

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

Advice Memorandum

S.A.M.

DATE: September 19, 2016

TO: Peter Sung Ohr, Regional Director
Region 13

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Postmates, Inc.
Case 13-CA-163079

177-2414-0100-0000
177-2414-2200-0000
177-2414-4400-0000
177-2484-5067-2000
512-5072-2000-0000
512-5072-5700-0000

The Region submitted this case for advice as to whether the Charging Party and other couriers working for the Employer are employees within the meaning of Section 2(3) of the Act, rather than independent contractors excluded from the Act's coverage. We conclude that the Employer's couriers are statutory employees. The Region should therefore issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by informing the Charging Party that [REDACTED] could not speak with other couriers about [REDACTED] employment terms and by maintaining an unlawful mandatory arbitration agreement.

FACTS

Postmates, Inc. ("Employer") operates a website and a software application ("app") available on smartphones, through which customers can order food from restaurants or other items from stores, and have them delivered within a short period of time by one of the Employer's couriers. This case involves a charge filed by a courier that worked for the Employer in [REDACTED] 2015.

A. The Employer's Website & App

The Employer's website shows a photo of food and drink and states, "On-Demand, 24/7, the best of your city delivered in minutes."¹ The website then prompts the visitor to enter an address. Scrolling down, the website states "[f]ind us in the

¹ See Postmates, <http://www.postmates.com>.

following areas” and lists the cities in the approximately 40 metropolitan areas that the Employer operates. Below the list of cities, the website has a button among others that says “ride or drive: become a Postmate, earn up to \$25+/hour.”² Below the buttons and in various other places of the website is a logo of a person on a bicycle riding upwards with three stars. Below the logo, and in very small writing, are a number of other links, including one that says “terms.” These terms, which apply to customers and couriers, are described further below. The app has a similar appearance, with prominent placement of its logo, photos of food, and an inquiry as to location.

After customers place their orders and pay through the Employer’s website or app, the Employer pushes the order to nearby couriers who have a courier-specific app on their smartphones. Once a courier is matched with an order, the courier purchases the order from the restaurant or store either with an Employer-provided credit card, or with its own funds, which the Employer later reimburses. The courier then delivers the items to the customer’s desired address, and the customer rates the courier on a scale from one to five.

B. The Employer’s Management Structure

The Employer operates its business from its headquarters in San Francisco, CA, and through offices in major cities, including Chicago, IL, which is where the Charging Party in this case worked. In its San Francisco headquarters, the Employer has a support line staffed by customer service associates (“CSAs”) who handle issues that arise for couriers while they are making deliveries. The job description for a CSA includes, among others, the following responsibilities: “[m]onitor activity on the platform and make adjustments to ongoing jobs as needed; [c]orrespond directly with couriers throughout their jobs to ensure accuracy and timeliness; and [s]erve as the voice of [the Employer] in your city.”

The Employer’s Chicago office employs community managers who are responsible for onboarding and removing couriers in the Chicago area. The Employer’s job posting for community managers lists the following responsibilities for the job: “[p]resent the Postmates service to courier applicants; [r]un training workshops to improve and maintain fleet quality; [a]ddress courier concerns in-person; [m]anage email and social media communications with Postmates; [p]lan and run social events to build a tight-knit Postmates community; [f]acilitate in-market promotions and street-team activities, and represent Postmates at local events; [i]dentify specific challenges for fleet growth and retention in your market and propose solutions; [i]mprove fleet quality based on ratings, feedback, and other metrics; and [c]ollaborate

² This is one of a number of places on the Employer’s website where it refers to its couriers as “Postmates.”

with the Operations Team across markets to share best practices and work towards company goals.”

(b) (6), (b) (7)(C), (b) (7)(D) in the Employer’s (b) (6), (b) (7)(C), (b) (7)(D) office gave testimony about onboarding of couriers, which is described further below. They also testified that they could unilaterally remove couriers from the Employer’s platform if the courier’s customer rating average fell below 4.7 out of 5. Removing a courier from the platform means that the courier can no longer obtain work through the Employer’s app and is effectively discharged. Both (b) (6), (b) (7)(C), (b) (7)(D) explained that they had discretion as to whether to remove a courier, that they did not need permission from anyone above them to remove a courier, and that there are practices, but no written policy for removing a courier. One (b) (6), (b) (7)(C), (b) (7)(D) said that if a courier had a low customer rating average, that (b) (6) would offer the courier a chance to come in and review his/her performance before removal. Both (b) (6), (b) (7)(C), (b) (7)(D) indicated that if a courier had a low customer rating average, that they would take into account the customer comments, and that they would often give couriers a second chance, or grace period, before they were removed.

C. The Employer’s Couriers

The following facts detail how the Employer recruits, provides initial training to, and otherwise establishes its relationship with its couriers.

1. The Employer’s recruitment and application process

The Employer has approximately 25,000 couriers in 40 cities that walk, bike, or drive to make deliveries. The Employer provided a sample advertisement for couriers that states, in part:

Earn up to \$20/hour delivering local goods. Postmates is hiring! Why work for Postmates? Highest payouts: Earn up to \$1000+/week. Flexible hours, work when you want. Explore your city, discover new restaurants and stores. Plus, best in class on the job coverage: excess liability insurance up to \$1M per incident and up to \$50,000 for medical expenses.

An individual applies to work for the Employer through its website. The Employer has changed its application various times since September 25, 2015.³ Before September 25, the Employer required applicants to provide basic personal information and driver’s license information. Applicants also had to agree to a background check and non-disclosure agreement.

³ All subsequent dates are in 2015 unless otherwise noted.

After September 25, 2015, it appears that the Employer began requiring applicants to additionally agree to “terms and conditions.” The terms and conditions, which as noted above, are available on the bottom of the Employer’s website and apply to both customers and couriers, include provisions regarding disputes and arbitration. These provisions require the user to arbitrate all legal claims against the Employer and bring claims only in his/her individual capacity and not as a plaintiff or class member in any purported class or representative proceeding. The terms and conditions also state that the company does not provide courier services but rather a method to obtain such third party couriers and that Postmates couriers are independent contractors.

2. How the Employer onboards couriers

Once a courier fills out the application, the courier is asked to attend an onboarding session at the Employer’s city office. The Employer provided the presentation slides that it uses for onboarding. The initial slides have pictures that depict the basics of how its app works. The next slides show a Postmates credit card and explain that cash-only jobs earn more, please customers, and result in the courier being reimbursed within 48 hours. Another slide explains that couriers should check IDs, respect privacy, and keep their eyes on the road. Another slide states that low customer ratings mean “[y]ou’re off the platform.” This slide has an image of a man pointing to a customer rating of 4.7 with a thought bubble stating “you’re out.” The next slide lists the following as ensuring a good rating: no accepting cash tip; no entering customer’s residence; no verbal feedback and complaints; and no physical contact. The next slide explains that the Employer sends money to the courier’s bank seven days after the job is completed through automatic wire transfer. The next slide describes the Employer’s protection plan, which provides a (b) (4) insurance policy covering couriers’ liability for bodily injury and/or property damage to third parties and an occupational accident benefit of up to (b) (4) per accident for medical expenses incurred by a courier while on the job. Finally, there is a slide that explains pricing and compensation, stating that under the Employer’s simple pricing plan, couriers receive (b) (4) of delivery fees and (b) (4) of tips. It also states that the Employer provides the courier with the following: Postmates app, insulated bag, scheduling tools, courier service, customer service, dispatch, ACH transfers, equipment, marketing, and tax documentation.

