Testimony of Zubin Soleimany, New York Taxi Workers Alliance
New York State Senate Standing Committee on Internet and Technology: Examination of the Gig Economy Hearing
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Good morning Chair Savino, and Committee members. My name is Zubin Soleimany and I am a staff attorney with the New York Taxi Workers Alliance, the 21,000 member strong union of drivers of yellow cabs, green cabs, Black Car vehicles, including drivers for app-based services.

We represent a workforce that is 94% immigrant, mostly people of color, and now almost universally struggling to earn a basic living. While our member base had mostly been yellow taxi drivers, in recent years, much of our membership has shifted sectors, moving away from yellow cabs towards app-based work for companies such as Uber and Lyft. The taxi and for-hire vehicle history, while long seen as an entryway to the middle has long been the scene of worker exploitation, strategic deregulation by employers and wage theft. Over the last few years, while the power in the industry passed from yellow cab fleets to large app-based black car companies such as Uber and Lyft, from a driver's view, little changed aside from who was reaping the benefits from their labor, and at what scale.

Drivers were still toiling without minimum wage protections, without unemployment insurance, paid sick leave, or paid family leave. The taxi driver who, six years ago, was having his wages stolen by a taxi garage run by Gene Freidman through illegal additional fees,[1] became an app-based black car driver who would then find Uber and Lyft unlawfully passing the cost of sales tax from passengers, and instead deducting these taxes from driver pay, on every single fare that drivers performed in New York state.[2] As far as worker misclassification has been concerned, where taxi fleets had, forty years ago, pushed for regulatory changes that reduced employer control, so drivers would become classified as independent contractors, exempt from the labor laws, the new app-based companies simply misclassify their drivers as independent contractors, despite exercising detailed levels of control over drivers' work.

App-based employers like to push the myth that their business models are novel and unique, and therefore require unique deregulatory treatment, yet there is nothing particularly novel or disruptive about worker exploitation and misclassification, and discussing the poverty and exploitation of app-based workers as a technological issue, rather than a labor issue only perpetuates this myth, and undermines the notion that there are certain bedrock rights that all workers in the state should have.

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[1] *See*, https://ag.ny.gov/press-release/ag-schneiderman-and-tlc-secure-first-its-kind-agreement-protecting-rights-taxicab-0

[2] *Haider v. Uber Technologies, Inc.*, 16-CV-04098 (AKH) (S.D.N.Y); See also, Noam Scheiber, *Uber to Pay Millions to Drivers Who Could Be Owed Fare More*, The New York Times(May 23, 2017), accessible at https://www.nytimes.com/2017/05/23/business/economy/uber-drivers-tax.html; Noam Scheiber, *How Uber's Tax Calculation May Have Cost Drivers Hundreds of Millions*, The New York Times (July 5, 2017), accessible at https://www.nytimes.com/2017/07/05/business/how-uber-may-have-improperly-taxed-its-drivers.html

That there was really nothing new in Uber and Lyft's misclassification tactics, was driven home for three of our Uber driver members during their extended administrative battle over their eligibility for unemployment benefits. For decades, black car companies had been found to be employers by the DOL, the Unemployment Insurance Appeal Board and the courts, when companies dispatched drivers and paid them on a commission basis, just like Uber and Lyft, even when drivers had flexible schedules, and could receive dispatches from multiple companies. Nothing about the fact that Uber and Lyft drivers were assigned work via an app, rather than a radio, changed this analysis. In fact, if anything, through their use of technology, these companies devised more detailed level control than ever seen in traditional black car companies: using the app to measure drivers' braking and acceleration rates, and docking drivers' pay if GPS trip data showed a driver taking an "inefficient route." So, we weren't surprised when the DOL, an ALJ, and the Appeal Board[3] all found Uber to be an employer under the New York Labor Law, applying its decision to three NYTWA Uber driver members, and "all similarly situated employees."

The issue today isn't so much that workers aren't always legally eligible for employee benefits, or won't always be found to be employees under the labor law, but that the current standards lack clarity and make enforcement of every basic labor right a protracted, fact-intensive legal battle over the meaning of the term "employee," which, despite having 80 years of case law to draw from, has yet to assume a clear meaning. Moreover, the current state of the NYLL is a patchwork of different statutes, wherein each benefit may be assessed using a different framework; this provides neither workers nor employers the clarity needed to know their rights and obligations under the labor law.

Our members' unemployment case and its aftermath also show the need for a clearer test for employee status for all workers. Applying the traditional common law test for employee status, the case took nearly three years from the date of an initial application for unemployment benefits until the final administrative decision. In a completely unheard-of procedure, the DOL simply put a freeze on all Uber unemployment claims for 9 months, claiming that the decision as to whether such work was employment required a process called "executive review," and that the DOL wouldn't even make an initial decision regarding whether Uber work constituted employment, apparently based on the notion that employee status determinations were so confounding, only through "executive review" could they be resolved.[4] This freeze was not lifted until after our members filed a federal lawsuit against the DOL and the Governor for failing to process their applications.

While our three Uber driver members won employee status for themselves and all similarly situated drivers, it's still unclear what impact this decision has on other cases. When the Appeal Board rendered its final agency decision, the DOL had claimed that after a final decision in this case, it would investigate the total amount Uber owed for all similarly situated drivers, upon Uber's withdrawal of its appeal into state court, the DOL would not comment on whether it would seek an audit and seek contributions for all drivers, and it's unclear what the status of such

[3] Unemployment Insurance Appeal Board #596725 (July 12, 2018).

