

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

S.A.M.

DATE: April 16, 2019

TO: Jill Coffman, Regional Director
Region 20

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Uber Technologies, Inc. 177-2484-5000
Cases 13-CA-163062, 14-CA-158833, 177-2484-5033-0100
and 29-CA-177483 177-2484-5067-2000
177-2484-5067-4700
177-2484-5067-6000

These cases were submitted for advice as to whether drivers providing personal transportation services using the Employer's app-based ride-share platform were employees of the Employer or independent contractors. Applying the common-law agency test as explicated in *SuperShuttle DFW, Inc.*,¹ we conclude that the drivers were independent contractors. The Regions should therefore dismiss the charges, absent withdrawal.

BACKGROUND

In 2013, Uber Technologies, Inc. (the "Employer" or "Uber"), based in San Francisco, California, released a smart-phone application allowing consumers to request personal transportation by car and for drivers to fulfill those requests (the "App"). Since that time, rides through the App have become available in an increasing number of regions throughout the United States and abroad. Uber has always asserted that the drivers providing those rides are independent contractors.

The instant charges assert the contrary. The first of the three charges was filed in Region 14 on (b) (6), (b) (7)(C), 2015. The second was filed in Region 13 on (b) (6), (b) (7)(C) 2015. These two charges allege, among other things, that Uber unlawfully terminated its relationships with drivers who had provided Uber rides under a general tier of service known as UberX. UberX rides involve standard passenger cars of diverse makes and economical fares. To begin offering UberX rides, drivers provided the necessary car and entered contracts in their individual capacity with a subsidiary of Uber. The third charge was filed in Region 29 on (b) (6), (b) (7)(C) 2016. It alleges, among other

¹ 367 NLRB No. 75 (Jan. 25, 2019).

things, that Uber provided unlawful assistance to or unlawfully dominated a labor organization representing Uber drivers in New York City. According to one of the Charging Parties, the alleged labor organization represented not only UberX drivers, but also drivers offering rides under Uber's other general tier of service, UberBLACK. UberBLACK rides involve higher-end black-colored vehicles and higher fares than UberX. Some UberBLACK drivers contracted directly with Uber; others entered employment or independent-contractor relationships with separately-owned business entities that contracted with Uber.

Between Uber's beginnings in 2013 and the present, the company significantly revised its operations and policies numerous times. The facts recounted herein relate to the period of February 27, 2015, to August 11, 2016, which includes the filing dates of the three charges and the six months preceding the filing of the first charge.²

During that period, basic UberX and UberBLACK rides proceeded in the same general manner. Riders opened the App, selected the tier of service, entered their pickup location and, optionally, their destination, and then submitted their request. Upon receiving a request, Uber offered the trip, through the App, to a driver in the rider's vicinity who was logged in to the App. The driver could accept or reject the trip. If rejected, Uber offered the trip to other nearby drivers in succession until someone accepted it, though there was no guarantee that a driver would accept the trip. If a driver did accept it, the rider could then see, on the App, the driver's real-time location and estimated time of arrival at the pickup location. The driver learned the trip's destination when picking up the requesting rider, and then drove the rider (and any others accompanying the rider) to the destination. Uber tracked the ride by GPS, and used the distance traveled, in combination with base fare amounts and time charges, to calculate the total fare for the rider. The rider paid the fare cash-free through the App. Uber retained a percentage of fares and, later, remitted the remaining fare amount to the driver.

A somewhat different procedure applied to a subtype of UberX service called UberPOOL. Such service involved the bundling of ride requests of distinct riders with at least roughly overlapping itineraries. Riders selecting the UberPOOL option could obtain a ride at a reduced price in exchange for the willingness to share the car's passenger space with unrelated riders, plus the additional time required to make any other stops along the way to the rider's destination. The fares Uber collected for a combined UberPOOL trip of given length fluctuated depending on the extent to which Uber could bundle separate riders into the trip. The amounts Uber remitted to a driver for each UberPOOL trip approximated what the driver would have earned from a basic UberX trip of similar length.

² Because some current terms may differ, we use the past tense to describe the terms of drivers' work during the relevant period.

A feature of the App applicable to every type of Uber ride was (and is) Uber's rating system. At the end of each ride, Uber prompted riders, through the App, to rate the ride on a scale of 1 (worst) to 5 (best) and elaborate on the rating with narrative feedback. Also, drivers could rate each rider on the same scale. Uber calculated average ratings for both drivers and riders. A high average rating could qualify a driver for exclusive types of rides that were potentially more lucrative, and a low average rating could result in Uber terminating its relationship with the driver.

