Delivered the News that FedEx Drivers were Employees

In FedEx Home Delivery, the National Labor Relations Board (“NLRB”) found that FedEx “essentially directs [drivers’]

114 The Unemployment Insurance Case, supra note 11, at 9, 11.
115 Id. at 9.
116 Id.
117 The Unemployment Insurance Case, supra note 11, at 9.
118 Id.
119 Id.
120 Id. at 9, 17.
121 Id.
122 Id.
performance via the enforcement of rules and tracking mechanisms." \(^{123}\) It is important to note that *FedEx Home Delivery* was overturned by the D.C. Circuit in favor of a decision that found the FedEx drivers to be "independent contractors". \(^{124}\) This comparison only serves to illustrate how the NLRB determined the employment classification with a similar set of facts.

The NLRB found that "FedEx conducts periodic audits and appraisals of driver performance, and has the ability to track all major work activities . . . in real-time." \(^{125}\) The "tracking" in *FedEx* is similar to Uber’s monitoring of drivers’ acceptance and cancellation rates; the duration of time of their "shifts" on particular days; and the drivers’ ratings. \(^{126}\) However, the Second Circuit in *Saleem*, found "some monitoring and discipline . . . does not alter" the inquiry into employer control. \(^{127}\)

The NLRB held that "FedEx may also impose disciplinary measures including suspension or termination if drivers fail to comply with contractual rules and procedures." \(^{128}\) Uber employed a similar discipline policy, where drivers were subject to "deactivation" (the term is used interchangeably for suspensions and terminations at Uber), for failing to maintain the Uber-proscribed "ninety percent" acceptance rate, for declining consecutive requests, or for having a low driver rating. \(^{129}\) The NLRB concluded that these factors "weigh in favor of employee status" under the *Darden* test and thus the FedEx drivers at issue were "statutory employees." \(^{130}\) While the NLRB’s decision was vacated in favor


\(^{124}\) *FedEx Home Delivery*, 361 N.L.R.B. at 622 (explaining this swing of the classification exemplifies how reasonable minds can differ on employment classification when presented with the same facts).

\(^{125}\) *Id.*

\(^{126}\) The Unemployment Insurance Case, *supra* note 11, at 9-11.


\(^{129}\) The Unemployment Insurance Case, *supra* note 11, at 9.

of a decision by the D.C. Circuit that found the FedEx drivers to be independent contractors and is not binding on New York State courts, nonetheless the comparison can be persuasive for this factor.

Applying the facts of the Unemployment Insurance Case to the first prong of the Bynog test, a New York State court would most likely weigh this factor in favor of employee classification for the drivers. The determinative factor would be Uber’s degree of control over the driver-claimants’ behavior, namely the incentive program that directs drivers to where and when Uber wants drivers, the monitoring of the driver’s reviews, and the rejecting of ride requests, which can result in its drivers’ suspension or termination. This amount of supervision could be deemed as controlling. With the analysis supplied by the NLRB in FedEx and the undisputed fact that Uber fails to provide drivers with notice of the requested destination before they can accept the fare, it is apparent that drivers can be inconvenienced by the work Uber provides. Again, because FedEx is not binding, along with the undisputed fact that drivers can use the app whenever it is convenient, a court could favor independent contractor status for this prong. However, the other facts surrounding the use of the Uber App show that Uber maintains a degree of control over the means to the end product, which is indicative of a master-servant relationship. Thus, this factor most likely will weigh in favor of employee status.

B. Whether the Worker was Free to Engage in Other Employment

This factor heavily favors Uber’s claim that drivers are “independent contractors.” Uber, and its competitor Lyft, state “that their platforms are designed to provide drivers with extra income on top of their existing salaries from other work.”131 “Uber [was] aware and [did] not prohibit” drivers from working for its competitors.132 In the instant case, two claimants “also accepted

131 Hamilton, supra note 7.
132 The Unemployment Insurance Case, supra note 11, at 13.
ride requests from Uber’s competitors while simultaneously using the Uber App.”\textsuperscript{133} Under the terms of Uber’s standard contract, drivers “retain the complete right to; (i) use other software application services in addition to the Uber Services; and (ii) engage in any other occupation or business.”\textsuperscript{134} While these facts are undisputed in the instant case, A.L.J. Michelle Burrowes found them to be “not necessarily dispositive.”\textsuperscript{135} Even if this factor is “not necessarily dispositive,” it still weighs in favor of an independent contractor classification because Uber does not have a restrictive covenant that controls drivers other employment opportunities.

C. Whether the Worker Received Fringe Benefits

1. Uber Does Not Provide Fringe Benefits

On its face, this prong most likely favors independent contractor classification for the driver-claimants, but it is entirely rebuttable based on the facts. It is undisputed that Uber does not provide drivers with fringe benefits.\textsuperscript{136} Uber did not provide the driver-claimants with “paid vacation, sick leave, health insurance coverage or other fringe benefits.”\textsuperscript{137} Pursuant to Uber contracts, drivers must maintain “workers compensation insurance as required by all applicable laws in the Territory.”\textsuperscript{138} In New York State, one such “workers compensation insurance” that exists for “for-hire drivers” is the Black Car Fund Insurance—Workers’ Compensation Insurance.\textsuperscript{139} Uber complied with this regulation through one of its twenty-eight black-car-base subsidiaries in New York City, namely Unter LLC., which the driver-claimants were

