

IN THE SUPREME COURT OF PENNSYLVANIA

No. 41 EAP 2018

DONALD LOWMAN,

Respondent/Appellee,

v.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,

Petitioner/Appellant

**BRIEF OF MON VALLEY UNEMPLOYED COMMITTEE and NATIONAL
EMPLOYMENT LAW PROJECT as *AMICI CURIAE* IN SUPPORT OF
RESPONDENT/APPELLEE**

Counsel for Amici Curiae
John Stember
(Pa. Bar. No. 23643)
Mon Valley Unemployed Committee
841 California Avenue
Pittsburgh, PA 15212
Phone: (412) 462-9962
Fax: (412) 462-5097

Co-Counsel for Amici Curiae
Laura Padin*
National Employment Law Project
2040 S Street NW, Lower Level
Washington, DC 20009
Phone: (202) 315-5589

*Admitted to practice in DC and NY

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae Mon Valley Unemployed Committee and National Employment Law Project, Inc. submit this brief in support of Appellee Donald Lowman. No one other than the amici curiae paid for the preparation of this brief or authored this brief, in whole or in part.

Mon Valley Unemployed Committee (“MVUC”) is a 501(c)(3) non-profit organization with more than 40 years of experience assisting and advocating on behalf of low-wage and dislocated workers throughout the Monongahela (“Mon”) River Valley and Western Pennsylvania. MVUC was founded by former industrial workers who lost their jobs permanently in the mid-70’s when steel, electrical and other industries in the region collapsed. In the ensuing decade, more than 100,000 jobs were lost, most of them high-paying union jobs. Since then, MVUC has been involved in a number of issue campaigns relating to unemployment compensation (“UC”) and has represented thousands of UC claimants at hearings and in appeals.

National Employment Law Project (“NELP”) is a non-profit legal organization with 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws and social benefits like unemployment insurance, and that employers are not rewarded for skirting those basic rights. For decades, NELP has

focused on the ways in which various work structures, such as calling workers “independent contractors,” exacerbate income and wealth inequality, the segregation of workers by race and gender into poor quality jobs, the ability of workers to come together to negotiate with businesses over wages and working conditions, and the promotion of unfair competition by companies that evade the law. NELP has researched, written, testified and participated as *amicus* in cases in Pennsylvania and nationwide addressing the treatment of workers in the on-demand or “gig” economy. NELP’s deep expertise in the on-demand or “gig” economy and in unemployment insurance systems in the states informs our argument in this brief.

SUMMARY OF ARGUMENT

We support the Appellee’s position that his work driving for Uber does not constitute self-employment and therefore should not have disqualified him from receiving unemployment compensation. We write separately not to repeat the arguments made by the Appellee but to explain why Uber drivers should be treated as any other employees for purposes of unemployment compensation eligibility. We also write to describe the social and policy importance of broad unemployment compensation coverage for most workers in Pennsylvania, including those hired by “gig” companies online.

Uber and many other so-called “online platform” or “gig” companies¹ are no different from other companies that engage workers to labor in their businesses. Uber sets most of the material terms of its drivers’ employment, including pay rates. Just like traditional employers, Uber can terminate—otherwise known as

¹ The U.S. Bureau of Labor Statistics (BLS) added four questions to the May 2017 Contingent Worker Supplement to measure “electronically mediated work,” which BLS defined as “short jobs or tasks that workers find through websites or mobile apps that both connect them with customers and arrange payment for the tasks,” which is the same basic definition of gig or online platform work that this brief uses. The BLS data showed that Black workers and Latino workers are overrepresented in in-person electronically mediated work, and that this type of work is more unstable than work overall (8.7 percent of in person electronically mediated workers report that they do not expect their job to last beyond a year, compared to 3.8 percent of workers overall). More than 72 percent of electronically mediated workers are doing the work as a main job. See Bureau of Labor Statistics, U.S. Dep’t of Labor, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, Monthly Labor Rev., Sep 2018, <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>.

“deactivate”—its drivers’ employment. It can also unilaterally change the conditions of their work—such as reducing their pay or available work—in ways that would constitute “good cause” for leaving the Uber driving business. Uber drivers’ similarities to traditional employees make clear that there is no logical reason to exclude them from eligibility for unemployment compensation, as they are not running an independent business.

Moreover, the wholesale exclusion of Uber drivers and other “gig” or “online platform” workers from unemployment compensation where there is no statutory exclusion would have negative consequences for these workers and the entire Pennsylvania economy. Along with losing out on unemployment compensation’s obvious financial benefits—which kept millions of Americans out of poverty during the last recession—online platform workers would lose out on the system’s social benefits, such as training opportunities and work sharing information that keep them connected to the labor market. Moreover, these workers’ exclusion from unemployment compensation would mean a loss of economic stimulus, which can increase the length and severity of any future recession.

