2020 WL 1452612



Court of Appeals of New York.

In the MATTER OF the Claim of Luis A. VEGA, Respondent,
**Postmates** Inc., Respondent,
v.
Commissioner of Labor, Appellant.

No. 13
|
Decided March 26, 2020

Substantial evidence supported Unemployment Insurance Appeals Board's determination that delivery business that used website and smartphone application to allow customers to request on-demand pick-up and delivery service exercised sufficient control over its couriers to render them employees, rather than independent contractors, and thus business was required to make contributions to unemployment insurance fund; business controlled assignment of deliveries by determining which courier had access to possible delivery jobs, customers could not request that job be performed by particular courier, business unilaterally fixed couriers' compensation and paid couriers, business unilaterally set delivery fees for which it billed customers directly, and business handled all customer complaints. N.Y. Labor Law § 511(1)(a).

**Attorneys and Law Firms**

Joseph M. Spadola, for appellant.

David M. Cooper, for respondent **Postmates**, Inc.

New York State AFL–CIO; Legal Services NYC et al., amici curiae.

**Opinion**

DiFIORE, Chief Judge:

***1** The issue before us is whether the decision of the Unemployment Insurance Appeals Board (the Board) that claimant, a former **Postmates**, Inc. courier, and others similarly-situated are employees for whom **Postmates** is required to make contributions to the unemployment insurance fund was supported by substantial evidence. Because there was record support for the Board's finding that the couriers were employees, we reverse the Appellate Division order and reinstate the Board's decision.

**Postmates** is a delivery business that uses a website and smartphone application to dispatch couriers to pick-up and deliver goods from local restaurants and stores to customers in cities across the United States—deliveries that are, for the most part, completed within an hour. **Postmates** solicits and hires its couriers, who undergo background checks before being approved to work by **Postmates**. Once they are approved, the couriers decide when to log into the application and which delivery jobs to accept. Once a courier accepts a delivery job made available through the application, the courier receives additional information about the job from **Postmates**, including the destination for the delivery. After completing a job, **Postmates** pays the couriers 80% of the delivery fees charged to customers, and payments are made by the customer directly to **Postmates**, which pays its couriers even when the fees are not collected from customers. Couriers' pay and the delivery fee are both nonnegotiable.

Claimant Luis Vega worked as a **Postmates** courier in June 2015. Based on negative reviews from customers alleging fraudulent activity, **Postmates** blocked claimant from using the application. Thereafter, claimant filed for unemployment benefits. In August 2015, the Department of Labor, based in part on a statement of Mr. Vega, initially determined that claimant was an employee of **Postmates**, requiring that **Postmates** pay unemployment insurance contributions on Mr. Vega's earnings, as well as on the earnings of "all other persons similarly employed."[1] After **Postmates** disputed the determination, a hearing was held before an administrative law judge (ALJ) who sustained **Postmates**' objection, concluding that claimant was an independent contractor and reasoning that **Postmates** did not exercise sufficient supervision, direction and control over claimant to

  

establish an employer-employee relationship. The Commissioner appealed the ALJ's decision to the Board, which reversed the ALJ, overruled **Postmates**' objection and sustained the Department's initial determination that claimant was an employee. After making findings of fact regarding the operation and logistics of **Postmates**' delivery business, the Board concluded that "claimant and any other on-demand couriers (delivery drivers) similarly situated" were employees because **Postmates** exercised, or reserved the right to exercise, control over their services.[2]

***2** **Postmates** appealed to the Appellate Division. With two Justices dissenting, the Appellate Division reversed the Board's determination and remitted to the Board for further proceedings not inconsistent with the court's decision. The Appellate Division concluded that "[w]hile proof was submitted with respect to **Postmates**' incidental control over the couriers," the proof "d[id] not constitute substantial evidence of an employer-employee relationship to the extent that it fail[ed] to provide sufficient indicia of **Postmates**' control over the means by which these couriers perform their work" (162 A.D.3d 1337, 1339, 78 N.Y.S.3d 810 [3d Dept. 2018]). The dissenting Justices would have confirmed the Board decision, concluding that there was substantial evidence supporting its determination that claimant was an employee of **Postmates**. The Commissioner appeals, pursuant to CPLR 5601(a).

[1] [2]Unemployment insurance is temporary income for eligible employees who lose their jobs through no fault of their own (*see* Labor Law § 501). The Commissioner of Labor is responsible for administering the State's unemployment benefits scheme (*see id.* § 530)—meaning the Department of Labor is the body that determines, on a case-by-case basis, whether workers are employees for whom contributions to the unemployment insurance fund must be made rather than independent contractors for whom no such contribution need be made (*see id.* § 570). The Department's determinations are subject to review by the Board upon appeal (*id.* § 621). A determination of the Board "if supported by substantial evidence on the...

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... a number of factors in determining whether a worker is an employee or an independent contractor, examining "[a]ll aspects of the arrangement" (*Villa Maria,* 54 N.Y.2d at 692, 442 N.Y.S.2d 972, 426 N.E.2d 466). But the touchstone of the analysis is whether the employer exercised control over the results produced by the worker or the means used to achieve the results (*see Concourse Ophthalmology,* 60 N.Y.2d at 736, 469 N.Y.S.2d 78, 456 N.E.2d 1201).[3] The doctrine is necessarily flexible because no enumerated list of factors can apply to every situation faced by a worker, and the relevant indicia of control will necessarily vary depending on the nature of the work.[4]

***3** [6]Here, there is substantial evidence in the record to support the Board's determination that **Postmates** exercised control over its couriers sufficient to render them employees rather than independent contractors operating their own businesses. The company is operated through **Postmates**' digital platform, accessed via smartphone app, which connects customers to **Postmates** couriers, without whom the company could not operate. While couriers decide when to log into the **Postmates**' app and accept delivery jobs, the company controls the assignment of deliveries by determining which couriers have access to possible delivery jobs. **Postmates** informs couriers where requested goods are to be delivered only after a courier has accepted the assignment. Customers cannot request that the job be performed by a particular worker. In the event a courier becomes unavailable after accepting a job, **Postmates**—not the courier—finds a replacement. Although **Postmates** does not dictate the exact routes couriers must take between the pick-up and delivery locations, the company tracks courier location during deliveries in real time on the omnipresent app, providing customers an estimated time of arrival for their deliveries. The couriers' compensation, which the company unilaterally fixes and the couriers have no ability to negotiate, are paid to the couriers by **Postmates**. **Postmates**, not its couriers, bears the loss when customers do not pay. Because the total fee charged by **Postmates** is based solely on the distance of the delivery and couriers are not given that information in advance, they are unable to determine their share until after accepting a job. Further, **Postmates** unilaterally sets the delivery fees, for which it bills the customers directly through the app. Couriers receive a company sponsored "PEX" card which they may use to purchase the customers' requested items, when necessary. **Postmates** handles all customer complaints and, in some circumstances, retains liability to the customer for incorrect or damaged deliveries.

