

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250**

PETITIONER:

Employer Account No. – **3288327**

RASIER LLC
1455 MARKET ST FL 4
SAN FRANCISCO CA 94103-1355

**PROTEST OF LIABILITY
DOCKET NO. 0026 2825 90-02 Ewers
0026 2834 68-02 McGillis
0026 2850 33-02 Hutton (PP)**

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

FINAL ORDER

This case, now before the Executive Director of the Florida Department of Economic Opportunity, presents the question of whether someone providing transportation services through the popular Uber software application is an independent contractor or an employee. If a driver is an independent contractor, then he is not entitled to unemployment insurance. If a driver is an employee, then he is entitled to unemployment insurance, assuming other requirements are met. The Department finds that the drivers at issue here—providers of transportation services through the Uber software application—are independent contractors, not employees, and are therefore not entitled to file for unemployment insurance in Florida.

Uber is a technology platform that, for a fee, connects transportation providers with customers seeking transportation. The agreement between drivers and Uber specifies that the relationship is one of independent contractor, and the actual course of dealing confirms that characterization. Drivers have significant control over the details of their work. Drivers use their own vehicles and choose when, if ever, to provide services through Uber’s software. Drivers

decide where to work. Drivers decide which customers to serve. Drivers have control over many details of the customer experience. Drivers may provide services through, or work for, competing platforms or other companies when not using the Uber application. On these facts, it appears that Uber operates not as an employer, but as a middleman or broker for transportation services.

Two other jurisdictions—California and Oregon—have in recent months come to the opposite conclusion, finding that drivers using the Uber software are employees under the law of those states. These opinions are not persuasive, as they largely ignore the contract, and misconstrue the actual course of dealings, between the parties. To a significant extent, these rulings appear to rest on the fact that Uber could not be in business without drivers. But the same is true of all middlemen. Uber is no more an employer to drivers than is an art gallery to artists. Just as technological advances have amplified the reach of social networks through applications like Facebook and Twitter, such advances have also amplified the reach of commercial relationships through applications like Uber, eBay, StubHub, Airbnb, and Amazon Marketplace. None of these commercial platforms would be in business without the goods and service providers who use the platforms, but that does not mean the providers are automatically employees of the platform company. Modern technology is enabling a rapidly evolving and expanding network of willing buyers and sellers to open once-restricted markets and efficiently allocate resources. These platforms are helping people pursue what has always been an important part of the American dream: to be one's own boss. The technology is novel and the economic transformation is important, but the law is straightforward. The transportation providers at issue here were independent contractors, not employees, of Uber.

BACKGROUND

Uber Technologies, Inc. (Uber) develops and markets transportation network software. The Petitioner, Raiser LLC, is a wholly owned subsidiary of Uber and holds a license to administer the software in Florida.¹ Uber’s software consists of two applications that are generally accessed on smartphones. The “User App” is used by people seeking transportation services (Passengers). The “Driver App” is used by people who are willing to provide transportation services for a fee (Drivers). Mr. Darrin McGillis and Ms. Melissa Ewers each at various times utilized Uber’s Driver App and provided transportation services to Passengers. Subsequently, for different reasons and at different times, Uber revoked access by Mr. McGillis and Ms. Ewers to the Driver App.²

In Florida, unemployment insurance is known as Reemployment Assistance. Mr. McGillis filed a claim for Reemployment Assistance on April 6, 2015. Ms. Ewers filed a claim for Reemployment Assistance effective April 19, 2015. The threshold issue raised by these claims is whether services performed through the Uber Driver App by Mr. McGillis and Ms. Ewers constitute employment pursuant to sections 443.036(19), 443.036(21), and 443.1216, Florida Statutes.

After investigation, on May 13, 2015, the Department of Revenue, Respondent here, issued a determination finding Mr. McGillis to be an employee of the Petitioner. Petitioner timely filed a protest on June 1, 2015. On May 20, 2015, the Department of Revenue issued a determination finding Ms. Ewers to be an employee of the Petitioner. Petitioner timely filed a protest on June 3, 2015.

¹ For simplicity, Raiser is referred to in this Final Order by the better-known name, Uber.

² Mr. Michael Hutton was originally a party to this matter, but at the hearing with the Special Deputy, Mr. Hutton’s case was severed and continued so that he could hire counsel.

After due notice to the parties, the DEO Special Deputy held a telephonic hearing on August 17, 2015, for the consolidated cases. The Petitioner's Florida General Manager, Mr. Matthew Gore, appeared and gave testimony for the Petitioner. A Department of Revenue Tax Auditor Supervisor, Ms. Myra Taylor, appeared and gave testimony for the Respondent. Mr. McGillis appeared and gave testimony. Ms. Ewers initially appeared but opted not to provide testimony or participate for the majority of the hearing.³ After the hearing, Petitioner and Mr. McGillis submitted proposed findings of fact and conclusions of law.

After a thorough review of the record and all evidence before him, the Special Deputy issued a Recommended Order on September 30, 2015, recommending reversal of the determinations in both the McGillis case (No. 0026 2834 68-02) and the Ewers case (No. 0026 2825 90-02). The Special Deputy recommended that both Mr. McGillis and Ms. Ewers should be classified as independent contractors, not employees. Mr. McGillis filed Exceptions to the Recommended Order on October 14, 2015. The Petitioner filed Counter Exceptions on October 26, 2015. Mr. McGillis filed a Brief in Opposition to Counter Exceptions on October 31, 2015.

