

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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UBER TECHNOLOGIES, INC.

Index No. 155943/2023

Petitioner,

- against -

NEW YORK DEPARTMENT OF CONSUMER AND
WORKER PROTECTION; VILDA VERA MAYUGA, in
her official capacity as Commissioner of the New York
City Department of Consumer and Worker Protection;
THE CITY OF NEW YORK,

**AFFIRMATION OF
ELIZABETH WAGONER IN
OPPOSITION TO
PETITIONER'S
APPLICATION FOR A
TEMPORARY
RESTRAINING ORDER**

Respondents.

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

ELIZABETH WAGONER, being duly sworn, deposes and says:

1. I am the Deputy Commissioner of the Office of Labor Policy & Standards at the New York City Department of Consumer and Worker Protection (“DCWP”). I am an attorney licensed to practice law in the State of New York. I have been employed by DCWP since July 2019. My responsibilities include managing the enforcement of worker protection laws under DCWP’s jurisdiction and DCWP’s workers’ rights policymaking and labor economics work, including the development of a Minimum Pay Rate for app-based restaurant delivery workers.

2. I submit this affirmation in opposition to the motion filed by Petitioner UBER TECHNOLOGIES, INC (“Uber Eats”) seeking a temporary restraining order enjoining the implementation of Title 6 of the Rules of the City of New York (“R.C.N.Y.”) §§ 7-801, 7-804, 7-805, 7-806, 7-807, 7-810; (“Minimum Pay Rule”) which sets forth the minimum pay of app-based restaurant delivery workers in New York City.

3. The statements made in this affirmation are based on my personal knowledge, review of records maintained by DCWP and the City of New York, communications with DCWP staff, and upon statements made by employees, officers and agents of the City of New York.

The Minimum Pay Law

4. In 2021, New York City Council adopted, and Mayor Bill de Blasio signed into law, a package of laws that improve working conditions for New York City's app-based restaurant delivery workers. New York City Administrative Code ("NYC Admin. Code") §§ 20-1522; 20-1501–1524, 20-563.2, and 20-563.6 ("the Delivery Worker Laws").¹ The Delivery Worker Laws cover third-party food delivery services and third-party courier services ("apps"), including the Petitioner in this case, and protect food delivery workers classified as independent contractors who perform deliveries for the apps. *See* NYC Admin. Code § 20-1501 (defining "food delivery worker," "third-party food delivery service," and "third-party courier service").

5. Local Law 115 of 2021, codified at Section 20-1522 of the NYC Administrative Code ("the Minimum Pay Law"), required DCWP to study the pay and working conditions of app-based restaurant delivery workers and, no later than January 1, 2023, to promulgate a rule establishing a method for determining the minimum payments that an app must make to its food delivery workers. Prior to the promulgation of the Minimum Pay Rule that Petitioner challenges here, there were no minimum pay protections for food delivery workers classified as independent contractors.

¹ This affirmation refers to "apps" as shorthand to describe the third-party food delivery services and third-party courier services covered by the Delivery Worker Laws.

6. The Minimum Pay Law gives DCWP broad discretion in designing the minimum pay method. NYC Admin. Code 20-1522(a)(3) (“Any rule promulgated by the department pursuant to this subdivision shall not prevent payments to food delivery workers from being calculated on an hourly or weekly basis, or by any other method, provided that the actual payments made to such workers comply with the minimum payment requirements determined by the department.”).

7. The minimum pay method, however, must be “based on the results of” a study into the working conditions of food delivery workers. NYC Admin. Code 20-1522(a)(1); (a)(3). The Minimum Pay Law required DCWP to study:

- The total income food delivery workers earn,
- The expenses of such workers
- The equipment required to perform their work,
- The hours of such workers,
- The average mileage of a trip,
- The mode of travel used by such workers,
- The safety conditions of such workers,
- And such other topics as the department deems appropriate.

Id. DCWP used its discretion to study the following additional factors: the existing pay and benefit standards that apply to other workers in NYC, ease of implementation for apps, workers, and DCWP, and the impact of the rule on apps, workers, consumers, and restaurants.