**Postmates** exercises more than "incidental control" over its couriers—low-paid workers performing unskilled labor who possess limited discretion over how to do their jobs. That the couriers retain some independence to choose their work schedule and delivery route does not mean that they have actual control over their work or the service **Postmates** provides its customers; indeed, there is substantial evidence for the Board's conclusion that **Postmates** dominates the significant aspects of its

  

couriers' work by dictating to which customers they can deliver, where to deliver the requested items, effectively limiting the time frame for delivery and controlling all aspects of pricing and payment.

Although the operative technology has changed in the interim decades, this case is indistinguishable from *Matter of Rivera,* where we held that substantial evidence supported the Board's conclusion that a similar delivery person was an employee of the delivery company—even though he set his own delivery routes and did not have a set work schedule but called the company's dispatcher whenever he wished to engage in work, accepting only the jobs he desired (*see Matter of Rivera [State Line Delivery Serv.–Roberts],* 69 N...

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... following and invite students to attend their classes at competing studios. Moreover, Yoga Vida's non-staff instructors were paid only if a certain number of students attended their class and, therefore, needed to ensure some degree of a customer following to be successful. They also chose the method by which Yoga Vida would calculate their pay (either hourly or on a percentage basis). In these ways, the non-staff yoga instructors, in contrast to the other staff instructors, operated as independent contractors who were in business for themselves. The same cannot be said of the couriers here. Customers cannot choose, nor do they have reason to choose, a particular individual to perform the delivery and thus, unlike the non-staff instructors in *Matter of Yoga Vida,* **Postmates**' couriers do not have the ability to create a following or generate their own customer base.[5] Instead, **Postmates** has complete control over the means by which it obtains customers, how the customer is connected to the delivery person, and whether and how its couriers are compensated. Therefore, there is record support for the Board's conclusion that **Postmates** exercised more than incidental control over the couriers. "There being substantial evidence to sustain the determinations, the judicial inquiry is complete" (*Matter of Rivera,* 69 N.Y.2d at 682, 512 N.Y.S.2d 14, 504 N.E.2d 381).

***4** Accordingly, the order of the Appellate Division should be reversed, with costs, and the decision of the Board reinstated.

Matter of Vega (**Postmates**)

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I.

RIVERA, J. (concurring in result):

According to **Postmates**, Inc., its "couriers"—persons who make up the company's delivery staff, like claimant Luis Vega—are independent contractors because they exercise a modicum of choice in how to conduct their work. Even a cursory look at **Postmates's** structure reveals the fallacy of this argument. **Postmates** has adopted an atomized business model which prevents these workers from providing delivery services as independent business owners. During their employ, "couriers" have no meaningful way to commodify their efforts into a self-sustaining business. The structure of their work and the realities of the service economy do not permit them to develop a client base by exercising control over their business choices. To put it bluntly, **Postmates** did not hire entrepreneurs as delivery persons, and **Postmates**' attempt to create the illusion of entrepreneurialism does not transform these employees into a fleet of independent contractors.

The majority correctly describes our multi-factor test for determining whether a worker is an employee (*see* majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——; *see also Bynog v. Cipriani Group,* 1 N.Y.3d 193, 198, 770 N.Y.S.2d 692, 802 N.E.2d 1090 [2003] [considering "whether the worker ... was free to engage in other employment"]; *Matter of Wells [Utica Observer–Dispatch & Utica Daily Press—Roberts],* 87 A.D.2d 960, 451 N.Y.S.2d 213 [3d Dept. 1982], *affd sub nom Matter of Di Martino [Buffalo Courier Express Co.-Ross],* 59 N.Y.2d 638, 463 N.Y.S.2d 189, 449 N.E.2d 1267 [relying on fact that workers could subcontract responsibilities and work for competitors] ), and reasonably considers the Board's application of the relevant factors here.[6] Nevertheless, while the test is well-suited to most cases, it has its limits and may prove difficult to apply to electronically mediated work arrangements. I would adopt as the better approach the Restatement of Employment Law's test for determining employee status, which alternatively considers the worker's entrepreneurial control over their services and the extent to which the employer "effectively prevents" such worker control (*see* Restatement of Employment Law § 1.01). Therefore, I write to clarify how the Restatement of Employment Law test applies to **Postmates** and similar business models.[7]

  

A. New York's Legislature Enacts the Unemployment Insurance Law to Address the Devastating Effects of Unemployed Worker Economic Insecurity

***5** New York's Unemployment Insurance Law is intended to "alleviat[e] the adverse financial condition that frequently accompanies ... the cessation of income from an employer" (*Matter of Van Teslaar [Levine],* 35 N.Y.2d 311, 316, 361 N.Y.S.2d 338, 319 N.E.2d 702 [1974] ). According to the legislature's stated public policy, which "guide[s] the interpretation and application of [the Law],"

> "[e]conomic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state. Involuntary unemployment is therefore a subject of general interest and...

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... having to supervise a worker in the traditional sense does not render the worker an independent contractor merely by dearth of oversight. An illusory opportunity to be your own businessperson is insufficient to establish independent contractor status where the employer controls significant aspects of the work that meaningfully impact the employer-employee relationship, and by so doing, "effectively prevents the individual from rendering those services as an independent businessperson" (Restatement of Employment Law § 1.01[a][3] ). The conditions establishing an employment relationship set forth in the Restatement of Employment Law, drawing in part from the multifactor test of the Restatement (Third) of Agency, should be applied to unemployment insurance cases.

II. **Postmates's** Business Model

***10** **Postmates** describes itself as "a company that created and operates a web-based and mobile Platform" which "facilitates a marketplace of deliveries from local businesses through a network of freelance Delivery Providers." Notwithstanding this attempt to distinguish itself from other delivery services, the record makes clear that **Postmates** is in the business of making timely deliveries and uses technology to atomize this service. **Postmates** does not "match" an individual who can then negotiate in their own interests the best way to meet a client's needs. **Postmates**' "marketplace" is illusory as **Postmates**' business model depends on unskilled workers who have no ability to work as independent delivery persons and develop a client base while in **Postmates**' employ.