STANDARD OF REVIEW

Pursuant to the Florida Administrative Procedure Act, an agency may not reject or modify the findings of fact in a recommended order unless the agency first determines from a review of the entire record, and states with particularity in its final order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were

³ Ms. Ewers was fully advised of her right to participate in the hearing. Ms. Ewers stated to the Special Deputy that rather than participate in the hearing it "would be best[] if you could just make a decision and leave it at that." Tr. 49. The Special Deputy explained to her that "the ultimate outcome of the case, based on other evidence but not from you ... might be that I would wind up ... recommending that you be considered an employee of Raiser LLC or Uber, or it might be that I recommend that you be considered an independent contractor, given the evidence." Ms. Ewers stated that she understood this and "[w]hatever you choose is fine." Tr. 49-50.

based did not comply with essential requirements of law. *See* §120.57(1)(l), Fla. Stat. Absent a demonstration that the underlying administrative proceeding departed from essential requirements of law, findings cannot be rejected unless there is no competent substantial evidence from which the findings could reasonably be inferred. *See Prysi v. Dept. of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002). In determining whether the record supports challenged findings of fact in accord with this standard, the agency may not reweigh the evidence or judge the credibility of witnesses, both tasks being within the sole province of the finder of fact. *See Heifetz v. Dept. of Bus. Regulation*, 475 So. 2d 1277, 1281-1283 (Fla. 1st DCA 1985). If the evidence presented in an administrative hearing supports two inconsistent findings, it is the fact-finder's role to decide the issue one way or the other. *See id.* at 1281.

The Administrative Procedure Act also specifies the manner in which the agency is to address conclusions of law in a recommended order. In its final order, an agency may reject or modify the conclusions of law over which it has substantive jurisdiction. When rejecting or modifying a conclusion of law, the agency must state with particularity its reasons for rejecting or modifying that conclusion of law and must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. *See* §120.57(1)(l), Fla. Stat.; *DeWitt v. Sch. Bd. of Sarasota County*, 799 So. 2d 322 (Fla. 2nd DCA 2001).

The undersigned has carefully reviewed the record of this case to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the essential requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

THE PROCEEDINGS

The Special Deputy conducted a telephonic hearing on August 17, 2015. After careful review, the undersigned finds that the proceedings conducted by the Special Deputy complied with the essential requirements of the law.

FACTUAL FINDINGS

The undersigned carefully reviewed the record, the factual findings made by the Special Deputy in the Recommended Order, and the Exceptions, Counter-Exceptions, and Brief of Mr. McGillis. There is competent substantial evidence in the record to support each finding of fact in the Recommended Order. The Findings of Fact set forth in the Recommended Order are hereby adopted and incorporated as if fully set forth herein.⁴

LEGAL ANALYSIS

For the reasons that follow, the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts.

A. Florida Law

As stated in the Recommended Order, for employment to be subject to the Reemployment Assistance laws in chapter 443, Florida Statutes, the work must be performed by "[a]n individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is an employee." § 443.1216(1)(a)2., Fla. Stat. Accordingly, "the Agency [is] limited to applying only Florida common law in determining the nature of the employment relationship." *Brayshaw v. Agency for Workforce Innovation*, 58 So. 3d 301, 302 (Fla. 1st DCA 2011).

⁴ References herein to record citations or facts not directly mentioned in the Recommended Order's findings do not reject, modify, substitute, or make new findings, but demonstrate that the Findings of Fact have adequate support in the record.

The Florida Supreme Court summarized these “usual common-law rules” in *Keith v. News & Sun Sentinel*, 667 So. 2d 167 (Fla. 1995).⁵ The Court held that, to determine employment status, “courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties’ actual practice, demonstrate that it is not a valid indicator of status.” *Id.* at 171. If “the actual practice of the parties[] belie[s] the creation of the status agreed to by the parties, [then] the actual practice and relationship of the parties should control.” *Id.* A court must “place special emphasis on the extent of the ‘free agency’ ... in the means and method of performing ... duties.” *Id.* at 171-72.

The Court held that “this analysis is consistent with the factors set out in the Restatement” of Law. *Id.* at 172. Those factors are:

- (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;
- (e) whether the employee 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 a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Id. at 169 n.1.⁶ The factors are not to be examined and tallied for each side, like runs in a baseball game, and the Court cautioned that the Restatement analysis should not “routinely be used to support any resolution of the issue by the factfinder simply because each side of the dispute has some factors in its favor.” *Keith*, 667 So. 2d at 172. Rather, priority should be given to the parties’

⁵ The *Keith* Court relied on and reaffirmed *Florida Publishing Company v. Lourcey*, 193 So. 847 (Fla. 1940), and *Miami Herald Publishing Company v. Kendall*, 88 So. 2d 276 (Fla. 1956).

⁶ As the Recommended Order notes, Florida courts have also considered other factors in determining the status of employment. *See* Recommended Order ¶ 49.

agreement and whether there was “independent control of the manner and method” of work. *Id.* at 172. *See also id.* at 171-72 (court “should place special emphasis on the extent of the ‘free-agency’ ... in the means and method of performing ... duties”). In other words, of all the factors, “the right of control as to the mode of doing work is the principal consideration.” *VIP Tours of Orlando v. Dep’t of Labor & Employment Sec.*, 449 So. 2d 1307, 1309 (Fla. 5th DCA 1984). *See also 4139 Mgmt., Inc. v. Dep’t of Labor & Employment*, 763 So. 2d 514, 517 (Fla. 5th DCA 2000) (“The first element of the ... test, control, is a primary indicator of status.”).