8. The Minimum Pay Law further provides that in establishing the minimum pay method, DCWP must consider:

- the duration and distance of trips,
- the expenses of operation associated with the typical modes of transportation such workers use,
- the types of trips, including the number of deliveries made during a trip,
- the on-call and work hours of food delivery workers,
- the adequacy of food delivery worker income considered in relation to trip-related expenses,
- and any other relevant factors, as determined by the department.

Id. The “other relevant factors” DCWP considered in setting the minimum pay method include the existing pay and benefit standards that apply to other workers in NYC, the practical challenges of minimum pay implementation for apps, workers, and the Department, and the prospective impact of the Minimum Pay Rate on apps, workers, consumers, and restaurants.

9. Additionally, the Minimum Pay Law prohibits DCWP from including workers’ tip earnings in the Minimum Pay Rate and prohibits apps from using a worker’s tips to offset the minimum pay obligation. NYC Administrative Code § 20-1522(b) (“Any minimum payment determined by the department pursuant to this section shall not include gratuities. A third-party food delivery service or third-party courier service shall not retain any portion of any gratuity or use gratuities to offset or cover any portion of minimum payments required by this section”).

Minimum Pay Study

10. In November 2022, DCWP published a 37-page report summarizing the results of the study mandated by the Minimum Pay Law. *See A Minimum Pay Rate for App-Based Delivery Workers in NYC*, Dep’t of Consumer and Worker Protection (“DCWP Report”), available at <https://www.nyc.gov/assets/dca/downloads/pdf/workers/Delivery-Worker-Study-November-2022.pdf> (last accessed July 5, 2023).

11. As detailed in the DCWP Report, DCWP’s study drew principally on data DCWP obtained from apps, including from Petitioner, in response to administrative subpoenas, combined with a survey that DCWP distributed to nearly all of the approximately 123,000 workers who performed app deliveries in New York City between October and December 2021 (the “NYC Delivery Worker Survey”). *Id.* at 6. DCWP’s study also drew on additional sources, including a separate in-person field survey of more than 400 delivery workers, a survey of restaurant owners and managers that was distributed to all of the approximately 23,000 restaurants in NYC (the

“NYC Restaurant Survey”), testimony from a public hearing on delivery worker pay and working conditions, expert and stakeholder interviews, and public information. *Id.*

12. DCWP’s study found that NYC’s app-based restaurant delivery workers earn an average \$14.18 per hour with tips and \$7.09 per hour without tips. DCWP Report (Exhibit A) at 17-18. The \$7.09 figure includes an adjustment for workers’ practice of working for multiple apps; apps actually pay workers just \$5.72 per hour on average. *Id.* at 18, Figure 11. DCWP’s study also found that delivery workers’ average hourly job-related expenses were \$3.06, reducing their take home pay to \$11.12 per hour with tips and \$4.03 per hour without tips. *Id.* at 18, 21. The DCWP Report contains detailed information about how DCWP calculated these numbers. *Id.* at 18-21.

13. DCWP’s study also found that app-based restaurant delivery workers experience the highest rates of occupational injury and death of any occupation in NYC. DCWP Report (Exhibit A) at 23-26. Delivery workers who experience injuries often miss significant work time while recovering and incur significant medical expenses. *Id.* at 25-26. In spite of these risks, delivery workers working as independent contractors for apps do not receive workers’ compensation coverage and often do not have health insurance. *Id.* at 26. While some apps voluntarily provide occupational accident insurance to delivery workers, reports indicate that the coverage is limited and that workers have difficulty getting claims paid. *Id.*

First Proposed Rule

14. On November 16, 2022, DCWP published a proposed Minimum Pay Rule in the City Record. In this First Proposed Rule, based on the results of the study, summarized in the DCWP Report, DCWP proposed to establish an average Minimum Pay Rate of at least \$23.82 per hour that apps would pay to delivery workers for the sum of their trip and on-call hours each

week. The proposed rate was to phase in over two years, from 2023 to 2025, adjust annually for inflation, and represented the sum of three parts:

- A base pay component (\$19.86). The base pay component matched the per-minute rate under TLC's minimum earnings standard for app for-hire service drivers;
- A workers' compensation component (\$1.70). The workers' compensation component reflected the actuarial value, as a percentage of payroll, of the workers' compensation benefits that must be provided to comparable delivery workers who – unlike the apps' delivery workers – are classified as W-2 employees; and
- An expense component (\$2.26). The expense component reflected average expenses that e-bike workers incur.