To be precise, **Postmates** created an algorithm that permits an individual to place an online delivery order. The request is made on the Platform and then **Postmates** finds a person from its pool of hired workers to make the delivery. Delivery persons—called "couriers"—access delivery assignments through the Platform, i.e., the **Postmates** app. **Postmates** does a criminal background check on couriers and trains them on how to use the app. Couriers must sign an "Independent Contractor Acknowledgement Agreement." Although couriers may use their preferred means of transportation to conduct their deliveries, they must give **Postmates** advance notice of their choice. Couriers log into the app at will, and may accept or decline a posted delivery assignment, but they do not receive details about the nature of the assignment in advance of acceptance. **Postmates** retains the right to unilaterally terminate couriers without notice, such as for poor customer ratings or other poor performance. As I discuss below, **Postmates**' business model depends on a delivery staff of "couriers" who are employees, not independent contractors.

III. Restatement of Employment Law Applied to **Postmates**

"Couriers" do not have an exclusive employment contract with **Postmates**, but being able to work simultaneously for another employer does not make a courier an independent businessperson. Couriers cannot build a client-base through their business savvy; apart from the moment of delivery, customer contact is through **Postmates**, and customers do not choose a delivery person. Nor does the work lend itself to the "exercise[ ] of entrepreneurial control over important business decisions" (Restatement of Employment Law § 1.01[b] ). Indeed, the model depends on a courier not providing the same services as an independent businessperson.

To illustrate the point, we need only consider what the parties present as a typical **Postmates** delivery assignment: the request to pick up a burrito bowl from a store and deliver it to the customer's home. **Postmates** informs couriers of the pickup location for this delivery request through the app, and once a courier accepts the assignment, **Postmates** forwards the details. The courier

  

is then tracked by both **Postmates** and the customer. At no time during the course of this delivery does the courier make important business decisions that would serve his entrepreneurial interests. The point is to get the delivery done and get paid by **Postmates**. There is no value in an independent relationship with any one customer since it will not lead to economically beneficial future business. You simply cannot individually deliver enough of those types of orders to make a business out of it.[11]

***11** During Vega's term as a courier for **Postmates**, he accepted approximately half of the assignments he was offered. According to his written agreement with the company, he carried his assigned deliveries on foot. He was involuntarily terminated from this role based, according to **Postmates**, on negative customer feedback related to his failure to deliver one or more of the items assigned to him. He was not hired as an independent contractor, and **Postmates** failed to provide evidence of how Vega was able to act as an entrepreneur in the course of delivering to **Postmates** customers. Put another way, the record evidence showed that Vega and other similarly situated couriers "can affect their remuneration or other economic interest only by working harder or more skillfully on [**Postmates**'] behalf; they are not entrepreneurs operating as independent businesspersons" (Restatement of Employment Law § 1.01, Comment *f* ).

The fact is that **Postmates** benefits from the labor of unskilled workers and persons of low income—both vulnerable to employer exploitation, as well as misclassification under the statute. In 2015, when Vega worked for **Postmates**, nearly three million New Yorkers, or 15.4% of the population, lived below the poverty line; nationally, fully 14.7% of persons in the United States lived in poverty (*see* United States Census Bureau, *Poverty: 2014 and 2015,* at 3 [2016] ). Among individuals over 25, those without four-year college degrees were far more likely to be in poverty and/or unemployed (*see* United States Census Bureau, *Income and Poverty in the United States: 2015,* at 13 [2016] [poverty levels declined from 28.9% for individuals without high school degrees to 5% for those with four-year degrees]; United States Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey: 2015 Annual Averages – Household Data – Table 7: Employment status of the civilian...*

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... States Bureau of Labor Statistics, *Electronically mediated work: new questions in the Contingent Worker Supplement* 23 [Sept 2018], https://www.bls.gov/opub/mlr/2018/article/pdf/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.pdf; *see also* dissenting op. at —— n. 11, —— N.Y.S.3d ——, —— N.E.3d ——). Although the Unemployment Insurance Law was passed decades before the digital age, today's app-enabled gig worker is subject to the same devastating financial "insecurity" faced by prior generations of unemployed wage earners and which initially motivated legislators to act (*see* Labor Law § 501).

## IV. Substantial Evidence Supports the Board's Determination

The Unemployment Insurance Appeals Board's determination that claimant Vega was **Postmates's** employee during his tenure as a courier is supported by substantial record evidence. I reach that conclusion by application of the Restatement of Employment Law, which considers the extent to which an employer prevents worker entrepreneurialism and the worker's exercise of entrepreneurial control over important business decisions. The Appellate Division should be reversed and the Board's decision reinstated.

Matter of Vega (**Postmates**)

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WILSON, J. (dissenting):

The majority's opinion suffers from two independent defects. The first is a failure to examine the record to determine whether the findings of the Commissioner of Labor were supported by substantial evidence. Many of those findings were so lacking in support as to appear to have been cut and pasted from the decision in some other matter, or from a form list of all the possible factors that might warrant the conclusion that someone was an employee. Under those circumstances, reversal is required. The second is a failure to recognize that the realities of the contemporary working world have outpaced our jurisprudence. The multitude of factors identified in our caselaw as pertinent to determining whether a claimant is an...

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... independent contractor – reflective of a time when employees received a gold watch upon retiring from the sole company at which they spent their entire careers – coupled with our deferential standard of review, has left only two undesirable paths open: either we adhere to the caselaw and standard of review, leaving all agency decisions unreviewable, or we make haphazard reversals without explanation, based on an *ad hoc* test we do not articulate because it defies explanation. We have chosen the latter approach, which has nothing to recommend it except that it is marginally better than the former.

I.

***12** The majority begins by asserting that "[t]he issue before us is whether the decision of the Unemployment Insurance Appeals Board (the Board) that claimant, a former **Postmates**, Inc. courier, and others similarly-situated are employees for whom **Postmates** is required to make contributions to the unemployment insurance fund was supported by substantial evidence" (majority op. at —— – ——, —— N.Y.S.3d ——, —— N.E.3d ——). That is not correct.