1. *The Agreement Is Straightforward and Creates an Independent Contractor Relationship.*

In the instant case, Mr. McGillis and Ms. Ewers—as a condition of accessing the Driver App—agreed to a seventeen-page “Software Sublicense & Online Service Agreement.” Recommended Order (“RO”) ¶ 11. The very first line of the agreement provides that the Driver is “an independent provider of rideshare or P2P transportation services.” Petitioner Ex. 1; Mr. McGillis Ex. 10. *See also id.* at 1 (“You are an independent transportation provider...”). More specifically, under a section entitled “Relationship of the Parties,” the Agreement states:

This agreement is between two co-equal, independent business enterprises that are separately owned and operated. The Parties intend this Agreement to create the relationship of principal and independent contractor and not that of employer and employee. The Parties are not employees, agents, joint venturers or partners of each other for any purpose. As an independent contractor, you recognize that you are not entitled to unemployment benefits following termination of the Parties’ relationship.

Id. at 9.

The Agreement could not be more straightforward: Mr. McGillis and Ms. Ewers entered into independent-contractor relationships with Uber. Contracts are the bedrock of the American marketplace, and contract language matters in legal disputes. Although some jurisdictions may breeze past contract language in determining employment status, in Florida we “initially look to

the agreement between the parties ... and honor that agreement.” *Keith*, 667 So. 2d at 171. Here, the agreement to be honored created an independent-contractor relationship in no uncertain terms, not an employer-employee relationship.

2. *The Actual Practice of the Parties Does not Belie the Agreement.*

As stated in *Keith*, it is possible that “the actual practice of the parties” can “belie the creation of the status agreed to by the parties,” *id.*, but in this case there is no such indication.

(a) Extent of control over the details of the work

While Uber requires some basic conformity (a car less than ten years old) from users of the Driver App, the Driver maintains autonomy over the most significant details of the engagement. Drivers decide when to work and may go long spans without providing services. RO ¶ 20. When choosing Passengers, Drivers decide whether to use Uber’s Driver App, some other service, or their own marketing. RO ¶ 4.⁷ Drivers decide what car to use and how to present it. RO ¶¶ 5, 8, 37. Drivers need not display Uber signage in their vehicles. RO ¶ 11; Petitioner Ex. 1 and Mr. McGillis Ex. 10, at 3. Drivers are not selected for jobs based on anything other than distance—not based on reputation, equity with other Drivers, length of association with Uber, or any other factor that employers would commonly use in assigning employee work. RO ¶ 3. Drivers need not follow Uber’s recommendations on how to receive high ratings from Passengers, on providing water to Passengers, or even on what to wear while on the job. RO ¶ 9.⁸ Drivers have complete

⁷ Mr. McGillis, for example, testified that he provided services through Uber’s competitor, Lyft, during the same time period he provided services through Uber. Tr. 289, 291-92.

⁸ Uber’s minimal and one-time orientation—short videos that Uber does not confirm are actually watched, RO ¶ 9—does not indicate substantial control. *See 4139 Mgmt.*, 763 So. 2d at 517 (“show[ing] ... what was expected ... is not sufficient exercise and control over the details of the work ... [but] is merely an orientation which would be expected in any job”); *Cosmo Pers. Agency of Fort Lauderdale, Inc. v. Dep’t of Labor & Employment Sec.*, 407 So. 2d 249, 250 (Fla. 4th DCA 1981) (employment counselors required to take “two weeks’ training without pay” still deemed independent contractors).

autonomy over whether to accept a request for service; Uber has no ability to demand that particular Passengers be serviced by anyone using the Driver App. RO ¶¶ 3, 13, 21.⁹ Drivers decide the speed and the route. RO ¶¶ 17, 30, 31.¹⁰ Drivers independently rate Passengers. RO ¶ 22. Drivers have no direct supervisors at Uber and Uber does not directly evaluate performance; rather, Passengers independently rate Drivers. RO ¶ 21-24; Tr. 146. Drivers are not contractually prohibited from taking cash tips from Passengers without reporting those tips to Uber. RO ¶ 15.¹¹

As stated in the Recommended Order, “Drivers decide when, where, and how to accept and perform Requests through their own entrepreneurial decision making process.... [W]here the central issue is the act of being available to accept Requests, the control over when and where

⁹ Mr. McGillis testified that he did not accept all requests. Tr. 268; *see also* McGillis Exceptions to Recommended Order at 14.

¹⁰ If a Passenger complains that a route was indirect or problematic, Uber might provide a partial refund to the Passenger and withhold that amount from a Driver, but even in that circumstance a Driver can dispute the withholding—as Mr. McGillis successfully did. RO ¶¶ 30-31.

¹¹ Uber does control the price of each trip through the software’s algorithm, and the Driver’s percentages are set by the Agreement. RO ¶¶ 25, 27. These facts, however, are not enough to vitiate the independent-contractor relationship. *Cf. La Grande v. B&L Sers., Inc.*, 432 So. 2d 1364, 1365 (1st DCA 1983) (finding a taxi cab driver to be an independent contractor even though driver profits affected by rates set by the dispatch company and subject to change at company’s discretion); RO ¶ 58 (citing cases). Indeed, in any independent-contractor relationship, there is a set price for services, negotiated by the parties. Here, Uber offers a price and Drivers are free to accept or reject it. Because fare prices vary with demand, and Drivers can choose when to work, where to work, and which requests to take, Drivers retain significant control over their earnings. *See 4139 Mgmt.*, 763 So. 2d at 518 (maids paid “on a per unit basis” and “could decline the ... request to come in to clean if they so chose”).