ACTION

Applying the common-law agency test, we conclude that UberX and UberBLACK drivers were independent contractors. Accordingly, the Regions should dismiss the charges, absent withdrawal.

Section 2(3) of the Act defines "employees" entitled to the Act's protection.³ The definition explicitly excludes "independent contractors."⁴ The burden of proving that workers are independent contractors rests with the party asserting independent-contractor status.⁵ To determine whether workers are employees or independent contractors, the Board applies the common-law agency test as explicated in *SuperShuttle*.⁶ The inquiry involves application of ten nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency:

- (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.

³ 29 U.S.C. § 152(3).

⁴ *Id.*

⁵ *SuperShuttle*, 367 NLRB No. 75, slip op. at 1 (citing *BKN, Inc.*, 333 NLRB 143, 144 (2001)).

⁶ *Id.*, slip op. at 1, 8 n.14.

- (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 part of the regular business of the employer.
- (i) Whether or not the parties believe they are creating the relation of master and servant.
- (j) Whether the principal is or is not in business.⁷

The Board’s analysis of these factors is “qualitative,” rather than “strictly quantitative.”⁸ There is no “shorthand formula” and “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”⁹ However, “an important animating principle by which to evaluate those factors . . . is whether the position presents the opportunities and risks inherent in entrepreneurialism.”¹⁰ “[W]here the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, [the Board] will likely find independent-contractor status.”¹¹

Additionally, in the shared-ride and taxicab industries, the Board gives significant weight to two factors: (1) the extent of the company’s control over the manner and means by which drivers conduct business and (2) the relationship between the company’s compensation and the amount of fares collected.¹² In *SuperShuttle*, the Board found that drivers who transported passengers by van were

⁷ *Id.*, slip op. at 1-2 (citing Restatement (Second) of Agency § 220 (1958)).

⁸ *Id.*, slip op. at 11 (citing *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 n.3 (D.C. Cir. 2009)).

⁹ *Id.*, slip op. at 2 (quoting *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968)).

¹⁰ *Id.*, slip op. at 8 (quoting *FedEx*, 563 F.3d at 497).

¹¹ *Id.*, slip op. at 11.

¹² *See id.*, slip op. at 2-3, 12-14.

independent contractors where the drivers had total control over their work schedules, kept all fares they collected, and had discretion over which trips to perform.¹³ The *SuperShuttle* drivers had “nearly unfettered opportunity to meet and exceed their weekly overhead,” indicating significant opportunity for economic gain.¹⁴ Conversely, in *Elite Limousine Plus*,¹⁵ the Board found the black-car drivers to be employees where the company controlled drivers by restricting their work locations, punishing drivers for rejecting even a single dispatch trip, enforcing extensive and detailed rules and regulations through extensive and detailed sanctions, using a quality assurance committee to monitor compliance on the road, and retaining a portion of most fares in addition to weekly fees from the drivers.

Thus, the level of company control should be assessed in the context of its effect on entrepreneurial opportunity. As the Board observed in *SuperShuttle*, “control and entrepreneurial opportunity are two sides of the same coin: the more of one, the less of the other. Indeed, entrepreneurial opportunity often flowers where the employer takes a ‘hands off’ approach.”¹⁶

I. UberX

Consideration of all the common-law factors, viewed through the “prism of entrepreneurial opportunity,”¹⁷ establishes that UberX drivers were independent contractors. The drivers had significant entrepreneurial opportunity by virtue of their near complete control of their cars and work schedules, together with freedom to choose log-in locations and to work for competitors of Uber. On any given day, at any free moment, drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the App, working for a competing ride-share service, or pursuing a different venture altogether. As explained in detail below, these and other facts strongly support independent-contractor status and outweigh all countervailing facts supporting employee status.

¹³ *See id.*, slip op. at 3, 12-15.

¹⁴ *See id.*, slip op. at 12.

¹⁵ 324 NLRB 992, 992, 1002-04 (1997).

¹⁶ *SuperShuttle*, slip op. at 11.

¹⁷ *Id.*, slip op. at 9.