At the inception of the hearing before the ALJ, the following colloquy occurred:

> ALJ PICHARDO: This two-page document is marked as an exhibit for the record as Hearing Exhibit 1 as of today's date. And so where on this document does it say similarly situated, Ms. Claxton?
>
> MS. CLAXTON [Counsel for the Commissioner]: I don't see it. I don't see it, you're right.
>
> ALJ PICHARDO: So then it's only for—
>
> MS. CLAXTON: For the claimant.
>
> ALJ PICHARDO:—claimant?
>
> MS. CLAXTON: Yes, Judge.
>
> ALJ PICHARDO: All right.

After the close of evidence, the ALJ reiterated that "my decision in this case ... only relates to Mr. Vega and not any other employees." Thus, this appeal concerns only Mr. Vega: whether there is substantial evidence supporting the determination that he was an employee of **Postmates**. The Board's determination, erroneously purporting to apply its decision to all similarly situated **Postmates** workers, is itself a freestanding basis to reject the Board's determination (*see Pell v. Board of Education,* 34 N.Y.2d 222, 230–231, 356 N.Y.S.2d 833, 313 N.E.2d 321 [1974] [the action of an administrative tribunal is arbitrary when "taken without regard to the facts"] ).[12]

Anyone can download the **Postmates** Fleet app to become a courier for **Postmates**. I could be a **Postmates** courier, so long as I passed a criminal background check. I could make **Postmates** deliveries when and where I pleased, and extemporaneously indicate my availability at moments when I need a break from the press of court business. I could make my deliveries by any form of locomotion I choose: walk, bicycle, scooter, car, rollerblade, etc.

Luis Vega, at least briefly, thought more of the **Postmates** opportunity than did I. He downloaded the app, provided sufficient information to pass the criminal check, and was thereafter authorized to use the **Postmates** service to make deliveries. Mr. Vega indicated he would be walking to make deliveries. He first logged on to **Postmates** on June 8, 2015, and last logged on to **Postmates** on June 15, 2015. At that point, he had worked for **Postmates** for less than a week and had logged on 12 times for an average of 3 hours and 15 minutes at a time. During those six days, Mr. Vega rejected or ignored about 50% of the assignments offered to him. The record was unequivocal that, even if Mr. Vega requested to make a specific delivery assignment and obtained it, he could thereafter change his mind and reject it, causing it to be dumped back into the pool of assignments available to others. Mr. Vega had no set schedule; he had no supervisor[13]; and, he chose what deliveries interested him, how to perform deliveries, the route he would take, and the times at which he would log on and off. Of the jobs he accepted over those six days, "a lot of requesters' feedback" indicated that "they weren't receiving the items requested." **Postmates** therefore blocked Mr. Vega from the app. Mr. Vega then filed for unemployment benefits.

***13** In its determination of the matter in August 2015, the Department of Labor classified Mr. Vega as an employee for the purposes of New York Unemployment Insurance Law. The Department of Labor's determination that Mr. Vega was **Postmates**' employee lists 24 factors supporting that determination. A large number of those factual findings are directly contradicted by the record.[14] Among those factors are: Mr. Vega was told "when, where, and how the work was to be performed"; he was

  

required to report to a supervisor and work an established schedule; he was required to deliver the packages within a set time; his work would be reviewed; he could not take time off without **Postmates**' approval; he was covered by a workers' compensation policy; he was not free to determine the route of the delivery; and, he could not perform other deliveries while on route with **Postmates**.

None of these factors has support in the record. Each of those factors was undermined by the testimony before the ALJ, who found that the **Postmates** couriers chose when they worked, how they worked, and where they worked; couriers could and did choose their own routes; Mr. Vega was not covered by workers' compensation; couriers were free to reject, ignore, or accept assignments as they chose; and, couriers were free to work for other companies at the same time as they worked for **Postmates** (*id.*). Although the Commissioner found that Mr. Vega "could not engage substitutes or other couriers without your permission," the record evidence was that Mr. Vega could "hand his phone to a complete stranger" to complete deliveries. Additionally, the Department noted as a factor that: "Individuals performing such services as couriers were previously determined to be your employees." However, the ALJ expressly stated that she was "not going to be considering it" because **Postmates** and its counsel "weren't aware of this determination." Moreover, counsel for the Commissioner stated, "I didn't really want to make it a part of the record," after which the ALJ reiterated, "that's not going to be before me."

Based on the record, which included both exhibits and testimony, the ALJ held that Mr. Vega was an independent contractor not entitled to unemployment benefits. Although the Board did not make any finding of fact contrary to the ALJ's findings, the Board reversed the ALJ's determination. The Appellate Division reversed the Board's determination for lack of substantial evidence, citing our decision in *Yoga Vida* (*Matter of Vega v. **Postmates** Inc.,* 162 A.D.3d 1337, 78 N.Y.S.3d 810 [3d Dept. 2018]). The court noted the lack of application or review process, the lack of supervision, the courier's choice to log on and accept delivery requests, the courier's choice of route and mode of transportation, the lack of a required uniform or identification, the payment system (allowing for payment only upon the completion of a delivery), and the lack of reimbursements for delivery-related expenses (*id.* at 1338–1339, 78 N.Y.S.3d 810). Although some indicia of control remained, the court concluded it only showed incidental control, insufficient to render Mr. Vega an employee (*id.* at 1339, 78 N.Y.S.3d 810). To recap: the Commissioner, the Board and majority conclude that Mr. Vega's slapdash week of activity made him **Postmates**' employee; the ALJ and Third Department concluded, as do I, that it did not.[15] What accounts for that disagreement? The failure of our precedent to keep up with the times.

II.

"Any employer shall become liable for contributions under [Article 18, the Unemployment Insurance law] if it has paid remuneration of three hundred dollars or more in any calendar quarter" (Labor Law § 560[1]). "Remuneration" in this part of the Labor Law means "every form of compensation for employment paid by an employer to his employee" (Labor Law § 517[1] ) and "employment" is defined as "any service under any contract of employment for hire, express or implied, written or oral" (Labor Law § 511[1][a] ), subject to many additions not relevant here.[16] Thus, **Postmates**' obligation to pay unemployment insurance contributions for Mr. Vega turns on whether its agreement with him was "a contract of employment for hire." That definition of "employment" is circular, so we have interpreted it to apply what is described as the "common law test" of employee status (*In re Morton,* 284 N.Y. 167, 173, 30 N.E.2d 369 [1940], *cf. Community for Creative Non–Violence v. Reid,* 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 [1989] ), often described as the "control test," when determining liability for unemployment insurance payments.[17]