Uber also requires that Drivers meet certain minimal qualifications—many required by law—such as having a valid driver’s license, passing a background check, and maintaining insurance. RO ¶ 8. Requiring compliance with these basic conditions is not indicative of a substantial level of control, but is simply what is necessary to do the work at issue. *See La Grande*, 432 So. 2d at 1366 (“Governmental regulations do not constitute control or supervision by the putative employer.”); *4139 Mgmt.*, 763 So. 2d at 517 (“An employer does not give up the right to require a certain standard of performance just because the worker is an independent contractor.”); *VIP Tours of Orlando*, 449 So. 2d at 1308 (independent contractor tour guides “paid on a per-tour basis”).

availability is engaged and released is highly indicative of the type of relationship. This control is entirely in the Driver’s hands.” RO ¶ 56. In Mr. McGillis’s own words, he was in charge of his own process of “trial and error” and “had to spend a lot of time not making money to learn where to make the money.” Tr. 220-24.

As a matter of common sense, it is hard to imagine many employers who would grant this level of autonomy to employees—permitting work whenever the employee has a whim to work, demanding no particular work be done at all even if customers will go unserved, permitting just about any manner of customer interaction, permitting drivers to offer their own unfettered assessments of customers, engaging in no direct supervision, requiring only the most minimal conformity in the basic instrumentality of the job (the car), and permitting work for direct competitors.

As a matter of Florida law, Uber’s minimal level of control points decidedly in favor of an independent-contractor status. The “extent of the ‘free agency’ ... in the means and method of performing ... duties” is significant. *Keith*, 667 So. 2d at 171-72. Even if other factors pointed in a different direction, this “right of control ... is the principal consideration,” *VIP Tours of Orlando*, 449 So. 2d at 1309, and thus the most important aspect of the actual practice of the parties confirms the parties’ agreement as to independent-contractor status.

(b) Who supplies the instrumentalities, tools, and the place of the work

Each party provides instrumentalities necessary for the work at issue. Uber provides the software platform. RO ¶¶ 1-2. Drivers provide their own vehicles, and are free to change vehicles at their own discretion. RO ¶¶ 5, 37. Mr. McGillis did just that during his relationship with Uber, believing that purchasing a new SUV would result in better business outcomes for him. RO ¶¶ 37-38. The other instrumentality necessary to use the Driver App is a smartphone. Although Uber

will rent a smartphone to Drivers, “[m]ost drivers install the software on their own phones.” RO ¶ 10.¹²

As for place of work, Drivers are free to choose where they work, including only in areas that offer the best pricing. RO ¶¶ 26, 39. Uber’s only ability to shift Drivers to a location is to change the pricing; it has no ability to demand that Drivers work a specific location. RO ¶ 3, 33.

On balance, this factor points toward independent-contractor status. It is always true that each of the two parties will provide *something* that permits the work to be done—or else there would be no basis for a commercial relationship. A house painter is not an employee of a home owner simply because the home owner provides the walls to be painted.¹³ Here, the Driver provides the main instrumentality for transportation—the car—and chooses the place it will be used. This is indicative, and at least not contrary to, independent-contractor status. *See Jean M. Light Interviewing Servs., Inc. v. Dep’t of Commerce*, 254 So. 2d 411, 412 (Fla. 3d DCA 1971) (independent-contractor status where market research company provides customer leads and interviewer provides own telephone and space necessary for interview).

(c) The method of payment, whether by time or job

“The Agreement provides that each accepted Request is considered a separate contractual engagement.” RO ¶ 13. Drivers receive payment for each ride provided. RO ¶ 27. Drivers are not paid for time they spend waiting for requests, investigating possible markets or routes, preparing their vehicles, or for any task other than fulfilling a transportation request. RO ¶¶ 27,

¹² In this case, Mr. McGillis used his own smartphone. Tr. 204.

¹³ Mr. McGillis suggests that relative investment is what matters under this factor. Florida caselaw does not support this assertion, and the assertion makes little sense. If relative investment is dispositive, then companies will rarely have independent contractors because they will always have larger investments in their business relative to individual contractors. Indeed, on this theory, a home owner could not hire an independent-contractor painter because the home costs more than the brushes and ladders.

39. Drivers are not paid any type of fringe benefits. *Id.* These facts are indicative of an independent-contractor status. *La Grande*, 432 So. 2d at 1367; *VIP Tours of Orlando*, 449 So. 2d at 1308; *4139 Mgmt.*, 763 So. 2d at 518.¹⁴

(d) The length of time for which the person is engaged

The Agreement specifies that “each accepted Request is a separate contractual engagement,” RO ¶ 13. Under that view, the length of time for each engagement is very short. And it is difficult to consider any other length of time, because “Drivers have no obligation ... to accept any Request,” RO ¶ 13, “Drivers are free to use the Driver Application whenever they desire, and as little or often as they desire,” with up to three months of inactivity, RO ¶ 20,¹⁵ and Drivers are paid only for actual time spent transporting Passengers, RO ¶ 27. *See Jean M. Light Interviewing Servs.*, 254 So. 2d at 413 (independent contractor had right to accept or reject assignments, demonstrating “no continuity in the relationship”); *La Grande*, 432 So. 2d at 1365.