\begin{footnotesize}
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\item \textsuperscript{133} The Unemployment Insurance Case, supra note 11, at 13.
\item \textsuperscript{134} Tech. Services Agreement, supra note 13, at §§ 2.4, 13.1.
\item \textsuperscript{135} The Unemployment Insurance Case, supra note 11, at 19.
\item \textsuperscript{136} The Unemployment Insurance Case, supra note 11, at 5.
\item \textsuperscript{137} \textit{Id}.
\item \textsuperscript{138} Tech. Services Agreement, supra note 13, at § 8.2.
\item \textsuperscript{139} The Unemployment Insurance Case, supra note 11, at 5; see 35 RCNY § 59B-03(d); see N.Y. EXEC. LAW §§ 160-dd, 160-ff (McKinney 1999).
\end{itemize}
\end{footnotesize}
affiliated with.140 “Unter withheld a small amount of each fare,” and “[t]he withheld fares were submitted to New York State on a monthly basis . . . on behalf of the claimants for their Black Car Fund insurance.”141 The only control Uber exercised over the driver-claimants’ benefits is the remittance of the required money for the Black Car Fund.142 Drivers providing their own insurance was, inter alia, a determinative factor in Castro-Quesada v. Tuapanta, a case determining that the black car driver-claimant was an “independent contractor” using the Bynog test.143

2. Uber Provided Perks to the Driver-Claimants

However, the driver-claimants received perks from their employment with Uber, such as the opportunity to lease vehicles, open credit cards for fuel, and purchase a smart phone. Uber requires all drivers to have a vehicle and a smart phone in order to use its App.144 Driver-claimants “assumed the cost of their leased or owned vehicles, fuel[,] (sic) insurance and maintenance cost.”145 Further, drivers must operate a vehicle that is on Uber’s list of acceptable vehicles for each of its services: “Uber X (the most basic acceptable vehicles); Uber XL; and, Uber Black (luxury vehicles).”146 Two driver-claimants had “poor credit,” so Uber provided them with an affiliated third-party lender so the driver-claimants could “lease vehicles despite their poor credit.”147 However, Uber did not require the driver-claimants to use this

141 The Unemployment Insurance Case, supra note 11, at 5.
142 See id.
144 The Unemployment Insurance Case, supra note 11, at 5.
145 Id.
147 The Unemployment Insurance Case, supra note 11, at 5.
leasing company. Once the two driver-claimants leased vehicles from the Uber-affiliated third party, the driver-claimants "executed a Consent and Deduction Waiver, thereby, authorizing Uber to deduct and forward lease payments, from their fares . . . to the third-party lessor." When one driver-claimant JS "became delinquent in his payments" and quit driving for Uber, Uber stepped in and negotiated on the driver’s behalf with the lessor "for an alternative payment schedule . . . which incentivized [the driver] to resume providing ride service under Uber’s App."

Another perk offered by an Uber affiliated third-party was a “Fuel Card Program,” that provided drivers with “credit cards to purchase fuel.” Like the leasing agreement, Uber would withhold fares and forward the money to the creditor on behalf of the driver. Uber also provided the driver-claimants with the perk of cell phones and accessories. Driver-claimant AK did not own a smart phone that could run the Uber App so Uber provided him with a compatible smart phone and withheld fares to pay for it. “Uber also provided JH with a phone charger and cable, at no cost.”

While Uber does not provide its drivers with healthcare or banked time, Uber did provide drivers with poor credit opportunities for loans, lines of credit and it also stepped in to negotiate the terms of a lease for a driver-claimant. In a Darden/§ 220 Degree of Control test, these facts would be applied to “the source of the instrumentalities and tools” factor because Uber certainly provided them. This factor is absent from the Bynog test, but as one of Morten’s progeny, the § 220 factors may be considered by the New York State court. The state court could find that Uber did

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148 The Unemployment Insurance Case, supra note 11, at 5.
149 Id. at 5-7.
150 Id. at 7.
151 Id.
152 Id.
153 Id.
154 Id.
155 Id.
156 Id. at 5.
control the driver-claimants’ access to the ‘tools of the trade’ by providing access to loans for the needed vehicles and providing the needed smartphones and accessories for the driver-claimants in order to use the Uber App.

Unfortunately, the court in the 2017 Appellate Division, Second Department case of Wienfeld v. HR Photography, Inc., stated that “incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship.”\(^{158}\) The state court would have to determine if these perks were “incidental control” in order for this factor to sway the driver-claimants’ classification to that of “employee.” Otherwise this factor would squarely land in the “independent contractor” classification.

**D. Whether the Worker was on the Employer’s Payroll**

Uber drivers are not a party to the monetary transaction that pays for the rides they provide.\(^{159}\) The Uber App “calculates the fare based on current market factors.”\(^ {160}\) The driver is “paid on a per trip basis,”\(^ {161}\) and Uber pays the driver weekly.\(^ {162}\) In the weekly paycheck are all the fares the driver had completed that week and any promotional reward the driver had received,\(^ {163}\) minus Uber’s non-negotiable fee of “twenty to thirty percent per fare,”\(^ {164}\) the Black Car Fund insurance payment,\(^ {165}\) “deductions . . . for adverse Rider reports,” and any withholdings Uber is authorized to take and remit to a lender.\(^ {166}\) Driver-claimant JS claimed

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159 The Unemployment Insurance Case, supra note 11, at 5.
160 Id. at 7.
161 Id. at 11.
162 Id.
163 Id.
164 Id.
165 Id. at 5; see 35 R.C.N.Y. § 59B-03(d) (providing injury compensation for Black Car operators in New York).
166 The Unemployment Insurance Case, supra note 11, at 11.
he made "$1,200 to $1,500 a week when he began driving" in November 2015. By August 2016, when he stopped driving for Uber, JS claimed to make "below the minimum wage despite working 40-plus hours a week." Uber initially prohibited drivers from "solicitation, or acceptance of gratuities," because Uber claimed, "the tip is already included" in the fare. But, since the events of this case, Uber has implemented a tipping option in the Uber App.