A. Extent of Control by the Company¹⁸

Three features of the Uber system afforded drivers significant opportunities for economic gain and, ultimately, entrepreneurial independence. First, drivers had virtually unfettered freedom to set their own work schedules—they chose when to log in to the App to receive trip requests and how long to remain online.¹⁹ Drivers needed only to fulfill one trip request per month, and there was no upper limit. For any reason or no reason, the driver could simply log off.²⁰ Second, drivers controlled their work locations by choosing where to log in to the App, within the broad confines of a geographic market, rather than being restricted to assigned routes or neighborhoods.²¹ Even though drivers' later locations over the course of an outing depended on riders' destinations, drivers could predict likely destinations from particular origins and choose their log-in locations accordingly.²² Third, drivers could, and often did, work for competitors.²³ In fact, drivers could toggle between different ride-sharing apps at will over the course of an outing.²⁴ Moreover, Uber placed no limits on this freedom such as restrictions on drivers' use of their cars or fees that drivers must pay even if they perform no Uber rides.

¹⁸ Drivers were subject to certain requirements imposed by state and local governments. We exclude such requirements from our discussion as they do not constitute employer control under well-established Board law. *See id.*, slip op. at 3 (citing *Elite Limousine*, 324 NLRB at 1002).

¹⁹ *See id.*, slip op. at 12; *cf. Yellow Cab Co.*, 312 NLRB 142, 145 (1993) (employer determined drivers' shifts).

²⁰ *See SuperShuttle*, 367 NLRB No. 75, slip op. at 12 (drivers could take breaks at will by turning off dispatch device); *cf. Elite Limousine*, 324 NLRB at 997, 1002 (employer limited number of breaks drivers could take without losing position in dispatch queue).

²¹ *See SuperShuttle*, 367 NLRB No. 75, slip op. at 12; *cf. Elite Limousine*, 324 NLRB at 1002 (employer restricted drivers' work locations, which was "telling" sign of control).

²² As stated above, drivers learned riders' destinations upon picking up the riders.

²³ *See AAA Cab Services*, 341 NLRB 462, 465 (2004); *cf. Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000) (drivers prohibited from operating taxicabs independently or for another taxicab company).

²⁴ We note, however, that drivers could not independently transport additional riders or deliveries at the *same time* as Uber customers.

Together, these three features of the Uber system imbued drivers with significant control over their earnings. On any given day, and, indeed, at any free moment, drivers could decide how best to serve their own economic objectives: by accepting ride requests through the App, working for a competing ride-share service, or pursuing a different venture altogether. And, because Uber forwarded ride requests to drivers based on their proximity to the pickup location, drivers further controlled their earning potential by choosing log-in locations and times based on their own assessment of ride demand and traffic.

In fact, Uber amplified the entrepreneurial opportunity inherent in those decisions through variable fare pricing and promotions aimed at drivers. At times of high ride demand in particular locations, Uber applied higher-than-usual “surge” fares to trips starting from those locations. Drivers knew when and where surge pricing was in effect because Uber provided a real-time “heat map” on the App showing this information. In addition to surge pricing, Uber offered minimum earnings guarantees and other financial incentives for being online at certain locations and times and performing certain numbers of trips. Whether to take advantage of these opportunities were among the many entrepreneurial judgments UberX drivers made due to their freedom to set their work schedules, choose log-in locations, and pursue earnings opportunities outside the Uber system.

Drivers’ unlimited freedom to look elsewhere for better earnings also minimized the impact that certain other features of the Uber system would otherwise have on their entrepreneurial opportunity. Thus, although Uber set baseline fares (subject to a driver’s contractual right to negotiate a lower fare)²⁵ and drivers could not subcontract their work,²⁶ routinely reject trips based on expected profitability,²⁷

²⁵ See *SuperShuttle*, 367 NLRB No. 75, slip op. at 13 (company set fares). During the relevant period, Uber prohibited drivers from accepting tips. Presently, drivers can accept tips, and the App even includes an option for riders to leave a tip cash-free.

²⁶ See *Metro Cab Co.*, 341 NLRB 722, 724 (2004) (drivers could not sublease vehicles leased from employer), *supplemented by Friendly Cab Co.*, 344 NLRB 528 (2005), *enforced sub nom. NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008); *cf. AAA Cab Services*, 341 NLRB at 465 (drivers could sublease their vehicles).