(e) Whether the principal is in business; whether the work is part of the regular business of the employer; and whether the employed is engaged in a distinct occupation

Uber is most certainly in business, and according to the Agreement it “is engaged in the business of providing lead generation” for transportation services and “does not provide transportation services.” Petitioner Ex. 1 and Mr. McGillis Ex. 10, at 1; RO ¶¶ 1-3, 6, 11, 13. Uber does not own a fleet of vehicles and without users of the Driver App, would not be able to

¹⁴ The record contains evidence indicating that Drivers can receive bonuses for reaching certain milestones and can get guaranteed pay for accepting riders during surge pricing. RO ¶ 33. But these are exceptions to the general pay structure and without more do not transform this relationship into an employer-employee status. *See, e.g., Sarasota Chamber of Commerce v. Dep’t of Labor and Employment*, 463 So. 2d at 461, 462 (Fla. 2d DCA 1985) (bonus system for consecutive sales did not indicate employment relationship).

¹⁵ Even after deactivation due to three months of inactivity, Drivers can simply reactivate the account upon request. Tr. 137.

provide transportation services on its own. RO ¶ 5. Essentially, Uber is a middleman or broker for transportation services. This is related to and dependent upon provision of transportation services, but it is not the same thing. A broker is a distinct and common profession in the American marketplace. *See Black's Law Dictionary* 894 (5th ed. 1979) ("Middleman: An agent between two parties, an intermediary who performs the office of a broker or factor between seller and buyer...."); Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/middleman> ("Middleman: a person who helps two people or groups to deal with and communicate with each other when they are not able or willing to do it themselves.").

It could be argued that these factors are somewhat circular because they turn on whether the work of the Drivers is categorized as within Uber's employ. Indeed, it could be argued that, without users of the Driver App, Uber has no independent service of value. But that is the nature of the broker or middleman profession. Without a marketplace of sellers and buyers, the broker has no business. That economic reality does not transform the broker into the seller's employer, any more than it transforms the broker into the buyer's employer. *See La Grande*, 432 So. 2d 1364; *see also Jean M. Light Interviewing Servs.*, 254 So. 2d 411.

- (f) 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

In Florida, at least one court has found that independent contractors provide transportation services. *La Grande*, 432 So. 2d 1364. It can be assumed that some taxi companies prefer to have direct employees. Accordingly, in this case, this factor is neutral and the other factors are far more important. At the very least, the fact that some transportation services are provided by independent contractors in Florida suggests that the Agreement between the parties—the most important issue—is accepted in this field.

(g) The skill required in the particular occupation

To be a Driver for Uber, only basic driving skills are needed. But, as just noted, in Florida, transportation providers trading in this basic skill can still be independent contractors, *see La Grande*, 432 So. 2d 1364, and other occupations requiring ordinary skills can also engage as independent contractors, *see, e.g., 4139 Management*, 763 So. 2d at 516 (housekeepers); *Delco Industries, Inc. v. Dep’t of Labor and Employment Sec.*, 519 So. 2d 1109, 1110 (Fla. 4th DCA 1988) (sales requiring “no great amount of talent or study”); *Sarasota Chamber of Commerce*, 463 So. 2d at 461 (membership solicitation). This factor does not belie independent-contractor status in this case.

(h) Whether the parties believe they are creating the relationship of master and servant

The litigation position of the parties is obvious: Uber asserts it enters into an independent-contractor relationship with Drivers, and Mr. McGillis asserts he was an employee. During the actual relationship, however, record evidence shows that, at the very least, Mr. McGillis accepted independent-contractor status. He twice accepted the terms of the Agreement that plainly stated this relationship, RO ¶¶ 11, 12, 44, and for federal income-tax purposes he represented his earnings from Uber as those of an independent contractor, RO ¶ 29; Tr. 241, 247.¹⁶ The parties’ actual practice points in favor of an independent-contractor status. *See 4139 Mgmt.*, 763 So. 2d at 518.

Most, if not all, of the Restatement factors support, rather than belie, the independent-contractor status agreed to by the parties. The most important factor—control over the details of

¹⁶ Mr. McGillis was already familiar with IRS Form 1099. He filed his earnings as a notary using this form because, according to his testimony, when he works as a notary “I’m acting as self-employed.” RO ¶ 40; Tr. 293.

the work—points decidedly in favor of independent-contractor status. The Recommended Order properly concluded that under Florida law Mr. McGillis and Ms. Ewers were independent contractors.

3. *Prior Precedent Supports this Decision.*

The Department’s conclusion here is firmly supported by a case cited in the Recommended Order, *La Grande*, 432 So. 2d 1364. In *La Grande*, the court determined that a taxicab driver was an independent contractor and not employee of a taxicab company. The court explained that “[t]he relationship of employer and employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and to the method and details by which the desired result is to be accomplished, is the feature that distinguishes an independent contractor from a servant.” *Id.* at 1367-68. The court found that “there was not a degree of control exercised by [the taxicab company] as would pierce the independent contractor status contemplated by the parties in their taxicab service agreement.” *Id.* at 1368.