The driver-claimants’ wages were entirely dependent on Uber. The drivers did not negotiate their rate to provide services for Uber, nor did the drivers set the rate for each ride performed. Uber unilaterally set its cut of the drivers’ earnings and had the sole discretion to change it. Uber had the discretion to be able to withhold funds for negative customer feedback and provided drivers with little recourse in appealing the decision. These funds were presumably held in Uber’s coffers or remitted back to the passenger. Uber also paid the drivers on a set schedule, so the drivers did not have immediate access to the funds. Finally, Uber’s policy to forbid tipping and the lack of a tipping function

167 Hamilton, supra note 7.
168 The Unemployment Insurance Case, supra note 11, at 3 n.1.
169 Id.
170 Id.
171 Hamilton, supra note 7.
172 The Unemployment Insurance Case, supra note 11, at 7.
174 The Unemployment Insurance Case, supra note 11, at 11.
175 Id.
176 Id.
177 Id. at 11-13.
178 Id. at 11.
of the app artificially limited the driver's potential earnings and thereby increased their dependence on Uber for wages.

1. Payroll Similarities between FedEx and Uber

While *FedEx Home Delivery* was overturned, the similarities of the payroll systems used by FedEx and Uber and the analysis provided by the NLRB serve as a helpful illustration on how these factors are applied.

The driver-claimants were subject to a similar payroll scheme as the employee-drivers in *FedEx Home Delivery*. Both FedEx and Uber "unilaterally" determined the drivers' rate of pay. The FedEx driver's weekly check was based on "the number of packages delivered, the number of stops made, the distance traveled, and the number of days a driver's vehicle is available to provide service." Similarly, the driver-claimants were paid based on a "per trip basis." The "per trip basis" payment by Uber was similar to FedEx's because an Uber driver's trips include delivering passengers, making stops to pick up and drop off passengers, and the distance traveled is factored into the fare.

The FedEx drivers, like the driver-claimants also received bonuses. The bonuses were for "drivers who service two or more routes . . . service bonus[es] based on years of service . . . a bonus for meeting certain accuracy goals . . . and a group bonus if all drivers at the terminal meet . . . service goal[s] for the period." Additionally, FedEx paid "$27 to $127 daily to drivers who service routes where customer density and package volume are still developing." Similarly, the driver-claimants could re-

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180 Id. at 615; The Unemployment Insurance Case, supra note 11, at 5.
181 FedEx Home Delivery, 361 N.L.R.B. 610 at 615.
182 The Unemployment Insurance Case, supra note 11, at 11.
183 FedEx Home Delivery, 361 N.L.R.B. 610 at 615.
184 Id.
185 Id.
ceive a promotional bonus such as “surge pricing,” or promotions to provide rides in certain areas during a set time period.186

The NLRB in *FedEx* found that this prong of the test favored “employee” status for the FedEx drivers because “FedEx ‘establishes, regulates, and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to customers.’”187 Similarly, Uber “establishes, regulates, and controls the rate of compensation” for the driver-claimants and provided “financial assistance,”188 by giving the driver-claimants access to loans they would not have otherwise received.189 Additionally, Uber sets the rates charged to customers, the Uber driver does not.190

One factor that is present in FedEx’s compensation scheme, and not Uber’s, is an “insulated . . . against loss,” and a “guarantee[d] an income level predetermined by FedEx.”191 FedEx paid drivers for “simply . . . showing up on contractually-mandated days,” subsidized drivers delivering to “emerging routes,” compensated drivers if FedEx caused a reduction of deliveries on a driver’s route, and provided a “fuel/mileage subsidy if gasoline prices increase[d] substantially.”192 Essentially, FedEx paid its drivers a weekly salary through this insulation from any loss.

Uber’s compensation scheme does not “insulate” drivers from loss or “guarantee an income.” Uber compensates drivers “on a per trip basis.”193 Uber does provide its drivers with incentive programs like surge pricing, but it does not “guarantee an income” by simply logging into the App. Uber does, within its own discretion, provide drivers with a “wait fee” or a “cancellation fee” for drivers who accept rides that are ultimately cancelled by the

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186 The Unemployment Insurance Case, *supra* note 11, at 11.
188 *Id.*
189 *Id.*
190 *Id.*
192 *Id.*
193 The Unemployment Insurance Case, *supra* note 11, at 11.
passenger prior to pick-up or the passenger fails to meet the driver within the ten-minute wait period. Unlike FedEx, Uber did not essentially provide drivers with a weekly salary, but had some insulation-from-loss provisions like FedEx.

Because of the similar pay structure between the employee FedEx drivers and the driver-claimants, this Note argues that this factor leans in favor of employee status, even if Uber did not provide insulation-from-loss or guarantee some compensation like FedEx.

2. Party Like its 1099

The driver-claimants did not receive W2s, but instead were provided with an “IRS Form 1099 to report . . . fare-based income to the Internal Revenue Service.” The 1099 form (“1099”) is “used to report payments to independent contractors.” Unter also provided the claimants with “Form 1099 Miscellaneous to report non-fare base earnings, such as incentive and promotion payments.”