While a decision in the Appellee’s favor will not change Uber drivers’ or other online platform workers’ eligibility for unemployment compensation, this case is an important step in acknowledging online platform work for what it is—

not self-employment, as Uber and other online platform companies insist—but employment for a company that dictates most of the material terms of the work. For these reasons, Uber drivers should be treated no differently than employees for purposes of unemployment compensation eligibility and coverage, and Uber should be treated no differently than other employers for purposes of unemployment compensation contributions.

ARGUMENT

- I. The public policy reasons for enabling employees to collect unemployment compensation apply with equal force to Uber drivers and workers on similar online platforms.**
 - a. Uber drivers and many other “online platform” workers are a precarious and poorly-paid workforce.**

“Gig” or “online platform” companies use internet-based technology platforms, accessible via smartphones and other personal computers, to coordinate and manage on-demand services in a variety of industries, including car service (Uber and Lyft), handyman and other home services (Handy), and food delivery (DoorDash and GrubHub). The business model used by many online platform companies is based on a deception: to engage the people who actually carry out the core business, and over whose work significant control is exerted, most of these companies with labor-intensive businesses require their workers to act as independent contractors instead of employees. They impose take-it-or-leave-it

contracts on their workers that set most of the terms of the work, including fee rates, protocols for interactions with customers, and penalties for noncompliance.²

Online platform workers, including Uber drivers, make up an estimated one percent of the Pennsylvania workforce.³ (In many cities, that share is likely larger—a recent analysis found that if Uber classified its drivers as employees, it would be the single largest private-sector employer in New York City.)⁴ Many of them strive to make a living by working poorly paid “gigs”, such as driving for Uber, that offer little chance of a stable income.⁵ A 2017 report on online platform vehicle companies estimates that the median pay (after accounting for expenses like fuel and car maintenance) for Uber drivers in New York City is \$14.17 per hour,⁶ which is less than New York City’s minimum wage as of December 2018.

According to a two-year study of 40 Uber drivers in the DC area, half of the

² See Maya Pinto & Rebecca Smith, *Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It*, Nat’l Employment Law Project, Mar. 25, 2019, at 1-2, <https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2-19.pdf>.

³ There are 6.2 million workers in Pennsylvania, and approximately 62,000 online platform workers. Bureau of Labor Statistics, U.S. Dep’t of Labor, *Economy at a Glance, Pennsylvania*, <https://www.bls.gov/eag/eag.pa.htm>, <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>; Bureau of Labor Statistics, U.S. Dep’t of Labor, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, *supra* note 1.

⁴ James A. Parrott and Michael Reich, *An Earnings Standard for New York City’s App-Based Drivers*, Report for the New York City Taxi and Limousine Comm’n, July 2017, at 69, <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf>.

⁵ See Rebecca Smith & Sarah Leberstein, *Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy*, Nat’l Employment Law Project, Sept. 2015, at 5, <https://s27147.pcdn.co/wp-content/uploads/Rights-On-Demand-Report.pdf>.

⁶ Parrot & Reich, *supra* note 4, at 29-30.

drivers reported monthly household incomes of \$2,000 or less, which is below the federal poverty line.⁷

Even worse than Uber's poverty wages is its lack of transparency regarding how it calculates drivers' pay, which makes it difficult, if not impossible, for drivers to figure out how much they will make each day. Although Uber used to calculate drivers' pay per ride as a certain percentage of each passenger's fare (which is set by Uber), it recently decoupled its calculation of passenger fares from driver pay, resulting in the "opportunity for a much higher degree of manipulation [around driver pay]," according to one Uber driver.⁸ That driver claimed that his pay has dropped from \$1200 per week after expenses for 40 hours of work two years ago to \$900 per week after expenses for 60 hours of work.

b. Uber drivers and other similarly-situated online platform workers need unemployment compensation for the same reasons as other workers.

Uber drivers and other similarly-situated online platform workers need unemployment compensation for the same reasons as workers classified as employees. Uber drivers experience involuntary separation from their employment—otherwise known as Uber's "deactivation" drivers—just like

⁷ *The Uber Workplace in D.C.*, Georgetown Univ. Kalmanovitz Initiative for Labor and the Working Poor, at 8, http://lwp.georgetown.edu/wp-content/uploads/Uber-Workplace.pdf#_ga=2.119755912.1437132930.1555596211-1931215545.1555596211.