The factual similarities between *La Grande* and the instant case are striking. As here, the contract “disclaim[ed] any relationship of employer/employee ... and characterized [the] relationship as ‘that of seller/buyer, the buyer being an independent person engaged in the business of driving taxicabs.’” *Id.* at 1366. As here, the driver “was not required to respond to the dispatcher’s calls and was free to operate independently of the dispatcher.” *Id.* at 1367. As here, “drivers operating under this kind of agreement determined for themselves the days they would work as well as the hours of the day.” *Id.* As here, driver profits were affected by a rate schedule provided by the company and subject to change at the company’s discretion. *Id.* at 1366. As here,

the company “provided ... no fringe benefits of the kind usually found in an employment relationship.” *Id.* at 1367. Indeed, the main factual difference between *La Grande* and this case (other than the technology platform), is that the company in *La Grande* had *greater* control over the drivers than Uber has over its drivers: there the company owned all the vehicles, maintained them, and required that they be stored in its facility each night. *Id.* at 1366. If the actual course of dealing of the parties in *La Grande* was sufficient to maintain independent-contractor status, there is no question that the course of dealing here yields the same legal result.¹⁷

B. Recent Decisions Outside of Florida

Although not controlling under Florida law, it is worth commenting on the analysis of two jurisdictions—California and Oregon—that have found the Uber-driver relationship to be one of employer-employee. These analyses are not persuasive, not only because the law of those jurisdictions might differ, but because they seem to misconstrue the nature of the Uber-driver relationship.

The Labor Commissioner of California, earlier this year, held that a driver using Uber’s application was an employee under California law. *See Berwick v. Uber Tech., Inc.*, Case No. 11-

¹⁷ Other precedent is also supportive of the conclusion here. *See, e.g., Sarasota Chamber of Commerce*, 463 So. 2d at 461-63 (salespersons deemed independent contractors where “there is no meaningful supervision of the ... work,” “[t]hey set their own schedules and contact ... prospects as they please,” the contracting company provided only “examples” of how to perform the work but did not require adherence, and the salespersons could “dress in whatever fashion they desire”); *Delco Indus.*, 519 So. 2d at 1110-11 (salespersons paid on a weekly basis were independent contractors where they “could work as many or as few hours as they wish and could come and go at will” and could work for competitors).

In *Bowdoin v. Anchor Cab*, 643 So. 2d 42 (Fla. 1st DCA 1994), the court held that taxi drivers were employees of the taxi company. In that case, however, the company not only set maximum fares but also prohibited drivers from working for competitors or soliciting fares from competing dispatch companies. That combination deprived drivers of the free agency necessary for an independent contractor. Here, however, Drivers are at all times free to solicit fares from any other source they choose. Additionally, in *Bowdoin*, the company supplied all of the instrumentalities of the work, unlike the situation here.

46739, Order of the Labor Commissioner (June 16, 2015). The California Labor Commissioner relied on a California appellate case in which a taxicab driver was found to be an employee of a taxicab company. *See id.* at 7 (citing *Yellow Cab Coop. v. Workers Comp. Appeals Bd.*, 226 Cal. App. 3d 1288 (1991)). *Berwick* stated that, under California law, “the overriding factor is that the persons performing the work are not engaged in occupations or businesses distinct from that of” the company. *Id.*¹⁸ The California Labor Commissioner thus reasoned: “[Uber is] in business to provide transportation services to passengers. Plaintiff did the actual transporting of those passengers. Without drivers such as Plaintiff, Defendants’ business would not exist.” *Berwick* Order at 8.

It seems to this Department, also with jurisdiction over a state’s labor law, that overreliance on that single factor—line of work—is not consistent with Florida law, which looks first to the agreement and honors that agreement if the course of dealing does not belie it. California’s position also seems inconsistent with the Restatement’s view that multiple factors must be considered and that if any single factor is “overriding” it is “the right of control as to the mode of doing the work.” *VIP Tours of Orlando*, 449 So. 2d at 1309.

Moreover, the reasoning of the California Labor Commissioner—“[Uber is] in business to provide transportation services to passengers ... [and] [w]ithout drivers such as Plaintiff, Defendants’ business would not exist”—proves far too much.¹⁹ For at least hundreds of years, people have made money by bringing willing buyers and sellers together. They are called

¹⁸ The *Berwick* order references *Yellow Cab* as the source of this quotation, but the language does not appear in *Yellow Cab*. The language appears to come from *JKH Enterprises, Inc. v. Dep’t of Indus. Relations*, 142 Cal. App. 4th 1046, 1054 (2006), which itself erroneously attributes this language to *Yellow Cab*.

¹⁹ As noted above, it is equally true that without passengers Uber’s business would not exist. And, like drivers, passengers must agree to certain restrictions that indicate some level of control by Uber. Surely no one would suggest passengers are employees of Uber.

middlemen or brokers. Sometimes middlemen even provide specific platforms for that service, such as a physical location. Everyday examples include flea markets, art galleries, street fairs, food truck festivals, and gun shows. The vendors at these events use the common platform because it attracts customers, and typically they must agree to some standard conditions (e.g., size of a booth, operating hours, noise restrictions, clean-up routine), but no one thinks of the vendors as employees of the platform provider. Technological advances like the Internet and smartphones have provided new platforms for middlemen, and new services abound—like eBay, StubHub, Expedia, Amazon Marketplace, and Airbnb. None of these would be in business without the sellers who use the platform, but that does not mean the sellers are automatically employees of the platform company.