[4] Dana Rubinstein. *In New York State former Uber drivers are in unemployment limbo.* Politico (June 15, 2016). Available at https://www.politico.com/states/new-york/albany/story/2016/06/in-new-york-state-former-uber-drivers-are-in-unemployment-limbo-102878

claims is.[5] Our own conservative estimates of Uber's liability for the period at issue in that case, based on an understanding of the number of drivers and applying the lowest assessment rates, would put Uber's total liability to the UI fund at over $30 million. Such a sum is especially significant, considering that the state's UI fund is still below the recommended minimum adequate solvency level and as of 1/1/2019 had the fifth worst solvency level of all the states.[6]

This lack of clarity leaves future driver claims as unsettled as the initial claims, and potentially jeopardizes the state's access to funds owed by Uber and other misclassifying employers for payroll taxes. Yet, because of the detailed, fact-intensive nature of the current test, employers often, after losing such cases, make minor tweaks to their workers' conditions, and simply claim that these changes require a whole new analysis of employee status, without complying with the labor law in the meantime. Such practices have the effect of leaving workers' rights indefinitely undecided, and make affirmative enforcement and compliance nearly impossible. This appears to be the tactic taken by Uber, which, despite their loss before the Appeal Board, has intimated that it will simply appeal the cases of other drivers, rather than those of our members, in the hopes of gaining a more favorable decision.

Unfortunately, this tactic has often been successful and these issues are not limited solely to app-based workers; as another example, one of the NYTWA members in the Uber unemployment case, also used wages from a traditional black car company to establish his claim for benefits. Despite the fact that his employer had been found twice to be an employer in a final UIAB decision, his claim began with DOL treating that work as non-employment, meaning the initial application was denied because the DOL had no record of wages paid in employment and put the burden on the worker to prove eligibility, delaying by months the delivery of emergency UI benefits. Such failures of the labor laws to serve their intended purposes in a workable manner show the need to ensure that employee status can be measured by a legal test that is far more straightforward than what we've used for 80 years, and creates meaningful access to bedrock rights for all workers, whether or not their work is mediated by app-based technology.

Specifically, New York State should adopt a generally applicable test to determine employee status known as the "ABC Test." Cutting to the main purpose of labor law statutes—providing basic labor rights to those workers who are serving other business rather than working in business for themselves—the ABC test finds worker to be employees unless they are A) free from employer control; B) performing work that is not the usual business performed the person/entity who hired the worker and; C) the worker is customarily engaged in an independently established trade or business providing the type of service at issue.

While the ABC test has recently received much attention as California codified a version in its labor law, it's important to note that New York has already adopted the ABC test, by statute, for

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[5] Dana Rubinstein. *Labor Department still mum on 'employee status' of Uber drivers seeking unemployment insurance*. Politico (Mar. 4, 2019), available at https://subscriber.politicopro.com/states/new-york/city-hall/story/2019/03/01/labor-department-still-mum-on-employee-status-of-uber-drivers-seeking-unemployment-insurance-883888

[6] U.S. Dep't of Lab.. *State Unemployment Insurance Trust Fund Solvency Report 2019*, U.S. Dep't of Lab. (Feb. 2019), https://oui.doleta.gov/unemploy/docs/trustFundSolvReport2019.pdf.

both the trucking and construction industries.[7] Most recently, New York passed the "Fair Play in the Commercial Goods Transportation Act," sponsored by Senator Savino, applying the ABC test across several articles of the labor law, in 2013. Only six years ago, this was not a particularly partisan or controversial issue; the bill passed the Senate by a vote of 61-2. Moreover, the Fair Play Acts make misclassification its own punishable offense, further disincentivizing employers from using their current tactic of simply waiting to get caught, paying out if litigation occurs, and continuing to misclassify workers going forward. Because we've done this before we know it works: after the passage of the New York State Construction Industry Fair Play Act, the number of independent contractors in the construction industry remained flat, while the number of payroll workers grew 43% from 2011-17.[8]

The justification provision of the most recent Fair Play Act read: "Unlike real independent contractors, these workers are subject to stringent behavioral controls and are financially dependent on the company. Such drivers who functionally operate as employees are classified as independent contractors and therefore deprived of proper social security benefits, healthcare, workers' compensation, unemployment benefits, minimum wage protections, rights to join a union, and the right to a safe and healthful workplace."[9] For the Uber and Lyft drivers without whom those businesses could not operate, and who have their braking rates and routing choices monitored by the company, while being denied all employee benefits, the same is true.

There is no reason why all workers shouldn't share in the protections that New York currently extends to truckers and construction workers, and should have access to all New York State employee protections. New York needs to continue this work by extending the protections, clarity, and enforcement mechanisms in the existing Fair Play Acts, to all workers in New York. We look forward to working with you to make this happen.

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[7] See, the New York State Construction Industry Fair Play Act, N.Y.L.L. § 861 *et seq.* and the New York Commercial Goods Transportation Industry Fair Play Act, N.Y.L.L. §862 *et seq.*
[8] Forthcoming Report from the Center for New York City Affairs at the New School.
[9] SB 5687 (2013).