⁸ Faiz Siddiqui, *Uber and Lyft Drivers Strike for Pay Transparency – After Algorithms Made it Harder to Understand*, WASH. POST, May 9, 2019.

employees. Uber “deactivates” drivers for a host of reasons, including failing to maintain a high ride acceptance rate and a low pick-up cancellation rate,⁹ maintaining a relatively low average customer rating (4.6 out of 5 or lower),¹⁰ or, in some cases, getting just one negative customer evaluation, even if the allegations made in the evaluation are false.¹¹ One former Uber driver who maintained a very high average customer rating said Uber did not give him a reason for his deactivation, even after he attempted to appeal the decision with the company.¹²

Uber drivers may also experience “good cause” for leaving the Uber driving business, such as when Uber materially changes any of the many terms and conditions of their employment over which it maintains unilateral control. As a recent article in the *Philadelphia Inquirer* about an Uber driver put it: “Every time

⁹ “Generally, Uber requires drivers to maintain a high ride acceptance rate, such as 80% or 90%, and a low cancellation rate, such as 5% in San Francisco (as of July 2015), or they risk deactivation (temporary suspension or permanent firing) from the platform.” Alex Rosenblat, *The Truth About How Uber’s App Manages Drivers*, HARVARD BUS.REV., Apr. 26, 2016, <https://hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers>.

¹⁰ James Cook, *Uber’s Internal Charts Show How Its Driver-Rating System Actually Works*, BUS. INSIDER, Feb. 11, 2015, <https://www.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015-2>.

¹¹ Marcus Lim, *‘Deactivated’—When Drivers Are Cut Off From Uber*, MEDIUM, Oct. 15, 2018, <https://medium.com/labor-new-york/deactivated-when-drivers-are-cut-off-from-uber-fe7f9c04d136>.

¹² *Id.*

Uber changes the terms for drivers, [the Uber driver] has a choice: Agree, or lose her only source of income.”¹³

At the end of 2018, for example, Uber unilaterally changed how it paid its drivers in fourteen cities, increasing the per-minute rate and decreasing the per-mile rate. In Philadelphia, UberX drivers saw their per-mile rate drop from 86 cents to 69 cents, a substantial amount, particularly for drivers who rely on long rides.¹⁴ According to one Philadelphia Uber driver, when he first started, he made 80 percent of the fees from his fares, with Uber retaining 20 percent.¹⁵ Recently, however, Uber began retaining 60 percent or more of each passenger fare. As a result, this driver’s pay has decreased from about \$1,500 a week after expenses five years ago, to between \$300 to \$600 a week now, even though he often works more hours.¹⁶ According to one study, online platform drivers’ income has been steadily decreasing for years; they made about 53 percent less in 2017 than they did in 2013.¹⁷

¹³ Jason Laughlin, ‘*Working Harder and Getting Less*’: *Good Old Days of Ridesharing Are Gone, Philly Drivers Say*, PHILADELPHIA INQUIRER, Apr. 11, 2019.

¹⁴ *Id.*

¹⁵ Michael Sainato, ‘*They Treat Us Like Crap*’: *Uber Drivers Feel Poor and Powerless on Eve of IPO*, THE GUARDIAN, May 7, 2019, <https://www.theguardian.com/technology/2019/may/07/uber-drivers-feel-poor-powerless-ipo-looms?>.

¹⁶ *Id.*

¹⁷ Alexia Fernandez Campbell, *Thousands of Uber Drivers Are Striking in Los Angeles*, VOX, Mar. 25, 2019, <https://www.vox.com/2019/3/25/18280718/uber-lyft-drivers-strike-la-los-angeles>.

Uber drivers also can experience a reduction in work hours through no fault of their own for which unemployment compensation can deliver important income-smoothing benefits. Uber suspends drivers—otherwise known as “temporary deactivation” —for noncompliance with its detailed protocols. One former Uber driver in New York who applied for unemployment benefits had been temporarily deactivated for 24 hours for cancelling too many trips. Another claimant in the same case faced temporary deactivations for 10 minute intervals for declining too many requested trips. *In the Matter of Uber Technologies Inc.*, Appeal Board No. 596722, at *5-*6 (July 12, 2018) (holding that claimants, former Uber drivers, were eligible for unemployment insurance and Uber was liable for contributions because it exercised supervision, direction or control over the claimants and similarly-situated drivers).¹⁸

Uber has also flooded many cities’ markets with its drivers, resulting in longer wait times between rides and less paid work per driver. According to one driver for Uber and Lyft in Chicago who joined forces with taxi drivers to push for a legislative cap on online platform drivers because the glut of drivers drove down available work, “[t]he vast majority of ride-share drivers are making minimum