On May 14, the Charging Party attended an onboarding session conducted by one of the Chicago community managers.⁴ Eight to ten other couriers also attended the

⁴ The following facts about the content of the May 14 onboarding session are based on the Charging Party’s recollection of what the community manager told (b) (6), (b) (7) and the other new couriers at that meeting.

session. The community manager gave out a trade dress, or placard, for the couriers to put in the car while driving for Postmates, Postmates stickers to place on bags for the goods to be delivered, and a Postmates bag to carry the goods. The community manager said that while the couriers are driving for Postmates, the trade dress needs to be on the car. [REDACTED] also told the couriers that they could pick up their Postmates t-shirt in a week and that they had to wear the t-shirt while driving for Postmates.

The community manager also told the new couriers that they could accept or reject any delivery and would not be penalized for rejecting a delivery, but that they are only working for Postmates once they log onto the Postmates courier app and cannot accept calls from Uber or other companies at that point. [REDACTED] informed the couriers that they would need to pick up shifts ranging from one to four hours and could swap shifts with other drivers. The Charging Party asked how many shifts [REDACTED] needed to take, and the community manager replied that couriers needed to work at least eight hours per day and a total of 40 hours in shifts in a week. The community manager said there were no benefits and couriers had to maintain their own insurance, but that couriers would be paid a minimum of \$25/hour and that they would be paid by the hour and not by the delivery. He added that after two weeks, the couriers would have an indefinite incentive that would increase their pay rate to \$50/hour until the Employer removed the incentive.

The community manager informed the couriers about the driver rating system and the need to maintain a 4.7 rating, as well as the procedure for alcohol deliveries, which involved checking customer IDs and then calling the job support line if there were any doubts about the customer's ID. He also said that they should greet the customer, and the Charging Party viewed a video on customer service. The community manager told the couriers that part of the job is to check that the delivery items are complete and that if they deliver an incomplete or incorrect order, it would be held against them. [REDACTED] also said that couriers could not develop their own clients through the job and that they are matched to customers on the app only.

Additionally, the Charging Party explained that at the onboarding session the community manager gave the couriers a Postmates credit card to purchase the goods to be delivered and explained that if a restaurant or store did not accept credit cards, the courier needed to pay with cash, get a receipt, and then submit the receipt to the Employer for reimbursement.

3. The Employer requires its couriers to sign an agreement containing an Independent Contractor Acknowledgement

After attending an onboarding presentation, a new courier is then required to sign an agreement stating that he or she will use the credit card provided by the Employer only for authorized purposes and immediately report if it is lost or stolen.

This agreement also contains an “Independent Contractor Acknowledgement,” which states the following:

- a) I understand that Postmates is a marketplace and that I am an independent contractor, and not an employee of Postmates.
- b) I understand that it is my responsibility to maintain my vehicle at my own expense, including insurance, gas, maintenance and parts.
- c) I understand that when I am not providing services to Postmates, I am permitted to use my vehicle for any purpose, including performing deliveries for any other company or myself.
- d) I understand that I am permitted to determine my own work schedule, and reject or accept any particular job offered on the platform.
- e) I understand that I will be paid for jobs 7 days after such jobs are completed, and not on any specific, regularly scheduled pay-day.
- f) I understand that I am permitted to take any route in order to complete a delivery, and any map routes offered by the Postmates application are only suggestions.
- g) I understand I am not required to wear any Postmates uniform or, put any Postmates logo on my vehicle while providing services to Postmates.
- h) I understand that I get compensated per delivery, and not on an hourly or salary basis.

4. The Employer provides its new couriers with a special app to perform the delivery work

After the courier signs the agreement containing the Independent Contractor Acknowledgement, a community manager downloads the Employer’s courier app onto the courier’s smartphone. This app is different from the version that customers use and is not publicly available. One of the Chicago community managers explained that when a courier gets a job request on this app, the courier can click accept or reject on his or her phone. The courier is not able to see the contents of the delivery until he or she clicks accept. If the courier changes his or her mind, the courier has to contact the Employer’s job support team in San Francisco to have the order reassigned. The

community manager explained that job support was trained to convince couriers to stick with a job unless there was an emergency or religious exemption. [REDACTED] also explained that the Employer tracked the number of times that couriers reject a delivery. If a courier has an abnormally high rejection rate, the community manager would touch base with the courier, but [REDACTED] had never removed a courier from the platform for having a high rejection rate. The community manager explained that if a courier rejects ten jobs in a row, the courier is logged out but can log back in. The community manager said that at some point, the Employer began pushing a notice through the app that informed couriers that high reassignment requests could lead to a suspension.

The community manager said that [REDACTED] told couriers that they could be logged onto Uber or Lyft, other app-based companies, at the same time as Postmates. However, [REDACTED] instructed couriers that if they had a customer in the car for Uber or Lyft, they should log off the Postmates app. [REDACTED] said (b) (6), (b) (7)(C), (b) (7)(D)

The Employer provided data to the Region indicating that it tracks the following data through its website and app: (i) whether the courier accepted an order, (ii) whether the courier completed the drop-off, (iii) the delivery commission, (iv) the tip, if any, (v) the merchant's name, (vi) the courier's rating,⁵ (vii) the customer's rating, (viii) any customer feedback, (ix) the total number of jobs completed by each courier, and (x) deactivated couriers.

D. The Charging Parties' Employment with the Employer in May 2015

As stated above, the Charging Party attended the Employer's onboarding session on May 14. The Employer provided a copy of the agreement containing the Independent Contractor Acknowledgement that the Charging Party signed that day. After the onboarding session ended, the Charging Party told the community manager that [REDACTED] did not want to deliver alcohol because it was against [REDACTED] religious beliefs. According to the Charging Party, the community manager told [REDACTED] that was fine and [REDACTED] could pass those calls onto another driver.

On May 15, the Charging Party received an email from the community manager that said [REDACTED] had cleared [REDACTED] background check and could begin work for the Employer. The Charging Party began work on that day. [REDACTED] said that [REDACTED] tried to reject a job involving the delivery of alcohol but received an alert saying that by rejecting a delivery [REDACTED] could be subject to a lower rating and discipline, including suspension and termination. The Charging Party then called the Employer's job support line to try

⁵ The Employer-provided data indicates that couriers have the option, through the app, to rate the customer.

and get the delivery reassigned. The CSA that the Charging Party spoke with told [REDACTED] that [REDACTED] could not decline the job. The Charging Party tried to explain that the community manager had said that it was okay for [REDACTED] to do so, but the CSA told [REDACTED] that [REDACTED] had to make the delivery and hung up on [REDACTED]. The Charging Party proceeded to get the order, which included alcohol and cigarettes, but [REDACTED] was held up at gunpoint and the package [REDACTED] was delivering was taken. The Charging Party called the Employer's job support line and told them what had happened. [REDACTED] said that [REDACTED] was not going to deliver alcohol anymore and that [REDACTED] wanted to discuss the issues with [REDACTED] coworkers, including new hires, in a meeting with the community manager. The CSA said, "you need to talk to management about this issue and if you want to talk to the employees, don't come to the office, we will not allow you to do that." The Charging Party asked, "I can't talk to the other employees?" and the CSA said "you can't talk to the other employees about whatever it is." The CSA said that [REDACTED] would forward the fact that the Charging Party was refusing to deliver alcohol and instigating other employees to also refuse delivering alcohol.⁶

On May 16 and 17, the Charging Party worked two four-hour shifts. The Employer provided information showing that on May 16 the Charging Party received five dispatches and accepted one job and on May 17 received 15 dispatches and accepted eight jobs.