15. With respect to the method for calculating workers' pay, the First Proposed Rule required an app to satisfy two requirements each week: an individual pay requirement and an aggregate pay requirement.

- **Individual Pay Requirement:** The app's required payment to each delivery worker, individually, would have to meet or exceed the Minimum Pay Rate multiplied by the sum of each individual worker's own trip time during the week; and
- **Aggregate Pay Requirement:** The app's total required payments to all its delivery workers, together, would have to meet or exceed the Minimum Pay Rate multiplied by the sum of all workers' total trip time and on-call time during the week.

DCWP Report (Exhibit A) at 28. Consistent with the requirements of Section 20-1522(b) of the Minimum Pay Law, discussed *supra*, the First Proposed Rule provided that apps could not credit tips towards their satisfaction of either requirement.

16. DCWP held a public hearing on the First Proposed Rule on December 16, 2022. DCWP received comments on the First Proposed Rule from the Petitioner in this action, food delivery workers, worker advocates, transportation safety advocates, restaurants, researchers, elected officials, and members of the public, among others. In total, DCWP reviewed thousands

of pages of comments submitted in response to the First Proposed Rule. Public comments from the apps that DCWP received during rulemaking are collectively annexed hereto as Exhibit B.²

17. DoorDash’s comments on the First Proposed Rule included a December 12, 2022 letter containing “initial comments” on the rule, a December 16, 2022 letter containing more fulsome comments on the rule, and a comment submitted by economist Stephen G. Bronars on behalf of DoorDash. *See id.*, at 1407-1447.

18. Uber Eats’ comments on the First Proposed Rule included sensitivity analyses on the potential impact of the rule, a report by Itmar Simonson, a professor at Stanford University, a report by economists at Charles River Associates, and a report detailing an alternative method for paying food delivery workers. *See id.*, at 1448-1532.

Second Proposed Rule

19. On March 7, 2023, DCWP published a Second Proposed Rule, which incorporated changes DCWP made to the First Proposed Rule after consideration of comments received by all relevant stakeholders, including Petitioner. *See* Exhibit C (Notice of Hearing and Statement of Basis and Purpose (“SBP”) of the Second Proposed Rule (“Second SBP”). The Second SBP detailed the changes DCWP made and, over 15 single-spaced pages, responded to comments received, exceeding the requirements of the City Administrative Procedure Act. *Id.* Two significant changes DCWP made in response to apps’ comments are particularly relevant here.

20. **First**, the Second Proposed Rule retained the individual pay and aggregate pay requirements from the First Proposed Rule, described *supra*, and renamed the requirements as the “Standard Method.” DCWP, however, added a second, “Alternative Method” for calculating

² All public comments on the Minimum Pay Rate that DCWP received during rulemaking are available at: <https://www.nyc.gov/site/dca/workers/Delivery-Worker-Public-Hearing-Minimum-Pay-Rate.page> (last accessed July 6, 2023).

minimum pay, in response to requests from apps, including Petitioner, for an option to pay workers only for the time they spend on deliveries. Under the Alternative Method, an app may pay each food delivery worker individually for time spent making deliveries at no less than the alternative Minimum Pay Rate. The alternative Minimum Pay Rate is calculated by dividing the Minimum Pay Rate by 60%. The 60% figure reflects the proportion of time that food delivery workers spend engaged in trips, also known as the “utilization rate.” Second SBP (Exhibit B) at 12. An app may choose the Alternative Method or the Standard Method, provided that after April 1, 2024, an app may choose the Alternative Method only if its food delivery workers, in aggregate, have a utilization rate of at least 53% (i.e., they spend at least 53% of their trip time and on-call time engaged in trips). DCWP provided its rationale for this change and responses to comments in the Second SBP (Exhibit B) at 11-13.

