# NEW YORK WORKERS' COMPENSATION ALLIANCE.

**230 Washington Avenue Extension, Suite 101 Albany, New York 12203-3539**

December 5, 2019

To: Chairman Crespo and members of the NYS Assembly Labor Committee:

Thank you for this opportunity to allow the NY Workers' Compensation Alliance to comment on the issue of workers in the Gig economy. The Workers' Compensation Alliance is a statewide coalition of injured workers, attorneys, and others committed to protecting the rights of injured workers under the New York State Workers' Compensation Law. My name is Louis Dauerer. In addition to being a co-chair of the Alliance, I'm a partner with Ouimette, Goldstein & Andrews, LLP, and have been with the firm since 1990. I've been representing injured workers before the Workers' Compensation Board since 1993, and I appreciate your invitation for me to testify on this issue.

The question presented is whether Gig economy workers should be afforded protection under the New York Workers' Compensation Law ("WCL").

From the Workers' Compensation Alliance's perspective, the answer is: yes.

The public policy underpinning the protections afforded injured workers under the WCL as explained by the Court of Appeals:

> It was the intention of the legislature to secure such injured workmen and their dependents from becoming objects of charity, and to make reasonable compensation for injuries sustained or death incurred by reason of such employment a part of the expense of the lines of business included within the definition of hazardous employments as stated in the act. It was also the intention of the legislature to make such compensation not only a part of the expense of the business and a part of the cost of the things manufactured and of transportation as defined by the act, but ultimately to require such compensation to be paid by the consumer of the manufactured goods and by those securing transportation.

*Post v. Burger & Gohlke*, 216 N.Y. 544, 553-554 (1915). The grand bargain underlying the WCL provides benefits to injured workers without regard to fault in exchange for the employer's immunity from a common law cause of action for injuries sustained on the job.

Should workers in the Gig economy be considered employees for workers' compensation purposes? To answer this question, we should begin by looking at the factors for establishing an employer/employee relationship under the WCL. The well settled factors for determining whether an employer/employee relationship exists was set forth in *Matter of Ziegler v. Fillmore Car Service, Inc*. 83 AD2d 692 (1981). The factors to be considered are: Right to control; Method of payment; Who furnishes equipment; The right to discharge; and The relative nature of the work. No one factor is dispositive. In recent decisions, the Workers' Compensation Board has unfortunately determined that certain Gig economy workers are independent contractors, not covered by the WCL.

In *Matter of Postmates Inc.*, 2019 NY Wrk Comp G1917469, the Full Board disallowed the claim holding that,

> the claimant was an independent contractor and not an employee of Postmates. Both the claimant and the employer witness testified that the claimant did not have a set working schedule. Instead, the claimant was free to choose what days and hours to work. In addition, the claimant was free to turn down delivery jobs, was able to work for other companies, and was not required to sign into Postmates software application. With the exception of the insulated bag, Postmates provided no equipment and did not instruct the claimant on how to complete his delivery jobs. Moreover, the claimant was not directly supervised and not given feedback on his performance from Postmates nor was he restricted from working his full-time job. As such, the preponderance of the evidence in the record supports the finding that the claimant was an independent contractor who controlled his own work and hours rather than an employee of Postmates.
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> In several recent cases with almost identical facts, the Board has determined in each case that claimants who delivered food by bicycle through a digital platform were independent contractors rather than employees (see *Matter of RJ Square Inc.,* 2017 NY Wrk Comp G1524445; *Matter of Relay Delivery Inc*., 2018 NY Wrk Comp G1775559; *Matter of Relay Delivery Inc.*, 2018 NY Wrk Comp G1911011; *Matter of Relay Delivery Inc.*, 2018 NY Wrk Comp G1657755).