On [REDACTED] the Charging Party received an email from the community manager that had onboarded [REDACTED] stating that [REDACTED] was suspended and asking [REDACTED] to come to the office to discuss an issue. The Charging Party said that [REDACTED] could not come during the designated time period. The next day, the other community manager in Chicago emailed the Charging Party and told [REDACTED] that [REDACTED] was being removed from the platform because feedback from customers showed that Postmates was not a good fit for [REDACTED]. This community manager testified that [REDACTED] was unaware of the Charging Party's conversation with the CSA or the safety issues raised by the Charging Party and that [REDACTED] removed the Charging Party from the platform solely because of [REDACTED] low customer ratings. Specifically, [REDACTED] stated that the Charging Party's ratings were the lowest [REDACTED] had ever seen, that [REDACTED] had abandoned one delivery, and that [REDACTED] had engaged in an oral altercation during another delivery. The Employer provided the Charging Party's ratings and customer comments. [REDACTED] average rating for 14 [REDACTED] deliveries was a four, and the customer comments indicated that the orders [REDACTED] delivered were late, incorrect, and damaged.

The Charging Party filed a charge with the Region alleging that [REDACTED] termination and the CSA's statements to [REDACTED] on May 15 violated Section 8(a)(1). [REDACTED] later amended [REDACTED] charge to allege that the Employer's mandatory arbitration agreement also violated Section 8(a)(1). The Region concluded that the Charging Party's

⁶ It is not clear to whom the CSA was going to forward this information.

termination did not violate the Act. The Region also concluded that the CSA's statements to the Charging Party that [REDACTED] could not discuss safety issues with [REDACTED] coworkers and the Employer's mandatory arbitration agreement did violate Section 8(a)(1) if the Employer's couriers are employees.

The Charging Party also filed discriminatory discharge complaints with the Chicago Commission on Human Relations and the State of Illinois Department of Human Rights. On February 18, 2016, the Chicago Commission on Human Relations issued an order dismissing the Charging Party's case because it concluded that [REDACTED] was an independent contractor primarily based on the Employer's Independent Contractor Acknowledgment Agreement. On March 1, 2016, the State of Illinois Department of Human Rights dismissed the Charging Party's case also because it concluded that [REDACTED] was an independent contractor, again primarily based on the Employer's Independent Contractor Acknowledgment Agreement.

ACTION

We conclude the Employer's couriers are statutory employees. The Region should therefore issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) based on the CSA's unlawful statements on May 15 and its maintaining an unlawful mandatory arbitration agreement.⁷

The definition of statutory "employees" covered by the Act's jurisdiction is provided by Section 2(3).⁸ In interpreting this section and distinguishing between employees and independent contractors, the Board applies the traditional common-law factors enumerated by the Restatement (Second) of Agency § 220, with no single factor being determinative.⁹ The Board has emphasized that all factors must be assessed and weighed, that the factual circumstances of each case are crucial, and

⁷ As a preliminary matter, we agree with the Region that although the Charging Party may not have been subject to the Employer's unlawful mandatory arbitration agreement, that is not dispositive for purposes of finding a violation because it is well established that there is no standing requirement under the Act for purposes of filing a charge. See 29 CFR § 102.9; *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17-18 (1943).

⁸ 29 U.S.C. § 152(3).

⁹ See, e.g., *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 2 (Sept. 30, 2014) (concluding that package delivery drivers were statutory employees rather than independent contractors).

that “[t]here is no shorthand formula or magic phrase that can be applied to find the answer.”¹⁰ The common-law factors are:

[1] the extent of control which, by the agreement, the [employer] may exercise over the details of the work, [2] whether or not the one employed is engaged in a distinct occupation or business, [3] 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, [4] the skill required in the particular occupation, [5] whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work, [6] the length of time for which the person is employed, [7] the method of payment, whether by the time or by the job, [8] whether or not the work is part of the regular business of the employer, [9] whether or not the parties believe they are creating the relation of master and servant, and [10] whether the principal is or is not in the business.¹¹

The Board also considers, along with the preceding factors, “whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*.”¹² The “independent-business factor” includes consideration of whether the putative contractor has (a) a significant entrepreneurial opportunity, (b) a realistic ability to work for others, (c) a proprietary or ownership interest in his or her work, and (d) control over important business decisions, such as the scheduling of performance, hiring, selection, and assignment of employees, equipment purchases, and investment of capital.¹³ The Board gives weight to actual, and not merely theoretical, entrepreneurial opportunity, and also evaluates the constraints imposed by a company on the individual’s ability to pursue this opportunity.¹⁴ The Board also considers whether the terms and conditions under which the individual operates are “promulgated and changed unilaterally” by the putative employer.¹⁵

¹⁰ *Id.*, citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968).

¹¹ *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 2.

¹² *Id.*, slip op. at 11 (emphasis in original).

¹³ *Id.*, slip op. at 12.

¹⁴ *Id.*, slip op. at 10.

¹⁵ *Id.*, slip op. at 12.

The Board has also long held that the party asserting independent-contractor status bears the burden of proof on that issue.¹⁶ Further, when applying these common-law agency factors and determining employee status under Section 2(3), the Board will “construe the independent-contractor exclusion narrowly” so as to not “deny protection to workers the Act was designed to reach.”¹⁷

Applying these principles, we conclude, as described in more detail below, that the Employer’s couriers are statutory employees because almost all of the common law factors weigh in favor of employee status. Although we address each factor below, we place primary emphasis on the fact that couriers: conduct the Employer’s core function of delivering on-demand items to customers; are identified with the Employer rather than their own distinct delivery business; are set up with the Employer for long-term, uninterrupted employment; rather than set their own fee, are paid according to the Employer’s formula regarding delivery fees with no opportunity for negotiation; are provided with certain key supplies such as the Employer’s app, credit card, bags, and brand markings; are closely monitored by the Employer through its customer rating system; are disciplined and terminated by the Employer based on the discretion that city community managers have to assess couriers’ conduct and performance; and have very little entrepreneurial opportunity beyond the ability to work more hours.¹⁸

¹⁶ *Id.*, slip op. at 2, citing *BKN, Inc.*, 333 NLRB 143, 144 (2001) and *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–712 (2001) (upholding Board’s rule that party asserting supervisory status in representation cases has burden of proof). See also, *Central Transport, Inc.*, 247 NLRB 1482, 1483 n.1 (1980).

¹⁷ *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 9-10.

¹⁸ The determinations of the Chicago Commission on Human Relations and the Illinois Department of Human Rights that the Charging Party was an independent contractor do not undercut our conclusion. The Board has long held that the determinations of state and local administrative agencies on legal issues that it also must resolve are not controlling because those determinations are rendered under statutes with “different definitions, policies, and purposes from” the Act. See, e.g., *Garrison Valley Center*, 277 NLRB 1422, 1422 n.1 (1985). Moreover, the Board does not find the decisions of those other agencies controlling because it must conduct its own “independent consideration and evaluation of the evidence received in this unfair labor practice proceeding.” *Id.* (citation omitted).

1. **The Extent of Control by the Employer Weighs in Favor of Employee Status.**

While it appears that the Employer's couriers have some flexibility as to when they work, this is not inconsistent with employee status. The Board has held that even where individuals have flexibility as to when they work, this factor weighs in favor of employee status if the employer exerts significant control when the individual is performing the work. For example, in *Sisters' Camelot*, the Board held that the extent of control factor weighed in favor of employee status where "canvassers [were] not required to report for work on any given day, [but] they [were] subject to significant control by the [employer] when they [did] work."¹⁹ Similarly, in *Lancaster Symphony Orchestra*, the Board held that musicians were statutory employees despite having the discretion to not sign up for any musical programs in a given season because once a musician was selected, the musician's control over his or her worktime ended.²⁰ Here, as in *Sisters' Camelot* and *Lancaster Symphony Orchestra*, while couriers may have flexibility in selecting which shifts they will work, once they select a shift the Employer exerts significant control over the work, who performs it, and how it is performed.