21. *Second*, in the Second Proposed Rule, DCWP reduced the Minimum Pay Rate from \$23.82 to \$19.96. Most of this reduction flows from DCWP’s incorporation of a “multi-apping” downward adjustment of -\$3.60, on the recommendation of apps, including Petitioner. “Multi-apping” refers to workers’ practice of logging into multiple apps concurrently; the DCWP study found that workers spend an estimated 17.7% of working time connected to more than one app. Report at 5. Under the pay methodology in the First Proposed Rule, multi-apping was likely to decrease, and so the First Proposed Rule did not contain a multi-apping adjustment. With the addition of the Alternative Method in the Second Proposed Rule, workers’ rates of multi-apping were more likely to continue unchanged. DCWP provided its rationale for the multi-apping adjustment and responses to comments in the Second SBP (Exhibit B) at 10-11.

22. DCWP held a public hearing on the Second Proposed Rule on April 7, 2023. DCWP received comments on the Second Proposed Rule from the same stakeholders who

commented on the First Proposed Rule, including, again, Petitioner. In total, DCWP reviewed thousands pages of comments submitted in response to the Second Proposed Rule.

The Final Rule

23. On June 12, 2023, DCWP published a Final Rule. The Notice of Adoption and Statement of Basis and Purpose to the Final Rule at Exhibit D (“Final Rule SBP”), over nearly 25 pages, provides a thorough overview of the Minimum Pay Rate calculation, as well detailed summaries of, and responses to, the comments received by DCWP. The Final Rule SBP also incorporates the findings of the DCWP Report, and past DCWP responses to comments made in the Second SBP. The Final Rule contains the following adjustments from the Second Proposed Rule:

- A limited “safe harbor” to the low-utilization floor required under the Alternative Method.
- In the report DCWP must submit to the City Council and the Mayor no later than September 24, 2024 pursuant to Section 20-1522(d) of the Administrative Code, DCWP must review the base pay component, the workers’ compensation component, the expense component, the multi-apping adjustment, the 53% utilization eligibility threshold for the Alternative Method, and the calculation used to determine the alternative Minimum Pay Rate.

DCWP Analysis of the Impact of the Minimum Pay Rate

24. DCWP carefully considered potential impacts of the Minimum Pay Rate on restaurants, consumers, and apps, and published a detailed description of its economic impact modelling in the DCWP Report (Exhibit A) at 34-36. During the course of rulemaking, DCWP also provided Uber Eats the technical code underlying the impact model.

25. Uber Eats submitted comments about DCWP’s impact model projections in response to the Second Proposed Rule. DCWP responded to each of these new comments in the Second SBP (Exhibit C) at 14-16 and in the Final Rule SBP (Exhibit D) at 15-22. DCWP also published a table detailing sensitivity analyses in the impact model, including eight sets of

alternative assumptions about how apps and consumers may react to the Minimum Pay Rule. Among the comments DCWP answered in the Final Rule SBP was “Uber Eats’ assertion that the Department’s assumption that restaurants earn margins of 0% on delivery is wrong. Uber Eats contends that restaurants do earn a profit on each order and, because the Minimum Pay Rule will lead to fewer orders, restaurant profits will decline.” Final Rule SBP (Exhibit D) at 21. DCWP responded:

The Department considered apps’ possible responses to the Minimum Pay Rule and their impacts on restaurants. Because consumers may substitute away from app delivery towards restaurant sales channels that have higher margins, the effect of any reduction in demand from apps’ pass-through of costs to consumers may be to increase profitability. (Report at 35). With respect to shorter delivery distances (which could result from lower maximum radii, among other strategies), the effect is ambiguous. Longer delivery distances benefit some restaurants, though these restaurants’ enlarged markets come at the expense of other restaurants that face increased competition. If consumers value long delivery distances, apps are free to continue offering them and can set the fees they charge to consumers at any level they choose. The Department’s finding of a 0% margin on app delivery is consistent with prior research. (Report at 15). The Department also confirmed this finding through discussions with restaurant industry stakeholders. Restaurants choose to use delivery apps despite low or no margins, in part, because such sales provide restaurants with opportunities to reach new customers in the hopes of converting them to more profitable channels on subsequent purchases.