The 1099 appears in most of the relevant case law on this subject matter. The claimants in Bynog were not employees of the principal-defendant because, inter alia, the waiters received a 1099 from the agent-company. In Saleem v. Corp. Transp.
Group, Ltd., the drivers received 1099s, and the court ruled that the plaintiff black-car drivers,²⁰¹ were in-fact and in-law "independent contractors."²⁰² In addition, the Saleem black-car drivers also did not receive benefits, like the driver-claimants.²⁰³ While Saleem is a Second Circuit case, and thus is not binding on New York State courts, the fact that the black-car drivers are within the same industry as the driver-claimants in the same city, may be persuasive.

This factor, whether the drivers were on Uber’s payroll, was determined by A.L.J. Michelle Burrowes to be in favor of the employee classification of the driver-claimants,²⁰⁴ and thus the court will most likely find that the ruling is correct.²⁰⁵ Nonetheless the Saleem facts may sway the court to determine that this prong leans in favor of an independent contractor classification.

E. Whether the Worker was on a Fixed Schedule

“Uber does not impose a work schedule on the drivers,”²⁰⁶ and the drivers are free to choose “when, where and how long they will work” when using the Uber App.²⁰⁷ Drivers do not have to request time off from Uber, but one claimant’s contract stated that he must accept ride requests on the Uber App “at least once per

²⁰¹ Compare 35 R.C.N.Y. § 59A-01(a) (defining For-Hire vehicles as “Liveries,” “Black Cars,” and “Limousines”) and 35 R.C.N.Y. §59A-03(b), (c) (explaining all black cars belong to a base that dispatches vehicles on a “pre-arranged basis” (emphasis added)), with 35 R.C.N.Y. §51-03 (“Taxicab means a motor vehicle, yellow in color, bearing a Medallion indicating that it is licensed by the Commission to carry up to five passengers for hire and authorized to accept hails” (emphasis added)).


²⁰³ Id. at 141 n.22; The Unemployment Insurance Case, supra note 11, at 5.

²⁰⁴ The Unemployment Insurance Case, supra note 11, at 11.


²⁰⁶ The Unemployment Insurance Case, supra note 11, at 7.

²⁰⁷ Id.; Hamilton, supra note 7.
month. A.L.J. Burrowes conceded that this freedom in work schedule, along with the driver’s ability to “select[] their works areas;” take leave without Uber’s permission, and the lack of fringe benefits [were] all factors indicative of an independent contractor status."

F. BYNOG SCORCARD

The Bynog factor test attempts to determine “the degree of control exercised by the purported employer over the results produced or the means used to achieve the results.” Based on the analysis above, the “score” is one point for an employee classification, i.e. whether the worker works at his own convenience. The independent contractor classification “score” is three, i.e. whether the worker can have other employment, whether the worker received fringe benefits, and whether the work had a fixed schedule. The “payroll” factor is undetermined by the analysis because compelling evidence supports each determination.

Even though A.L.J. Burrowes acknowledged that those three factors were “indicative of an independent contractor status,” she still determined that the driver-claimants were employees for unemployment benefits purposes, and the Appeal Board affirmed this decision. The A.L.J. placed significant weight on the facts included in the analysis of the “convenience” factor in the Bynog test. A.L.J. Burrowes found “the overriding evidence establishes that Uber exercised sufficient supervision, direction, and control over key aspects of the services rendered by

208 The Unemployment Insurance Case, supra note 11, at 7.
209 Id. at 15.
211 See supra Part IV.A.
212 See supra Part IV.B, C, E.
213 See supra Part IV.D.
214 The Unemployment Insurance Case, supra note 11, at 15.
215 Id. at 19.
216 The Board Decision, supra note 16.
217 Id.
claimants such that an employer-employee relationship was created.”

Because there is “substantial evidence” to support the A.L.J. and Board’s conclusion that Uber exerted enough control over the driver-claimants to form an employer-employee relationship, and because the legal presumption of correctness pursuant to Concourse Ophthalmology weighs so heavily in favor of the prior Administrative decision, the court hearing Uber’s appeal will most likely affirm.

V. EFFECTS OF A POTENTIAL APPEAL

A. If Uber Loses the Appeal

Because the A.L.J. extended the employment classification to “all others similarly situated to [the] claimants . . . as of January 1, 2014,” Uber may be on the hook for unemployment benefits to substantially more former drivers than just the three driver-claimants. This could mean non-stop litigation for Uber when these “similarly situated” former drivers start presenting their claims for unemployment benefits. These potential claims mean that Uber will be expending substantial resources not only fighting every claim, but also providing unemployment benefits to the successful claimants. Discovery-related demands will also cost Uber because it will have to dig up records on the potential claimants, which date back to before January 24, 2014, more than four years ago at minimum.

Furthermore, the precedent this case sets could be used to determine that all Uber drivers in New York/New York City are employees. If so, Uber would then be required to provide minimum wage, overtime, and other statutory benefits guaranteed to

218 The Board Decision, supra note 16.
219 In re Concourse Ophthalmology, 456 N.E.2d at 1201; The Unemployment Insurance Case, supra note 11, at 15.
220 The Unemployment Insurance Case, supra note 11, at 19.
221 See id.
222 See id.
employees. This is a destination that Uber does not want to be dropped off at and certainly will mean that Uber will give the judge a one-star rating.

B. If Uber Wins the Appeal

1. Beating the Case and Doing the Race:

McGillis

In McGillis v. Department of Economic Opportunity, a former Uber driver in Florida was determined not to be an “employee” for the purpose of reemployment assistance. In other words, not only is the McGillis plaintiff not an employee for the purpose of reemployment assistance, but no Uber driver in the State of Florida is eligible for reemployment assistance.