In *Matter of Uber Eats*, 2017 NY Wrk Comp G1915433, the Full Board disallowed a claim by determining that the injured worker was not an employee. They wrote:

> Here, the credible evidence in the record indicates that claimant did not have a set schedule he was required to work and could log on and off the Uber Eats app whenever he chose. Claimant was free to turn down delivery assignments. Uber Eats did not instruct the claimant how to complete his delivery jobs. The claimant was not directly supervised by Uber Eats. He used his own bicycle to make deliveries and could make deliveries either by bicycle or on foot. Claimant was paid per delivery, rather than by the hour. These factors reflect a lack of direction and control by Uber Eats over the claimant, which supports a finding that the claimant was an independent contractor.
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> The Board has consistently found that claimants who deliver food by bicycle through a digital platform were independent contractors rather than employees (*see*Matter of RJ Square Inc., 2017 NY Wrk Comp G1524445; Matter of Relay Delivery Inc., 2018 NY Wrk Comp G1775559; Matter of Relay Delivery Inc., 2018 NY Wrk Comp G1911011; Matter of Relay Delivery Inc., 2018 NY Wrk Comp G1657755). In a case involving facts that are essentially identical to the facts of this case, the Full Board recently found that the claimant was an independent contractor (Matter of Postmates, Inc., 2019 Wrk Comp G1917469).

We contend that the Board erred in its analysis. In these pickup and delivery scenarios, the company is analogous to a dispatcher. As soon as the worker signs into the app and accepts a delivery job, they are “on duty” because at that point the company knows, where they are, where they are going to pick up the order, and where they will deliver the food. They also set the customer’s delivery fee. They are under the employer’s direction and control for the duration of that errand, and should be covered. Other than the worker’s ability to decline the trip or set their hours, they are under the company’s direction and control. The company retains the right to hire and fire. The relative nature of this work drives this business model, and is the most important factor in these cases to determine employer/employee relationship.

In Matter of Matrix Absence Management, 2019 NY Wrk. Comp. G1953353, an at home worker was injured while moving and installing ergonomically correct office furniture for his home office. The case was disallowed by the Judge, the Board Panel and the Full Board. The Board held:

> In the present case, claimant was injured in his home while carrying furniture into his home office. The record reflects that the furniture was chosen and paid for by the claimant. The employer did not authorize the purchase of the furniture, did not pay for it, and did not require the claimant to purchase it. While the accident occurred in the middle of claimant's work day, he testified that he was on his lunch break at time of the injury. Because claimant's injury occurred while he was moving furniture, rather than performing his work duties as a claims adjustor, and the employer did not pay for the furniture or direct claimant to obtain it, the record supports a finding that the activities that claimant was engaged in where not sufficiently work related to render his injuries compensable.

The Board unfortunately added that,

> the scope of compensable injuries to employees working from home should be limited in recognition of the distinctive nature of their work environment. Employees who work from home, outside the direct physical control of their employers, are potentially able to alternate between work related and personal activities when they choose. For this reason, injuries sustained by employees working from home should only be found to be compensable when they occur during the employee's regular work hours and while the employee is "actually performing her employment duties" (*Matter of McRae v Eagan Real Estate*, 170 AD2d 900 [1991]). Injuries which occur while claimant is not actively performing his or her work duties, such as taking a short break, getting something to eat, exercising or using the bathroom, for example, should be found to have arisen from "purely personal activities [that] are outside the scope of employment and not compensable" (*Matter of McFarland v Lindy's Taxi, Inc.*, 49 AD3d 1111 [2008]).

Matter of Matrix Absence Management, 2019 NY Wrk. Comp. G1953353. This dicta contradicts established caselaw that injuries that occur while engaging in a personal act on the job are compensable. *Matter of Harris v. Poughkeepsie Journal*, 289 AD2d 640 (2001). “Employer did not provide meal breaks to delivery drivers, so it was not unusual for drivers to “grab and go” or eat in their vehicles, thus benefitting the employer by allowing drivers to deliver on time. Decedent’s act of eating a sandwich during the course of his employment was sufficiently work related and not purely personal.”

In the Gig economy, although the workers are at home, the employer benefits from their labor and should cover injuries that arise out of and in the course of employment. It’s not unreasonable for a worker to take a short break. Additionally, the facts in the Matrix case, could easily have been found by the WCB to arise out of and in the course of employment. Clearly the employer could be said to benefit from the worker’s purchase and installation of ergonomically correct furniture that was to be used as his work station. The fact that they did not approve the purchase is not material. The furniture benefits the worker which, in turn, benefits the employer.

The Workers’ Compensation Alliance urges the committee to further the public policy set forth above to secure injured workers from becoming objects of charity by ensuring the Gig economy workers coverage under the Workers’ Compensation Law. To that end we will support any legislation that would provide them coverage.

Respectfully submitted,

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