26. The assumption that restaurants earn margins of 0% on delivery is all but immaterial to the restaurant impact analysis. It is undisputed that restaurants’ margins on app delivery are low; apps take 23% of the order cost in fees. NYC Admin. Code §§ 20-563 and 20-563.1. Even if restaurants’ profit margins on app delivery were higher than 0% – and DCWP’s study indicated that they were not – the overall impacts on restaurant profitability due to the Minimum Pay Rule are limited, because consumers who wish to order food from restaurants are likely to shift their purchases from app delivery to ordering directly from restaurants, dine-in, and takeout. *See* DCWP Report (Exhibit A) at 35 (“The Department expects restaurant profitability to be mostly unaffected, though to the extent that higher app fees lead consumers to purchase

restaurant meals through higher margin channels, such as direct delivery orders, dine-in, or takeout, restaurant profits will increase.”); *see also* Final Rule SBP (Exhibit D) at 21.

27. DCWP’s impact model shows that DCWP relied on an assumption of 0% margins in its analysis and contains DCWP’s projection that restaurant profits will increase by \$4 million as a result of the minimum pay rate. The model can incorporate alternative specifications that assume restaurant margins are higher. For example, even if restaurant margins on app delivery are 3.5% – which is extremely generous to Petitioner in light of the evidence DCWP gathered for the study – restaurant profits would decline by only \$17 million annually. This is a mere 0.09% of the \$20.7 billion in annual sales at NYC restaurants. DCWP Report (Exhibit A) at 7, Figure 1. This also pales in comparison to the losses workers will experience if the Minimum Pay Rule is enjoined, as discussed at the end of this affirmation.

The Workers’ Compensation Component

28. The purpose of the workers’ compensation component of the Minimum Pay Rate is to compensate for expected income loss and medical expenses associated with on-the-job injuries that delivery workers experience. DCWP Report (Exhibit A) at 30. Although delivery workers experience high rates of injury on the job, they do not have access to traditional workers’ compensation, as workers classified as employees in New York State do. *Id.* Unlike high-volume drivers covered by the Taxi and Limousine Commission’s Minimum Pay Rate, who have the Black Car Fund, food delivery workers also do not have access to an alternative system for medical care and wage replacement for on-the-job injuries. *Id.*

29. DCWP calculated the workers’ compensation component of \$1.68 to provide for comparability to the actuarial value of the workers’ compensation coverage received by employed restaurant delivery workers in New York State (7.84% of payroll). *Id.* The workers’

compensation component also includes an adjustment to reflect differences in how federal Medicare and Social Security contributions apply to independent contractor income and employee benefits (i.e., independent contractors pay 15.3% in contributions to Medicare and Social Security on their income, while an employee does not make any contributions to Medicare and Social Security on the value of benefits like workers' compensation). *Id.* This ensures that app delivery workers receive the same value, despite less advantageous tax treatment. *Id.*

30. In response to the First Proposed Rule, apps submitted comments critical of the workers' compensation component that are substantively the same as those made in the Petition. DCWP responded to these comments in the Second SBP (Exhibit C) at 6-7, describing the necessity and premise of the workers' compensation component. In relevant part, DCWP responded:

After considering these comments, the Department determined that retaining the workers' compensation component is necessary to compensate workers for lost income and out-of-pocket medical expenses associated with job-related injuries. Food delivery workers' rates of injury and work-loss time are high. (Report at 24-26.) Workers report substantial out-of-pocket medical expenses associated with work related injuries that are not reimbursed by the apps. (Report at 26.) Comments show that three of the four largest apps offer no occupational injury or accident coverage. The occupational injury policy offered by DoorDash does not provide coverage for injuries sustained during on-call time; such injuries can and do occur before a worker accepts a trip or after dropping off a delivery. Its policy also contains coverage exclusions that make benefits difficult or impossible for injured workers to access, and includes coverage terms that are less generous than the requirements of the New York State workers' compensation system.