²⁷ Drivers could be locked out of the App temporarily for excessively rejecting trips. See *Elite Limousine*, 324 NLRB at 1002 (drivers who rejected fares lost place in dispatch queue and, depending on time of day, were barred from queue for 30 minutes); *City Cab Co. of Orlando v. NLRB*, 628 F.2d 261, 264-65 (D.C. Cir. 1980) (drivers risked losing future dispatch calls if they refused fares); *cf. SuperShuttle*, 367 NLRB No. 75, slip op. at 12 (except in very limited circumstances, drivers could decide whether to accept offered trips); *AAA Cab Services*, 341 NLRB at 464-65 (drivers could reject dispatch calls for any reason without penalty). And, until around 2016, an

or attempt to divert business from Uber to competitors,²⁸ these terms only affected drivers' entrepreneurial opportunity while performing rides through the App. Since drivers had unlimited freedom to drive or perform other work outside the App, the impact on drivers' overall entrepreneurial independence was diminished.

Drivers' entrepreneurial independence is also apparent in contractual requirements that they indemnify Uber and hold it harmless for liability based on their own conduct. To similar effect is a provision through which Uber disclaimed responsibility for the conduct of riders.²⁹ These contractual provisions greatly lessened Uber's motivation to control drivers' actions, since Uber was not liable for drivers' or riders' negligent or intentionally harmful acts.³⁰

Like certain other companies in the taxicab and shared-ride industries that lack an employment relationship with drivers, as well as many companies concerned with protecting their product or brand, Uber maintained minimum service standards and customer feedback channels to learn of and respond to any relevant customer service issues. Uber's standards included approving a vehicle before a driver could use it to provide Uber rides, adhering to dispatch procedures such as waiting a minimum time for riders to arrive at the pickup location, keeping up the appearance of cars and a comfortable in-car environment, appropriate communication with riders, professional driver appearance, competent driving and navigation,³¹ minimal training (often via a 16-minute video), and courtesies such as returning left-behind rider items. Uber also maintained a rating system through which riders could express their satisfaction with a driver's service or lack thereof.

acceptance rate lower than 80-90% could be a basis for terminating a driver's relationship with Uber.

²⁸ See *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008) (drivers prohibited from giving riders their own business cards and phone numbers).

²⁹ However, Uber regularly reimbursed drivers for the costs of cleaning messes and repairing damage to cars caused by riders.

³⁰ See *SuperShuttle*, 367 NLRB No. 75, slip op. at 12 (citing *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998)).

³¹ If a rider complained to Uber about the route taken and Uber determined, based on GPS data, that the route was inefficient, Uber would adjust the fare downward. Uber also used smartphone technology to monitor and offer drivers feedback about their driving style, but Uber's assessments of driving style had no direct impact on a driver's relationship with Uber.

None of these facts indicate significant employer control nor interfere with the drivers' economic opportunities. The Employer's dispatch procedures and nominal training carry minimal weight.³² Virtually all of the remaining standards went unenforced unless a rider specifically complained about an issue or a driver consistently failed to maintain region-specific minimum average ratings, in contrast to work rules embodying employer control over details of work.³³ Indeed, Uber would not even learn of issues implicating those standards absent customer complaints. Moreover, those standards were too general, and did not sufficiently impact drivers' entrepreneurial opportunity, to establish Uber's control over the manner and means by which the drivers worked.³⁴

The Board's recent decision in *SuperShuttle* squarely supports the conclusion that the extent of company control—by minimally impacting economic and entrepreneurial opportunity—weighs in favor of independent-contractor status for the UberX drivers. Indeed, UberX drivers had more entrepreneurial opportunity than the drivers in *SuperShuttle*, who could control their earnings by selecting specific trips based on profitability,³⁵ because UberX drivers could base decisions about where and when to log in on time-limited earnings opportunities like “surge” fares and their total freedom to work for competitors.³⁶ UberX drivers also had far more entrepreneurial opportunity than other taxicab or shared-ride drivers whom the Board found to be

³² See *AAA Cab Services*, 341 NLRB at 465 (rule related primarily to orderly dispatch of taxicabs was not significant incident of control); *SuperShuttle*, 367 NLRB No. 75, slip op. at 13 (although employer required more training than government contract, drivers were still independent contractors).

³³ See *AAA Cab Services*, 341 NLRB at 465 (employer's ability to counsel drivers and terminate leases based on customer complaints did not establish control sufficient to show employee status); *cf. Metro Cab*, 341 NLRB at 723-24 (employer hired road manager to enforce employer rules by monitoring drivers' activities on the job); *Elite Limousine*, 324 NLRB at 1003 (drivers on quality assurance committee reported rules violations to employer).