First, when the Employer onboards couriers, it explains how to perform the work, including ordering the items for customers, how to pay for ordered items, and how to interact with customers. It has specific procedures that apply to alcohol orders, which involve checking customer IDs and calling the job support line if there are any doubts about a customer's ID. It also has rules that apply to how the courier must make the delivery, including not accepting cash tips, not entering a customer's residence, not giving any verbal feedback and complaints, and not engaging in any physical contact.²¹ Couriers also cannot perform work for other companies concurrently and

¹⁹ 363 NLRB No. 13, slip op. at 2 (Sep. 25, 2015).

²⁰ 357 NLRB 1761, 1764 (2011), *enforced*, 822 F.3d 563 (D.C. Cir. 2016). *See also Metro Cab Co.*, 341 NLRB 722, 724 (2004) (finding that drivers were statutory employees despite the fact that the employer did "not require the drivers to work set hours or even a minimum number of hours"), *supplemented by* 344 NLRB 528 (2005), *enforced sub nom.*, *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008).

²¹ *Cf. Porter Drywall*, 362 NLRB No. 6, slip op. at 3 (Jan. 29, 2015) (finding drywall crew leaders to be independent contractors where, among other things, "[a]lthough [they] are obligated to meet the general project deadlines, they may do so in whatever manner they see fit.").

cannot build relationships with customers outside of the app.²² Further, as described in more detail below, the Employer closely monitors couriers' performance through customer ratings.²³ It then imposes disciplinary warnings and terminations based on its strict customer service standards, which involve maintaining an average customer rating of 4.7 out of 5.²⁴

While the Employer's couriers can accept or reject a potential delivery job, the couriers have very little control over the actual work assigned. It appears to be the Employer that has control over which couriers are offered which jobs. Moreover, the courier cannot view the delivery job before accepting it, and has to call a job support line and speak to a CSA in order to request that the job be reassigned, which as the current case shows, is not certain. The CSAs are trained to convince the courier to stick with the job, and the Employer denied the Charging Party's request to have a delivery reassigned when he tried to do so.

Further, while the Employer's Independent Contractor Acknowledgement Agreement states that couriers are "permitted to determine [their] own work schedule, and reject or accept any particular job offered on the platform," in reality the Employer has a number of practices that undermine the ability of couriers to reject any particular job. One of the community managers explained that couriers are logged out if they reject ten jobs in a row (though they can log back in) and that when a courier had an abnormally high rejection rate (b)(4) would "touch base" with them. The Employer also sent a notice through the app to couriers warning that a high reassignment request rate could lead to suspension or other disciplinary consequences.²⁵ Further, the Charging Party understood from the onboarding session that (b)(6) had to work at least eight hours a day and 40 hours of shifts in a week.

²² See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (finding canvassers to be employees where, among other things, they were prohibited from soliciting for another organization when they were canvassing for the employer).

²³ *Id.* (noting that the employer required canvassers to complete callback sheets that reflected in detail the houses visited, the outcome of each visit, and the donations collected). Cf. *O'Connor v. Uber*, 82 F. Supp 3d. 1133, 1151 (N.D. Cal. 2015) (noting that monitoring through app data and customer ratings arguably gave Uber a tremendous amount of control over the manner and means of its drivers' performance).

²⁴ See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (explaining that the Board has found that even occasional instances of discipline indicate significant control by the employer).

²⁵ Cf. *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) (models were independent contractors in large part because they "exercise[d] complete control of

Likewise, the Employer's provision in the Independent Contractor Acknowledgment Agreement that the courier is "permitted to take any route in order to complete a delivery, and any map routes offered by the Postmates application are only suggestions" provides very little discretion to the courier. Once the courier accepts an order, the courier is told where to pick it up and where to deliver it; deciding to take a slightly different route than offered by the Postmates map does not constitute meaningful control over the manner of performing the work.²⁶

Because the Employer exerts significant control over the manner and means of couriers' work, this factor weighs in favor of employee status.

2. Whether or not the Individual is Engaged in a Distinct Occupation or Business Weighs in Favor of Employee Status.

The Employer's couriers are not engaged in a distinct occupation or business. First, the Employer is called Postmates, and refers to its couriers as Postmates, an indication to the public that the couriers are the company. Further, while there is a factual dispute as to whether couriers are required to carry the Postmates trade placard in their vehicle, use Postmates stickers and Postmates branded bags, and wear a Postmates shirt, the Employer does provide these items to couriers for use. While the Charging Party understood from the Postmates' onboarding that he was required to carry the Postmates logo in these various ways, even if it was completely voluntary, as is stated in the Employer's Independent Contractor Acknowledgment Agreement, these logos still support the inference that Postmates wants its couriers to communicate to the public that they are part of the Employer's operation rather than a distinct business. Further, the Employer's customers submit their orders either on the Postmates website or the Postmates app and then receive their order from a Postmates courier. While the lengthy terms and conditions available through a link on the very bottom of the Postmates website states that Postmates are

their own schedule" in a manner the Board described as "sweeping"); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998) (finding owner-operators were independent contractors where they could decline orders without penalty); *Boston After Dark*, 210 NLRB 38, 43 (1974) (contributors to a newspaper were independent contractors where they could refrain from contributing material any given week without prejudicing their chances of contributing more material at a later date).

²⁶ See *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 11-12 (noting that, while delivery drivers exercised some discretion over the order in which to deliver packages, for a rational driver such decisions were "mainly or wholly dictated by the location of customers" and thus required little if any independent judgment, weighing in favor of employee status (citation omitted)).

independent contractors and Postmates is not a courier company, the Postmates operation and its branding severely undermine those statements. Thus, to customers, it appears that the courier delivering their items is an employee of Postmates.²⁷

Additionally, like the drivers found to be employees in *FedEx Home Delivery*, the Employer's couriers are "fully integrated" into its business and "receive considerable assistance and guidance from the company and its managerial personnel."²⁸ For example, when operational difficulties arise while performing the work, couriers are supposed to call the job support line and receive help and guidance from the Employer. As for integration, as described more below, it is important to note that the work performed by the Employer's couriers is the Employer's sole function and operation. With respect to carrying out that operation, couriers rely extensively on the Employer's app and infrastructure, including job support, customer support, and insurance to perform their work.²⁹ Thus, this factor weighs in favor of employee status.

3. Whether the Work is Usually Done Under the Direction of the Employer or by a Specialist Without Supervision Weighs in Favor of Employee Status.

While the Employer's couriers are not subject to in-person supervision while performing their work, this is not dispositive.³⁰ The Employer essentially directs the

²⁷ See, e.g., *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3 (factor favored employee status because canvassers, through their presentations as well as the materials that they presented and distributed identified themselves as working for the employer); *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13 (factor favored employee status because drivers were not engaged in a distinct occupation or business because they were "doing business in the name of [the employer] rather than their own").

²⁸ 361 NLRB No. 55, slip op. at 13. See also *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3 (favoring employee status where "[a]s shown by the [employer's] significant control over the canvassers and the importance of their fundraising activities to the [employer's] operations, canvassers as a group are also well integrated into the [employer's] organization.")