The purpose of the workers' compensation component is not to enable workers to purchase their own insurance, as some commenters asserted. Rather, the purpose is to compensate food delivery workers for their exclusion from the workers' compensation benefits available to most workers. Were food delivery workers to gain a legal right to a benefit equivalent to the workers' compensation coverage currently available to employees, the Department may choose to revisit the workers' compensation component at that time. The existing occupational injury coverage offered by DoorDash is inadequate to warrant exemption from the workers' compensation component. However, in a future rulemaking the

Department may consider providing for an exemption for policies that meet minimum coverage and accessibility criteria.

In response to comments that \$1.68 is inadequate, the Department acknowledges that its approach only partially compensates workers for injuries. The workers' compensation benefit provided to employees in New York State also does not fully replace workers' lost income or compensate for pain and suffering. Because the Department derived the workers' compensation component to provide for equivalence with the benefits provided to employees, the Minimum Pay Rate component also reflects these limitations. It is also possible that given food delivery workers' exceptionally poor safety conditions (Report at 25), they may be at higher risk than the population of insured employees from which the Department derived the workers' compensation component. However, the detailed data necessary to perform an actuarial analysis of food delivery workers' work-related injury and illness costs does not exist. For this reason, the Department chose to base the component on the claims experience of the closest-comparable insured population within the New York State workers' compensation system, despite this limitation. See Report at 22 (referring to employed delivery workers, who belong to rate class 7380, which includes commercial drivers, chauffeurs, and their helpers).

31. In response to the Second Proposed Rule, Petitioner reiterated these comments critical of the workers' compensation component. DCWP responded in the Final Rule SBP (Exhibit D) at 9: "For the reasons stated previously (Report at 30, Second Proposed Rule at 6), the Department did not adopt this recommendation and is maintaining the workers' compensation component."

Survey Data

32. As part of its expense measurement, DCWP fielded the NYC Delivery Worker Survey, a survey of all workers who accepted an offer to perform a delivery in NYC between October 1 and December 31, 2021 for Uber Eats, Grubhub, DoorDash, Relay, Chowbus, or HungryPanda, except a small number of workers whose contact information was missing or suppressed. DCWP Report (Exhibit A) at 2. In its fielding and analysis of the NYC Delivery Worker Survey, DCWP used controls to authenticate responses, exclude submissions from inattentive or unreliable respondents, and address possible non-response bias. DCWP Report

(Exhibit A) at 2-5. The 8,000 responses the Department used from the survey represent a response rate of 6.5%, which is several times the rate obtained by leading academic researchers conducting surveys of low-wage work. DCWP Report (Exhibit A) at 3. DCWP then validated these survey responses against matched administrative records from the apps. DCWP also fielded two other surveys, the Columbia-Sam-Schwartz-Deliveristas Survey, and the NYC Restaurant Survey, but DCWP did not use data from these surveys in calculating the Minimum Pay Rate. DCWP Report (Exhibit A) at 3.

33. As discussed in the Second SBP, the NYC Delivery Worker Survey? was methodologically sound and DCWP used it for specific, limited, and appropriate purposes:

In consideration of the [apps' criticisms], the Department reviewed the methodological critiques provided in comments but was not persuaded that the survey is inappropriate for its applications within the Department's expense calculations. Specifically, the Department used the survey to measure the frequency with which workers experience loss or theft of their e-bike, purchase replacement batteries or e-bike accessories, and buy and trade-in phones. The Department separately gathered market prices for relevant equipment from retailers and other independent sources, including for the specific makes and models of the phones workers reported buying and selling, and did not use workers' recollections of the dollar amounts they spent on any item. (Report at 5.) Further, the Department's methods for estimating e-bike depreciation, maintenance, and data plan costs did not draw on survey responses at all. To confirm that the Department's estimates of e-bike-related expenses is not overstated, the Department, in a supplemental analysis, found that e-bike rentals and sales in promotions marketed by Uber Eats and DoorDash are significantly more expensive than the costs reflected in the expense component of the Minimum Pay Rate. Additionally, the Second Proposed Rule amends apps' recordkeeping requirements to include certain information about the phones food delivery workers use. This information will enable the Department to efficiently measure phone expenses without reliance on a survey should it choose to re-estimate expenses for use in future rulemaking.

Second SBP (Exhibit B) at 11.