³⁴ See *Elite Limousine*, 324 NLRB at 1003 (distinguishing “common sense” rules on condition of vehicle and driver's behavior, which do not necessarily evidence employer control over drivers, from detailed rules amounting to micromanagement of drivers); *City Cab Co. of Orlando*, 285 NLRB 1191, 1194 (1987) (requiring cabs to be neat and clean or drivers to be reasonable and courteous shows only minor control with little impact on details of work).

³⁵ See *SuperShuttle*, 367 NLRB No. 75, slip op. at 12.

³⁶ *Cf. id.*, slip op. at 13 n.29.

employees in cases prior to *SuperShuttle*.³⁷ For example, in contrast to the black-car drivers in *Elite Limousine*, UberX drivers were not subject to restrictions on their work locations, extensive and detailed rules and regulations enforced through extensive and detailed sanctions, or use of a quality assurance committee to monitor compliance on the road.³⁸ In sum, Uber's lack of control over the manner and means of the UberX drivers' work, and the drivers' freedom to make their own entrepreneurial decisions, strongly favor independent-contractor status.

B. Method of Payment

The second factor to which the Board gives significant weight in the taxicab and shared-ride industries is "the relationship between the company's compensation and the amounts of fares collected."³⁹ Pure flat-fee arrangements, whereby drivers retain all fares and pay the company flat fees to operate during a fixed time period, generally support independent-contractor status.⁴⁰ Conversely, commission-based arrangements, where the company receives portions of drivers' fares, generally support the inference of employee status.⁴¹ These conclusions are based on the inferences that, in flat-fee arrangements, the company lacks motivation to control the manner and means of drivers' work, giving drivers significant entrepreneurial opportunity because they retain all fares; whereas in commission-based compensation, in which the company's earnings depend upon driver production, the company has a greater incentive to control drivers' activities, thus giving them less entrepreneurial opportunity.⁴² The actual impact of these various fee arrangements

³⁷ See, e.g., *Metro Cab*, 341 NLRB at 724 (employer prohibited drivers who leased taxicabs from employer from using cabs for outside business, required drivers to come into garage for inspections or placement of advertising on cabs, and hired road manager to monitor compliance with employer policies); *Stamford Taxi*, 332 NLRB at 1373, 1381-82 (lessee-drivers prohibited from operating employer's cabs independently or for another company and employer controlled work hours, though drivers could sublease cabs); *Yellow Cab*, 312 NLRB at 144 (employer assigned shifts to lessee-drivers and discouraged using sources of business other than employer's dispatch service due to 50-cent per mile rental fee).

³⁸ Cf. *Elite Limousine*, 324 NLRB at 1002-03.

³⁹ *SuperShuttle*, 367 NLRB No. 75, slip op. at 14 (quoting *AAA Cab Services*, 341 NLRB at 465).

⁴⁰ See *id.*, slip op. at 13.

⁴¹ See *Yellow Cab*, 312 NLRB at 144-45.

⁴² See *id.*; *SuperShuttle*, 367 NLRB No. 75, slip op. at 13.

on a company's motivation to control drivers' activities and, thus, these inferences, are questionable. Accordingly, the method of payment, whether flat-fee or commission-based, should not be considered as an indicium of control. Rather, the *actual* control exerted by the company on drivers' entrepreneurial opportunity should be determinative of employee or independent-contractor status.

In any event, even under current Board law, the inferences behind the method-of-payment analysis may be overcome by the facts of particular cases.⁴³ This is such a case. Uber retained a percentage of fares paid by riders rather than charging drivers a flat fee for the opportunity to use the App. But the fundamental features of the Uber system overcome any inference of employer control and diminished entrepreneurial opportunity for drivers. Thus, notwithstanding any incentive there may have been to control drivers, Uber did not in fact control them (as discussed above), but, rather, relied on customers to maintain quality and insure repeat business without the need for control by Uber. In addition, the absence of a flat fee here actually *increased* drivers' entrepreneurial opportunity, since this made it easier to take advantage of the unlimited freedom they had to work for competitors or pursue other ventures and drive for Uber only when it suited them.⁴⁴ In light of drivers' independence from Uber's control and their significant entrepreneurial opportunity, we conclude that the method-of-payment factor is neutral in the particular circumstances here.⁴⁵

C. Other Factors

Three of the remaining factors support independent-contractor status. Drivers provided the "principal instrumentality" of their work, the car, the control of which afforded them significant entrepreneurial opportunity.⁴⁶ Drivers were also responsible for chief operating expenses such as gas, cleaning, and maintenance for their cars. Uber provided only the App, commercial liability insurance, and minor

⁴³ See *Metro Cab*, 341 NLRB at 724 (inference of minimal control based on flat-fee arrangement overcome by evidence of "extensive" employer control).