²⁹ See *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13 (favoring employee status because drivers relied extensively on the employer's scanner system and package handlers to perform their jobs and absent their affiliation with the employer they lacked the infrastructure and support to operate as separate entities).

³⁰ See, *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3; *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13.

courier's performance through its intensive monitoring and tracking system and its strict enforcement of service standards.³¹ With respect to monitoring and tracking, the Employer tracks, among other things, whether the courier accepted an order, whether the courier completed the drop-off, the delivery commission, the tip, if any, the merchant name, the courier rating, the customer rating, customer feedback, total jobs completed by each courier, and deactivated couriers.³²

Based on all of this information that it compiles, the Employer is able to monitor all aspects of a courier's performance, including, among other things, the exact interactions with customers, the time of delivery, and whether there were any damages or mistakes in the order.³³ Community managers then take action based on the customer ratings and comments. For example, if a courier has a rating lower than 4.7 out of 5, the community manager will often ask them into the office, review their performance with them, and then give them a second chance, or grace period to improve. If the courier does not improve, the community manager will remove the courier from the platform, which in effect is a termination of the courier's employment.³⁴ Indeed, one community manager here stated that (b) (6), (b) removed the Charging Party from the platform based solely because of (b) (6), (b) low customer rating (average rating of 4) and negative comments about (b) (6), (b) deliveries.

Thus, through a system of monitoring delivery data and customer reviews, combined with coaching and termination, the Employer does in fact provide supervision to couriers.³⁵ And while there is not in-person supervision, the nature of

³¹ See *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13.

³² The Region should also seek to determine whether the Employer uses GPS tracking and how it uses that data.

³³ See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3 (employer's extensive recordkeeping requirements demonstrate that the employer closely monitored canvassers' activities on a daily basis); *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13 (employer conducted periodic audits and appraisals and had the ability to track all major work activities in a real-time scanner).

³⁴ See *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13 (favoring employee status where employer imposed disciplinary measures including suspension or termination if drivers failed to comply with contractual rules and procedures). Cf. *Porter Drywall*, 362 NLRB No. 6, slip op. at 4 (favoring independent contractor status because drywall crew leaders and their crews were not subject to the putative employer's personnel policies, employee handbook, or disciplinary system).

³⁵ See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3 (favoring employee status because significant level of oversight establishes that the canvassers ultimately do not

the Employer's monitoring system, which makes couriers potentially observable at all times, creates a powerful method for Employer control.³⁶ Further, it is important to note that the nature of the Employer's delivery work makes in-person supervision highly impractical.³⁷ Because of the significant level of monitoring and control, this factor favors employee status.

4. The Skill Required in the Occupation Weighs in Favor of Employee Status.

The Employer's couriers are not required to possess any special skills or prior experience,³⁸ and do not practice a trade.³⁹ Further, the Employer's training is minimal and consists mostly of describing the Postmates system and how couriers

work without supervision), *citing Michigan Eye Bank*, 265 NLRB 1377, 1379 (1982) (despite lack of daily supervision, employer effectively oversaw technicians' work through weekly monitoring meetings). *See also SpoonRocket*, Case 32-CA-144189, Advice Memorandum dated July 28, 2015 (in a case also involving drivers performing work for an app-based company, concluding that the drivers were employees, in part, because the employer exerted indirect supervisory control where it relied heavily on customer feedback and reviews in order to monitor the performance of individual drivers and then counsel or discipline them based on that feedback).

³⁶ *Cf. O'Connor v. Uber*, 82 F. Supp 3d. at 1151 (monitoring, where drivers are potentially observable at all times, allows Uber to exercise significant control over its drivers).

³⁷ *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3, *citing Mitchell Bros. Truck Lines*, 249 NLRB 476, 481 (1980) (finding drivers to be employees and analyzing extent of supervision in the context of "the nature of the occupation.").

³⁸ *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3 (favoring employee status where employer did not require canvassers to have any specialized education or prior experience and hired almost everyone who applied for a position); *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13 (favoring employee status delivery-driver employees were "not required to have any special training or skills"); *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000) (favoring employee status where delivery-driver employees trained by employer and "need not have prior experience"), *enforced*, 292 F.3d 777 (D.C. Cir. 2002).

³⁹ *Cf. Porter Drywall*, 362 NLRB No. 6, slip. op. at 4 (favoring independent contractor status where drywall crew leaders practiced a trade and performed skilled work as evidenced by the fact that not all contractors were able to perform all phases of drywall installation).

should conduct themselves when performing the work.⁴⁰ Thus, this factor weighs in favor of employee status.

5. Whether the Employer or Individual Supplies the Instrumentalities, Tools, and Place of Work Weighs in Favor of Employee Status.

As is typical with statutory employees, the Employer provides its couriers with the critical instrumentalities and tools of its business, including the proprietary software application used to coordinate deliveries and access customer orders. The Employer's entire business model is based on the ability of customers to order through its website or app, with the orders then electronically transmitted to couriers through the Employer's courier-specific app in order to ensure fast deliveries. Thus, the fact that the Employer provides its drivers with the necessary software is of particular significance.

In addition to the app, the Employer also provides couriers with a Postmates credit card, which the couriers use to purchase the customer orders and is thus a central tool that permits couriers to perform their work. The Employer also provides: an insulated Postmates bag, scheduling tools, a job support line, customer service, dispatch, automated wire transfers, equipment, marketing, tax documentation, Postmates stickers, and a Postmates t-shirt. Finally, the Employer provides couriers with both a (b) (4) insurance policy covering their liability for bodily injury and/or property damage to third parties, and an occupational accident benefit of up to (b) (4) per accident for medical expenses incurred by a courier while on the job.⁴¹

As for the location of the work, while the couriers do not operate out of the Employer's facility, they are trained out of the Employer's office. In addition, it

⁴⁰ See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3 (favoring employee status where canvassers testified that their training lasted between 15 minutes and 1.5 hours and was primarily to review the employer's recording keeping and presentation requirements and discuss basic fundraising skills); *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13 (favoring employee status where drivers received all necessary skills via two weeks of training provided by the employer).

⁴¹ See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3 (favoring employee status employer provided canvassers with canvassing materials, maps, callback sheets, informational fliers, and visual aids and procured the necessary permits and legal documents). Cf. *Porter Drywall*, 362 NLRB No. 6, slip. op. at 4 (apart from drywall panels, drywall crew leaders found to be independent contractors were responsible for their crews' tools, supplies, and transportation and insuring that their equipment was in working order).

appears that couriers have very little control over what orders they are offered, and then are practically unable to get orders reassigned. Thus, the Employer controls where the courier picks up the order and where he or she delivers it, and the courier has little to no control over these respective locations.⁴²

Further, although couriers use their own vehicles and are responsible for gas, basic maintenance, and general insurance, ownership and maintenance of passenger cars and bikes—unlike, for example, the specialized delivery trucks at issue in *FedEx Home Delivery*—is routine among a large percentage of the general workforce, and thus does not tend to indicate independent-contractor status.⁴³

For the above reasons, this factor weighs in favor of employee status.

6. The Length of Time for Which the Individual is Employed Weighs in Favor of Employee Status.

As with the individuals found to be employees in *FedEx Home Delivery*, the drivers here in effect “have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.”⁴⁴ In contrast to an independent-contractor relationship with a fixed duration or with contractual limitations on termination, the Employer’s couriers are more like at-will employees—indeed, the Employer discharged the Charging Party after three days

⁴² See *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 3 (favoring employee status where employer chose territory where each day’s canvassing would take place and assigned each canvasser to his or her allotted area and canvasser had little or no influence on his or her assignment).