In order to determine the employment relationship status, Florida courts follow the factors listed in Section 220 of the Restatement (Second) of Agency. These factors are similar to those discussed in Morton and later refined in Bynog. After applying these factors, the court in McGillis “agree[d] with the Department’s conclusion that Uber drivers like McGillis are not employees for purposes of reemployment assistance.” The court also held that the contract between the drivers and Uber “unequivocally disclaim[ed] an employer-employee relationship[;] [and] the parties’ actual practice reflect[ed] the written contract.”

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225 See id.
226 See id. at 224; see also supra note 62 (outlining the nine factors provided in Section 220 of the Restatement (First) of Agency).
227 Compare supra note 62 (listing the nine factors provided in Section 220 of the Restatement (First) of Agency), with supra text accompanying notes 75-76 (stating the five factors outlined in the Bynog decision).
228 See McGillis, 210 So. 3d at 225.
229 Id.
of autonomy granted to its employees, the court first noted that the drivers “suppl[ied] their own vehicles—the most essential equipment for the work—and control whether, when, where, with whom, and how to accept and perform trip requests.”\textsuperscript{230} Furthermore, drivers worked at “their own discretion,” and Uber did not provide “direct supervision.”\textsuperscript{231} Uber also “did not prohibit drivers from working for its direct competitors.”\textsuperscript{232} Notably, Uber provided its drivers with the 1099 IRS tax form, a form reserved for independent contractors, and Uber did not provide fringe benefits.\textsuperscript{233} The court did not find the fact that “Uber may deactivate a driver’s account under certain circumstances” to be dispositive, but instead decided the Uber driver requesting relief was more akin to an independent contractor than to an employee and therefore, he was not entitled to receive reemployment assistance benefits.\textsuperscript{234}

2. \textit{What Does McGillis Mean for the Driver-Claimants and the “Similarly-Situated” Drivers?}

If these facts sound familiar, it is because they are. A.L.J. Michelle Burrowes considered identical facts in her determination and came to the opposite conclusion, which was affirmed by the Appeal Board.\textsuperscript{235} The actual question is how “similarly-situated” the relevant courts are.

While \textit{McGillis} has no precedential value on a New York State court, Uber will almost certainly introduce it as persuasive evidence. Using the standard of review articulated in the \textit{Concourse Ophthalmology} decision,\textsuperscript{236} Uber could attempt to get A.L.J. Burrowes’ determination overruled by arguing that her de-

\begin{flushleft}
\textsuperscript{230} See \textit{McGillis}, 210 So. 3d at 225-26.
\textsuperscript{231} \textit{Id.} at 226.
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} \textit{Id.}
\textsuperscript{234} See \textit{id.}
\textsuperscript{235} The Unemployment Insurance Case, \textit{supra} note 11; The Board Decision, \textit{supra} note 16.
\end{flushleft}
cision was not "supported by substantial evidence."\textsuperscript{237} The almost-identical case found in \textit{McGillis} could be used to show that the determinative facts do not support her conclusion. The major difference between \textit{McGillis} and the driver-claimants is that in \textit{McGillis}, the Department of Economic Opportunity found in favor of Uber before the case was appealed to a state court.\textsuperscript{238}

Similar to the \textit{Concourse Ophthalmology}'s standard of review, the controlling standard of review in \textit{McGillis} required the court to give "great deference" to the Department of Economic Opportunity's "interpretation of [the] statute it is charged with enforcing."\textsuperscript{239} Unlike the \textit{McGillis} plaintiff, the administrative adjudicative process found in favor of the driver-claimants, thus Uber is walking into the batter's box with two strikes in New York, whereas it started with a runner on third in Florida.

3. \textit{Uber May Have an Ace Up Its Saleem}

In \textit{Saleem v. Corporate Transportation Group, Ltd.}, the Second Circuit held the claimant-black car drivers, a service similar to Uber, were not "employees."\textsuperscript{240} On the surface, the service provided by the Corporate Transportation Group ("CTG") black car drivers was similar to the Uber driver-claimants in the Unemployment Insurance Case,\textsuperscript{241} \textit{Saleem} shows that even seemingly

\textsuperscript{238} \textit{McGillis} v. Dep't of Econ. Opportunity, 210 So. 3d 220, 222-23 (Fla. Dist. Ct. App. 2017).
\textsuperscript{239} \textit{Id.} at 224 n.6.
\textsuperscript{241} Compare N.Y.C. Admin. Code 19-502(u) ("Black Car" means a for-hire vehicle dispatched from a central facility whose owner holds a franchise from the corporation or other business entity which operates such central facility, or who is a member of a cooperative that operates such central facility, where such central facility has certified to the satisfaction of the commission that more than ninety percent of the central facility's for-hire business is on a payment basis other than direct cash payment by a passenger), with N.Y.C. Admin. Code 19-502(g) ("'For-hire vehicle' means a motor vehicle carrying passengers for hire in the city, with a seating capacity of twenty passengers or less, not including the driver, other than a taxicab, coach, wheelchair accessible
“similarly situated” drivers may not as similar once further analyzed.