The Internet and the smartphones that can now access it are transformative tools, and creative entrepreneurs are finding new uses for them every day. People are being connected in ways undreamed of just a decade ago. This is as true for business relationships (through software like Uber) as it is for social relationships (through software like Facebook). Many more people have access to, and a voice in, markets that may once have been closed or restricted.²⁰ Just as many more people can now publish their own thoughts to a vast audience, many more people can now offer their services or hawk their wares to a vast consumer base. This is economic progress based on new technology, but the law’s foundational principles are equipped to handle these changes. We need not break new legal ground or upend economic progress by transforming middlemen into employers.

The Commissioner of the Oregon Bureau of Labor and Industries recently issued an “advisory opinion” concluding, like California, that “[u]nder Oregon law ... Uber drivers are

²⁰ The taxi industry is one example.

employees.” Oregon Bureau of Labor and Industries, Advisory Opinion re The Employment Status of Uber Drivers (Oct. 14, 2015) at 4.²¹ For reasons already stated, and on the facts of a developed record in an actual case, the Florida Department of Economic Opportunity disagrees with the conclusions of that advisory opinion in so far as they could be persuasive in analyzing Florida law.

It is noteworthy that the Oregon Commissioner’s advisory opinion seems to have been animated by the assertion that, across the country, “workers are increasingly performing work in circumstances that appear to be outside of traditional employment arrangements. This trend has raised concerns that employees are being improperly classified as independent contractors....” *Id.* at 1. Certainly, if businesses are misclassifying workers for any purpose, state and federal labor authorities should rectify those cases. But, as noted above, the real shift in our economy is that technology is allowing hundreds of thousands of people to go into business for themselves. Those in business for themselves may not have the same guarantees and benefits of those in the employ of others, but there are many other benefits of being your own boss. This is probably why such status has long been part of the American dream. Technological advances are opening up that dream to many more people, and we should not malign (or, perhaps, misclassify) that trend as worker misclassification.²²

²¹ Available at <http://www.oregon.gov/boli/SiteAssets/pages/press/101415%20Advisory%20Opinion%20on%20the%20Employment%20Status%20of%20Uber%20Drivers.pdf>.

²² The Oregon advisory opinion cites the U.S. Department of Labor, Wage and Hour Division, Administrator’s Interpretation No. 2015-1 (July 15, 2015). In that document, the Administrator likewise asserts that “[m]isclassification of employees as independent contractors is found in an increasing number of workplaces in the United States, in part reflecting larger restructuring of business organizations.” *Id.* at 1. Again, to the extent misclassification is occurring, labor authorities and courts (and hopefully the businesses themselves) should rectify it. To the extent, however, more people are going into business for themselves because technology is making it possible, that is a trend for the market to dictate, rather than one to be stifled by novel and tortured applications of federal or state law.

After careful review, the undersigned finds that the Recommended Order properly applies Florida law. The Recommended Order correctly determines that the relationship between Petitioner and Mr. McGillis and Petitioner and Ms. Ewers was that of independent contractor. In light of the above discussion, the undersigned hereby adopts the conclusions of law set forth in the Recommended Order as if they were fully set forth herein.²³

In any event, the Labor Department document is an administrative interpretation of the “Application of the Fair Labor Standards Act’s ‘Suffer or Permit’ Standard in the Identification of Employees Who Are Misclassified as Independent Contractors.” As noted in the document, the Fair Labor Standards Act’s “economic reality” test is different from, and of “a broader scope” than, traditional common law, the latter of which controls the instant Florida case. But it should be noted that even under the factors spelled out in that document—many of which are similar to the Restatement factors—the relationship here still appears to be one of independent contractor. As noted in the Labor Department document, “[u]ltimately, the goal is ... to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor).” *Id.* at 2. As explained above, Uber drivers have substantial autonomy and do appear to be in business for themselves. That is the “economic reality” of the relationship.

²³ With respect to the Recommended Order’s Conclusions of Law, the undersigned’s obligation is to determine whether they are a reasonable application of applicable law to the Findings of Fact. The analysis above demonstrates the undersigned’s conclusion that the Recommended Order’s Conclusions of Law are, indeed, reasonable. To the extent, however, that any court finds that the above legal analysis is inconsistent with, or modifies, any conclusion of law in the Recommended Order, the undersigned finds that, for the reasons stated with particularity above, the statements herein are as or more reasonable than those modified.

RULINGS ON MR. MCGILLIS'S EXCEPTIONS TO THE RECOMMENDED ORDER

Mr. McGillis filed Exceptions to the Recommended Order. For the reasons stated below, each of these exceptions is denied.

A. Exception 1, page 2: "Never Signed, Received or Seen any Employment Contract"

In this exception, Mr. McGillis appears to challenge Paragraph 11 of the Recommended Order, which finds that all Drivers must agree to the terms and conditions of the Petitioner's "Rasier Software Sublicense & Online Agreement" ("Agreement") in order to use the Driver App. Mr. McGillis argues that he never so agreed.

The Recommended Order states that Drivers must agree to the terms and conditions of the Agreement in order to use the Driver App. RO ¶ 11. This finding was supported by the undisputed testimony of Petitioner's Florida General Manager, who testified that all Drivers must agree—through electronic signature—to the terms and conditions of the Agreement in order to access and use the Driver App.