⁴³ 361 NLRB No. 55, slip op. at 13-14 (finding instrumentalities and tools factor to be “neutral” in determining employee status despite fact that drivers owned specialized delivery trucks, in part because employer “play[ed] a primary role in dictating vehicle specifications” and “ease[d] drivers’ burden in acquiring vehicles by providing prospective drivers with the names of dealers”).

⁴⁴ 361 NLRB No. 55, slip op. at 14 (quoting *United Insurance*, 390 U.S. at 259); see also, e.g., *A.S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984) (finding that “open-ended duration” of employment relationship weighed in favor of employee status). Cf. *Porter Drywall*, 362 NLRB No. 6, slip. op. at 4 (favoring independent contractor status where drywall crew leaders worked for the employer on a project basis rather than for an indefinite time period).

based on what community managers considered to be poor performance.⁴⁵ As a result, we conclude that this factor weighs in favor of employee status.⁴⁶

7. The Method of Payment Weighs in Favor of Employee Status.

While some aspects of how the Employer pays its couriers are consistent with independent contractor status, it has significant and unilateral control over its couriers' compensation, thus weighing in favor of employee status. For example, the Employer pays its couriers (b) (4) of delivery fees for orders. The Employer unilaterally determines both the actual delivery fee paid by the customer and the commission percentage paid to the courier, without any input from or negotiations with the couriers, which is a factor that the Board has found weigh in favor of employee status.⁴⁷ The Board has also historically found in the taxi industry, which is similar to the service the Employer provides, that commission-based payments rather than standard lease or rental payments support a finding of employee status.⁴⁸

⁴⁵ See *Time Auto Transportation*, 338 NLRB 626, 626 n.1, 637 (2002) (relying, in part, on the fact that truck lease agreements were terminable at-will to find employee status), *enforced*, 377 F.3d 496, 499 (6th Cir. 2004); *cf. Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (noting that, under California law, the “right to terminate at will, without cause, is ‘[s]trong evidence in support of an employment relationship’” (citation omitted)).

⁴⁶ There is no evidence here that couriers commonly have gaps in their working relationships with the Employer as they pursue other opportunities. The Board in *Sisters' Camelot* concluded that under such circumstances, and where employees also had discretion over whether and how much to work, this factor was inconclusive. 363 NLRB No. 13, slip op. at 4.

⁴⁷ See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 4 (where employer paid canvassers a commission of 40% of donations they collected, and the rate was nonnegotiable, this factor weighed in favor of employee status); *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 14 (finding employee status where drivers' rates of compensation were “generally nonnegotiable”); *Porter Drywall*, 362 NLRB No. 6, slip op. at 4 (where drywall crew leaders were paid pursuant to an established square footage formula and employer would not generally negotiate for increased payments, this factor weighed in favor of employee status); *Lancaster Symphony Orchestra*, 357 NLRB at 1764 (finding employee status where musicians' “fees are unilaterally set by the [employer] and there are no negotiations over such fees”).

⁴⁸ See *AAA Cab Services*, 341 NLRB 462, 465 (2004) (noting that the relationship between a company's compensation and amount of fares collected by drivers is given significant weight in determining employee status in the taxicab industry and because, in part, employer's primary source of revenue was derived from drivers'

The Employer also remits (b) (4) of the tips that customers give through the app, but maintains control over the method and transmittal of those tips by prohibiting couriers from accepting cash tips. And while it appears that the Employer does not pay its couriers hourly, it does advertise the courier job as paying up to \$20 or \$25/hour. Moreover, the Charging Party understood from (b) (6) onboarding session that couriers would be paid on an hourly basis. It is also important to note that the Employer's method of compensation greatly minimizes the possibility of genuine financial risk or gain, and that generally, the way a courier makes more money is by working more hours, a method consistent with employee status.⁴⁹

Also consistent with employee status, the Employer provides some insurance coverage to the couriers.⁵⁰ And, although the Employer does not provide extensive fringe benefits, gas money, or similar forms of compensation, the Board has found that these facts are outweighed where an employer exerts significant control over compensation.⁵¹ Moreover, although the Employer's decision not to withhold taxes and instead provide its couriers with tax documentation is consistent with independent contractor status, it is not controlling.⁵² This is merely a unilateral

standard lease payments as opposed to a commission-based system, drivers were independent contractors).

⁴⁹ *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 14 (noting that drivers found to be employees were not paid an hourly wage but that their compensation nonetheless greatly minimized the possibility of genuine financial risk or gain).

⁵⁰ *See, e.g., Pacific 9 Transportation, Inc.*, Case 21-CA-150875, Advice Memorandum dated December 18, 2015 (finding employee status where, among other things, employer had insurance on all of its trucks contrary to the requirement in the agreement that the drivers do so).

⁵¹ *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 4 (while canvassers found to be employees were not guaranteed any minimum compensation and did not receive benefits, the critical consideration was the employer's right of control over their compensation); *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 14 (finding lack of fringe benefits outweighed by the fact that the employer established, regulated, and controlled the rate of compensation and financial assistance to the drivers as well as the rates charged to customers).

⁵² *See, e.g., Igramo*, 351 NLRB 1337, 1345 (2007) (ALJ, affirmed by Board, noted that "[t]o the extent that the Respondent has failed to make deductions ... it merely demonstrates that the Respondent is probably violating a substantial number of other Federal and State laws."). *See also J. Huizenga Cartage Co. v. NLRB*, 941 F.2d 616, 620 (7th Cir. 1991) ("[I]f an employer could confer independent contractor status

decision by the Employer to treat its couriers as independent contractors.⁵³ Further, the Employer's decision to do so may be at a loss to the couriers and a gain for itself due to the avoidance of, among other things, minimum wage and overtime regulations applicable only to employees.⁵⁴

Considering the Employer's complete control over the form and method of compensation, this factor weighs in favor of employee status.

8. Whether or not the Work is Part of the Regular Business of the Employer Weighs in Favor of Employee Status.

The Employer argues that it is in the technology business and not the delivery business and thus that its couriers work outside the usual course of its business. Specifically, the Employer argues that it is not a transportation company because it neither employs drivers nor owns, leases, or operates any commercial vehicles.

This argument fails for a number of reasons. First, in *FedEx Home Delivery*, the Board concluded that the work of the drivers was part of the regular business of the employer because delivering packages to customers was the employer's central mission and the drivers effectuated that purpose.⁵⁵ The Board thus found that the drivers were "not merely a 'regular' or even an 'essential' part of the [e]mployer's

through the absence of payroll deductions there would be few employees falling under the protection of the Act."), *enforcing*, 298 NLRB 965 (1990).

⁵³ While the Eleventh Circuit in *Crew One Productions v. NLRB*, 811 F.3d 1305, 1312 (11th Cir. 2016), *denying enforcement to* 362 NLRB No. 8 (Jan. 30, 2015), concluded that the Board erred by not giving strong weight to the factual finding that the stagehands did not have taxes withheld from their payments, the Region should be prepared to argue that this aspect of the court's decision is in conflict with the weight of legal authority in this area, as represented by the cases cited in note 52, *supra*.

⁵⁴ See Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 Mich. Telecomm. & Tech. L. Rev. 341, 351-52 (2016) (noting that employer classification of employees as independent contractors is often motivated by incentives to minimize the cost of labor and limit employer liability because employers can avoid the costs of paying payroll taxes, minimum wage, and overtime; the risks of employment discrimination law; the need to bargain with unions; and the burden of providing unemployment insurance, workers' compensation, or family and medical leave).