***14** Under the control test of employee status, "the critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over...

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...." Imagine instructing a contractor to build a house, with no specification as to the size, layout, style or features to be included (ends) or a requirement that the contractor comply with local building laws (means). Absent a more defined legal standard it is unclear how much control the employer may have over an independent contractor before that contractor becomes an "employee," or, for that matter, what makes control "incidental" as compared to non-incidental.[18]

Matters are especially unclear in the semi-professional world of the "overall control" test, which tells us only that

  

sometimes control over "important aspects" other than ends or means matters. But even the means-ends test is no panacea. Means and ends are not perfectly polarized. Here, for example, **Postmates** allows its couriers to choose whatever method of delivery they wish, but had Mr. Vega opted to deliver by pogo stick, turning sushi into a poke bowl or burritos into taco salads, surely he would have been bounced from the app expeditiously. **Postmates** undoubtedly cares that its customers receive their dinners intact, but **Postmates**' concern for that end, or a ban on the means of pogo stick deliveries, does not address the question of control for employment purposes. Both the means (no pogo) and ends (no mush) would be required whether the delivery person was an independent contractor or an employee.

Because "control" standing alone is relatively unhelpful, we have responded by creating a multifactor analysis where no one factor is determinative and where, as the majority correctly observes, "no enumerated list of factors can apply to every situation faced by a worker" (majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——). The Supreme Court of the United States, reviewing a similar proliferation of factors, noted dryly that "the traditional agency law criteria offer no paradigm...

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... used to achieve the results" – and "such control [wa]s lacking" where the salespersons: (1) were paid commissions; (2) worked whatever hours they chose; (3) were free to engage in outside employment; (4) bore their own expenses; (5) were not required to attend meetings or trainings; (6) paid their own premiums for health insurance; and, (7) found their own leads. Those salespeople were independent contractors even though the real estate corporation supplied them with business cards, held regular sales meetings, and provided them with workers' compensation (*12 Cornelia St., Inc. v. Ross,* 83 A.D.2d 681, 682, 443 N.Y.S.2d 707 [3d Dept. 1981]). Mr. Vega – like the salespeople – was paid by commission (he received a percentage of the fee charged to the customer by **Postmates** for each delivery, which fee varied by distance), worked whatever hours he chose, was free to engage in outside employment, bore his own expenses, was provided no health insurance, and was not required to attend meetings or trainings (other than one initial meeting on how to use the app). Yet, despite the "evidence in the record that would have supported a contrary conclusion" (majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——, citing *Concourse Ophthalmology,* 60 N.Y.2d 734, 469 N.Y.S.2d 78, 456 N.E.2d 1201 [1983] ), in *12 Cornelia St.,* we reversed the Board's determination as not supported by substantial evidence.

In *Concourse Ophthalmology*, 60 N.Y.2d at 736, 469 N.Y.S.2d 78, 456 N.E.2d 1201 (1983), another memorandum decision, we upheld the Board's...

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... maintained their own malpractice insurance, operated substantial outside practices, and "functioned completely autonomously" (*Matter of Concourse Ophthalmology Assocs., P.C.,* 89 A.D.2d 1047, 1048, 456 N.Y.S.2d 112 [3d Dept. 1982] [Levine, J., dissenting] ). We did not dispute the putative employer's contention that "the record is devoid of evidence of control over results or means." Instead, we brushed the means-ends test aside because "professional services do not lend themselves to such control." Thus, we affirmed the Board's decision on the grounds that substantial evidence existed in the record. Following that precedent, then, where the factors cut in different directions, the Board may have had "substantial evidence" for its determination here, because **Postmates** controlled the delivery-assignment process, the fee schedule, administration of bills and allocation of record-keeping responsibilities, even though the first two factors we cited in *Concourse Ophthalmology* (regular work schedule and employer determination of place of work) cut against finding Mr. Vega an employee.

***16** In yet another memorandum, we reversed the Board's decision that salespeople for an aluminum siding installation company were employees, holding that decision was not supported by substantial evidence (*Ted Is Back,* 64 N.Y.2d at 726, 485 N.Y.S.2d 742, 475 N.E.2d 113; *see also Matter of Ted Is Back Corp.,* 103 A.D.2d 932, 932, 478 N.Y.S.2d 178 [3d Dept. 1984]). We held that "incidental control over the results produced without further indicia...

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... told her what to wear during her visits, instructed her on what products to promote, barred her from promoting competing products, and instructed her on how to present Hertz products (*id.*). Despite those factors, which could have supported the Board's determination under the substantial evidence standard, we said that she was not an employee as a matter of law, because Hertz exerted merely "incidental control" (*id.*). Mr. Vega was compensated per delivery; the Hertz salesperson per visit. Mr. Vega was told where and what to pick up and deliver, just as the Hertz representative was told what products to promote. Neither was supervised; neither had to attend

  

meetings. But Mr. Vega was not prohibited from delivering for competing services even while engaged in a **Postmates** delivery and could wear whatever he liked. *Hertz* would lead one to conclude that the order of the Appellate Division must be affirmed here because the factors determining Mr. Vega's status point more strongly to independent contractor than the factors on which we reversed the Board's determination in *Hertz.*

Our most recent decision in this area, also a memorandum, is *Yoga Vida.* There, as here, the Department of Labor initially determined Yoga Vida was liable for unemployment insurance for its non-staff yoga instructors; as here, an ALJ overruled that determination; next, the Unemployment Insurance Appeal Board reversed the ALJ's decision, sustaining the Department's initial determination (*Yoga Vida,* 28 N.Y.3d at 1015, 41 N.Y.S.3d 456, 64 N.E.3d 276). The Appellate Division sustained the Board's determination that the non-staff yoga instructors were employees. We reversed, holding the Board's determination was not supported by substantial evidence because the non-staff instructors made their own schedules, were paid only if students attended their classes, could work for competitors, and were not required to attend meetings or trainings (*id.*).[20] Each of those factors – which are the factors that justified our reversal as a matter of law – is true as to Mr. Vega: Mr. Vega made his own schedule, was paid only for deliveries he made, could work and perform deliveries for other companies even while making deliveries for **Postmates**, and was not required to attend meetings or trainings. Moreover, Mr. Vega did not have to work on a prearranged schedule; the non-staff instructors did. Mr. Vega did not have to work at his employer's place of business; the non-staff instructors did. In *Yoga Vida,* we emphasized that Yoga Vida's determination and collection of the fees that the non-staff instructors received did "not supply sufficient indicia of control" (*id.* at 1016, 41 N.Y.S.3d 456, 64 N.E.3d 276). So too, **Postmates**' control over the fees Mr. Vega received should be insufficient to support an employer-employee relationship.[21] That the outcome today is the diametric opposite of the outcome arrived at just three years ago in *Yoga Vida,* an outcome that the majority contends was reached by the same standard as applied here (majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——), shows just how inconstant our "test" has become.