One major difference between Saleem and the Unemployment Insurance Case is that the statute which the case arose under was the federal Fair Labor Standards Act (“FLSA”), has as decidedly different intention than the New York State Unemployment Insurance Law.\textsuperscript{242} Further, the test used by the Saleem court to determine the black car drivers’ employment status was the “economic reality test” as articulated by U.S. v. Silk and adopted by the Second Circuit in Brock v. Superior Care, Inc.\textsuperscript{243} Besides the differences in the tests applied,\textsuperscript{244} the actual employment of the van, commuter van or an authorized bus operating pursuant to applicable provisions of law.”). New York City classifies Uber and Lyft as For-Hire Vehicles. For-Hire Vehicle Transportation Study, Office of the Mayor (Jan. 2016), https://www1.nyc.gov/assets/operations/downloads/pdf/For-Hire-Vehicle-Transportation-Study.pdf.

\textsuperscript{242} Id. at 135, 138. The Second Circuit did not hear the New York Labor Laws claim on appeal. See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1938). The stated policy behind the FLSA is to eliminate adverse working conditions while the Unemployment Insurance Law stated policy is to maintain an unemployment fund for qualified workers fired due to no fault of their own. Id. Compare 29 U.S.C. § 202 (1938), with N.Y. LAB. LAW § 501 (McKinney 1944).

\textsuperscript{243} Saleem, 854 F.3d at 140 (first citing Brock v. Superior Care, Inc., 840 F.2d 1054, 1058-59 (2d Cir. 1988); then citing U.S. v. Silk, 331 U.S. 704, 716 (1947)).

\textsuperscript{244} Compare Silk, 331 U.S. at 716,

(1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

with Bynog v. Cipriani Grp., 802 N.E.2d 1090, 1093 (2003) (“(1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule.”). The Economic Realities Test focuses its analysis on the worker and whether the work is self-reliant and in essence is running his/her own business,
Saleem drivers and the Uber driver-claimants differed to a such a degree that Saleem would most likely not be persuasive on a New York State court hearing the Unemployment Insurance Case on appeal.

The work conducted by the Saleem drivers and the Uber driver-claimants was similar in the sense that each driver picked up passengers and brought them to their destination. Additionally, both sets of drivers could work for competitors.\textsuperscript{245} Lastly, the drivers in both cases did not have to set a schedule.\textsuperscript{246} But the similarities in their employment ends there.

First, the Saleem drivers had a significantly higher financial investment into their own business. The Saleem drivers were franchisees of CTG and becoming so required a “substantial financial outlay” of “between $68,838 and $89,038.”\textsuperscript{247} In addition to high capital investment, Saleem drivers had a greater degree in negotiating their contracts with CTG, showcased by “wide variation” in terms that each franchisee-driver agreed to.\textsuperscript{248} The Uber driver-claimants had no such franchise agreement nor “substantial financial outlay,” instead the Uber driver-claimants entered into “adhesion contracts.”\textsuperscript{249} Further, the Saleem drivers were responsible for “vehicle acquisition, fuel, repair, and maintenance, license, registration and insurance fees, and tolls, parking, and tickets,” and were not reimbursed by CTG.\textsuperscript{250} The Uber driver-claimants had similar expenses but Uber charged the passengers for tolls and Uber, within its own discretion, reimbursed drivers for vehicle damage caused by passengers and tickets.\textsuperscript{251}

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while the Degree of Control test focuses on the employer and how much control he/she wields over the worker.

\textsuperscript{245} Saleem, 854 F.3d at 141; The Unemployment Insurance Case, \textit{supra} note 11, at 19.

\textsuperscript{246} Saleem, 854 F.3d at 146; The Unemployment Insurance Case, \textit{supra} note 11, at 7.

\textsuperscript{247} Saleem, 854 F.3d at 144-45.

\textsuperscript{248} \textit{Id.} at 141.

\textsuperscript{249} The Unemployment Insurance Case, \textit{supra} note 11, at 15.

\textsuperscript{250} See Saleem, 854 F.3d at 145.

\textsuperscript{251} The Unemployment Insurance Case, \textit{supra} note 11, at 11-13.
Second, while both the Saleem drivers and the Uber driver-claimants did not have to set a schedule with CTG or Uber respectively, Uber provided financial benefit and hardship for drivers who did or did not work when Uber wanted them to. CTG did not provide an “incentive structure for [drivers] to drive at certain times, on particular days of in specific locations.” When Uber demand was high, Uber would provide “surge” pricing to incentivizing the drivers to provide service when Uber needed the help. Further, Uber provided promotional monies for driving at certain times, and specific places, serving as an example was Uber attempting to control where and when drivers worked. Additionally, Uber would punish drivers with termination/deactivation for rejecting or cancelling rides, i.e. for not working when Uber wanted. On the other hand, Saleem drivers had sole discretion in accepting and declining rides, exemplified by one driver “reject[ing] 949 job offers” in a three-year span, without any consequences.

It is clear that the “type” of employment was different between the Saleem and Uber driver-claimants. The Saleem drivers were, in fact, running their own business that had access to CTG resources, but were subjected to CTG rates when providing service for CTG. The Uber driver-claimants had no financial stake in Uber, were at the whims of Uber’s deactivation policy, depended on Uber to cover some necessary expenses, and most importantly, Uber directed drivers when and where to provide services by incentivizing drivers. The facts of cases are distinguishable. Thus, Saleem would not be persuasive because it is contemplating employment classification under a federal law distinguishable from

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252 Saleem, 854 F.3d at 146; The Unemployment Insurance Case, supra note 11, at 7.
253 Saleem, 854 F.3d at 146; The Unemployment Insurance Case, supra note 11, at 7.
254 The Unemployment Insurance Case, supra note 11, at 11; How surge pricing works, supra note 103.
255 The Unemployment Insurance Case, supra note 11, at 7.
256 Id. at 8-9.
257 See Saleem, 854 F.3d at 147.
258 Id. at 136-37.
the case at hand and the facts simply suggest that the drivers were different.