⁵⁵ *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 14.

normal operations, but are the very core of its business.”⁵⁶ The same is true here. The Employer’s sole business is to deliver items from restaurants and stores on-demand to customers, and it is the Employer’s couriers that perform that work.⁵⁷

Second, in *Sisters’ Camelot*, the Board found that canvassers for a charitable organization, whose function was to collect and distribute food to low-income individuals, were employees because they were an integral and indispensable part of the employer’s regular business. Specifically, the canvassers were responsible for collecting 90% of the employer’s total revenue. The Board noted that without the canvassers’ work, the employer would not have been able to obtain the operational funding to fulfill its mission.⁵⁸ Similarly, here, the Employer’s revenue comes from the delivery fees that it charges for the work performed by its couriers. Without these couriers, the Employer could not operate.

Additionally, the Employer is not solely in the technology business. In fact, the Employer provided the couriers with, among other things, training and orientation, supplies (as discussed above), a job support line that performs a number of important operational functions, and customer service assistance.⁵⁹ It also heavily monitors and

⁵⁶ *Id.*, citing *United Insurance*, 390 U.S. at 259, and *Slay Transportation Co., Inc.*, 331 NLRB 1292, 1294 (2000).

⁵⁷ See, e.g., *Lancaster Symphony Orchestra*, 357 NLRB at 1765 (because the orchestra was in the business of providing live music in its region and the musicians were in the business of performing music, their work was part of the employer's regular business); *BKN, Inc.*, 333 NLRB at 144 (show writers clearly performed functions that were an essential part of the employer’s normal operations and constituted an integral part of the employer’s business, which was to produce a show). See also *SpoonRocket*, Case 32-CA-144189, Advice Memorandum dated July 28, 2015 (employer marketed its app-based business on promise that it delivered meals to customers, thus drivers were not merely a regular or even essential part of the employer’s operations, but at the very core of its business).

⁵⁸ See also *United Insurance*, 390 U.S. at 259 (the insurance agents did not operate their own independent businesses but performed functions that were an essential part of the company’s normal operations); *Lancaster Symphony Orchestra*, 357 NLRB at 1765 (the success and failure of the orchestra was dependent on the services rendered by the musicians and the orchestra could not conduct its business without them).

⁵⁹ Cf. *O’Connor v. Uber*, 82 F. Supp 3d. at 1138, 1141-45 (rejecting Uber’s claims that it is a technology company and not a transportation company in part because Uber is deeply involved in marketing its transportation services, qualifying and selecting

terminates them based on their performance. Moreover, if a company can be considered a “technology company” based on the central use of technology to its business, there are few, if any, firms that are not technology companies.⁶⁰ Thus, the claim that the Employer is solely in the business of creating or maintaining the technology behind its website and app is severely undermined by the various functions that the Employer performs as part of its operation.

For the above reasons, this factor favors a finding of employee status.

9. Whether or not the Parties Believe They Are Creating an Independent-Contractor Relationship is Inconclusive.

Although couriers are required to sign an Independent Contractor Acknowledgement Agreement before starting work for the Employer, the Board has held that the existence of such an agreement is not determinative in assessing the parties’ understanding of their relationship. For example, in *FedEx Home Delivery*, the Board found this factor to be inconclusive where drivers were required to sign independent-contractor agreements without any “opportunity to negotiate” over the relevant terms, and where there was conflicting evidence indicating that the drivers considered themselves to be employees.⁶¹ Here, the Employer presented the couriers with a standard agreement that it required them to sign without any negotiation.

drivers, regulating and monitoring their performance, disciplining or terminating those who fail to meet its standards, and setting prices).

⁶⁰ *See id.* at 1141 (“Uber is no more a ‘technology company’ than Yellow Cab is a ‘technology company’ because it uses CB radios to dispatch taxi cabs, John Deere is a ‘technology company’ because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a ‘technology company’ because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few [if any] firms are *not* technology companies if one focuses solely on *how* they create or distribute their products.”). *But see Crew One Productions v. NLRB*, 811 F.3d at 1314 (concluding that a company was in the business of referring stagehand workers to event producers but did not perform stagehand work itself and thus this factor supported independent contractor status). The Region should be prepared to argue that this aspect of the Eleventh Circuit’s decision in *Crew One Productions* is in conflict with Board law and long-established court precedent. *See supra*, notes 57-58, and *infra*, note 65.

⁶¹ 361 NLRB No. 55, slip op. at 14; *see also Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 5 (“Because the crew leaders do not have the opportunity to bargain over the terms of the Independent Contractor Agreement, the agreement provides ‘inconclusive evidence’ . . . for finding that the crew leaders are independent contractors.” (citation omitted)).

Additionally, the Employer advertises its courier job stating, “Postmates is hiring!” and lists the amount per hour that couriers can make. Those statements are consistent with employee status.⁶² Thus, this factor is inconclusive.

10. Whether the Principal is or is not in the Business Weighs in Favor of Employee Status.

The Employer’s business *is* the on-demand delivery of items to customers. Because the Employer’s business is indistinguishable from the services performed by its couriers, this factor weighs in favor of employee status.⁶³ Further, the Board has specifically held that even where an employer does not have undisputed statutory employees performing the same work as the disputed individuals, this is not controlling.⁶⁴

As noted above, the Employer’s argument that it is not in the business of delivering items but instead of simply providing technology is undermined by its actual operation and the way it projects its business to the public. The Employer presents itself to the public as a company composed of couriers it refers to as “Postmates” that perform these deliveries, and the Employer calls itself Postmates. It

⁶² The Region should also seek to determine whether the Charging Party believed he was an independent contractor or employee. *Compare FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 14 (where majority of unit members voted to be represented as employees in collective bargaining with the employer, that conduct offset the employer’s belief that it was establishing an independent contractor relationship), *with Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 4 (favoring independent contractor status where some canvassers testified that they understood they would be working as independent contractors).

⁶³ *See FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 14 (because the employer, by the terms of the agreement “is engaged in providing a small package information, transportation, and delivery service throughout the United States” and its drivers are engaged in the same business, this factor weighed in favor of employee status); *Prime Time Shuttle International*, 314 NLRB 838, 840 (1994) (the employer’s business is providing shared rides to the public and its vans and drivers perform that function, thus “[d]riving is not merely an essential part of [the employer’s] business it is [the employer’s] business.”)

⁶⁴ *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 4 (finding the fact that the employer did not have undisputed statutory employees who performed the same work as canvassers outweighed by the fact that the employer had established and directed its own fundraising operation, which relied heavily on the financial support collected by the canvassers).

brands its website and app with a logo and provides this logo for use by couriers. Additionally, virtually any company can characterize itself as in the business of providing individuals who provide a service, rather than in the business of providing that service. This characterization, however, is overly broad and universally applicable, and arguments like it have long been rejected by courts.⁶⁵ The argument is also inconsistent with the common-law test, which focuses on the perspective of third parties.⁶⁶ Here, customers understand the Employer to be providing on-demand delivery services, and thus the Employer is in the business of doing so.⁶⁷ This factor therefore weighs in favor of employee status.

⁶⁵ See, e.g., *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552-53 (2d Cir. 1914) (rejecting mining company's argument that it was not in the business of coal mining because it let out contracts to independent contractors to perform the mining, as the miners carried on the company's only business). See also Anna Deknatel, Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J.L. & Soc. Change 53, 100 (2015) (explaining that "despite some employers' attempts to re-characterize the nature of their businesses, courts have been unwilling to draw such stringent lines in defining a business's purpose and have rejected an employer's attempt to limit and distinguish its business from the services that many of its workers perform.")