***17** The facts surrounding Mr. Vega's six-day adventure as a courier neatly fit into the exertion of mere "incidental control," which does not provide substantial evidence for a Board's determination of employee status (*see e.g. Ted Is Back,* 64 N.Y.2d at 726, 485 N.Y.S.2d 742, 475 N.E.2d 113). Mr. Vega retained more than just "some independence to choose [his] work schedule and delivery route" (majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——) – he had complete control over his schedule, the hours he logged on, the jobs he accepted or rejected (or rejected even after accepting them), and the routes he took when, having accepted a job, he actually made the promised delivery. Nor does Mr. Vega need to have actual control over "the *service* **Postmates** provides its customers" (majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d —— [emphasis added] ), for that is not the test. The control test applies only to the company's control over the worker's labor; the worker need not have control over, or anything to do with, the service provided by the company. Our precedent may not be consistent, and it certainly makes it difficult for litigants and lower courts to apply the control test, but at least it provides this answer: Mr. Vega is far more an "independent contractor" than the real estate salespeople given business cards by their company in *12 Cornelia St.,* the product promoter who was told what to wear and how to present in *Hertz,* or the yoga instructors told when, where and what to teach in *Yoga Vida....*

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... 14, 504 N.E.2d 381 (1986), is misplaced. Simply because the employees at issue in *Rivera* were delivery persons does not make that case "indistinguishable" (majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——). Although similar in many respects, there are several notable differences: Mr. Vega could accept a delivery assignment and then later change his mind at any time, even after a customer had been told that Mr. Vega would deliver it, whereas there is no indication that the *Rivera* couriers could turn back a delivery assignment after accepting it; Mr. Vega was not given a time limit for completing deliveries, whereas the *Rivera* couriers were; Mr. Vega was free to choose any means of transportation he wished (which he could vary at will with no need to inform **Postmates**), whereas *Rivera* required its couriers to use motor vehicles and to purchase both ordinary insurance as well as special cargo insurance for their vehicles (*Claim of Rivera,* 120 A.D.2d 852, 854, 501 N.Y.S.2d 964 [3d Dept. 1986]).

The addition of a new factor to the control test illustrates the most concerning aspect of our ever-changing employment determination decisions. Because the test depends on innumerable factors, which vary from case to case and opinion to opinion, and we review the Board's determinations for substantial evidence, the Board is given unbounded discretion. We will never be able adequately to review their determinations because they will always rely on factors that we – at one point or

another – have sanctified. "Substantial evidence"...

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> ... an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled."[24]

***20** Although it is well within the purview of the courts to alter a common-law test, that is best done incrementally; the complete overhaul of our common-law employment test to adapt it to the present and future economy is not a task to which courts are well suited.[25] Whether, to what degree, and on what basis we wish to provide unemployment benefits to **Postmates** couriers generally, or to other workers in the gig economy, is a policy question best left to the legislature. Whether the test for that entitlement should be the same as the test for **Postmates**' liability if a courier, speeding on an electrified bicycle to make a timely delivery of a hot dinner, injures a pedestrian, is also a question best suited to legislative determination. The role of the courts is to interpret the law and to clarify it when we can. The accumulation of indecisive, unweighted factors articulated in our past cases, scrutinized under our highly deferential standard of review, typically produces either a de facto lack of review or an uninformative summary reversal. The resulting body of law is difficult to reconcile and does little to advise agencies and lower courts (to say nothing of business enterprises or workers) how any particular work relationship will or should be adjudicated. Today's decision places further stress on that test through its contradiction of our recent decision in *Yoga Vida* and its incompatibility with several others in which we found the Board lacked substantial evidence in circumstances less compelling than this. Nevertheless, until the legislature steps in, we have an obligation to do our best to reach consistent results so that both businesses and workers can structure their affairs with a sound understanding of when the benefits and obligations of "employment" are imposed or conferred upon them. Whether other **Postmates** couriers are employees is not before us. Mr. Vega's case is, and he is not.

Judges Stein, Fahey and Feinman concur. Judge Rivera concurs in result in an opinion. Judge Wilson dissents and votes to affirm in an opinion in which Judge Garcia concurs.

Order reversed, with costs, and decision of the Unemployment Insurance Appeal Board reinstated.

**All Citations**

--- N.E.3d ----, 2020 WL 1452612, 2020 N.Y. Slip Op. 02094

Footnotes

1 The parties do not dispute that, consistent with the Department's initial decision, the Board's determination imposes a contribution requirement for similarly situated couriers employed by **Postmates** (*see* Labor Law § 620[1][b]), nor does **Postmates** direct any argument at that aspect of the Board's decision.

2 The record does not indicate whether Mr. Vega actually received or was eligible for unemployment insurance benefits and that issue is not before this Court.

3 Both the dissent and the concurrence suggest that we should devise a different test for analyzing whether a worker is an employee or independent contractor. But that assertion is neither preserved for review nor argued by any party in this Court. As the dissent recognizes, overhauling the test "is not a task to which courts are well suited" and "is a policy question best left to the legislature" (dissenting op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——). The Legislature defined "employment" in the context of the unemployment insurance law. Whether a different definition or test should now apply to employees generally, or to couriers in particular, is a policy question for the Legislature to be implemented by the administrative agency authorized to make those determinations.

4 The factors the agency considers in assessing control will vary depending on the type of work; for example, that a worker in one industry is not limited to a particular territory (dissenting op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——) may be irrelevant to the inquiry relating to a worker in a different industry. Because of the variability of work relationships, employment status for

  

unemployment insurance purposes requires a case-by-case analysis. It is nonetheless appropriate to consider precedent and view the factors in context when determining whether the Board's determination is supported by substantial evidence. While the "nature of the work" is not determinative of whether a worker is an employee, it does impact how control is (or practically can be) manifested in a particular work environment and in this way is integral to the analysis. To recognize this – which is obvious from our precedent – is not to add a "new factor" (dissenting op. at ——, —— – ——, —— N.Y.S.3d ——, —— N.E.3d ——) to the analysis.