4. What McGillis and Saleem Mean for the Driver-Claimants

The similarities and outcomes of McGillis and Saleem are damning for the driver-claimants. But there is a silver-lining. Neither McGillis nor Saleem are binding on a New York State court. However persuasive these cases may be, a New York State court does not have to consider the rational of those decisions. Uber may be best-served by using the arguments that persuaded those courts to decide in their favor. Luckily for the driver-claimants, they most likely will not have to withstand McGillis/Saleem attacks to heart of their labor misclassification claims, thanks to the Concourse Ophthalmology decision.

VI. IF UBER DECIDES TO SETTLE INSTEAD OF APPEAL

A. The Terminator vs. Sarah O’Connor

O’Connor v. Uber Technologies, Inc., is a class action lawsuit currently being argued in the United States District Court for the Northern District of California in the Ninth Circuit. Like the driver-claimants in New York, the O’Connor plaintiffs alleged “that Uber misclassifies drivers as independent contractors rather than employees.” The O’Connor plaintiffs have further alleged that as a result of the misclassification, Uber’s drivers lose employment entitlements such as “reimburse[ment] for expenses such as gas and use of their vehicle,” and that Uber was “failing to

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260 Id. at 1113.
261 Id.
remit the full gratuity to drivers as required by-California Labor [Laws].”

Similarly to their defense in the driver-claimants’ case, Uber “argued that because it exercises minimal control over how drivers set their own hours and work schedule, its drivers cannot be considered employees.” The O’Connor plaintiffs “contend that Uber in fact exercised considerable control and supervision over the methods and means of its drivers’ provision of transportation services, making drivers employees.” Identical contentions regarding Uber’s control was the determinative factor for A.L.J. Michelle Burrowes’ decision to classify the New York driver-claimants as employees.

During the course of litigation in O’Connor, the plaintiffs’ class size increased to more than 240,000 drivers. The court “concluded that the ultimate determination of employment status had to be decided by a jury because there were disputes over material questions of fact, such as whether Uber has the right to significantly control the ‘manners and means’ of drivers’ transportation services.” However, before the trial began, the plaintiffs accepted a settlement offer of $84 million from Uber. In exchange for the payments and other changes Uber agreed to make regarding policy, it “require[d] settlement class members . . . to release all claims based on or reasonably related to the employment misclassification claim.”

Although the parties were able to reach a consensus, the Settlement Agreement still had to be approved by the court to

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262 O’Connor, 201 F. Supp. 3d at 1113.
263 Id. at 1114; see The Unemployment Insurance Case, supra note 11, at 15.
264 O’Connor, 201 F. Supp. 3d at 1114.
265 The Unemployment Insurance Case, supra note 11, at 19.
266 O’Connor, 201 F. Supp. 3d at 1115.
267 Id. at 1114.
268 Id. at 1116-17 (explaining that per the terms of the settlement, the drivers represented would be paid, on average, $10-$1,950, based on the mileage that the driver drove for Uber).
269 Id. at 1117-19.
270 Id. at 1119.
comply with the Federal Rules of Civil Procedure. The court ultimately rejected the Settlement Agreement, and one reason it gave for its decision was that the $84 million settlement was essentially “a 90% discount off the verdict value.” In the Settlement Agreement, $1 million of the $84 million was to be earmarked for the Private Attorneys General Act (“PAGA”) claims. The PAGA claim in O’Connor involved the invalidation of Uber’s arbitration clauses, which was a point of contention in this litigation, and partly served to shape the class size. The Plaintiff’s counsel “argued that the PAGA claim could result in penalties over $1 billion.” Because the “[p]laintiffs propose settling the PAGA claim for 0.1% of its estimated full worth,” and due to the “relatively modest settlement of the non-PAGA

271 Fed. R. Civ. P. 23(e) (“The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed or compromised only with the court’s approval.”).

272 O’Connor, 201 F. Supp. 3d at 1129.

273 Id. at 1128, 1132-33 (“By creating a cause of action under which private plaintiffs may recover civil penalties otherwise recoverable by the state, PAGA benefits the public by augmenting the state’s enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance.”).

274 Id. at 1115.

After further briefing on this matter and oral arguments, the Court certified the following subclass of drivers: All Uber-Black, UberX, and UberSUV drivers who have driven for Uber in the state of California at any time since August 16, 2009, and meet all the following requirements: (1) who signed up to drive directly with Uber or an Uber subsidiary under their individual name, and (2) are/were paid by Uber or an Uber subsidiary directly and in their individual name, and (3) electronically accepted any contract with Uber or one of Uber’s subsidiaries which contain the notice and opt-out provisions previously ordered by this Court, and did not timely opt out of that contract’s arbitration agreement.

275 Id. at 1133.

276 Id.
claims," the court reasoned, "the settlement as a whole as currently structured is not *fair, adequate and reasonable.*" Essentially, the settlement attempt in *O’Connor* failed due to Uber’s strategy of low-balling, but Plaintiff’s counsel shares some blame for accepting those terms.