34. DCWP responded to comments from Uber Eats' consultant regarding the NYC Delivery Worker Survey in the Final Rule SBP, as follows:

Uber Eats' consultant commented that the Department's explanation of the survey's sponsor and purpose to potential respondents biased the results of the NYC Delivery Worker Survey, leading to an overestimate of expenses.³ The consultant asserted that a survey can only be reliable if its sponsor and purpose is concealed from the respondent. The consultant also stated that eight of the survey questions were drafted in a way that produces bias. The consultant objected to questions asking workers to consider their expenses, to give estimates (especially of amounts spent), and select answers from sets of close-ended responses. The consultant recommended instead the use of open-ended questions, collection of receipts from respondents, and use of free response formats. Finally, the consultant criticized the Department's choice not to include "phantom questions" as part of a method to control for the possibility that respondents reported purchasing certain items for their work which they did not in fact purchase for work.

Final Rule SBP (Exhibit D) at 24.

35. DCWP's response was as follows:

It would not have been appropriate to conduct a survey without informing respondents that it was being conducted by the City of New York or informing respondents how their responses would be used. Such disclosures, which are customary, do not invalidate the survey results. Had the Department not provided appropriate disclosure, it is likely that participation would have been lower and less representative.

None of the eight questions to which Uber Eats' consultant objected were used in calculating the Minimum Pay Rate. Still, the Department considered the extent to which such criticisms might also extend to questions the Department did use in its expense calculation (see Second Proposed Rule at 9) but found that they either do not apply or are not valid. First, the Department's decision to ask workers about whether they purchased specific accessories, as opposed to an open-ended question about expenses, followed from initial testing with delivery workers in which respondents had difficulty recalling the accessories they purchased without prompting. Had the Department adopted commenter's recommendation, it would have led to an under-estimate of accessory expense. Second, as stated previously (Second Proposed Rule at 9), the Department did not use any responses in which a respondent was asked to report a monetary amount in its calculation of the Minimum Pay Rate. Lastly, field surveyors on the Columbia-Sam Schwartz-Deliveristas Survey reported that delivery workers experienced a high level of difficulty completing free response format or numeric input questions, leading the Department to determine that close-ended responses were the most appropriate format for this population and essential in keeping the voluntary survey short and

³ The preamble was: "NYC is surveying New Yorkers about their work for delivery apps. This is part of a new law to raise pay for app delivery workers. Your answers will help NYC set a Minimum Pay Rate that reflects your expenses and needs."

cognitively undemanding, which increases survey completion and representativeness.

With respect to “phantom questions,” respondents to the NYC Delivery Worker Survey reported purchasing some items at very low rates (e.g., anti-theft camera at 13 percent), putting a low upper bound on the frequency with which respondents may have reported purchasing an item for delivery work that they did not in fact purchase for that purpose. The use of “phantom questions” is not customary in government surveys and the Department’s choice not to include them in the NYC Delivery Worker Survey does not invalidate its results.

Recordkeeping Requirements

36. Each of the recordkeeping requirements in the Minimum Pay Rule will enable DCWP to effectively monitor compliance. These requirements will also enable the Department to carry out its statutory obligation under subdivisions (c) and (d) of Section 20-1522 of the Administrative Code to amend the minimum pay method, if warranted or necessary, and to complete its statutorily required reporting obligations, including the report on the minimum payment standard DCWP must submit to City Council and the Mayor in September 2024.

Coverage Limited to Third-Party Food Delivery Services and Third-Party Courier Services

37. DCWP does not have the rulemaking authority under the Minimum Pay Law to regulate other delivery entities like grocery and convenience delivery services.

38. The Minimum Pay Law gives DCWP authority to set a Minimum Pay Rate for “**food delivery workers,**” whom the law defines as “any natural person or any organization composed of no more than one natural person, whether or not incorporated or employing a trade name, who is hired, retained, or engaged as an independent contractor by a **third-party food delivery service** required to be licensed pursuant to section 20-563.1 or a **third-party courier service** to deliver food, beverage, or other goods from a business to a consumer in exchange for compensation.” NYC Admin. Code § 20-1501 (emphasis added)

39. The term “**third-party food delivery service**” means “any website, mobile application, or other internet service that: (i) offers or arranges for the sale of food and beverages prepared by, and the same-day delivery or same-day pickup of food and beverages from, a **food service establishment**; and (ii) that is owned and operated by a person other than the person who owns such food service establishment.” *Id.*

40. The term “**third-party courier service**” means a service that (i) facilitates the same-day delivery or same-day pickup of food, beverages, or other goods from a food service establishment on behalf of such **food service establishment** or a third-party food delivery service; (ii) that is owned and operated by a person other than the person who owns such food service establishment; and (iii) and is not a third-party food delivery service.