5 Although the dissent asserts otherwise (dissenting op. at —— n. 10, —— N.Y.S.3d ——, —— N.E.3d ——), yoga instructors' interest in creating and maintaining their own customer followings is nothing like customers' online ratings of their **Postmates** couriers. **Postmates** customers have no ability to choose their courier when placing a delivery request. Further, there is no evidence in the record that **Postmates**' couriers can determine the compensation they will receive from a delivery job before accepting it (*id.* at —— n. 10, —— N.Y.S.3d ——, —— N.E.3d ——).

6 As to the majority's application of our common-law test, I disagree insofar as the majority attempts to explain the holding in *Matter of Yoga Vida NYC, Inc. (Commissioner of Labor)*, 28 N.Y.3d 1013, 41 N.Y.S.3d 456, 64 N.E.3d 276 (2016). As the Appellate Division opinion here demonstrates, *Yoga Vida* 's erroneous focus on factors that the majority apparently believed outweighed the Board's rationale (see *id.* at 1016–18, 41 N.Y.S.3d 456, 64 N.E.3d 276 [Fahey, J., dissenting] ) has created confusion as to the proper application of the substantial evidence test when an employer alleges that it exercises limited to no supervision over a worker (*see* 162 A.D.3d 1337, 1339, 78 N.Y.S.3d 810 [2018]; *see also Matter of Mitchell [Nation Co. Ltd Partners—Commissioner of Labor],* 145 A.D.3d 1404, 1406–1407 & n. 1, 44 N.Y.S.3d 567 [3d Dept. 2016] [reading *Yoga Vida* as requiring "a more detailed, qualitative and arguably less deferential analysis of the various employment factors" than had been required by the Court's prior decisions] ). Although the majority states that *Yoga Vida* did not purport to "change the substantial evidence standard that applies to judicial review of the Board's determinations" (majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——), the majority reaffirms the mistake of that case by, in turn, focusing on the facts in *Yoga Vida* that supported a conclusion contrary to that of the Board as the basis for distinguishing that case from the instant appeal. This part of the majority analysis clouds the issue before us, for as I discuss, there is ample evidence that Vega was an employee and not a businessperson serving his own entrepreneurial interests.

7 Contrary to the majority's assertion our rules of preservation are not implicated by my analysis. Our task on this appeal is to decide whether substantial evidence supports the Board's determination that the couriers are employees. The only way to do that is by determining the test for establishing an employment relationship under the Unemployment Insurance Law, which does not define an employment relationship. We have applied common law principles to fill in this statutory gap, and the majority does so again today, acknowledging that "no enumerated list of factors can apply to every situation faced by a worker" (majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——). I consider whether, in this gap-filling role, we should apply the Restatement of Employment Law approach, which draws from the common-law test but also considers as a factor whether workers can act without impediment as entrepreneurs. As I explain, that test addresses concerns the Court has previously raised as a basis for recognizing various relevant factors.

8 While the *Concourse Ophthalmology*, 60 N.Y.2d 734, 469 N.Y.S.2d 78, 456 N.E.2d 1201 branch of the doctrine may have "been typically applied in the context of professionals such as physicians and attorneys" (*Empire State Towing and Recovery Assn., Inc.,* 15 N.Y.3d at 438, 912 N.Y.S.2d 551, 938 N.E.2d 984), its logic has force in other areas as well. For example, a job might not be susceptible of close control because it can "be done only one way" (*S.G. Borello & Sons, Inc. v. Department of Indus. Relations,* 48 Cal.3d 341, 345, 256 Cal.Rptr. 543, 769 P.2d 399 [1989] ).

9 A similar "control" test is applied by the federal government and by many of our sister states in similar contexts (*see Eisenberg v. Advance Relocation & Storage, Inc.,* 237 F.3d 111, 114–115 [2d Cir.2000] [collecting cases] ).

10 The Restatement (Second), issued in 1958, adds one more factor to the original list: "(j) whether the principal is or is not in business" (Restatement [Second] of Agency § 220[2][j] ).

11 The record shows that **Postmates** pays its couriers 80% of the fee it charges its customers, which varies based on the distance that the courier travels. According to **Postmates's** website, the fee varies from $0.99 to $9.99 per delivery (*see* **Postmates**, *How do fees work?,* available at https://support.postmates.com/buyer/articles/360032280952–article–How–do–fees–work–#:~:text=). Thus, assuming an average delivery fee of $5, a courier would make $4 per delivery. To make the New York City minimum wage of $15 per hour over a 40–hour work week (*see* Labor Law § 652), a courier would have to deliver 150 food orders per week over those 40 hours. Even if the courier makes the maximum of $8 per delivery every single time—an unrealistic prospect—the courier would have to make

  

75 deliveries per week. Setting aside the sizeable costs of healthcare and other benefits, which **Postmates** couriers must provide for themselves, it is obvious that these couriers cannot create an independent business out of delivering food orders or other similar items for **Postmates**.

12 Not only was **Postmates** given no opportunity to present evidence as to other couriers, but the parties were expressly informed by the ALJ, at the start of the hearing, that the ALJ's determination would be limited to just Mr. Vega. That neither party addressed the ALJ's limited determination does not change that determination's scope (majority op. at 3 n. 1, —— N.Y.S.3d ——, —— N.E.3d ——). Thus, the Board's subsequent decision, if read to impose a contribution requirement on **Postmates** for Mr. Vega and all other similarly situated couriers, would implicate due process concerns because **Postmates** was expressly instructed that the proceeding would relate solely to Mr. Vega's claim and not others similarly situated (*see e.g. Martin v. Ronan,* 47 N.Y.2d 488, 490, 419 N.Y.S.2d 42, 392 N.E.2d 1226 [1979]["a requisite of due process (is) the opportunity to be heard before one's rights or interests are adversely affected"] ).

13 **Postmates**' witness before the ALJ, the regional manager, believed Mr. Vega had been a bicycle courier, which just goes to show how much "supervision" of Mr. Vega actually took place.

14 Incidentally, Mr. Vega did not appear and presented no evidence at the hearing; the sole evidence presented came from **Postmates**.

15 At oral argument, counsel for the Board had difficulty pinpointing when Mr. Vega became an employee of **Postmates**, eventually settling for the moment he made his first **Postmates** delivery.