⁴⁴ Cf. *Elite Limousine*, 324 NLRB at 1002 (employer received weekly service fees from drivers in addition to percentage of nearly all fares).

⁴⁵ It should be noted that under the traditional common-law test of employee or independent-contractor status, the method-of-payment factor concerns whether the individual is paid "by the time or by the job." Restatement (Second) of Agency § 220. The commission-based payment system used by Uber is clearly a "by the job," rather than a "by the time" system. This further supports the conclusion that the commission-based method-of-payment factor does not weigh in favor of employee status and thus is a neutral factor in the analysis.

⁴⁶ *SuperShuttle*, 367 NLRB No. 75, slip op. at 14.

assistance such as reimbursement for the costs of cleaning spills and repairing damage caused by riders. Drivers shouldered significant risk of loss, since they invested significant capital and time to use the App, and fare earnings could fluctuate depending on where and when drivers logged in. Given that the drivers provided the cars and incurred most of the expenses associated therewith, the instrumentalities factor strongly favors independent-contractor status.⁴⁷

With regard to the “supervision” factor, drivers operated without supervision by Uber. They did not report to supervisors and generally interacted with Uber agents only when a problem arose. Uber did not “assign” trips through the App as drivers maintained the right to reject any particular trip.⁴⁸ Although, as discussed above, Uber maintained minimum service standards to the extent necessary to address specific customer complaints, which could affect drivers’ relationship with Uber and earnings opportunities, those customer-driven standards do not amount to the kind of supervision normally indicative of employee status.⁴⁹ Overall, drivers had “near-absolute autonomy in performing their daily work without supervision,” supporting independent-contractor status.⁵⁰

With regard to the parties’ self-assessment of their relationship, both parties understood their relationship to be one of independent contractors. Drivers’ contracts explicitly characterized the relationship this way. Uber withheld neither taxes nor

⁴⁷ See *id.*, slip op. at 13 & n.29 (instrumentalities factor supported independent-contractor status where the primary instrumentalities of drivers’ work were vans and dispatching system; drivers purchased or leased the vans; drivers paid for dispatch system devices through weekly fees; drivers paid for operation costs such as gas, tolls, and vehicle repairs; and drivers possessed the vehicles full-time).

⁴⁸ See *id.*, slip op. at 13. As discussed in the control analysis, UberX drivers were incentivized to accept most trip requests, and more generally had less freedom to select trips based on expected profitability than *SuperShuttle* drivers. But UberX drivers were nonetheless free to reject specific trips in the course of their work.

⁴⁹ See *AAA Cab Services*, 341 NLRB at 465 (fact that employer counseled drivers and terminated leases based on customer complaints did not establish employee status); *cf. Metro Cab*, 341 NLRB at 723-24 (employer hired road manager to enforce rules by monitoring drivers’ activities on the job); *Elite Limousine*, 324 NLRB at 1002 (drivers on quality assurance committee reported rules violations to employer).

⁵⁰ *SuperShuttle*, 367 NLRB No. 75, slip op. at 14.

social security and provided drivers with IRS 1099 forms. Uber provided no benefits, paid leave, or holiday pay. These facts support independent-contractor status.⁵¹

Although there are several factors that point toward employee status, the strength of the evidence supporting independent-contractor status overwhelms those factors. One factor that supports employee status is that no special skills or experience were required to begin driving for Uber.⁵² In addition, although Uber disagrees, we assume *arguendo* that drivers did not work in a distinct occupation or business, but worked as part of the Employer's regular business of transporting passengers.⁵³ But the Board has not deemed this to be a strong or dispositive factor.⁵⁴ Indeed, there are a number of decisions in which individuals were held to be independent contractors, even though their services were integral to the business of the company that engaged them, given the extent of entrepreneurial opportunity afforded them.⁵⁵ Whereas, in situations of greater company control, this factor has been cited in favor of employee status.⁵⁶

⁵¹ *See id.* The length of employment is a neutral factor because drivers had a relationship of indefinite duration with Uber but could go up to thirty days without fulfilling a single ride request. *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 4 (Sept. 25, 2015) (factor inconclusive where workers had potential long-term relationship with employer but commonly had gaps in working relationship as they pursued other opportunities).