Although Mr. McGillis now claims he never saw the Agreement, at the hearing he testified that he could not remember whether he consented to the Agreement by pressing the "agree" button when it appeared in the App. *See* Tr. 296-97. Given that the Petitioner's Florida General Manager testified that the Driver App cannot be accessed without accepting the terms of the Agreement, Tr. 333, that it is undisputed that Mr. McGillis twice registered for and then used the Driver App, Tr. 289, and that Petitioner's General Manager testified that Uber had an electronic record of Mr. McGillis's acceptance, Tr. 333, it was reasonable for the Special Deputy to conclude that Mr.

McGillis had clicked the “agree” button. The finding in Paragraph 11 is supported by competent substantial evidence.²⁴

Mr. McGillis’s exception—“Never Signed, Received or Seen any Employment Contract”—is DENIED.

B. Exception 2, page 5: “Contradictions Over Firing”

In this exception, Mr. McGillis disputes the purported reasons Uber revoked his access to the Driver App. These facts are irrelevant to the question at issue; they would become relevant only if Mr. McGillis was an employee and could thus file a claim for Reemployment Assistance. Accordingly, the specific details surrounding the reason for the revocation of Mr. McGillis’s access to the Driver App are not addressed in the Recommended Order. The only reference to Mr. McGillis’s revocation is in Paragraph 41 of the Recommended Order, which states: “[T]he Joined Party McGillis filed a claim for reemployment assistance benefits on April 6, 2015, after his account was deactivated in connection with an incident where the Petitioner believed that the Joined Party McGillis had violated the Petitioner’s privacy policy.” This finding is supported by competent substantial evidence.

Mr. McGillis’s exception “Contradictions Over Firing” is DENIED.

C. Exception 3, page 8: “Rasier LLC d/b/a/ UBER – Control Over Illegal Airport Drop Off’s”

In this exception, Mr. McGillis argues that the Petitioner has “total control over the drivers picking up and dropping off at airports in South Florida.” To the extent that Mr. McGillis is taking exception to Paragraph 34 of the Recommended Order, which finds that Petitioner sent out a

²⁴ Moreover, at the hearing, Mr. McGillis’s counsel submitted, and relied on, the Agreement, so Mr. McGillis should not now be heard to disclaim the very evidence he introduced and relied upon.

message giving advice to Drivers on ways to unobtrusively pick up riders at the Miami International Airport and thereby avoid a traffic citation, Paragraph 34 is supported by competent substantial evidence. To the extent that Mr. McGillis is referencing this finding—or the finding that Petitioner handled potential citations of Drivers at the Miami airport, RO ¶ 34—as evidence of the Petitioner’s control over the Drivers, this fact by itself, or taken together with other facts, is not enough to lead to a conclusion of law that is as or more reasonable than the conclusion of law that the relationship between Petitioner and Mr. McGillis was that of an independent contractor. As explained above, Drivers exercise substantial control over the details of the work.

Mr. McGillis’s exception “Rasier LLC d/b/a/ UBER – Control Over Illegal Airport Drop Off’s” is DENIED.

D. Exception 4, page 12: “The Petitioner, Rasier LLC, committed perjury”

In this exception, Mr. McGillis appears to dispute Mr. Gore’s testimony that Petitioner has over 10,000 Drivers in Florida. Mr. McGillis argues that Petitioner had previously not disclosed this figure on a form provided to the Department of Revenue. The number of Drivers, however, is not addressed in the Recommended Order. To the extent that Mr. McGillis is asserting that this issue speaks to Petitioner’s credibility, the Special Deputy is tasked with judging the credibility of witnesses. *See Heifetz*, 475 So. 2d at 1281-1282.²⁵

Mr. McGillis’s exception “The Petitioner, Rasier LLC, committed perjury” is DENIED.

E. Exception 5, page 14: “Rehired by Rasier LLC, d/b/a Uber”

In this exception, Mr. McGillis comments on the facts surrounding the new account he created after Uber deactivated his first account. Paragraph 44 of the Recommended Order states

²⁵ Moreover, Mr. McGillis, in his Proposed Finding of Fact ¶ 2, endorsed Mr. Gore’s testimony on this very point, so he should not be heard to take exception to his own proposed finding.

that Mr. McGillis created a new Driver account in May or June 2015, and that Petitioner soon after deactivated that account. To the extent that Mr. McGillis is taking exception to Paragraph 44, it is supported by competent substantial evidence.

Mr. McGillis's exception "Rehired by Rasier LLC, d/b/a Uber" is DENIED.

ORDER

Based on the foregoing and having carefully considered the Exceptions, Counter Exceptions, Brief in Opposition to the Counter Exceptions, the Recommended Order, and the record of this case, I hereby find that the proceedings conducted by the Special Deputy complied with the essential requirements of the law. I also find there is competent substantial evidence in the record to support each finding of fact stated in the Recommended Order. Finally, I find that the Conclusions of Law in the Recommended Order reflect a reasonable application of the law to the facts, and to the extent the preceding discussion is deemed inconsistent with, or to modify, any conclusion of law in the Recommended Order, the undersigned finds that, for the reasons stated with particularity above, the statements herein are as or more reasonable than those modified. A copy of the Recommended Order is attached as Exhibit A and is incorporated by reference as if fully set forth herein.

Therefore, it is ORDERED that 1) the determination dated May 13, 2015, in case 0026 2834 68-02 and 2) the determination dated May 20, 2015 in case 0026 2825 90-02 are REVERSED and this FINAL ORDER is hereby ADOPTED.

Jesse Panuccio
Executive Director
Florida Department of Economic Opportunity