¹⁸ This decision is included in Appendix 1.

wage — before they factor in expenses. . . . A lot of drivers might actually be operating at a loss.”¹⁹

Uber drivers’ lack of control over their pay rate, work hours, and even their continued employment wreaks havoc on their financial livelihoods.²⁰ A recent article in the *Philadelphia Inquirer* summed up Uber drivers’ predicament as follows:

Instead of the freedom and flexibility the industry pitched when it arrived on the scene in Philadelphia in late 2014, [Uber and Lyft drivers] speak of pay cuts, dwindling incentives, and the looming threat of getting kicked off the platform with barely any notice or reason. Contract changes come arbitrarily, from many drivers’ perspectives, and the end result often seems to be more work for less money, even as Uber and Lyft’s revenue from ridesharing in Philadelphia has steadily grown from \$320 million in 2017 to \$456 million in 2018, according to the Philadelphia Parking Authority. These drivers feel powerless, serving at the whims of a company they say they can barely contact.²¹

Because of their chronic income instability, Uber drivers are exactly the types of workers most in need of unemployment compensation.

¹⁹ See, e.g., Robert Channick, *Too Many Uber Drivers? Chicago Cabbies and Ride-Share Workers Join Forces, Urge Cap on Uber and Lyft Cars*, CHICAGO TRIBUNE, OCT. 31, 2018, <https://www.chicagotribune.com/business/ct-biz-chicago-taxi-ride-share-drivers-limit-20181030-story.html>.

²⁰ *Making Unemployment Work for On-Demand Drivers*, Nat’l Unemployment Law Project, Jan. 2017, <https://s27147.pcdn.co/wp-content/uploads/Making-Unemployment-Insurance-Work-for-On-Demand-Workers.pdf>.

²¹ Laughlin, *supra* note 13.

II. Online platform workers' ineligibility for unemployment compensation benefits has profoundly negative consequences for them and the Pennsylvania economy as a whole.

a. The wholesale exclusion of online platform workers from unemployment compensation means that a growing sector of the workforce will not be able to access these crucial benefits.

The wholesale exclusion by fiat of online platform workers from unemployment compensation benefits due to their “independent contractor” imposed label means that a growing sector of the workforce will not be able to access these crucial benefits. If the companies’ practices are not checked, during the next recession, online platform workers in Pennsylvania will lose out on an estimated \$308,000 per week in benefits,²² a loss of income that will cause them great financial instability and will reverberate throughout the economy.

This wholesale exclusion may also negatively impact the unemployment compensation eligibility of former online platform workers who have since found new employment. If a worker drives full time with Uber for a year and then takes another position that discharges her after several months, for example, she will

²² During peak unemployment in Pennsylvania in 2011, 85,711 people were unemployed. Philadelphia Works, *Fast Facts About Philadelphia's Labor Market in September 2018*, Dec. 12, 2018, <https://www.philaworks.org/fast-facts-philadelphias-labor-market-september-2018/>. The current average weekly benefit is \$359.58. U.S. Dep't of Labor, Unemployment Insurance Data, <https://oui.doleta.gov/unemploy/DataDashboard.asp> (last viewed May 10, 2019). Assuming a similar number will be unemployed in a future downturn and that the proportion of unemployed workers will mirror the proportion of workers currently employed in electronically mediated work (one percent), 857 times \$359.58 equals \$308,160.06 per week in lost benefits.

have difficulty establishing the requisite base period earnings to qualify for compensation if working for Uber is not counted as employment for purposes of unemployment compensation

Left unchecked, the number of ineligible unemployment compensation claimants—and the amount of lost unemployment compensation benefits—are likely to grow as more companies are emboldened to follow Uber’s lead and acquire labor through online platforms in order to classify their workers as independent contractors and avoid paying into social insurance programs. In fact, online platform companies are lobbying state legislatures across the country to pass legislation that would classify all workers who obtain work through online platforms as independent contractors regardless of the realities of their relationship with the platform company, such as the level of control that the company exerts over the work and whether these workers are actually in business for themselves.²³ This is creating a race to the bottom on worker protections and benefits; brick-and-mortar companies will face pressure to move work requests to online platforms in order to convert their employees to independent contractors and compete on a level playing field with online platform companies.²⁴

²³ Pinto & Smith, *supra* note 2, at 9-10.

²⁴ *Id.* at 12.

b. Unemployment compensation provide enormous benefits to online platform workers.

Unemployment compensation provides enormous financial and social benefits to recipients and their families—benefits that Uber and other online platform workers may lose out on because their companies characterize them as independent contractors.