⁵² *See SuperShuttle*, 367 NLRB No. 75, slip op. at 14.

⁵³ *See id.*

⁵⁴ *See id.*, slip op. at 14-15.

⁵⁵ *See, e.g., Argix Direct, Inc.*, 343 NLRB 1017, 1017, 1020-22 (2004) (finding drivers working for a company providing distribution and transportation services to retailers to be independent contractors); *Arizona Republic*, 349 NLRB 1040, 1040, 1043-46 (2007) (finding newspaper carriers engaged by a company that distributes eight newspaper publications to be independent contractors).

⁵⁶ *See, e.g., Slay Transportation Co.*, 331 NLRB 1292, 1293-95 (2000) (finding freight drivers to be employees); *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000) (same), *enforced*, 292 F.3d 777 (D.C. Cir. 2002).

D. Conclusion

Considering all the common-law factors through “the prism of entrepreneurial opportunity” set forth in *SuperShuttle*,⁵⁷ we conclude that UberX drivers were independent contractors. Drivers’ virtually complete control of their cars, work schedules, and log-in locations, together with their freedom to work for competitors of Uber, provided them with significant entrepreneurial opportunity. On any given day, at any free moment, UberX drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the App, working for a competing ride-share service, or pursuing a different venture altogether. The surge pricing and other financial incentives Uber utilized to meet rider demand not only reflect Uber’s “hands off” approach, they also constituted a further entrepreneurial opportunity for drivers. Although Uber limited drivers’ selection of trips, established fares, and exercised less significant forms of control, overall UberX drivers operated with a level of entrepreneurial freedom consistent with independent-contractor status. In addition, drivers’ lack of supervision, significant capital investments in their work, and their understanding that they were independent contractors also weigh heavily in favor of that status. Although Uber retained portions of drivers’ fares under a commission-based system that may usually support employee status, that factor is neutral here because Uber’s business model avoids the control of drivers traditionally associated with such systems and affords drivers significant entrepreneurial opportunity. The other factors supporting employee status—the skill required and our assumption that drivers operated as part of Uber’s regular business, and not in a distinct business or occupation—are also of lesser importance in this factual context.⁵⁸ Accordingly, we conclude that UberX drivers were independent contractors.

II. UberBLACK

As noted above, UberBLACK drivers either contracted directly with Uber or worked on behalf of other businesses that did so. We conclude that drivers of both types were independent contractors of Uber.

Drivers of the first type (“UberBLACK partner-drivers”) operated almost exactly like the UberX drivers discussed above. The few relevant distinctions weigh even more in favor of independent-contractor status: UberBLACK partner-drivers (1) generally invested more capital in their work than UberX drivers because they had to provide higher-end vehicles and maintain commercial liability insurance; (2) were free to hire other drivers to work on their behalf;⁵⁹ (3) could choose to receive UberX ride

⁵⁷ 367 NLRB No. 75, slip op. at 9.

⁵⁸ *See id.*, slip op. at 14-15.

⁵⁹ *See AAA Cab Services*, 341 NLRB at 465 (drivers could sublease their vehicles).

requests in addition to UberBLACK requests; and (4) contracted with Uber as business entities, and not as individuals.⁶⁰ Based on this evidence, and that discussed above regarding the UberX drivers, we conclude that the UberBLACK partner-drivers were clearly independent contractors.

UberBLACK drivers who worked on behalf of other businesses may have differed significantly in terms of facts like vehicle ownership. However, there were no more indicia of an employment relationship between *Uber* and such drivers than there were between Uber and other drivers.⁶¹

Therefore, all of the drivers at issue in the subject charges were independent contractors not covered by the Act. Accordingly, the Regions should dismiss the charges, absent withdrawal.

s/
J.L.S.

ADV.13-CA-163062.Response.Uber (b) (6), (b) (7)(C)

⁶⁰ See *SuperShuttle*, 367 NLRB No. 75, slip op. at 14 (entering into franchise agreement as corporation is associated with independent-contractor status).

⁶¹ We express no opinion on whether such drivers were employees of the other businesses on whose behalf they worked, a question irrelevant to resolving the instant charges.