41. The term “**food service establishment**” means a business establishment located within the city where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, and whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle.

42. In a comment to the Second Proposed Rule, Petitioner Grubhub commented that the Minimum Pay Rule should apply to all delivery companies, not only food delivery services, including quick convenience and grocery delivery companies. DCWP responded that it could not adopt Grubhub’s recommendation because it is outside the scope of DCWP’s rulemaking authority granted by the Minimum Pay Law. Final Rule SBP (Exhibit D) at 13. DCWP cannot, by rule, extend coverage of the Minimum Pay Law to companies that do not meet the definition of a “third-party food delivery service” or “third-party courier service,” such as companies that only offer delivery from grocery stores or convenience stores but not from establishments that meet the definition of “food service establishment.”

43. The definition of “food service establishment” in NYC Admin. Code § 20-1501 mirrors the long-established definition of “food service establishment” in the New York City Health Code. See NYC Health Code § 81.03(s). The Health Code contains a distinct definition for a “similar retail food establishment,” which includes “a convenience store, grocery or supermarket that serves restaurant-type food.” See NYC Health Code § 81.03(a)(9). Thus, for example, when the NYC Health Code requires the posting of calorie information, it covers both “a food service establishment or similar retail food establishment...” See NYC Health Code § 81.50(a)(2) (emphasis added). Thus, City law draws a distinction between restaurants, on the one hand, and supermarkets and grocery stores, on the other. There is no reason to read the definition of “food service establishment” in Title 20 of the Administrative Code to conflict with the Health Code. Indeed, if Petitioner’s reading of NYC Admin. Code § 20-1501 were to prevail, it would imply that supermarkets across New York City have long acted as unpermitted “food service establishments” under the Health Code. For this reason, legislation is required to cover apps that perform deliveries only from grocery stores and convenience stores; it cannot be done by rule.

Harms to Workers

44. If the Minimum Pay Rule is enjoined, delivery workers will suffer immediate, irreparable injury.

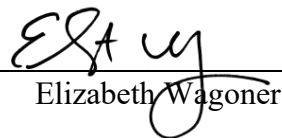
45. Apps, including Petitioner, pay delivery workers an average of \$5.72 per hour, far below the \$15 minimum wage that apps would be required to pay if they classified their workers as employees. DCWP Report (Exhibit A) at 18. A NYC delivery worker with average hourly earnings, working hours, and expenses has annual net earnings of \$11,970 after 52 weeks of work. *Id.* at 23. For comparison, the NYC poverty threshold for a single adult is \$19,088 and the near poverty threshold is \$28,632. NYC poverty and near-poverty thresholds for a two-adult,

two-child family are \$41,185 and \$61,778, respectively. *Id.* Delivery workers also lack access to ordinary employee benefits, the costs of which are substantial 22. *Id.* at 22. This compounds the hardship of low pay.

46. The Department's most conservative estimate projects that delivery workers' aggregate net earnings in NYC will increase by at least \$0.9 billion by 2025. DCWP Report (Exhibit A) at 35, Final Rule SBP (Exhibit D) at 16, Table 7. This means that NYC's 60,000 delivery workers collectively stand lose approximately \$15 million per week of delay in implementation. Petitioner and other apps, in turn, would profit.

I hereby affirm under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
July 6, 2023


Elizabeth Wagoner

CERTIFICATION UNDER UNIFORM CIVIL RULE 202.8-B

According to Microsoft Word, the portions of this documents which must be included in a word count contain **5,996** words, and this document complies with Uniform Civil Rule 202.8-b.

Dated: New York, New York
July 6, 2023

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