Unemployment compensation has a hugely positive financial impact on recipients. In 2009, it kept more than 5 million Americans out of poverty and saved more than 2 million jobs by boosting the economy.²⁵ And, between 2008 and 2012, it prevented an estimated 1.4 million foreclosures.²⁶ Unemployment compensation benefits also help a recipient’s entire family. During the last recession, while 23.9 million workers received extended unemployment benefits, 28.5 million adults in households with a recipient benefited as well as 16.9 million children.²⁷

²⁵ Rachel West, Indivar Dutta-Gupta, Kali Grant, Melissa Boteach, Claire McKenna & Judy Conti, *Strengthening Unemployment Protections in America*, Center for Amer. Progress, Nat’l Employment Law Project & Georgetown Law Center on Poverty and Inequality, June 2016, at 1, https://cdn.americanprogress.org/wp-content/uploads/2016/05/31134245/UI_JSAreport.pdf.

²⁶ *Id.*

²⁷ *The Economic Benefits of Extending Unemployment Insurance*, Council of Econ. Advisors & Dept’ of Labor, Dec. 2013, at 10, <https://U/obamawhitehouse.archives.gov/sites/default/files/docs/uireport-2013-12-4.pdf>

Unemployment compensation also helps recipients find the right job. Research shows that workers who are afforded the opportunity to search for jobs for longer periods find jobs that are a better match and stay employed for longer periods subsequently.²⁸ Unemployment compensation helps individuals absorb the cost of a longer and more exhaustive work search period.

Collecting unemployment compensation also has social benefits for recipients. It keeps recipients connected to the labor market through workforce development opportunities and work sharing information, as well as the job search requirements that ensure that recipients continually seek out new opportunities. The unemployment compensation system connects recipients with local employers and job openings, screens recipients to assess their skills and needs, and provides work-search tools, counseling, and training opportunities.²⁹ Uber drivers and other online platform workers may lose out on these critical resources because they are called “independent contractors” by the companies that hire them.

c. Online platform workers’ inability to access unemployment compensation hurts the economy.

Online platform workers’ wholesale exclusion from unemployment compensation will result in a loss of economic stimulus. Mark Zandi of Moody

²⁸ Kristin L. Terris, *Job Matching: The Effects of Jobs Search on Match Quality*, Dep’t of Econ., Georgetown Univ., Nov. 2004, at 1-2, http://ase.tufts.edu/economics/papers/Terris_Tufts.pdf

²⁹ West *et al.*, *supra* note 25, at 12-14.

Analytics estimates that extending unemployment compensation benefits during the 2008 recession had a 1.63 multiplier stimulus effect, such that the \$308,000 per week in lost benefits for Pennsylvania online platform workers results in \$502,040 per week in lost economic stimulus for Pennsylvania.³⁰

This loss of economic stimulus can increase the length and severity of the next recession. Since the unemployment compensation system was enacted, recoveries from recessions have become lengthier, meaning that unemployment remains high long after economic growth resumes.³¹ The exclusion of online platform workers from unemployment compensation, coupled with increasingly lengthy recessions, undermines the unemployment compensation system's capacity to serve as a macroeconomic stabilizer during recessions.

CONCLUSION

Uber and similarly-situated online platform companies label their workers as “independent contractors” in order to avoid the benefits and protections—including unemployment compensation eligibility—that attach to employees. Yet, despite being labeled as “independent contractors”, Uber drivers are not in business for themselves. Uber sets most of the material terms of their work, including their

³⁰ Mark Zandi, *The Economic Impact of the American Recovery and Reinvestment Act*, Moody's Economy.com, Jan. 21, 2009, at 9, https://www.economy.com/mark-zandi/documents/Economic_Stimulus_House_Plan_012109.pdf.

³¹ West *et al.*, *supra* note 25, at 3.

fluctuating and opaque pay rate, and maintains the power to terminate drivers, limit the amount of work they can obtain, or change the terms of their employment in ways that would constitute “good cause” for leaving the Uber driving business. As such, Uber drivers should be treated no differently than other employees and Uber should be treated no differently than any other employer for purposes of unemployment compensation eligibility.

Moreover, the wholesale exclusion of online platform workers from unemployment compensation has profoundly negative consequences for them, their families, and the economy as a whole. The exclusion puts an additional financial burden on this already poorly-paid and precarious workforce and denies them access to critical social benefits that could help them obtain a new job. The lost unemployment compensation benefits for this workforce also means a loss of economic stimulus, which could increase the severity of the next recession.

Respectfully submitted,

John Stember
Mon Valley Unemployed Committee
Counsel for Amici Curiae

Laura Padin
National Employment Law Project
Co-Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: May 13, 2019

/s/ John Stember
John Stember