16 I note that "employment" under Article 18 expressly includes "any service by a person for an employer as an agent-driver or commission-driver engaged in distributing meat, vegetable, fruit, or bakery products; beverages other than milk; or laundry or dry-cleaning services" (Labor Law § 511[1][b][1] ), a definition that might arguably sweep in Mr. Vega if the record showed what he had delivered (or promised to deliver), but the parties do not direct any arguments to the possible application of this definition and accordingly I do not consider it.

17 Of course, the Legislature may, for unemployment compensation purposes, adopt a different definition of "employee." It has done so in other parts of the Labor Law, providing at Labor Law § 2(7) that one is employed simply when one is "permitted or suffered to work" for an employer (*cf. Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326, 112 S.Ct. 1344, 117 L.Ed.2d 581 [1992] [discussing similar language in the federal Fair Labor Standards Act] ). However, that broader definition does not apply to the unemployment insurance article, which uses the definition discussed above (Labor Law § 510).

18 We have never defined "incidental control." Doing so might better allow us, even if we cannot reach consensus on what meets the substantial evidence standard, to determine when the facts are not supported by substantial evidence.

19 Of our opinions in the unemployment insurance cases since 1981, *Villa Maria Inst. of Music v. Ross,* 54 N.Y.2d 691, 442 N.Y.S.2d 972, 426 N.E.2d 466 (1981), *12 Cornelia St., Inc. v. Ross*, 56 N.Y.2d 895, 453 N.Y.S.2d 402, 438 N.E.2d 1117 (1982), *Matter of Concourse Ophthalmology Assoc., P.C.*, 60 N.Y.2d 734, 469 N.Y.S.2d 78, 456 N.E.2d 1201 (1983), *Matter of Ted Is Back Corp.*, 64 N.Y.2d 725, 485 N.Y.S.2d 742, 475 N.E.2d 113 (1984), *Matter of Rivera*, 69 N.Y.2d 679, 512 N.Y.S.2d 14, 504 N.E.2d 381 (1986), *Matter of Salamanca Nursing Home, Inc.*, 68 N.Y.2d 901, 903, 508 N.Y.S.2d 939, 501 N.E.2d 588 (1986), *Matter of Hertz Corp. (Commissioner of Labor)*, 2 N.Y.3d 733, 778 N.Y.S.2d 743, 811 N.E.2d 5 (2004), and *Matter of Yoga Vida NYC, Inc.,* 28 N.Y.3d 1013, 41 N.Y.S.3d 456, 64 N.E.3d 276 (2016) were all summary, memoranda judgments. We have treated this question in a full opinion only in *Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 498 N.Y.S.2d 111, 488 N.E.2d 1223 (1985) and *Matter of Empire State Towing and Recovery Assn., Inc.*, 15 N.Y.3d 433, 912 N.Y.S.2d 551, 938 N.E.2d 984 (2010). The profusion of summary memoranda in this area underscores the incoherence of the conventional test for independent contractor/employee status when applied to an evolving economy that encompasses new styles of working.

20 The majority's claim that our decision in *Yoga Vida* "reaffirmed" the substantial evidence standard (majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——) illustrates the amorphousness of that standard when applied in the unemployment insurance context. For example, even though "Yoga Vida generally determines what fee is charged and collects the fee directly from the students ... [that] does not supply sufficient indicia of control over the instructors" to constitute substantial evidence of employment (*Yoga Vida,* 28 N.Y.3d at 1016, 41 N.Y.S.3d 456, 64 N.E.3d 276). If the majority is reaffirming the standard we applied in *Yoga Vida,* that standard has become so elastic as to be whimsical.

21 The majority cites a few other distinctions between the non-staff yoga instructors and Mr. Vega, but those sound more different

  

than they really are. The yoga instructors' interest in maintaining a "customer following to be successful" is akin to the customer ratings Mr. Vega needed to remain successful on the **Postmates** app (majority op. at ——, —— N.Y.S.3d ——, —— N.E.3d ——). Likewise, the ability of the yoga instructors to affect their compensation to some degree by choosing hourly compensation or a percentage of class fees corresponds to Mr. Vega's ability to affect his compensation by taking, e.g., high dollar volume jobs or short-haul jobs that he could consolidate and deliver simultaneously. Indeed, Mr. Vega had more control of his compensation than did the yoga instructors, inasmuch as he could accept a job, immediately see the compensation he would receive from it, and reject it if it was not to his liking. There is nothing to suggest the yoga instructors could decline to teach a class or switch from percentage to hourly compensation if only two customers appeared for class.

22 Judge Rivera's concurring observation that *Yoga Vida* was wrongly decided further emphasizes the incoherence of our decisional law in this area.

23 Although the majority points to no prior precedent of ours listing "nature of the work" among the factors to be considered, we are advised that because "indicia of control will vary depending on the nature of the work," it is "obvious" that nature of the work should be included in the list of factors (majority op. at —— n. 3, ——, —— N.Y.S.3d ——, —— N.E.3d ——). I do not think it "obvious" – one way or the other – that differences in the work of ophthalmologists and aluminum siding salespeople tend to make the former more controllable than the latter, or that our determination that the former were employees and the latter independent contractors had anything to do with the intrinsic nature of their occupations.

24 *See also* Joint Task Force on Employee Misclassification, *Annual Report 2015,* https://www.labor.ny.gov/agencyinfo/PDFs/Misclassification–Task–Force–Report–2–1–2015.pdf (discussing at length the effect of employee misclassification on New York state in particular); Sarah Jeong, *Strike All You Want. Uber Won't Pay a Living Wage,* N.Y. Times (May 10, 2019), https://www.nytimes.com/2019/05/10/opinion/uber-ipo.html (discussing studies showing that in New York City, about half of ride-hailing drivers are supporting families with children, but earn so little that 40 percent of those drivers qualify for Medicaid and another 18 percent qualify for food stamps); Noam Scheiber, *Uber and Other Gig Companies Maneuver to Shape Labor Rules,* N.Y. Times (Mar. 26, 2019), https://www.nytimes.com/2019/03/26/business/economy/gig-economy-lobbying.html (discussing the "highly disruptive" effect of proposals to classify large numbers of gig workers as employees).

25 Our call for a new test need not be preserved (majority op. at —— n. 3, —— N.Y.S.3d ——, —— N.E.3d ——). In fact, because the employment test is one created by the courts, it is our job to change it if necessary – regardless of if the parties call for it. However, it is the role of the legislature to make policy; here, where the majority's holding overturns a decision of this Court from just three years prior, it is clear we are in sore need of legislative decision-making, not solely judicial re-interpretation.

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