⁶⁶ See *Smith v. Castaways Family Diner*, 453 F.3d 971, 976 (7th Cir. 2006) (noting that at common law, whether an employer controls the means and manner of work performance has been an important factor in determining whether an employer is liable to third parties for the misdeeds of those performing work on the employer's behalf and that courts have come to rely on the same distinction to determine when an employer owes statutory obligations to persons working on its behalf); *In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 758 F. Supp. 2d 638, 654 (N.D. Ind. 2010) ("Courts developed the common law right to control test to determine whether an employer had reserved enough control over a worker to justify holding the employer liable for the worker's tortious conduct towards a third party."), *rev'd in part sub nom. Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313 (11th Cir. 2015); Robert Sprague, *Worker (Mis)classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 ABA J. Lab. & Emp. L. 53, 59 (2015) (the common law of agency focuses on the "principal's" potential vicarious liability to third parties arising from the acts of its "servants.").

⁶⁷ (b) (7)(A)



11. Whether the Evidence Tends to Show That the Individual is, in Fact, Rendering Services as an Independent Business Weighs in Favor of Employee Status.

In *FedEx Home Delivery*, the Board stated that the “independent-business factor supplements – without supplanting or overriding – the traditional common-law factors.”⁶⁸ Moreover, the Board clarified that the question of actual entrepreneurial opportunity for gain or loss is merely one of the sub-factors that must be assessed in determining whether the individual is rendering services as part of an independent business. The weight of these sub-factors support finding that the couriers are employees.

a. Actual entrepreneurial opportunity for gain or loss

The Employer’s business model provides couriers very little entrepreneurial opportunity for gain or loss. Although couriers can increase their compensation by accepting more deliveries, the mere ability to perform additional work for an employer does not indicate independent-contractor status. As the Board noted in *Lancaster Symphony Orchestra*: “The choice to work more hours or faster does not turn an employee into an independent contractor. To find otherwise would suggest that employees who volunteer for overtime . . . would be independent contractors.”⁶⁹ Moreover, as in *FedEx Home Delivery*, because the couriers’ earnings “do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits,” they are not “genuinely independent businessm[e]n.”⁷⁰

b. A realistic ability to work for other companies

While the Employer’s couriers are permitted to work for other companies, this ability is not without constraint. Specifically, the Employer’s Independent Contractor Acknowledgement Agreement provides that when couriers are not providing services to Postmates, they are permitted to use their vehicle for any purpose, including performing deliveries for any other company or themselves. Thus, couriers can work for other companies, but cannot do so concurrently. One of the community managers explained that (b) (6), (b) (7)(C) instructed couriers that if they had a customer in the car for Uber or Lyft, they should log off the Postmates app. (b) (6), (b) (7)(C) said, “(b) (6), (b) (7)(C), (b) (7)(D)

⁶⁸ 361 NLRB No. 55, slip op. at 12.

⁶⁹ 357 NLRB at 1765.

⁷⁰ 361 NLRB No. 55, slip op. at 14, quoting *Roadway Package System*, 326 NLRB 842, 852 (1998).

(b) (6), (b) (7)(C), (b) (7)(D).”⁷¹ Moreover, although the couriers can work for other companies when they are not working for the Employer, the mere ability to work multiple jobs does not establish independent-contractor status. The Board has recognized that: “Part-time and casual employees covered by the Act often work for more than one employer. . . . The fact that [the employees] hold other jobs simply reflects the part-time nature of [the employer’s] schedule.”⁷²

c. Proprietary or ownership interest in the work

Couriers do not possess any proprietary interest with respect to certain restaurants or stores, delivery areas, or customers. Further, the Charging Party testified that (b) (6) was told by a community manager during the onboarding session that couriers could not develop their own clients through the job.⁷³

d. Control over important business decisions

While couriers have the ability to determine their hours, and the initial decision of whether to accept or reject a delivery, they do not have control or even input into the many important business decisions that are involved in the Employer’s business. As in *FedEx Home Delivery*, the Employer retains “total command over its business strategy, customer base and recruitment, and the prices charged to customers.”⁷⁴ Similarly, the Employer unilaterally determines the restaurants and stores it partners with, the design of its website and software, and the customers to whom it

⁷¹ *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 5 (favoring employee status where canvassers could not solicit donations for other organizations while they were actively working for the employer, which limited their opportunity to develop other business relationships with new clients or employers as they canvassed). *Cf. St. Joseph News-Press*, 345 NLRB 474, 479 (2005) (employer’s lack of restriction on carriers’ ability to deliver competing newspapers concurrently on their routes supported independent-contractor status).

⁷² *Lancaster Symphony Orchestra*, 357 NLRB at 1765. *See also Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 5 (“That the canvassers may and often do work for other employers when they are *not* actively working for the [employer] is essentially indicative of their part-time work schedule and has little bearing on whether canvassers are employees or independent contractors.”).

⁷³ *See, e.g., Prime Time Shuttle International*, 314 NLRB at 840 (favoring employee status where, “[e]ven for unscheduled business, the intent is that customers will return for [the employer’s shared rides] services rather than that of the driver”).

⁷⁴ 361 NLRB No. 55, slip op. at 15.

delivers.⁷⁵ The Employer also unilaterally drafts, promulgates, and changes the terms of agreement with its couriers, which weighs heavily in favor of employee status.⁷⁶ Additionally, the couriers cannot realistically increase their opportunity for profit by hiring assistants; the model is not set up to allow couriers to claim multiple jobs and hire helpers or assistants to perform them, and there is no evidence that this occurs.⁷⁷

Thus, while the couriers have some control over their work schedules, and the ability to work for other companies when they are not working for the Employer, we find that these facts are outweighed by the couriers' inability to influence important business decisions, couriers' inability to take on more work and hire helpers or assistants to perform that work, and the very little opportunity for gain or loss available under the Employer's business model. As a result, the couriers are similar to employees with a flexible work schedule.

Applying the common-law agency factors discussed above, almost all of which weigh in favor of employee status, together with the independent-business factor which also weighs in favor of employee status, we conclude the Employer's couriers are statutory employees under the Act.

⁷⁵ See, e.g., *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 5 (favoring employee status because canvassers had no discretion to implement a business strategy for developing a customer base).

⁷⁶ *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 15.

⁷⁷ Cf. *Porter Drywall*, 362 NLRB No. 6, slip. op. at 5 (among other things, contractors decided how many crew members to employ on a particular job and the terms and conditions of employment for the crews they hire, set their own hours and the hours of their crew, and were liable for damages arising out of the work of their crews).

Because the Employer's couriers are statutory employees, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by informing the Charging Party on May 15 that [REDACTED] could not speak with other couriers about their terms and conditions of employment and by maintaining and unlawful mandatory arbitration agreement.⁷⁸

/s/
B.J.K.

ADV.13-CA-163079.Response.Postmates [REDACTED]

⁷⁸ While the employee testimony in this case is limited to the Charging Party, the evidence that is publicly available and that was obtained by the Region from the Employer and other sources is sufficient to show that the Employer's couriers are generally employees. An ALJ recently determined that the individuals performing work for a national app-based company are employees based on the testimony of one individual and documentary evidence. (b) (7)(A) [REDACTED]

See, e.g., Boch Honda, 362 NLRB No. 83, slip op. at 3 (Apr. 30, 2015) (leaving to compliance the question of what entities the respondent owned or operated with respect to the scope of the remedy for unlawful handbook policies), *enforced*, 2016 WL 3361733 (1st Cir. June 17, 2016).