### B. The Price of Settling

In January 2018, "Los Angeles Superior Court Judge Ma- ren Nelson, approved a settlement agreement between Uber and a class of California Uber drivers." Similar to the driver-claimants and the *O’Connor* plaintiffs, lead plaintiff Price claimed that Uber “misclassifies drivers as independent contractors instead of employees.” Like the *O’Connor* settlement, the initial settlement agreement in *Price* was rejected by the court. The initial settlement would have only provided the drivers within the class with "roughly $1 each." A year after the initial settlement’s rejection, a nearly identical settlement was approved by the

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277 *O’Connor*, 201 F. Supp. 3d at 1135.
278 *Id.* (emphasis added).
court.283 The Honorable Judge Nelson, the same judge that rejected the initial settlement, described the second settlement agreement as "fair and reasonable" under the circumstances.284 Seemingly, over the course of a year, the $1 offer to each driver became "fair and reasonable."285

C. The Difference Between O'Connor and Price Settlements

Seemingly the only difference between the O'Connor and Price settlements is the amount that the State of California will receive under the respective PAGA claims. The O'Connor settlement was rejected, inter alia, because "[p]laintiffs propose[d] settling the PAGA claim for 0.1% of its estimated full worth," of $1 billion.286 In Price, "at least $2.9 million" of the "$7.75 million" settlement agreement was earmarked for the State.287 Other than that one fact, the claims and settlements are similar.

D. Applying O'Connor & Price to the "Similarly Situated" Drivers

In applying the lessons learned from O'Connor and Price to the New York drivers "similarly situated" to the driver-claimants, Uber could reach a settlement with these drivers with much less difficulty than it had in California.

One major difference between the O'Connor case and the driver-claimants' case is the magnitude of the classes. O'Connor was a class action suit that involved 240,000 drivers, and poten-

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284 Id.

285 See id.

286 O'Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016) (noting that a $1 billion maximum penalty was estimated by the Labor and Workforce Development Agency).

287 Tait, supra note 31.
tially more if the PAGA claim had been successfully litigated by the plaintiffs. As of March 2019, New York State does not have a statute similar to the PAGA. The New York driver-claimants sued as three individuals and only sought judgment on their collective case. The potential of the unknown amount of “similarly situated” drivers is a product of the A.L.J. extending the judgment to “similarly situated” drivers.

Another major difference is the complexity of the claims. The New York driver-claimants were seeking unemployment benefits. The O’Connor and Price plaintiffs were seeking to be classified as employees and receive all the benefits and protections that California law has to offer for employees, including reimbursement for expenses, miles traveled, wear and tear of their vehicle, and the right to their tips.

Meanwhile, the weekly “maximum benefit rate” of Unemployment Insurance in New York State is currently $450. Whereas the O’Connor class plaintiffs could have received as little as ten dollars, and the Price plaintiffs could have received “roughly $1 each,” similarly situated New York plaintiffs are looking to receive much greater sums in this litigation. Decisions

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288 See O’Connor, 201 F. Supp. 3d at 1115 (deciding that 240,000 drivers were certified into the class action but noting that “a waiver of PAGA claims was void as a matter of public policy” and thus, “this PAGA waiver could not be severed from the remainder of the arbitration agreement, rendering the entire arbitration agreement void”).


290 See The Unemployment Insurance Case, supra note 11, at 19.

291 See id. at 3, 19.

292 See O’Connor, 201 F. Supp. 3d at 1113-14, 1117, 1124, 1128; Tait, supra note 31.


294 See O’Connor, 201 F. Supp. 3d at 1117.

295 Tait, supra note 31.
in other states can serve to illustrate how costly these “similarly situated” drivers could be to Uber, if Uber is not successful in settling here in New York.296

VII. CONCLUSION

Based on A.L.J. Michelle Burrowes’ decision in the Unemployment Insurance Case and Concourse Ophthalmology, there is “substantial evidence” to determine that the driver-claimants are “employees” for unemployment benefits purposes. Because of the highly deferential standard of review required by Concourse Ophthalmology,297 a New York State court will most likely uphold the A.L.J.’s determination. While the Bynog “scorecard” leans in favor of an “independent contractor” classification, the amount of control Uber held over the driver-claimants in the “convenience” analysis substantially outweighs the lack of the control Uber held over the driver’s schedule, outside employment opportunities, and their fringe benefits.298 Cases such as Saleem and McGillis could be damaging to the driver-claimants and the “similarly situated” drivers, but luckily those cases are not binding on a New York State court. A New York State court will most likely affirm A.L.J. Michelle Burrowes’ determination.

Thus, Uber’s “go-to” move in this scenario is to offer settlements to the driver-claimants and the “similarly situated” drivers. As shown by Price, this strategy can and does work, even if the O’Connor settlement failed.299 While Uber does have persuasive, but not binding, case law on its side in McGillis and Saleem, the price could literally be too high to risk litigating this labor misclassification suit. All it takes is one loss in a New York State

296 See Griswold, supra note 18.
298 See supra text accompanying notes 75-76 (outlining the five factors used in the Bynog decision), with The Unemployment Insurance Case, supra note 11, at 16-17 (listing the means of control that Uber exercises over its drivers in regard to timing and freedom to turn down rides).
court to upend Uber’s independent contractor business model. With tens of thousands current and former Uber drivers in New York State, any adverse court decision for Uber on the labor classification front could break the bank. Uber would be best served by offering a settlement to the driver-claimants like the Price settlement and stipulate that driver-claimants dismiss their labor misclassification claims. By doing so, there will be no precedent in New York State that declares that Uber drivers are “employees” in any capacity. As seen in the countless Uber labor misclassification cases, Uber’s ultimate goal is to maintain the status quo of its drivers as “independent contractors”, and Uber has been willing to shell out millions of dollars to keep the courts from interfering with its business model. Based on the evidence provided, this Note concludes that Uber will have the drive-claimants driving straight to the bank with settlement money.

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